



**Wanjiru & another v Bajuun Properties Limited & 2 others (Environment and Land Case Civil Suit E049 of 2023) [2025] KEELC 3206 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E049 OF 2023**

**AA OMOLLO, J  
APRIL 8, 2025**

**BETWEEN**

**NANCY WANJIRU ..... 1<sup>ST</sup> PLAINTIFF**

**DAVID MAINA GICHOHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BAJUUN PROPERTIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant moved the court vide the Motion dated 19<sup>th</sup> September, 2024 which is brought under the provisions of Order 40 rule 7 of the [Civil Procedure Rules](#) and all enabling provisions of the law. It prays for Orders;
  - i. Spent
  - ii. That this Honourable Court be pleased to discharge, vary or set aside the Orders granted on the 11<sup>th</sup> of July 2024 restraining the 1<sup>st</sup> Defendant by themselves their agents and/or servants from demolishing and/or construction on the parcel of Land Known as LR No. Nairobi Block 104/231 pending the hearing and determination of this suit.
  - iii. That this Honourable Court be pleased to discharge, vary or set aside the Orders granted on the 11<sup>th</sup> of July, 2024 restraining the 1<sup>st</sup> Defendant by themselves their agents/or servants from demolishing and/or construction on the parcel of land known as LR No. Nairobi Block 104/228 which land has been amalgamated with LR No. Nairobi Block 104/229, LR



No. Nairobi Block 104/230 and LR No. Nairobi Block 104/231 pending the hearing and determination of this application.

- iv. That the 1<sup>st</sup> Defendant be allowed to proceed with the development of the suit properties as per the approved development plans issued by the Nairobi City County on the 6<sup>th</sup> of December, 2022.
  - v. That the Costs of this Application be provided for.
  - vi. Any other similar orders that this Honourable Court deems just, fair and in the interest of justice to provide.
2. The application is supported by the grounds on its face inter alia that;
- a. That the injunctive Orders have adversely affected the 1<sup>st</sup> Defendant as it continues to incur daily costs of Kshs.500,000 arising from losses and penalties due to its contractors who were already on site to carry out the construction on the parcels of land
  - b. That the Plaintiff's claim is the alleged irregular obtaining of development and construction permission from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and has nothing to do with the ownership of the property and thus they do not stand to suffer any losses if the construction continues.
  - c. That the 1<sup>st</sup> Defendant acquired the necessary approvals to start the construction on the suit properties and will thus be acting within the ambits of the law.
  - d. That further to the foregoing, the failure of the 1<sup>st</sup> Defendant's previous advocates to file a response to the application dated 9<sup>th</sup> August, 2023 should not be visited upon the 1<sup>st</sup> Defendant. The orders were granted undefended, and it is in the interest of justice that they be set aside to allow for a fair determination of the matter.
  - e. That the Plaintiff did not satisfy any of the three requirements of prima facie case, irreparable loss and balance of convenience.
3. The application was also supported by the affidavit of Mohamed Abdi Ibrahim sworn on same date of 19<sup>th</sup> September, 2024. The supporting affidavit reiterated the facts as contained on the grounds on the face of the application. The Applicant annexed copies of the approvals granted to it by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.
4. The application is opposed by the Replying Affidavit of David Maina Gichohi who is the 2<sup>nd</sup> plaintiff. He deposed that the Applicant has not demonstrated that he is incurring losses and penalties daily in the sum of Kshs.500,000.
5. The Respondents aver that on the 11<sup>th</sup> day of July, 2024, when the court granted the injunctive orders restraining the 1<sup>st</sup> Defendant/Applicant from demolishing/constructing on the parcel of land known as LR. Nairobi Block 104/231 the Applicant was in the process of demolishing a residential house that share a common wall with Plaintiff residential house situate on LR Nairobi Block 104/232 without the necessary permission. That the house that the 1<sup>st</sup> Defendant/Applicant was demolishing is a residential house. That he is well aware that the rental income for houses within the estate can never be at a sum of Kshs.500,000 per day and therefore the amount stated is a gross exaggeration.
6. It is averred by the Respondents that the approvals displayed by the Applicant were fraudulently and or irregularly acquired and the court needs to determine their veracity. They further argue that the Applicant is seeking to vary the injunctive orders to circumvent the enforcement notice issued by the 2<sup>nd</sup> Defendant on 22/8/2023.



7. The Respondents deposes further in paragraphs 19 – 22 of the Replying Affidavit that the Applicant appointed an advocate on 9<sup>th</sup> August, 2023 who filed appearance and submissions to the Preliminary Objection raised by the 2<sup>nd</sup> Defendant. Subsequently, on 29<sup>th</sup> February, 2024 there was a notice of change of advocate filed. That the 1<sup>st</sup> defendant was ably represented on 11<sup>th</sup> July, 2024 when the court rendered its ruling. Therefore, they are surprised by the 1<sup>st</sup> Defendant's averment that the order was made without their participation.
8. They averred the present application does not meet the grounds for review as set out in order 45 of the *Civil Procedure Rules* and urged the court to dismiss the application with costs.
9. To counter the facts stated in the Replying Affidavit, the Applicant filed a further affidavit. He reiterated that the injunctive orders were obtained exparte and without full disclosure of material facts and that it was denied opportunity to be heard.
10. That it has demonstrated that the daily figure of Kshs.500,000 represent actual losses incurred due to penalties owed to contractors who had mobilized resources and equipment on site as these penalties, along with additional site management costs, stem directly from the contract and were subsequently triggered by the delay caused by the injunctive orders. Hence the Plaintiffs' claim/allegation that the amounts are exaggerated are baseless and unsupported.
11. The Applicant avers that any claims of environmental or statutory violations are misplaced, as all requisite approvals, including the Environmental Impact Assessment (EIA), were obtained from NEMA, and no irregularities have been identified by the relevant authorities. That in reply to paragraph 12, the Plaintiffs have made general allegations of fraud and irregularity in obtaining approvals, yet they have failed to particularize these claims or provide credible evidence. This is contrary to Order 2 Rule 10 of the *Civil Procedure Rules*, which requires particulars of fraud to be clearly pleaded and proven. That regarding paragraph 143 of the Replying Affidavit, the Applicant averred that the enforcement notice issued by the 2<sup>nd</sup> Defendant (County Government of Nairobi) was based on misinformation provided by the Plaintiffs. The 1<sup>st</sup> Defendant has since complied with all relevant legal requirements, and the notice has been duly addressed.
12. In response to paragraphs 19 and 20 of the Replying Affidavit, the Applicant acknowledged WWM Advocates LLP and the subsequent Notice of Change of Advocates by Musyoki Benson & Associates. However, neither firm filed a substantive response to the application dated 9<sup>th</sup> August 2023. Consequently, the orders were granted undefended, which undermines the fairness of the proceedings. That it is in the interest of justice that these orders be set aside to allow for a fair and thorough determination of the matter.
13. The parties filed written submissions which I have read and considered when writing this determination.

#### **Analysis and determination;**

14. This application is premised on the provisions of order 40 rule 7 which states as herebelow;
  - Order for injunction may be discharged, varied, or set aside.
    7. Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.
15. Although the Plaintiffs averred that the present application did not meet the threshold of Order 45, the said order was not invoked since this is not an application for review. Order 40 rule 7 allows a party



- to move the court to vary and or set aside orders of injunction. I will proceed to assess the application on whether a basis has been laid to vary and or discharge the orders of injunction which are in force.
16. The orders sought to be varied/discharged were granted on 11<sup>th</sup> July, 2024 after the 1<sup>st</sup> Defendant/Applicant failed to file any pleadings in opposition to the impugned application dated 9<sup>th</sup> August, 2023. The Applicant does not deny it had an advocate who came on record on its behalf as early as August 2023.
  17. The 1<sup>st</sup> Defendant/Applicant has posited that the orders were obtained *ex parte* and without material disclosure of facts. From the documents annexed to the affidavit in support of the current application, annexure, MAI – 4a which is a notification of approval from Nairobi City County dated 25<sup>th</sup> November, 2022. Annex MAI – 2C is a title deed issued to the Applicant on 6<sup>th</sup> October, 2023.
  18. These documents were in the hands of the Applicant before the impugned orders were granted. It is necessary that the Applicant does persuade this court why the same were not filed long before the orders of injunction were confirmed in July 2024. Mr. Mohamed deposing the further affidavit at paragraph 16 thereof said that neither firm of their advocates filed substantive response to the application dated 9<sup>th</sup> August, 2023. However, the Applicant does not go further to say why neither firm filed any response. The court record bears that each time the matter came up, there was representation for the Applicant.
  19. The application was filed on 9<sup>th</sup> August, 2023 and as at June 2024, there was no response filed other than the preliminary objection filed by the 2<sup>nd</sup> Defendant which was determined by a ruling rendered on 6<sup>th</sup> June, 2024. The record also show that I extended time to both Respondents by a period of 21 days for filing of any response to the impugned application. They did not utilize this opportunity.
  20. Having failed to exercise its right within the timelines provided the Applicant now wishes this court to set aside the orders because it is incurring daily costs. Instead of making a case for variation, or discharge of the orders of injunction, the Applicant proceeded to present arguments as if it was the hearing of the application that was already allowed. The impugned order was not made *ex parte* but due to inaction by the counsels representing the Applicant.
  21. In the case of *James Kanyiita Nderitu & Another v Marios Pholotas Ghika & Another* Civil Appeal No. 6 of 2015 the Court of Appeal held that:

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v E.A. Cargo Handling Services Ltd* [1975]



EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).”

22. Further the Applicant alleged that it was suffering losses at Kshs.500,000 daily. The Applicant does not plead when it began suffering these losses as Orders of status quo were issued on 19<sup>th</sup> September, 2023 when the application was heard ex parte at the first instance. The said orders of status quo remained in place until July, 2024 when the order of injunction were confirmed as already stated hereinabove, the Applicant contributed to the delay in prosecuting the application 9<sup>th</sup> August, 2023. Even the present application was brought 2 months after the order complained of was issued. If there are huge losses being incurred the Applicant would not have been this indolent.
23. In summary, I am not satisfied that the present application is merited for two reasons; first because no reasons have been stated why no response was filed when the opportunity was presented. Secondly, the Applicant has opportunity to defend itself during the hearing of the suit on merits so its not been denied the right to hearing. I decline to issue any order sought. Let the matter proceed on merit taking into consideration that it was at the stage of setting the hearing date of the main suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF APRIL, 2025**

**A. OMOLLO**

**JUDGE**

