



**Center for Litigation on Environment and Governance (CLEG) v Tasir
& 7 others; Odero (Interested Party) (Environment & Land Petition
E001 of 2024) [2024] KEELC 13693 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E001 OF 2024
NA MATHEKA, J
DECEMBER 11, 2024**

BETWEEN

**CENTER FOR LITIGATION ON ENVIRONMENT AND GOVERNANCE
(CLEG) APPLICANT**

AND

**HAJI MBARAK TASIR 1ST RESPONDENT
COUONTY GOVERNMENT OF MOMBASA 2ND RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY 3RD RESPONDENT
NATIONAL BUILDING INSPECTORATE 4TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT
KENYA URBAN ROADS AUTHORITY 6TH RESPONDENT
ENGINEERS BOARD OF KENYA 7TH RESPONDENT
ATTORNEY GENERAL 8TH RESPONDENT**

AND

ENG TOM OCHANDA ODERO INTERESTED PARTY

JUDGMENT

1 The Petition is dated 22nd February 2024 and it is claimed that around mid-year 2021, extra floors were being added on an existing building on Plot No. 1417 Mwembelegeza scheme. That Mwembelegeza residents became concerned when the developer extended part of the building into a road reserve and



- raised more floors on top which physically to a layman was not well done and some beams were not straight and the entire building structure was slanting.
- 2 That around mid-November 2021 the Petitioner wrote a letter to the 3rd respondent (National Construction Authority) seeking answers from the authority if the development on plot no. 1417 Mwembelegeza scheme was registered by them. That on 22nd November 2021, upon a site visit, the 3rd respondent suspended with immediate effect further construction works on the building via a suspension order no. SINO. 111435 dated 22nd November 2021. That the 1st respondent defied the suspension order and this prompted the 3rd respondent to file a case at Kadzandani Police Station under OB No. 24/26/11/2021 and the workers were arrested but released later in the night after the 1st respondent intervened. That it is upon this defiance that the Petitioner on 8th December 2021 wrote a letter to the 4th and 7th respondents seeking their intervention. That on 7th January 2022, a team from the 4th respondent (National Building Inspectorate) conducted a site visit. They found that the construction site and building were structurally unsafe to the public using the ground floor, construction workers, the public using the street fronting of the building and neighbouring properties.
 - 3 That upon the 4th respondent's site visit, they issued the following orders that businesses operating on the ground floor of the building be vacated for safety concerns. The developer (1st respondent) to provide all approved plans and documentation for development. The developer to give details of all professionals engaged in the supervision of the ongoing project indicating their registration numbers and their commitments to being the project consultants. All works on the building should be stopped until scientific testing report is provided by the developer and that the County Government of Mombasa (2nd respondent) to issue enforcement notice as per the [physical and land use planning Act, 2019](#).
 - 4 That on 7th December 2021 the petitioner wrote a letter addressed to Mombasa County Director for KURA (6th respondent) seeking information on whether the said building was on road reserve. On 14th January 2022, the 6th respondent responded on affirmative stating the roads are gazetted KURA roads within the jurisdiction of the 6th respondent.
 - 5 That it is upon the blatant disregard of lawful orders from the 3rd and 4th respondents by the 1st respondent and refusal and or failure by the 2nd respondent to ensure enforcement of the said orders and failure by the 2nd to 7th respondents to take further legal steps in addressing dangers the said building pose to business tenants presently operating on ground floor, and the danger the building pose to occupants of neighbouring buildings and the danger the building pose to users of nearby road and general public that this suit has been instituted to move the court for appropriate orders.
 - 6 The Petitioner prays for a declaration that;
 - a. The respondents and the interested party violated Article 42 of [the constitution](#) 2010 that guarantees right to a clean and healthy environment.
 - b. The building structure being undertaken by the 1st respondent on plot no. 1417 Mwembelegeza scheme in Mombasa County is structurally defective and unsafe for human habitation.
 - c. The 1st respondent illegally and without relevant statutory approvals and authorization constructed additional four (4) floors on previously constructed 3rd floor building on Plot No. 1417 Mwembelegeza scheme.
 - d. The 1st respondent encroached on road reserve in violation of Article 62(4) of [the constitution](#) 2010.



- e. The 2nd to the 8th respondents failed in their statutory obligations.
- f. The interested party who is registered by the 7th respondent as an Engineer knowingly and without regards to building codes regulations assisted the 1st respondent in perpetuating the illegal construction of development on Plot No. 1417 Mwembelegeza scheme and therefore the interested party is complicit.
- g. The 5th respondent violated section 58 of the Environmental Management and Coordination Act (EMCA) by corruptly and through illegal means issuing Environmental Impact Assessment (EIA) License with intent to aid construction works being undertaken on Plot No. 1417 Mwembelegeza scheme in Mombasa County.

And for orders that;

- a. That any further developments or construction works on Plot No. 1417 Mwembelegeza scheme in Mombasa County be stopped immediately.
- b. Compelling the 1st respondent to remove his developments and structures built on plot no. 1417 Mwembelegeza scheme in Mombasa County within ninety (90) days of the court's judgement.
- c. That incase the 1st respondent fails to comply with order no. (b) hereabove, the 2nd and 4th respondents be directed to demolish all and every structure and development erected and built on plot no. 1417 Mwembelegeza scheme in Mombasa County and the cost incurred in the exercise be met by the 1st respondent.
- d. That upon complying with order no. (b) or (c) hereabove, the 1st respondent be at liberty to apply afresh for development approval, authorization and registration from relevant statutory bodies should he so wish.
- e. That the interested party and the engineering consulting firm, Nyali consulting engineers registered by the 7th respondent who were involved in the consultancy and development of the building structure on plot no. 1417 Mwembelegeza scheme in Mombasa County be struck out from the register of the 7th respondent.
- f. That the contractor(s) and construction workers registered by the 3rd respondent who were involved in the construction works of the building structure on plot no, 1417 Mwembelegeza scheme in Mombasa County be struck out from the register of the 3rd respondent.
- g. Compelling the respondents to bear the cost of this suit.
- h. Any other relief the honourable court may deem just to grant.

7 The 1st respondent submitted that he is the proprietor of the parcel of land known as Plot No. 1417 Mwembelegeza. He put up a building which is 15 years old. Then in 2021 he started to add a floor above the 3rd floor of the building and the petitioner started complaining. In January 2022 the 4th respondent started to back track and required that the construction stops until scientific tests are done and the tenants on the ground floor vacate. The tests are yet to be done. The 1st respondent complied and no construction is going on. That the petitioner has no locus and he has not met the threshold for a constitutional petition.



- 8 The 2nd respondent submitted that the petitioner has violated the doctrine of exhaustion and they ensured that all necessary procedures were followed prior to issuing building approvals.
- 9 This court has considered the petition and the submissions therein. The preliminary issue to be determined is whether the petitioner has locus and if the petition meets the threshold.
- 10 The petitioner pleaded violation of Article 42 of *the Constitution* which guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.
- 11 One would wonder what a clean and healthy environment entails in the context of the building construction which is the subject of this petition. The Longman Dictionary of Contemporary English defines “clean” in relation to the environment as containing or producing nothing that is dirty or harmful. “Healthy” is defined in relation to persons, animals or plants as physically strong and not likely to become weak or ill. Black’s Law Dictionary, 10th edition defines “health” as the quality, state or condition of being sound or whole in body mind or soul especially freedom from pain or sickness; or the relative quality or state of one’s physical or mental well-being whether good or bad. The Environmental Management and Coordination Act (EMCA) defines the environment to include physical factors of the surroundings of human beings including land, water, atmosphere, climate; biological factors of animals and plants; and the social factor of aesthetics which includes both the natural and healthy environment.
- 12 A clean and healthy environment for persons using a building or near a construction site would be one that is devoid of falling debris, risk of collapse or anything harmful which may interfere with the physical or mental well-being of persons in or around the vicinity.
- 13 The petitioner’s case is that Article 42 of *the Constitution* grants them the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, and to have obligations of the State and its organs relating to the environment fulfilled. The Petition is therefore hinged on the alleged infringement of Article 42 of *the Constitution*. Article 22(1) of *the Constitution* guarantees the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, meaning that every person has a right of ensuring that their rights in relation to the environment are not violated or threatened by way of litigation.
- 14 *The Constitution* provides that if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to the court for redress, in addition to any other legal remedies that are available in respect to the same matter.
- 15 *The Constitution* goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- 16 Article 70 of *the Constitution* grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment. The said Article provides as follows:



- (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

17 I concur with the petitioner’s submissions that one need not have a personal interest or suffered any injury before filing a Petition alleging the infringement of the right to the a clean and healthy environment. In *Joseph Leboo & 2 others vs Director Kenya Forest Services & another* (2013) eKLR, the Court held as follows:

26. A reading of Articles 42 and 70 of *the Constitution*, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

27. This position was in fact the applicable position, and still is the position, under the Environmental Coordination and Management Act (EMCA), 1999, which preceded *the Constitution* of Kenya, 2010.... It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the locus standi rule, both under *the Constitution* and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no locus standi in this suit.”

18 Article 70 of *the Constitution* and Section 3(4) of the *Environmental Management and Co-ordination Act* permits any person to institute a suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. The Petitioner in this matter therefore has the requisite locus standi.

19 On the issue of meeting the constitutional petition threshold in *Anarita Karimi Njeru vs Republic* (1979) eKLR the court stated follows;

“We would, however, again stress that if a person is seeking redress from the High court on a matter which involves a reference to *the constitution*, it is important (if any to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

20 The petitioner pleaded various articles of *the Constitution* including, Article 2(1) I0(1)(a)(b), 35, Article 42(a)(b), Article 54 (l)(c), 39. Article 232(1)(a)(b)(d)(e)(f) and (2) of *the constitution* 2010 on values and principles of public service. The petitioner has a right to access justice pursuant to Articles 48 and 50(1) of *the Constitution* 2010 and an obligation under Article 3(1). The petitioner through its



chairman and acting executive director is also vested with locus standi to institute these proceedings by Articles 22, 70 and 258 of the Constitution 2010 which are tailored for the community and they enact into *the constitution* of Kenya the doctrine of public interest litigation.

- 21 The petitioner argued that the construction by the 1st respondent was causing injury to the public by obstruction of the road as a result of illegal building on road reserve has put lives of road users in danger. This has also led to loss of business opportunities road users end up losing valuable time because of competition among boda boda riders, pedestrians and drivers of the little space left. Numerous accidents involving motor cycle riders, other road users and the public because of sudden and abrupt stop public service vehicles make in the middle of the road to pick and drop passengers. Business tenants using the ground floor of the building under construction, road users and neighbouring homes and buildings are in danger as the building may collapse any time. The fear and anxiety gripping the general public because of uncertainty surrounding the building under construction is huge. I find this matter meets the Constitutional petition threshold as per Anarita's case(supra).
- 22 The 2nd respondent had submitted that the petitioner had violated the doctrine of exhaustion and they ensured that all necessary procedures were followed prior to issuing building approvals. The same issue was raised in the application dated 21st February 2024 and the court stated in its ruling as follows;

“Having reflected on the gist of the dispute in this petition vis-à-vis the above legal framework on primary adjudication of disputes relating to enforcement notices and development permissions, I entirely agree with the 4th and 8th respondents that this dispute has been placed before this court prematurely. In normal circumstances the petitioner ought to exhaust the primary dispute adjudication mechanism provided under the PLUPA before invoking the jurisdiction of this court. Be that as it may, this court takes judicial notice and it is a finding of fact that for one reason or another Mombasa County does not have a Liaison Committee and /or the same has not been operationalised and is not sitting. Being a court of original and appellate jurisdiction in disputes relating to environment and the use, occupation of and title to land, this court will proceed to entertain the matter as this is the current available avenue in the circumstances to the litigants. The preliminary objection is therefore not sustainable and is overruled.”

- 25 I need not say more on that issue. Going back to the facts of this case it is not disputed that the 1st respondent has received letters from the 3rd and 4th respondents suspending and stopping the said construction. The 1st respondent states that construction has stopped awaiting the scientific tests to be carried out. What is not clear is whether the said building has been vacated as per the letter from the 4th respondent and enforcement order from the 2nd respondent. Indeed, as per the court ruling dated 12th June 2024 this court made the following orders;

1. “That pending the hearing and determination of this petition, a prohibitory injunction is issued prohibiting the respondents themselves or by their agents or their staff or their tenants or any private not mentioned in this suit from developing or constructing and or the building on Plot No. 1417 Mwembelegeza scheme in Mombasa.
2. {} That pending the hearing and determination of this petition, a mandatory injunction is issued to all tenants and any other person not mentioned in this suit using the building for businesses and or residing in the building on plot no. 1417 {}Mwembelegeza scheme to vacate as per the notice issued by the County Government of Mombasa dated 4th April 2024.
3. That the cost of this application be in the cause.”



26 By an application dated 20th June 2024 the 1st respondent applied for stay of execution of the said ruling which this court rejected. I find that on 22nd November 2021, upon a site visit, the 3rd respondent (National Construction Authority) suspended with immediate effect further construction works on the building via a suspension order no. SINO. 111435 dated 22nd November 2021. That the 1st respondent defied the suspension order and this prompted the 3rd respondent to file a case at Kadzandani police station under OB No. 24/26/11/2021. On 7th January 2022, a team from the 4th respondent (National Building Inspectorate) conducted a site visit and they issued the following orders that businesses operating on the ground floor of the building be vacated for safety concerns. The 1st respondent was to provide all approved plans and documentation for development. The developer to give details of all professionals engaged in the supervision of the ongoing project indicating their registration numbers and their commitments to being the project consultants. All works on the building should be stopped until scientific testing report is provided by the 1st respondent and that the 2nd respondent to issue an enforcement notice as per the *Physical and Land Use Planning Act*, 2019. I find that the 1st respondent has not complied with the order and is busy trying to have the same stayed which this court has rejected. Guided by the report from the experts I find that building poses a danger to business tenants presently operating on ground floor, and to occupants of neighbouring buildings, to users of nearby road and general public. The issue of the building being on a road reserve will be determined once the relevant authorities issue fresh building permits if at all I find that this is a violation of the right to a healthy and safe environment. I find that the petition is merited and I grant the following orders;

1. The 1st respondent has violated Article 42 of *the Constitution* 2010 that guarantees right to a clean and healthy environment.
2. The building structure being undertaken by the 1st respondent on plot no. 1417 Mwembelegeza scheme in Mombasa County is structurally defective and unsafe for human habitation.
3. The 1st respondent to stop with immediate effect all construction and all tenants/occupants in the building on plot no. 1417 {}Mwembelegeza scheme to vacate as per the notice issued by the County Government of Mombasa dated 4th April 2024.
4. The 2nd respondent to ensure enforcement of the said notice and this court's orders and file a report to this court within the next 30 (thirty) days from the date of this judgement.
5. That the cost of this petition to be borne by the 1st respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

