

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO. E053 OF 2022

TOM BROWN LIMITED 1ST
PETITIONER

HON. JOHN HARUN 2ND
PETITIONER

VERSUS

COUNTY EXECUTIVE COMMITTEE
MEMBER IN CHARGE OF PLANNING 1ST
RESPONDENT

NAIROBI CITY COUNTY 2ND
RESPONDENT

NOVA REALTY GROUP LIMITED 3RD
RESPONDENT

AND

THE HON. ATTORNEY GENERAL 1ST INTERESTED
PARTY

MINISTRY OF DEFENCE 2ND INTERESTED
PARTY

THE CHINESE EMBASSY, KENYA 3RD INTERESTED
PARTY

DIRECTOR, DIRECTORATE OF
CRIMINAL INVESTIGATIONS (DIRECTOR
IN CHARGE, CID INVESTIGATIONS,

**NAIROBI CITY COUNTY) 4TH INTERESTED
PARTY
NAIROBI CITY COUNTY, COUNTY
PHYSICAL AND LAND USE PLANNING
LIAISON COMMITTEE 5TH INTERESTED
PARTY**

RULING

1. Through a Notice of Motion dated 11th March 2025, and brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15, Order 19 Rule 1, Order 45 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 5 of the Oaths and Statutory Declarations Act, the 3rd Respondent seeks the following orders:

a. That this Honourable Court be pleased to strike out from the records the affidavit sworn on 2nd June 2023 by one Major Julius Messo and allegedly commissioned by Richard A. Onchuru, Commissioner for Oaths for being incurable defective having not complied with Section 5 of the Oaths and Statutory Declarations Act.

b. That this Honourable Court be pleased to review and set aside the injunctive orders granted on the 8th day of June 2023 in respect of L.R. No. 209/1458/2 based on concocted evidence

inadmissible in law pending hearing and determination of the main suit.

- c. That this Honourable Court be pleased to find that the injunctive orders were granted based on an incurably defective affidavit, which constitutes serious miscarriage of justice and warrants the review and setting aside of the said orders forthwith.***
- d. That this Honourable Court be pleased to grant any other orders it deems just and equitable to meet the ends of justice in the circumstances.***
- e. That the costs of this application be in the cause.***

2. The application is premised on the grounds set out on its face and in the Affidavit sworn by Hassan Adan Mohamed, a Director of the 3rd Respondent. It is deponed that the 2nd Interested Party placed before this Court an affidavit dated 2nd June 2023, sworn by one Major Julius Messo and purportedly commissioned by Richard Onchuru, Commissioner for Oaths.
3. According to the deponent, the said affidavit was not commissioned by Mr. Onchuru, who has disowned both the deponent and the act of commissioning the affidavit.
4. Mr. Mohammed averred that his advocates became suspicious of Major Julius Messo's affidavit and through a

letter dated 26th February 2025, sought clarification from the purported Commissioner of Oaths, Mr. R.A. Onchuru, on whether he had witnessed the deponent sign the affidavit and the place at which the affidavit was allegedly sworn.

5. In his response, it was deposed, Mr. Onchuru denied having commissioned the affidavit, denied knowing the deponent and further denied that the affidavit was sworn before him at his chambers in Ngong town.
6. It was further deposed that the affidavit dated 2nd June 2023 does not comply with the mandatory requirements of **Section 5** of the **Oaths and Statutory Declarations Act** and is therefore inadmissible as evidence before this court.
7. Mr. Hassan contended that the impugned affidavit is a forgery, is incurably defective and ought to be struck out from the record. He averred that in the circumstances, it is in the interest of justice that the injunctive orders previously issued be reviewed, discharged or otherwise set aside to forestall a further miscarriage of justice.
8. The 2nd Petitioner opposed the application through a Replying Affidavit dated 17th April 2025. He denied the premise of the 3rd Respondent's application that the interim orders were granted on the basis of the affidavit of Major Julius Messo and that because the said affidavit was allegedly not properly commissioner, the interim orders should be set aside.

9. He asserted that the court, in its ruling, made findings that the Petitioners had satisfied the legal threshold for the grant of interim injunctive orders.
10. It was further averred that the Petitioners, being beneficiaries of the orders granted by this court, cannot be penalized for any alleged deficiencies in the pleadings or responses of other parties. He maintained that the Petitioners have proved their case to the requisite standard for the grant of the injunctive reliefs sought.
11. The 2nd Petitioner deponed that, in its ruling delivered on 8th June 2023, the Court was satisfied that the Petitioners had established a prima facie case to warrant the issuance of injunctive orders and that the Court was persuaded that the change of user and development approvals relating to the suit property had been obtained in an opaque and clandestine manner, thereby violating the Petitioners' rights to privacy, to a clean and healthy environment, to fair administrative action, and to access to justice.
12. The 2nd Petitioner averred that the court found, on a prima facie basis, the 1st and 2nd Respondents had not complied with the mandatory provisions of **Sections 58(8) and 60(h)** of the **Physical and Land Use Planning Act**. This conclusion, he noted, was supported by the uncontroverted letter dated 17th May 2022, which confirmed that the development application had been deferred for want of a

clearance from the Ministry of Defence and letters of no objection from neighbouring landowners.

- 13.** Secondly, the 2nd Petitioner deponed that the Court had observed that the Petitioners had persistently sought information necessary to safeguard their rights through various letters, and had lodged objections to the development approval. The 1st and 2nd Respondents, he stated, neither rebutted these objections nor demonstrated any decisions made on them or whether such decisions were ever communicated to the Petitioners.
- 14.** He further deponed that the Court had identified inconsistencies relating to the existing use of the property; that while the notice for change of user described the property as a “single dwelling,” previous approvals indicated its lawful use was for “professional offices,” a discrepancy the Court considered material.
- 15.** The 2nd Petitioner also referenced the Court’s observation that the 2nd Respondent had, until 2006, declined to approve any change of user for the property except on condition that no redevelopment would occur. He asserted that the Court noted the absence of any explanation as to what had changed in 2021/2022 to justify the later approvals for both change of user and redevelopment, or whether such reasons had been communicated.

- 16.** He deponed that the Court had found that unless injunctive relief was granted, continued construction risked causing irreparable harm to the Petitioners and to the public, harm which could not be adequately compensated by damages should the Petition succeed.
- 17.** It was the 2nd Petitioner's contention that the present application does not address the evidentiary material or legal issues considered and determined by the Court in its ruling. He averred that it was incorrect to suggest that the Court relied on the affidavit of Major Julius Messo in granting the orders of 8th June 2023.
- 18.** He maintained that there was independent evidence, including the letter dated 17th May 2022 from the 1st and 2nd Respondents, confirming that the 3rd Respondent's land lies within a safeguarding area; that no clearance was sought from the Ministry of Defence as required under **Section 60(h)** of the **Physical and Land Use Planning Act**; and that letters of no objection from neighbours were not obtained contrary to **Section 58(8)** of the said Act.
- 19.** The 2nd Petitioner deponed that, even if the impugned affidavit were to be struck out, it would not affect the core findings underpinning the Court's ruling. He urged the Court to dismiss the application with costs.
- 20.** The 1st and 2nd Respondents opposed the application through a Replying Affidavit sworn on 13th May 2025 by Alex Mutua, a

licensed process server in the Office of the Attorney General. Mr. Mutua deponed that their office received instructions from the Ministry of Defence regarding this Petition by a letter dated 9th January 2023, received on 10th January 2023.

- 21.** He averred that, upon receiving instructions, a draft Replying Affidavit was prepared and forwarded to the Ministry of Defence for execution and that the affidavit was duly signed by Major Julius Messo, Staff Officer II, Lands, Ministry of Defence, and subsequently returned to the Office of the Attorney General in accordance with the established procedures governing Government ministries, departments and agencies.
- 22.** Mr. Mutua further stated that the executed affidavit was presented to the law firm of Ayieko Kang'ethe & Co. Advocates at Hazina Towers for commissioning, which was duly done and paid for. He maintained that the affidavit accurately reflected the position of the Ministry of Defence, the 2nd Interested Party, and that the Office of the Attorney General does not ordinarily require receipts from law firms after commissioning affidavits of Government officers.
- 23.** The deponent asserted that the ruling which the 3rd Respondent seeks to review and set aside was comprehensive and addressed the issues raised before the Court, and was not anchored on the impugned affidavit.

24. He added that the Ministry of Defence has since reinforced its position through a Supplementary Affidavit sworn by Major Julius Messo, annexing a letter referenced MOD/ELC/029/LEGAL dated 20th February 2025.
25. Mr. Mutua averred that the affidavit under challenge was not defective and that no miscarriage of justice had been demonstrated to warrant a review of the Court's orders. Reliance was placed on the case of ***Kioko Peter vs Kisakwa Ndolo Kingoku [2019] eKLR***.
26. He deponed that procedural rules are meant to serve the ends of justice and ought not to be exalted to a technical pedestal. Their purpose, he stated, is to facilitate fair, orderly and predictable adjudication, not to fetter or obstruct the administration of justice.

Submissions

27. Counsel for the 3rd Respondent/ Applicant submitted that the foundation of the present application is the assertion that the affidavit sworn by Major Julius Messo was not commissioned by Mr. Richard Onchuru, Commissioner of Oaths. Counsel referred to Mr. Onchuru's affidavit sworn on 3rd March 2025 in which he expressly denied commissioning the said affidavit. It was argued that such a denial renders the affidavit incurably defective for violation of **Section 5** of the **Oaths and Statutory Declarations Act**.

28. Counsel further submitted that the Replying Affidavit of Mr. Mutua confirms that the affidavit sworn by Major Messo was not executed in the presence of the Commissioner for Oaths. According to Counsel, Mr. Mutua's averment that the affidavit was collected from the Ministry of Defence and taken to Ayieko Kang'ethe & Company Advocates for commissioning corroborates the complaint that the affidavit was not sworn before the commissioner named in the jurat.
29. It was argued that an affidavit constitutes evidence on oath and, where not lawfully sworn, its contents must be expunged from the record. Counsel relied on the case of *Benson Mwangangi Njeru vs Director of Public Prosecutions & 3 others (2023) eKLR* and *David Wamatsi Omusotsi vs Returning Officer, Mumias East Constituency & 2 others (2017) eKLR* in support of this proposition.
30. On whether the orders issued on 8th June 2023 should be reviewed, Counsel submitted that **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**, empower the Court to review its own orders where there is discovery of new and important evidence that was not within the applicant's knowledge at the time, or where an error apparent on the face of the record is established.
31. Counsel contended that the application was filed promptly upon discovery that Major Messo's affidavit had not been

commissioned by Mr. Onchuru, despite bearing his name, stamp and a purported signature. It was submitted that once an affidavit is struck out, the evidence contained therein becomes unreliable; and where such evidence formed the basis of a court's decision, the resulting order cannot stand and ought to be set aside.

32. Counsel argued that whether or not the Court relied on the impugned affidavit is a matter of fact. Referring to the Court's ruling of 8th June 2023, Counsel asserted that the Court relied on the contents of the disputed affidavit. Since that evidence is now challenged as inadmissible, Counsel urged the Court to set aside the orders issued on 8th June 2023. Reliance was again placed on **Benson Mwangangi Njeru vs Director of Public Prosecutions & 2 others (2023) KLR.**

33. Counsel for the Petitioner submitted that, in its ruling delivered on 8th June 2023, this Court undertook an exhaustive analysis of the Petitioner's evidence and concluded that the Petitioner had established a prima facie case with a probability of success; that irreparable harm would be occasioned were the construction to be completed before determination of the Petition; and that serious irregularities attended the purported grant of the change of user and development permission, including non-compliance with **Sections 58(8) and 60(1)(h)** of the **Physical and Land Use Planning Act, 2019.**

- 34.** Counsel further submitted that the Court found that the 1st and 2nd Respondents had failed to produce any approvals allegedly issued on 7th April 2022, notwithstanding their letter of 17th May 2022 expressly confirming that the application for development permission had been deferred pending clearance from the Ministry of Defence and letters of no objection from neighbouring landowners.
- 35.** It was the Petitioner's submission that these findings were reached without reference to the contents of Major Messo's affidavit, and that the operative portion of the ruling granting injunctive relief was wholly independent of that affidavit.
- 36.** Learned Counsel argued that the 3rd Respondent's application fails to address the evidentiary material and legal issues that formed the basis of the Court's decision and is therefore devoid of merit and ought to be dismissed with costs.
- 37.** Counsel maintained that the allegation that the Court relied on the affidavit of Major Julius Messo in granting the interim orders of 8th June 2023 is unfounded. There is, Counsel submitted, no portion of the ruling that demonstrates reliance on the disputed affidavit in arriving at the decision to grant injunctive relief.
- 38.** It was further submitted that independent evidence existed, particularly the letter dated 17th May 2022 from the 1st and

2nd Respondents confirming that the 3rd Respondent's property lies within a safeguarding area; that clearance from the Ministry of Defence had not been sought contrary to **Section 60(h)** of the **Physical and Land Use Planning Act**; and that letters of no objection from neighbours had not been obtained as mandated under **Section 58(8)** of the Act.

- 39.** Counsel submitted that even if the affidavit of Major Julius Messo were declared defective and struck out, this would not affect the validity of the injunctive orders. First, the orders were sought by and granted in favour of the Petitioners, not the 2nd Interested Party. Second, the Petitioners proved their case independently through their own documentary evidence and affidavits, which were not challenged, and third, the Court's reasoning was grounded in the Petitioners' prima facie demonstration of statutory and constitutional violations, not on the averments of Major Messo.
- 40.** The Attorney General submitted that the issues raised by the 3rd Respondent have been adequately addressed in the Replying Affidavit of Alex Mutua, a Process Server from the Office of the Attorney General, who annexed the 2nd Interested Party's Replying Affidavit of 2nd June 2023 and Supplementary Affidavit of 24th February 2025, both of which are consistent with the instructions issued to the 2nd Interested Party.

41. On the admissibility of the affidavit dated 2nd June 2023, it was submitted that the same does not offend the provisions of **Section 5** of the **Oaths and Statutory Declarations Act**. The cases of **Toshike Construction Co. Ltd vs Harambee Co-op. Savings (2019) KECA 598**, **Burnaby Properties Ltd vs Suntra Stocks Ltd (2015) eKLR**, and **Sir Ali Bin Salim Primary School vs Francis Bahati Diwani & 2 Others (2014) KEELC 397** were cited in support.
42. Counsel submitted that the prayer to strike out pleadings is draconian and should only be resorted to in the clearest of cases. Reliance was placed on **D.T. Dobie & Company (Kenya) Ltd vs Muchina [1982] KLR 1** and **Co-operative Merchant Bank Ltd vs George Fredrick Wekesa (Civil Appeal No. 54 of 1999)**.
43. It was also submitted that in accordance with **Order 19 Rule 7** of the **Civil Procedure Rules**, the court retains the discretion to admit affidavits sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the for thereof or on any technicality.
44. Invoking **Article 50** of the **Constitution**, it was submitted that the 3rd Respondent is entitled to a fair hearing. Reference was made to **Gerita Nasipondi Bukunya & 2 Others vs Attorney General [2019] eKLR** and **In the**

Matter of Behill Investment Ltd (2012) KEHC 354 (KLR).

45. On the application for review, the Attorney General argued that the same has been brought after an inordinate delay, which the 3rd Respondent has failed to explain. Consequently, the application is barred by the doctrine of laches.
46. The cases of **Njoroge vs Kimani KECA [2022] 1188 (KLR), County Executive of Kisumu vs County Government of Kisumu & 8 others [2017] KESC 16 (KLR), Joshua Ngatu vs Jane Mpinda & 3 others [2019] eKLR, Mutisya (Suing as the Personal Representative of the Estate of Simon Wambua Makau (Dcd) vs Macharia t/a Three Bins Services & another [2023] KECA 234 (KLR)** were cited in support.
47. It was further submitted by the Attorney General that although the 3rd Respondent alleges discovery of new and important evidence, no proper basis has been laid for review of the ruling delivered on 8th June 2023. On the nature of the orders sought, it was submitted that they call for the exercise of judicial discretion, which the court must exercise judiciously and with restraint. The application, it was contended, serves to frustrate the expeditious conclusion of the matter.

48. The Attorney General submitted that the conduct of the 3rd Respondent is contrary to the overriding objectives under **Sections 1A, 1B, and 3A** of the **Civil Procedure Act**, and invited the Court to exercise its discretion against the applicant and dismiss the application dated 11th March 2025.

Analysis and Determination

49. Having considered the application, responses and submissions filed by the parties, the issues for this court's determination are two-fold:

- a. Whether the Affidavit sworn by Major Julius Messo contravenes Section 5 of the Oaths and Statutory Declarations Act.*
- b. Whether the circumstances disclosed warrant a review of the injunction orders issued on 8th June 2023.*

50. The 3rd Respondent's primary complaint is that the affidavit sworn by Major Julius Messo was never commissioned by the advocate indicated on its face. The Commissioning Advocate, Mr. Richard Onchuru, has expressly disowned the affidavit through his letter of 3rd March 2025, stating that he neither knew the deponent nor administered any oath to him.

51. Section 5 of the **Oaths and Statutory Declarations Act** provides that every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state

truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made. The provision presupposes that the deponent appears before the Commissioner, is identified, and takes the oath in the physical presence of the Commissioner for Oaths.

52. In **CMC Motors Group Limited vs Bengeria arap Korir trading as Marben School & another (2013) eKLR**, the court, while striking out an affidavit on similar grounds, stated: -

“The merit as I find it in respect of Waudu’s affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black’s Law Dictionary defines an oath as follows -‘Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that ones’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.’

‘ ... Bearing that definition the question that needs to be answered is whether Waudu took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore

seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.

- 53.** In the present case, the letter from Mr. Onchuru denying commissioning the affidavit remains unchallenged. The circumstances in which his stamp and purported signature found their way onto the affidavit is unclear. Further, the Replying Affidavit of Mr. Alex Mutua offers no explanation suggestive of compliance with **Section 5**.
- 54.** To the contrary, Mr. Mutua avers that the affidavit was collected from the Ministry of Defence and taken to the firm of Ayieko Kang'ethe & Company Advocates for commissioning, a position that confirms that the oath was not administered in the presence of the Commissioner named in the jurat. This is a direct violation of **Section 5** of the Act.
- 55.** Courts have consistently affirmed the mandatory nature of this requirement. In ***Regina Munyiva Ndunge vs Kenya Commercial Bank Limited (2005) eKLR***, the Court held that an affidavit is defective where the place of swearing and the commissioning stamp did not correspond, and struck out the affidavit as not having been sworn in the presence of the Commissioner for Oaths:

“The second issue raised by the Applicant is that the application should be treated as unopposed

because the replying affidavit is defective since it is not properly commissioned...

The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed."

56. The Court is cognizant of **Order 19 Rule 7** of the **Civil Procedure Rules**, which allows the Court to admit affidavits notwithstanding defects or irregularities in form.

57. However, jurisprudence is settled that defects going to the core requirements of **Section 5** of the **Oaths and Statutory**

Declarations Act cannot be cured under **Order 19 Rule 7 of the Civil Procedure Rules** or even under **Article 159(2) (d)** of the **Constitution**.

58. In **In re Estate of Dominicus Odhiambo (Deceased) [2020] KEHC 3582 (KLR)**, the Court held that such defects strike at the veracity, credibility and probative value of the affidavit itself, thereby affecting substance rather than form:

“In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) (d) of the Constitution. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits and the Petition for grant not being supported by the affidavit in question is no petition at all.”

59. This court is persuaded by this reasoning. It is the act of swearing before a Commissioner of Oaths that transforms statements into evidence under oath. Where, as here, the purported oath was not administered before the Commissioner for Oath whose name appears on the jurat, the affidavit cannot stand. Consequently, the affidavit sworn by Major Julius Messo and dated 2nd June 2023 is incurably defective, offends **Section 5** of the Act, and is hereby struck out.

60. The second issue is whether this court ought to review or set aside the interim orders issued on 8th June 2023, based on the impugned affidavit.

61. The law governing review is set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1(1)** of the **Civil Procedure Rules**. **Section 80** of the **Act** provides as follows:

*“80. Any person who considers himself aggrieved-
(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
(b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

62. Whereas **Order 45 Rule 1(1)** of the **Civil Procedure Rules, 2010** provides as follows:

“Rule 1 (1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of

new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

63. At the outset, the court must consider whether the Motion has been brought without unreasonable delay. This was buttressed by the Court of Appeal in the case of **Francis Origo & Another vs Jacob Kumali Mungala [2005] eKLR** when it held thus:

“...most importantly, the applicant must make the application for review without unreasonable delay.”

64. What constitutes unreasonable delay is a matter of fact dependent on the circumstances of the case. The impugned ruling was delivered on 8th June 2023 whereas this application was filed on 11th March 2025, approximately one year and nine months later.

65. The 3rd Respondent contends that the application was filed as soon as it learnt that the affidavit by Major Julius Messo was

defective, on 3rd March 2025. However, the letter to the Commissioner for Oaths was sent on 26th February 2025, about one year and eight months after the ruling sought to be reviewed. The delay in setting the review process in motion lies squarely at the feet of the Applicant, and no satisfactory explanation has been offered.

- 66.** The next consideration is the impact of striking out the impugned affidavit on the Court's ruling of 8th June 2023, through which it issued injunctive orders restraining and stopping all development activities pending the hearing and determination of the Petition.
- 67.** Having revisited its determination of 8th June 2023, this Court is not persuaded that the striking out of the impugned affidavit alters its conclusions in any material respect. The Court's findings were not anchored on the affidavit of Major Julius Messo but were instead premised on the averments and evidence presented by the Petitioners and the 1st and 2nd Respondents.
- 68.** The Court found that the Petitioners had established a prima facie case and, in particular, that there was no evidence to show that the Petitioners had ever been consulted prior to the approval of the change of user. The court further found that the 2nd Respondent did not avail minutes of the committee that allegedly approved the change of user, thereby depriving the Court of the opportunity to ascertain

whether any objections, including those of neighbouring residents, were considered.

- 69.** The Court also relied on the letter dated 17th May 2022, which the 1st and 2nd Respondents do not dispute, confirming that the application for development permission had been deferred for lack of clearance from the Ministry of Defence and for want of letters of no objection from neighbours.
- 70.** The said letter, which was produced by the Petitioners, also confirmed that the proposed development is in close proximity of a safeguarding area under **Section 60(1)(h)** of the **Physical and Land Use Planning Act**, thus necessitating the approval of the Ministry of Defence.
- 71.** The Court observed that the date on which the 3rd Respondent was granted development permission remained unclear. If, as alleged by the 5th Interested Party, approval was issued on 7th April 2022, then the subsequent letter of 17th May 2022 was inconsistent.
- 72.** Further, the Court noted that although the letter of 17th May 2022 stated that the development application had been deferred, the 3rd Respondent claimed in submissions to have obtained approval on 7th April 2022, and that no such approval was exhibited in the pleadings.
- 73.** The Court also considered the inconsistency concerning the existing use of the property at the time of the notice for

change of user. The 2nd and 3rd Respondents did not clarify whether the property was, as previously approved, for “professional offices” or, as indicated in the newspaper notice, “single dwelling.” That inconsistency required an explanation which was not provided.

- 74.** Additionally, the Court noted that the 2nd Respondent had historically declined to approve any change of user of the suit property until 2006, when approval for professional offices was granted on condition that no redevelopment would occur. The court found that no explanation was given as to what changed in 2021/2022 to justify approving both a change of user and redevelopment.
- 75.** Given the Petitioners’ claim that the change of user infringes their rights to privacy and to a clean and healthy environment, the Respondents were under a legal duty to furnish the Petitioners with documents supporting the impugned approvals. Their failure to do so was central to the Court’s finding that an injunction was warranted.
- 76.** In light of the foregoing, the striking out of the affidavit sworn by Major Messo for the 2nd Interested Party, does not in any way undermine the prima facie case established by the Petitioners during the hearing of the application that gave rise to the impugned orders of 8th June, 2023. The issues identified by the Court remain unresolved and are central to the Petition, which is now at an advanced stage of hearing.

This Court cannot, at this juncture, discharge the injunctive relief previously granted.

77. The upshot is that no grounds have been demonstrated to warrant a review or setting aside of the ruling delivered on 8th June, 2023.

78. In the result, the Notice of Motion dated 11th March, 2025 partially succeeds only to the extent set out below:

- a) **The affidavit sworn on 2nd June 2023 by Major Julius Messo is hereby struck out for being incurably defective and for failing to comply with Section 5 of the Oaths and Statutory Declarations Act.**
- b) **The injunctive orders issued on 8th June 2023 will remain in force pending the hearing and determination of the Petition.**
- c) **Each party will bear its own costs of the application.**

Dated, signed and delivered virtually in Nairobi this 28th day of November, 2025.

**O. A. Angote
Judge**

In the presence of;

Mr. Ouma for Petitioners

Mr. Adano for 3rd Respondent

Mr Tarus for Oketch for 1st and 2nd Respondents and the 5th
Interested Party

Mr. Allan Kamau for 1st, 2nd and 4th Interested Parties

Court Assistant: Tracy

ORIGINAL