



**Kassam & 13 others v Njoroge & 13 others (Environment and Planning  
Petition E009 of 2024) [2025] KEELC 584 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 584 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING PETITION E009 OF 2024  
OA ANGOTE, J  
FEBRUARY 13, 2025**

**BETWEEN**

**KARIM KASSAM & 13 OTHERS & 13 OTHERS & 13 OTHERS & 13  
OTHERS ..... PETITIONER**

**AND**

**GRACE NJERI NJOROGE & 13 OTHERS & 13 OTHERS & 13 OTHERS & 13  
OTHERS ..... RESPONDENT**

**RULING**

1. The Petitioners instituted the present Petition on 12<sup>th</sup> April, 2024, wherein they, aggrieved by the development activities undertaken on L.R Nairobi/Block 209/ 9316 (now Nairobi/Block 37/66/7) (hereinafter the suit property), sought inter-alia; conservatory orders compelling the Respondents to halt construction and development activities on the suit property and declarations that the development activities on the suit property were undertaken without the relevant statutory permissions and licenses and were subsequently illegal, irregular, unprocedural, null and void.
2. The Petitioners also sought for declarations that the Respondents' acts and omissions on the suit property were deleterious to the environment, denied, breached and infringed on the Petitioners' and the public's rights to a clean and healthy environment; and mandatory injunctive orders compelling the Respondents to decommission and restore the property to its original condition. On 20<sup>th</sup> May, 2024, the Petitioners filed a Notice of Withdrawal of the Petition.
3. The matter came up before court on the 24<sup>th</sup> June, 2024 wherein the Petitioners' Counsel formally informed the court of the aforesaid withdrawal. Counsel for the 2<sup>nd</sup>, 5<sup>th</sup> -9<sup>th</sup> and 10<sup>th</sup> and 11<sup>th</sup> Respondents sought for their costs contending that the matter had substantially proceeded. The court directed the parties to file submissions on the issue of costs.



4. On the 23<sup>rd</sup> August, 2024, and without the leave of the court, the Petitioners, through Karim Sherali Kassam filed a Supplementary Affidavit. Considering that the Supplementary Affidavit was filed without the leave of court, I decline to consider it, and expunge it from the record of the court.
5. The Petitioners filed submissions on 6<sup>th</sup> September, 2024 as directed by the court. Counsel submitted that the Petitioners' case as set out in the Petition was that all the Respondents therein were in one way or another involved in the development and construction activities on the suit property which activities have and continue to dent, violate and infringe on the Petitioners' and general public's fundamental rights and freedoms.
6. It was submitted that the Petition invoked Articles 10, 19, 20, 22(1), 23(1), 26, 28, 35, 42, 43(1) (b), 47(1), 50, 69(1), 70, 73, 75(1), 165 and 232 of the Constitution as read together with the Access to Information Act, Physical Land Use and Planning Act (PLUPA), the Environment Management and Co-ordination Act (EMCA), the National Construction Authority Act(NCA), the Leadership and Integrity Act and the Public Officers Ethics Act.
7. Counsel stated that the withdrawal of the Petition was necessitated by the discovery of crucial information of both fact and law not available at the time of the filing of the Petition, including the non-existence of the suit property on account of having been sub-divided and the need to include the new owners therein as parties.
8. According to Counsel, after the withdrawal, the Petitioners immediately filed a new Petition being ELC Petition E021 of 2024-Karim Sherali Kassam & 13 Others vs Grace Njeri Njoroge & 23 Others alleging the Respondents' violations of their, and the general public's fundamental rights and freedoms.
9. Counsel submitted that from the contents of the pleadings and evidence adduced in the withdrawn Petition, it is apparent that the same was not aimed at pursuing private and personal benefit but to achieve a common good and that the matters therein were of public interest. Counsel referred the court to the definition of public interest as set out in Stroud's Judicial Dictionary Vol V (4<sup>th</sup> Edition) and Blacklaw Dictionary (6<sup>th</sup> Edition)
10. It was submitted that similarly, the Supreme Court in *Okoti & 2 Others vs Attorney General & 14 Others* [2021]KESC 31, held that public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest, and the primary consideration in public interest litigation should always be the need to promote access to justice and not self-interest per se.
11. Further, Counsel noted, in *Harun Mwau & 3 Others vs Attorney General and 2 Others* [2012]eKLR, the court stated that costs should not be imposed on a party who has brought a case against the state but lost; that in the circumstances, the principle of 'costs follow the event' does not necessarily apply. Reliance in this respect was also placed on the cases of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*[2014]eKLR, *Brian Asin & 2 Others vs Wafula Chebukatu & Others*[2017]eKLR and *Affordable Medicines Trust vs Minister of Health (CCT27/04)* [2005] ZACC 3; 2006.
12. Counsel urged that the issues raised by the Petitioners in the withdrawn Petition are the same in the freshly filed ELC Pet E021 of 2024 relating to violation of the Petitioners' and public's constitutional rights and that the award of costs to any of the Respondents will hinder rather than promote the advancement of constitutional justice.
13. The 2<sup>nd</sup> Respondent's counsel filed submissions on 9<sup>th</sup> July, 2024. Counsel submitted that on 6<sup>th</sup> May, 2024, when the matter came up for directions in respect to the Petitioners' Motion dated 12<sup>th</sup> April,



- 2024, the 2<sup>nd</sup> Respondent had filed and served its objection and response to the Motion and the Petition; that on the said date, the Petitioners sought and were granted leave to file a Supplementary Affidavit and that in response to their plea to file an Amended Petition, the Petitioners were asked to file a formal Motion.
14. It was submitted that on 14<sup>th</sup> May, 2024, the Petitioners served them with an Amended Petition dated 13<sup>th</sup> May, 2024 in disregard of court orders and on the 20<sup>th</sup> May, 2024, they filed a notice seeking to withdraw the Petition and application.
  15. According to Counsel, despite the withdrawal having been filed on the 20<sup>th</sup> May, 2024, it was only served upon the 2<sup>nd</sup> Respondent on the 24<sup>th</sup> May, 2024 after they served the Petitioners with their submissions having them unnecessarily expend efforts in drafting the submissions and that nonetheless, no cogent reason has been given for the decision to withdraw the Petition.
  16. Counsel submitted that the withdrawn Petition substantially sought to challenge the development approvals, and the EIA License granted to the 2<sup>nd</sup> Respondent by the 5<sup>th</sup>, 10<sup>th</sup> and 12<sup>th</sup> Respondents in relation to the development of the suit property, all of which are personal matters disguised as an advancement of the right to a clean and healthy environment.
  17. Counsel referred the court to the case of *TWW vs KJH & 2 Others* [2023]KEHC 1607(KLR), where it was held that in public interest litigation, unlike traditional dispute resolution mechanisms, there is no determination or adjudication of individual rights. Reliance in this regard was also placed on the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2014]eKLR.
  18. It was submitted that the courts in *Cecilia Karuru Nguyu vs Barclays Bank & Another*[2016]eKLR and *Republic vs Independent Electoral and Boundaries Commission Ex-parte Allnoor Derow Abdullahi & Others*[2017]eKLR, stated that in determining the issue of costs, the court is entitled to look at inter-alia, the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the suit, the events which led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) (c) of *the Constitution*.
  19. Counsel urged that the 2<sup>nd</sup> Respondent expended a lot of time and money in addressing the Petitioners' claim which was unmerited; that the Petitioners having withdrawn the Petition, it is only fair that the 2<sup>nd</sup> Respondent be compensated and that the court should invoke its jurisdiction as set out in Section 15(5) of the *Environment and Land Court Act*, and Section 27 of the *Civil Procedure Act* and grant it costs.
  20. None of the other Respondents filed submissions. From the foregoing, only one issue that arise for determination is whether costs are payable in this matter, and if so, to which party?
  21. The dispute herein revolves around entitlement to costs after withdrawal of the Petition. The Petitioners assert that the withdrawn Petition was brought in the public interest and as such, they should not be condemned to pay costs.
  22. On its part, the 2<sup>nd</sup> Respondent asserts that it is entitled to costs having expended energy in addressing the Petition and the Motion which were withdrawn without any cogent reason. Further, it opines, the withdrawn Petition, although camouflaged as public interest matter, was not. The 2<sup>nd</sup> Respondent urged that the Petition was aimed at preservation of the Petitioners' properties from alleged noise, pollution and degradation as a consequence of the developments on the subject property.



23. The general rule with regard to costs is found in Section 27 of the *Civil Procedure Act* which provides as follows:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: (2) Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”

24. Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 states as follows:

1. The award of costs is at the discretion of the Court.
2. In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

25. Speaking to this, the Supreme Court in *Mbevo vs Mati & 2 Others* (Petition of Appeal 22 of 2019) [2021] KESC 74 (KLR) (16 July 2021) (Ruling) stated thus:

“The guiding principles applicable in costs were as stated in *Jasbir Singh Rai* where we stated that costs follow the event with the discretion of the court exercised judiciously by stating: [18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs.

However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation....

Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases.”

26. The rule on costs, as can be gleaned from the foregoing, is that while costs are typically borne by the losing party, the court retains the power to depart from this principle where justice and the circumstances of the case so demand.

27. One notable circumstance in which the general principle may be departed from is in matters of public interest litigation. Public interest litigation serves a broader constitutional and societal function, involving issues of fundamental rights, governance, and accountability. Courts have recognized that imposing costs on an unsuccessful party may deter individuals and organizations from bringing matters of public importance before the courts, thereby undermining access to justice.



28. This was enunciated by the Supreme Court in *Rai & 3 Others vs Rai & 4 Others* (Petition 4 of 2012) [2014] KESC 31 (KLR) (4 March 2014) (Ruling) thus:

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and another v The Minister for Lands and another*, Nairobi High Court Petition No 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and others v Attorney General and others*, Nairobi High Court Petition No 65 of 2011, [2012] eKLR, in which it was held [para 180]: In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

29. So, was the withdrawn Petition a matter of public interest? The Black’s Law Dictionary 9<sup>th</sup> Edition defines public interest as:

“...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation”. In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”

30. In the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others* [2014] eKLR the Supreme Court explained the essence of public interest litigation thus:

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the Constitution*’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”

31. In determining whether the Petition herein is a public interest litigation, the court has to consider the Petition as drawn and filed.



32. The Petitioners are all owners/occupiers of residential apartments situate on various parcels situate along City Park Drive, Parklands who are aggrieved by development activities undertaken on the suit properties which border their respective properties and with which they share common infrastructure including access roads, water, sewer line and rain water drainage/disposal systems.
33. They alleged in the Petition, inter-alia, that the construction and development activities undertaken on the suit property were carried out without the relevant statutory permissions and licenses and are ultimately perilous to the environment and a violation of not only their rights, but also the public's right to a clean and healthy environment.
34. They asserted that the Respondents have in the various acts and omissions refused to uphold and defend the national values and principles of governance by refusing and/or failing to perform their individual and constitutional duties.
35. While the Petitioners, as owners and occupiers of properties adjacent to the contested development, have a direct personal interest in the outcome of the litigation, the nature of their claims extend far beyond individual grievances.
36. Matters relating to environmental conservation, sustainable development, and adherence to planning laws transcend private disputes, as they implicate broader societal interests and the duty of the State to safeguard the right to a clean and healthy environment as guaranteed under Article 42 of *the Constitution*.
37. In this regard, the Petition does not merely seek to vindicate the private rights of the Petitioners, but also raises significant questions regarding the enforcement of environmental laws, and the accountability of regulatory agencies. The Petition raises issues affecting the public interest.
38. While the matter was of public interest, other considerations must be taken into account, including the stage of the proceedings and the conduct of the parties. The record shows that several Respondents had filed substantial responses to the Petition and Motion.
39. The 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection on the 29<sup>th</sup> April, 2024 and a Replying Affidavit dated 30<sup>th</sup> April 2024. The 5<sup>th</sup> -9<sup>th</sup> Respondents filed a Notice of Preliminary Objection on the 26<sup>th</sup> April, 2024. The 10<sup>th</sup> Respondent filed a Replying Affidavit on the 2<sup>nd</sup> May, 2024 and the 12<sup>th</sup> Respondent a Replying Affidavit on the 3<sup>rd</sup> May, 2024.
40. When the matter came up for directions on the 6<sup>th</sup> May 2024, the court directed that the Preliminary Objections be addressed first and instructed the parties to file their submissions accordingly. The Petitioners, in turn, sought leave to amend their Petition and were expressly directed to file a formal application for the amendments.
41. However, rather than complying with the court's directions and properly seeking leave, the Petitioners instead filed an Amended Petition dated the 13<sup>th</sup> May, 2024 which was subsequently withdrawn. It is unclear why the Petition was withdrawn without the Petitioners having first canvassed the Motion for amendment which if allowed would have enabled them to make the amendments they allege necessitated the withdrawal.
42. Nonetheless, by the time the matter was next due for mention on 24<sup>th</sup> June, 2024, the court was informed of the withdrawal of both the Motion and the Petition vide the Notice dated the 20<sup>th</sup> May, 2024. As at that date, the 2<sup>nd</sup> Respondent had filed submissions to the Preliminary Objections as directed [dated 24<sup>th</sup> May, 2024] oblivious to the withdrawal which despite having been filed on 20<sup>th</sup> May, 2024 was served upon them on the 24<sup>th</sup> May, 2024.



43. In the circumstances, notwithstanding the fact that the matter was in the nature of public interest, the court considers that in view of the progress of the matter, the effort expended by the Respondents and the conduct of the Petitioners as aforesaid, it is just and reasonable to grant costs to the Respondents. However, the court can only grant costs to the parties who sought the same.
44. In the end the court issues the following orders:
- a. The Petitioners shall pay costs of the Petition to the 2nd, 5th -9th and 10th-11th Respondents to be assessed by the taxing master.
  - b. The other Respondents shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Mavisi holding brief for Ndambiri for Petitioners

Ms Mulwa for Muchoki for 2<sup>nd</sup> Respondent

Court Assistant: Tracy

