Mavisi & 4 others v Nairobi County Government & 8 others; Land Registrar & 2 others (Interested Parties) (Environment and Planning Civil Case E032 of 2024) [2025] KEELC 4758 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4758 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING CIVIL CASE E032 OF 2024

AA OMOLLO, J

JUNE 26, 2025

BETWEEN

DANIEL NGOLI MAVISI ..... 1ST PETITIONER

CATHOLIC DIOCESE OF TORIT ..... 2ND PETITIONER

SATIENDER SINGH SEHMI ..... 3RD PETITIONER

JAGS KAUR (ON BEHALF OF PARKLANDS RESIDENT ASS.) ..... 4TH PETITIONER

TEDDY OBIERO (ON BEHALF OF ALLIANCE OF NBI METRO RESIDENTS ASSOCIATION) ..... 5TH PETITIONER

AND

NAIROBI COUNTY GOVERNMENT & 8 OTHERS & 8 OTHERS & 8 OTHERS ..... RESPONDENT

AND

THE LAND REGISTRAR ..... INTERESTED PARTY

MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND URBAN DEVELOPMENT ..... INTERESTED PARTY

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .... INTERESTED PARTY

RULING

1. The proposed petitioners filed notice of motion dated 28th January 2025 supported by an affidavit sworn by Jags Kaur seeking for the following issues;

i. Spent

ii. Spent

iii. Spent

iv. Spent

v. Spent

vi. Spent

vii. That this Honourable Court do grant Conservatory Orders stopping, halting and discontinuing any further development and construction activities on the property known as Nairobi/Block 37/283(former L.R No. 209/22334)-Limuru Road/City Park Drive Junction, Parklands, and also on sections/parts of Limuru Road and City Park Drive by the 8th and 9th Respondents, or any other persons pending hearing and determination of the Amended Petition hereof.

viii. That this Honourable Court do grant and issue Conservatory Orders, compelling the 1st, 2nd ,3rd ,4th ,5th and 6th Respondents jointly and/or severally, to take immediate measures to stop, prevent and discontinue any construction and development activities, or any act or omission deleterious to the environment on the property known as Nairobi/Block 37/283(former L.R No. 209/22334)-Limuru Road/City Park Drive Junction, Parklands, and also on sections/ parts of Limuru Road and City Park Drive by the 8th and 9th Respondents, their agents/ proponents, or any other persons, pending hearing and determination of this Petition.

ix. That this Honourable Court do give any further orders and /or directions deemed just, fair and necessary.

x. That costs of the application be provided for.

2. The motion was based on the grounds that it is a constitutional and a statutory requirement that all development activities in Kenya, including development within the 1st Respondent's geographical and Physical boundaries are to be undertaken in accordance with the provisions of the *Physical and Land Use Planning Act* 2019 and the Physical and Land use (Development Application and Control) (General) Regulations, 2021.

3. That it is a legal requirement under the said PLUPA that the 1st Respondent to prepare, develop and publish a County and also a Local Physical and Land Use Development Plan for Local Areas and further, that developments commenced before and without development permission from the 4th Respondents are illegal and are in violation of Section 57 of the Act.

4. The Applicants stated that the 8th and 9th Respondents commenced development activities on the parcel of land known as Nairobi/Block 37/283(former L.R No. 209/22334)-Limuru Road/City Park Drive Junction, Parklands herein after referred to as "the suit property" belonging to the 5th Respondent in March 2024 before obtaining development permission from the 4th Respondent.

5. That the developments are construction of proposed 4 High Speed lifts, mosque, madarasa, kids play area, gym area, offices, restaurant, supermarket, swimming pool, borehole, back-up generator,24/7 CCTV Camera and shops, with other development activities, including cutting down trees, demolition of buildings and structures and excavation of the ground having been undertaken between March 2024 and November 2024.

6. They stated that during the excavation period, the 8th and 9th Respondents excavated the subject property and dug more than thirty(30) meters deep beacon to beacon and dumped millions of tons of soil and other materials to unlicenced dumpsites, and also along/into the neighbouring Mathare River.

7. The Applicants stated that thy have established that the 8th and 9th Respondents did not apply for development permission from the 4th Respondent as required under the *Physical and Land Use Planning Act* 2019 and the Physical and Land Use (Development Permission and Control (General) Regulations, 2021) before commencing to undertake development activities on the said property.

8. That also, they established that no NEMA Licence was issued or shall be issued by the 5th Respondent in respect to the ongoing development and construction activities.

9. The Applicants contend that the ongoing activities are in breach and in violation of Articles of *the Constitution* of Kenya, provisions of PLUPA, the third schedule of the Act, the Physical and Land Use (Development Permission and Control (General) Regulations, 2021) the Environmental Management Co-ordination Act (EMCA) and the *National Construction Authority Act* (NCA).

10. That their efforts to have the illegal development stopped, halted or discontinued have been futile and there are clear indications that the 8th and 9th Respondents are ready to have the proposed development/ building constructed completed and occupied.

11. The Applicants stated that the development and construction activities have, and will continue breaching, denying, violating and infringing upon or threatening the Applicants' and the general publics' right to life, to equality and freedom from discrimination and to a clean and healthy environment.

12. They stated that unless stopped and discontinued by way of conservatory orders, the activities will continue, rendering the filed petition nugatory. That the loss and damage including environmental loss subjected to the Applicants and general public shall be immeasurable, irreversible and irreparable.

13. They added that any prejudice that may be caused or subjected to the Respondents will be of their own making given that they are involved in illegal and irregular activities on the subject property.

14. The 1st,2nd ,3rd and 4th Respondents filed grounds of opposition dated 20th March 2025 stating that under section 78(a)&(b) of the Physical Land Use and Planning Act (PLUPA) No. 13 of 2019, provides that any person may submit a complaint or claim in respect of any application for development permission or any decisions made pursuant to the Physical Land Use and Planning Act to the County Physical and Land Use Planning Liaison Committee in the first instance.

15. That under Section 20(2) of the *Environment and Land Court Act* as read with Article 159(2)(d) of *the Constitution*, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled and no attempt was made by the Applicants to exhaust the foregoing ADR mechanisms.

16. Thus, in the circumstances the instant proceedings are premature and ought to be stayed pending the outcome of the proceedings before the County Physical and Land Use Planning Liaison Committee, if at all.

17. The 6th Respondent, the National Construction Authority (NCA), filed replying affidavit sworn on 14th April 2025 by Arch Stephen Mwilu, their manager compliance.

18. The 6th Respondent, defends its role and actions in relation to the construction works being undertaken by the 8th and 9th Respondents on the suit property and clarifies that it has been properly

executing its statutory mandate under the *National Construction Authority Act* No. 41 of 2011 and the accompanying Regulations of 2014.

19. The deponent stated that developers are required to register construction projects and obtain compliance certificates, and confirms that the 8th Respondent, Highridge Auto Bazar Limited, duly registered the project and submitted all required documents, including approvals from other relevant authorities and a geotechnical site investigation report.

20. The 6th Respondent further explains that its compliance officers conducted a site inspection on 24th September 2024 in response to this suit and during the inspection, it was confirmed that excavation works were ongoing, the contractor was present, and a project signboard displaying approval details was visible.

21. That although some project reports were not available at the time of inspection, the site was otherwise compliant, and the project had been properly registered.

22. The Authority emphasized that its regulatory role does not extend to zoning and planning issues, which fall under the mandate of other agencies like the 1st and 5th Respondents, and its involvement is focused solely on construction safety, quality, and compliance.

23. The 6th Respondent refutes claims by the Applicants that it has failed, refused, or neglected its duties maintaining that all statutory responsibilities under the its Act and Regulations have been met and that no evidence has been presented to show otherwise.

24. The 6th Respondent argued that the Petitioners' application does not disclose any valid legal claim against it and urges the Court to find that it has fulfilled its obligations and acted within its lawful mandate in all matters concerning the construction on the subject property.

25. In opposition to the motion, the 9th Respondent filed a replying affidavit sworn by Abdirashid Mahad Dahir on 28th February 2025. He accused the Applicants of misrepresentation and material non-disclosure because the 8th and the 9th Respondents duly obtained all necessary development permissions, including change of user approval, certificate of compliance, and an EIA licence from relevant authorities before commencing any construction on the subject property as shown in the annexed documents.

26. They also refute claims of environmental degradation, such as dumping soil into the Mathare River or damaging plantations, asserting that all development activities are confined within the property boundaries and carried out lawfully.

27. Further, the 9th Respondent argue that the Petitioners' application to join additional parties is unnecessary and amounts to abuse of court process. They maintain that the concerns raised are already being addressed by existing Petitioners, making the inclusion of additional Petitioners redundant, particularly in a public interest litigation context.

28. The Respondents suggest the application is driven by ulterior motives, including personal vendettas, and aims to tarnish their reputation and frustrate their lawful property use and as such, urge the Court to dismiss the application with costs, emphasizing that the Respondents' rights under Article 40 of *the Constitution* should be protected.

Submissions:

29. The 4th and 5th Petitioners/Applicants filed submissions dated 9th April 2025, the 1st -4th Respondents filed submissions dated 20th March 2025 while the 8th and 9th Respondents filed submissions dated 2nd April 2025.

30. The Petitioners submitted that from their pleadings and the evidence adduced the application for conservatory orders is meritable relying in the cases of Nairobi Civil Appeal 151 of 2011-Invesco Assurance Co. Ltd v MW (Minor suing through next friend and mother (HW) (2016) Eklr, cited in Damour Florian Emmeric v Director of Immigration Services (2022) Eklr), Munya v Kithinji & 2 Others(Application 5 of 2014)[2014] KESC 30(KLR), Judicial Service Commission vs Speaker of the National Assembly & Another [2013]Eklr cited in Damour Florian case.

31. They stated that the 8th and 9th Respondents commenced development activities on the suit property by demolishing the existing buildings and structures and destroying all flora and fauna to and without obtaining the requisite development permission, permits, licences and approvals from the 1st -7th Respondents.

32. That also the 8th and 9th Respondents excavated the subject property beacon to beacon resulting to boundary walls bordering the subject property collapsing. Further, that they affixed hoarding walls extending on both Limuru Road and City Park Drive causing pedestrians to walk in the middle of the road and also blocking visibility to motorists joining Limuru Road from City Park Drive.

33. The Applicants submitted that the suit property has been constructed on top of the sewer manhole located along City Park Drive and Limuru Road with the obvious result of breaching, denying, violating and threatening general publics' right to a clean and healthy.

34. That the said construction activities are deleterious to the environment and are breaching, denying, violating, infringing and threatening their right to life, equality and freedom from discrimination and a clean and healthy environment.

35. They also submitted that the 1st to 4th Respondents have not contested the Applicants' position that no development permission was applied for and/or granted in respect of the suit property.

36. The Applicants stated that if any permission was ever granted which is denied, the same did not follow the laid down procedure as required under Section 58,60 and 61 of PLUPA particularly the development permission produced by the 9th Respondent which does not amount to development permission applied for and obtained under the Third Schedule of PLUPA and Physical and Land Use Planning (Development Permission and Control) (General) Regulations 2021.

37. They submitted that their evidence is backed up by the fact that the 1st-4th Respondents issued the 8th and 9th Respondents with the Enforcement Notice dated 27th December 2024 requiring stoppage of works for among other reasons, failure to submit structural drawings and the averments by the 5th Respondent that the EIA Project Report is still under review contrary to the 8th and 9th Respondents statement that the proposed project is licensed.

38. The Applicants submitted that they have met the threshold for grant of the conservatory orders sought and in support cited the case of Wilson Kaberia Nkunja v The Magistrates and Judges Vetting Board & Others, Nairobi Constitutional Pet No. 154 of 2016 Eklr, Centre for Rights Education and Awareness and Another v Speaker of the National Assembly and another (2017) Eklr.

39. They also submitted that the issues and complaints raised in this case transcend the jurisdiction and competence of the County Physical and Land Use Liaison Committee and any other forum except the High Court and superior courts of same status. In support of this, they cited the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others 2023 Eklr and West Kenya Sugar Co.Ltd v Busia Sugar Industries Limited & 2 others (2017)Eklr.

40. In their submissions, the 8th and 9th Respondents relied on Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) Eklr among others to argue that the Applicants/Petitioners have not established a prima facie case or demonstrated a real risk of constitutional violation that would justify such relief. They assert that the construction on the property in question is lawful, backed by all necessary permits, and in compliance with environmental and planning regulations.

41. That the conservatory orders sought would effectively determine the core petition prematurely, which is impermissible at an interlocutory stage. The 8th and 9th Respondents also stated that the Applicants' claims are speculative and unsupported by concrete evidence, and granting the orders would unfairly prejudice their property rights.

42. The 1st to 4th Respondents submitted that they challenge jurisdiction of the Environment and Land Court (ELC) to hear this petition and application, citing the doctrine of exhaustion and relevant provisions of the *Physical and Land Use Planning Act* (PLUPA) No. 13 of 2019, especially Sections 61(3), 61(4), and 78(a) & (b).

43. They argue that the County Physical and Land Use Planning Liaison Committee is the primary adjudicatory body mandated to first hear complaints or appeals concerning development permissions, and only after exhausting this process may an appeal be lodged in the ELC. They cited Section 20(2) of the *Environment and Land Court Act* and Article 159(2)(c) and (d) of *the Constitution*, which require courts to promote alternative dispute resolution mechanisms and uphold statutory conditions precedent before assuming jurisdiction.

44. The 1st to 4th Respondents stated that jurisdiction must be properly invoked and cannot be assumed where a statutory framework provides for an alternative dispute resolution mechanism and in support cited the case of Speaker of the National Assembly v Karume [1992] KLR, where the Court of Appeal held that where a clear procedure is prescribed by legislation, it must be strictly followed.

45. Similarly, in Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR, the Court reiterated that courts should be forums of last resort and in Maina & 2 others v Atlas Tower Group & 4 others [2023] KEELC 22054 (KLR), Justice Eboso dismissed a similar petition for failure to first seek redress from the Liaison Committee.

46. The Respondents maintained that the petition is premature and offends the doctrines of exhaustion and constitutional avoidance and no evidence was provided by the petitioners to show that they filed a complaint with the Liaison Committee or even attempted to initiate the dispute resolution process prescribed by PLUPA.

Analysis and Determination:

47. The issues for determination before this court are as follows;

    i. Jurisdiction

    ii. Whether conservatory orders should be issued

iii. Cost

Jurisdiction

48. It is trite that jurisdiction is everything. The Court of Appeal in the case of Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR had the following to say on the centrality of the issue of jurisdiction: -

> "So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

49. The Respondents have argued that the Petitioners have failed to follow the laid-out channel under *Physical and Land Use Planning Act* (PLUPA) No. 13 of 2019 to launch their complaint before instituting this suit. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the courts.

50. The Court of Appeal in the case of Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others [2015] Eklr observed as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

51. The question of what invokes the doctrine of exhaustion before embarking on the Court process was discussed in the case of William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020]eKLR by a five judge bench as follows:

> 41. The Court outlined the exceptions to the rule as follows:
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> "As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it.
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> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted.
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> The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

52. In this scenario, the Petitioners not only challenge the legality of permits, licences and approvals of development on the suit property but plead that there is real risk of constitutional violation of their rights. Given that the case raises the violation of fundamental rights and freedoms, which can only be addressed by the High Court and courts of equal status (Environment and Land Court ELC). The objection premised on lack of jurisdiction is for dismissal.

53. On the locus of the 2nd Capacity to sue or be sued on its own name, whether the said name is struck out, the claim as brought by the 1st and 2nd Petitioners will still stand. It serves no purpose to deal with it.

Whether conservatory orders should be issued

54. The supreme Court established the threshold for the grant of conservatory orders in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR as follows;

> "(86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
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> (87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
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> i. the appeal or intended appeal is arguable and not frivolous; and that
>
> (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
>
> (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
>
> (iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution*. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest."

55. Thus, for a conservatory order to be granted, the applicants must show that they have an arguable case in which if the orders sought are not granted, the suit would be rendered nugatory. Further, they must show that it is in the public interest to grant the orders sought.

56. With regard to whether the Petitioners have an arguable case, the Respondents argue that all necessary development permissions, including change of user approval, certificate of compliance, and an EIA licence from relevant authorities were duly obtained before commencing any construction on the subject property as shown in the annexed documents.

57. I have looked at the approvals which the 8th and 9th Respondents' development is backed on and considered the argument by the Petitioners challenging the same. It is noteworthy that delving into analysis of legality of the issued permits and approvals will amount to determining the main suit at an interlocutory stage. Whether those approvals were granted procedurally or otherwise forms part of the issues for determination during the hearing.

58. The purpose of the orders sought is to ensure the Applicants'/Petitioners' rights and those of the environment are preserved pending the hearing and determination of the Petition. This is balanced with the 8th and 9th Respondents' right to develop their property having obtained the requisite documents from the respective authorities.

59. In this instance, the Petitioners have generalised that the activities of the 8th and 9th Respondents on the construction site violates their constitutional rights but have not demonstrated that unless the conservatory orders sought are issued, the harm will be irreparable. Consequently, I hold that the application does not meet the threshold for grant of conservatory orders.

60. The motion is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE 2025

A. OMOLLO

JUDGE