



Ol'Kalou Quarry Association v County Government of Nyandarua (Environment & Land Petition E002 of 2023) [2024] KEELC 4968 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND PETITION E002 OF 2023**

**YM ANGIMA, J
JUNE 20, 2024**

BETWEEN

OL'KALOU QUARRY ASSOCIATION PETITIONER

AND

COUNTY GOVERNMENT OF NYANDARUA RESPONDENT

RULING

A. Introduction

1. Vide a petition dated 19.09.2023 grounded upon Articles 2, 19, 20, 21, 22, 23, 40 and 60 of the Constitution of Kenya and Section 40 of the Physical and Land Use Planning Act, 2019, the Petitioner sought the following reliefs against the Respondent:
 - a. A declaration do issue that the proposed regulations are unlawful, unconstitutional, void ab initio in so far as the same did not follow the rules of public participation in accordance with Articles 196 and 201 of the Constitution, Section 40(1) of the Physical and Land use Planning Act, 2019 and Section 127 of the Standing Orders.
 - b. A conservatory order be issued staying the enforcement or implementation of regulations relation to completion of County Physical and Land Use Development Plan in so far as the same relates to the change of use for Muthaiga Plots on extraction of quarry products.
 - c. The Respondent be restrained from enacting any legislation on completion of the County Physical and Land Use Development Plan for the conversion of all that land located within Muthaiga area from Commercial to Private without following the procedure set out in the Constitution.
 - d. The costs of the petition be borne by the Respondent.



2. The Petitioner pleaded that in 1997 the defunct Town Council of Ol'Kalou set aside a certain area in Muthaiga area in Ol'Kalou for stone mining purposes as a consequence whereof its members were allocated various portions thereof for mining purposes. It was pleaded that despite being duly licensed to undertake their business the Respondent had published a notice to re-plan the area for residential purposes with a view to allocating it to third parties, with the consequence that their members stood to lose their property and means of livelihood.
3. The Petitioner considered the Respondent's action to be ultra vires, unlawful and unconstitutional. It was pleaded that the Respondent had no such power or authority under the law and that in any event the process was being undertaken without any public participation and consultation.

B. Petitioner's Application

4. Simultaneously with the filing of the petition, the Petitioner filed a notice of motion of even date seeking a conservatory order to stay the implementation of the Respondent's impugned decision pending the hearing and conclusion of the petition. The application was based upon the same grounds set out in the petition. It was contended that the Respondent was not empowered under Section 40 of the *Physical and Land Use Planning Act*, 2019 to change the user of Muthaiga Area or to re-allocate the land for residential purposes. The Petitioner contended that the Respondent was essentially intending to repossess their land and reallocate it to other persons for residential purposes which shall result into closure of their mining business and loss of livelihoods.
5. It was further contended that the process was being undertaken in violation of the rules of natural justice, without any form of public participation, and in violation of the Petitioner's property rights under Article 40 of the *Constitution* of Kenya. The Petitioner thus contended that it had established a *prima facie* case with a probability of success hence it prayed for the interim order to be granted pending the hearing and determination of the petition.

C. Respondent's Response

6. The Respondent filed a replying affidavit sworn by Julius Ngambi, its Chief Officer Department of Lands, Physical Planning & Urban Planning on 27.02.2024 in opposition to the application for a conservatory order. It was contended that there was no evidence to show that the Petitioner was registered as an association and that it had legal capacity to file the petition. It was stated that the Petitioner had not demonstrated that any of its members were allocated the disputed land as no letters of allotment had been exhibited in the application.
7. The Respondent stated that the approved development plan for Ol'Kalou Township prepared in 1977 was meant to last for 10 years hence it had become necessary to revise the same to take into account the current and future development needs of the town. As a result, it embarked on preparation of the Ol'Kalou Municipality Integrated and Strategic Urban Development Plan and published its intention to plan in a newspaper of national circulation on 03.11.2021. It was stated that several stakeholder meetings and engagements were held and members of the public were given an opportunity to give their views on the plan between 2021 and 2023.
8. It was further stated that no allocation of land had taken place and that the re-planning process was still on going in accordance with the provisions of Article 66 of the *Constitution* of Kenya and Section 44 of the *Physical and Land Use Planning Act*, 2019. It was contended that the Petitioner's allegations on re-allocation were speculative since there was no evidence of such allocation. The court was consequently urged to dismiss the application with costs.



D. Directions on Submissions

9. When the application for interim orders was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Respondent filed submissions dated 02.05.2024 whereas the Petitioner's submissions were not on record by the time of preparation of the ruling.

E. Issues for Determination

10. The court has perused the notice of motion dated 19.09.2023, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following issues arise for determination herein:
 - a. Whether the petition should be struck out for being incompetent.
 - b. Whether the Petitioner has made out a case for the grant of the conservatory order sought.
 - c. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether the petition should be struck out for being incompetent

11. The court has considered the material and submissions on record on this issue. The Respondent submitted that the Petitioner was merely an unincorporated association which had no legal capacity to file suit in its own name. The Respondent cited, inter alia, the cases of *Andrew Inyolo Abwanza -vs- Board of Trustee of Pentecostal Assemblies of God Kenya & 3 Others* [2009] eKLR and *Kaseve Welfare Group -vs- Hospital Housing Limited* [2020] eKLR in support of that submission. As a consequence, the Respondent urged the court to find and hold that both the petition and the application for interim orders were incompetent and to strike them out.
12. It is evident from the petition and the application that the Petitioner has not given its description and disclosed whether or not it is an incorporated entity capable of filing suit in its own nature. However, vide a chamber summons dated 14.05.2024 the Petitioner sought leave to amend the petition to sue through its officials being the Chairman, Treasurer and Secretary respectively. The said application is scheduled for inter partes hearing on 20.06.2024. The court is of the view that the Petitioner has implicitly conceded that it could only sue through its officials hence the reason for filing the said application. The court is thus of the view that it would be premature to strike out the petition in limine when the Petitioner has already taken steps to regularize the defect in the proceedings. As a result, the court shall accord the Petitioner a chance to prosecute the chamber summons dated 14.05.2024 since striking out is a drastic measure which should only be employed where a pleading is so bad and so hopeless as to be beyond redemption by amendment. See *D.T. Dobie & Company Ltd -vs- Muchina & Another* [1980] eKLR.

b. Whether the Petitioner has made out a case for the grant of the conservatory order sought

13. The court has considered the material and submissions on this issue. The court is of the view that the 4th Schedule to the *Constitution* of Kenya devolved County planning and development to the counties. Similarly, under Section 36 of the *Physical and Land Use Planning Act*, 2019 the Counties



are considered to be planning authorities for purposes of County physical and land use development plans. Section 36(1) of the said Act stipulates that:

“(1) Once every ten years, a County Government shall prepare a County Physical and land use development plan for that County.”

14. Under Section 37 of the Act, the objects of a County Physical and Land Use Development Plan are the following:
- a. to provide an overall physical and land use development framework for the county;
 - b. to guide rural development and settlement;
 - c. to provide a basis for infrastructure and services delivery;
 - d. to guide the use and management of natural resources;
 - e. to enhance environmental protection and conservation;
 - f. to identify the proper zones for industrial, commercial, residential and social developments;
 - g. to improve transport and communication networks and linkages;
 - h. to promote the safeguarding of national security; and
 - i. any other purposes that may be determined by the planning authority.
15. Similarly, under Section 46 of the Act a County is empowered to prepare a local physical and land use development plan for, inter alia, zoning, urban renewal or development and for regulating land use and development. The Act also provides for the amendment and revision of the County and Local Physical and Land Use Development Plans with public participation and consultation and in adherence with the various procedures and processes set out in the Act.
16. The court is of the view that the process impugned by the Petitioner is still ongoing and the Respondent published the relevant notices in both a newspaper of national circulation and the Kenya Gazette in order to generate a public discourse on its re-planning proposal. There is prima facie evidence to show that the Respondent conducted stakeholder meetings including a public baraza on its planning proposal. The court is thus unable to find any prima facie evidence on record to demonstrate any illegality or unconstitutionality on the part of the Respondent thus far. The court is not satisfied that the Petitioner or its members were denied an opportunity to participate in the planning process. On the contrary, the material on record indicates that the Respondent took steps to conduct public participation. As a result, the court is not persuaded that the Petitioner has made out a case for the grant of the conservatory order sought.

a. Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the Respondent shall be awarded costs of the application.



G. Conclusion and Disposal Order

18. The upshot of the foregoing is that the court finds no merit in the Petitioner’s application for a conservatory order pending the hearing and determination of the petition. As a result, the notice of motion dated 19.09.2023 is hereby dismissed with costs.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED THIS 20TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

In the presence of:

Mr. Oira holding brief for Mr. Chege for the Petitioner

Mr. Mugo holding brief for Ms. Wanjiru for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

