Nzomo (Suing on his Own Behalf and on Behalf of Kunde Road Residents Welfare Association) c/o Githara & Associates Advocate) v Ontime Real Estate Limited & 2 others (Civil Application E161 of 2025) [2025] KECA 2253 (KLR) (19 December 2025) (Ruling)

Neutral citation: [2025] KECA 2253 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E161 OF 2025

W KARANJA, K M'INOTI & LA ACHODE, JJA

DECEMBER 19, 2025

BETWEEN

RAPHAEL NZOMO (SUING ON HIS OWN BEHALF AND ON BEHALF OF KUNDE ROAD RESIDENTS WELFARE ASSOCIATION) C/O GITHARA & ASSOCIATES ADVOCATE) ..... APPLICANT

AND

ONTIME REAL ESTATE LIMITED ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI ..... 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3RD RESPONDENT

(Being an application for interim orders pending the hearing and determination of the intended appeal from the judgment of the Environment and Land Court at Nairobi (Amollo J) dated 19th August 2024 in ELC PET. NO. E004 OF 2023)

RULING

1. The applicant filed a Notice of Motion dated 20th February 2025, expressed to be brought under Article 40, 163 (4)(b), and rules 5(2)(b), 43 and 44 of the Court of Appeal Rules, 2022, seeking an injunction to restrain the 1st respondent and its agents from continuing with construction on Plot No. L.R 330/478, situate along Kunde Road in Thompson Estate, Nairobi, pending the hearing and determination of an appeal and that the costs of the application be provided for.

2. The grounds of the application as stated on the face thereof and supported by the affidavit of the applicant dated 20th February 2020, are that, in the year 2020, the 1st respondent commenced development on Plot No. L.R 330/478 by clearing the subject property and demolishing a single

dwelling house erected on it. In a subsequent meeting held on 1st August, 2020 between the committee of Kunde Road Residents Welfare Association (KRRWA), chaired by the applicant, and a representative of the 1st respondent, the committee was informed that the 1st respondent intended to build six (6) town houses on the site. The committee objected to the proposal.

3. In a letter dated 17th August 2020, the applicant requested the 1st respondent to communicate a date when they would be available to discuss the matters raised during the meeting with a greater number of the members of KRRWA in a public gathering. The 1st respondent did not get back to the applicant and for a period of two years, there was no activity on the subject property, until sometime in the year 2022, when the 1st respondent resurfaced and started developing it.

4. The residents of Kunde Road were not informed of any of the developments, nor did they see an on-site notice indicating the ongoing construction. Upon further investigation, the applicant learnt that the 1st respondent applied for and obtained a change of user for the subject property, from a single dwelling residential to multi-dwelling residential townhouses. The applicant and the residents neighbouring the subject property were not consulted during the process of applying for and granting of the development approvals, or change of user. Based on the approvals and change of user, the 1st respondent is currently building on the subject property contrary to the zoning regulations and policy of the area.

5. The applicant lodged an appeal with the County Physical and Land Use Planning Liaison Committee, which was however dismissed for having been lodged out of time. The applicant then lodged ELC Petition No. E004 of 2023 in the Environment and Land Court on 10th November 2023 and was granted interim orders of injunction, pending the hearing and determination of the Petition. In a judgment rendered on 19th August 2024, Omollo J. considered the petition and found that it was lacking in merit. She dismissed the petition and vacated the injunction orders.

6. Aggrieved by the judgment, the applicant lodged an appeal raising four grounds of appeal in the Memorandum of Appeal dated 20th February, 2025. He alleges that the learned Judge erred in both fact and the law in finding that: the 1st respondent had carried out proper public participation for the change of user and the approvals issued by the 2nd respondent; the change of user was properly issued and had met all the requirements in law; the document relied upon to grant the change of user was not the Zoning Regulation and therefore, the court could not determine the zoning of the subject property and whether the change of user contravened the zoning policy; and, the EIA license issued by the 3rd respondent was proper and met the threshold of public participation.

7. The gravamen of the application before us is that the 1st respondent has embarked on construction of multi-dwelling town houses on its property located within the neighbourhood of the applicant, having obtained development approvals. The 1st respondent was granted change of user of the property by the 2nd respondent, while the EIA License was granted by the 3rd respondent. The applicant avers that the approvals and license were issued unprocedurally, without the participation of key stakeholders who ought to have been involved in public participation before any such approvals, change of user and EIA license were granted. The change of user of the subject property was from a single low - density user to multi-dwelling residential area user, contrary to the zoning regulations of the area.

8. The applicant is apprehensive that the 1st respondent will continue with the construction on the subject property rendering the appeal nugatory and they are likely to suffer irreparable damage considering that the change of user approval and the EIA license were granted without proper public participation as required by law. The construction of the intended townhouses will completely alter the nature and character of the neighbourhood and the applicant will lose the calm and peaceful single-dwelling

residential environment currently prevailing. This would be contrary to the zoning policies and the trial court failed to consider the zoning of the subject property in dismissing the Petition.

9. The 1st respondent has now resumed the impugned construction and it is therefore in the best interest of justice that the orders sought be granted, to prevent any further harm that may be caused to the residents of Kunde Road by continued construction of the townhouses.

10. In a Replying Affidavit dated 2nd April 2025, sworn by Abdirizak Abdikarim Mahamud, a director of the 1st respondent, he deposes that this application is defective and incompetent as it is premised on the misguided notion that the applicant's property rights are superior to the 1st respondent's. He deposes that the judgment entered by the trial court settled the matter fully and correctly, since the applicant did not apply the correct statutory procedure to challenge the development permission, nor did they point out the alleged violations specifically.

11. He further avers that the 1st respondent is the registered proprietor having acquired the subject property and is desirous of developing four townhouses. This is in tandem with the Nairobi City County Development Control Policy approved by the Nairobi City County Assembly, and which put the subject area in Zone 4D. Zone 4D allows for mixed development for residential and commercial development. That notwithstanding, the 1st respondent has kept its development to a minimum in accordance with the land ratio and size. He makes reference to Petition No. 16 of 2016: Pyramid Builders Ltd v Kunde Road Residents Welfare Association & 2 others, in which KRRWA similarly challenged a development in the same area on Kunde Road and on 7th September 2016, the developer was given the greenlight to construct six units.

12. The 1st respondent avers that it has conformed to the character of the area and followed the correct procedure when applying for change of user as required by law. That they satisfied the requirements of the 2nd respondent and there was no objection raised by the applicant within the stipulated period. The 1st respondent therefore, commenced the construction having obtained the approvals, upon further technical evaluation and ample public participation, contrary to the averments of the applicant.

13. The 1st respondent also deposes that the appeal was brought unprocedurally vide the wrong law to the Environment and Land Court, instead of Section 61(4) of the *Physical and Land Use Planning Act* 2019, and it failed to prove any violation, hence the dismissal. It is averred that the applicant's mandate is not to give approvals for development, but to present the views of the residents in form of objections during public participation. Therefore, the applicant has not met the threshold for grant of orders under Rule 5(2)(b), for the reasons that there is no arguable appeal and the appeal will not be rendered nugatory since the issues at hand were conclusively determined by the Court and the development is in the completion stage.

14. The 1st respondent avers that the environmental concerns raised by the applicant have been addressed by the Impact Assessment Report dated 31st October 2022, prepared by a licensed Environmental Lead Consultant Mr. Eric Mutahi. That the 1st respondent is entitled to the full protection of its property and the right to enjoy the property unfettered and free from interference. Further, that the Application is devoid of merit and should be dismissed in toto as it has failed to raise any substantive grounds to justify granting of the orders sought.

15. In a replying affidavit sworn on 12th May 2025 by Philomena Wanjiru, the Deputy Director Development Management in Nairobi City County, the 2nd respondent deposes that the issues raised in the application were all conclusively determined by the trial court and that the appeal is misconceived, lacks merit and seeks to delay the execution of the judgment of the trial court. That KRRWA cannot arrogate itself the approval powers for developments in the area, or decide who builds and what they

build in the area. Instead, they should give their views and objections to the relevant authorities within the stipulated periods and not engage in kneejerk reactions such as this one.

16. The 2nd respondent avers that the 1st respondent sought the relevant approvals for change of user and NEMA license, in accordance with the Nairobi City County Physical Planning and Land Use Laws. That there was no valid objection raised by the applicant, despite the 1st respondent issuing a notice inviting views and objections on the said development. That the complaints raised herein are an afterthought upon which the approvals cannot be revoked. That the 2nd respondent considered all the necessary evaluations, safeguards and caution for the Environment and the Zoning Regulations before issuing the approvals to the 1st respondent.

17. The 2nd respondent deposes that the judgment of the Court affirmed their actions and the applicant has not demonstrated an arguable appeal. He merely seeks to re-litigate issues that were canvased on merit in court. The applicant has not demonstrated that irreparable harm will result from the continuation of the development, hence the application for stay of execution does not meet the requirements of rule 5(2)(b). Further, that an order of injunction will be of no meaningful purpose, since the development would continue regardless, with the already issued approvals. The order will prejudice the rights of the 1st respondent and the public interest for orderly urban development. If, however, the injunction is denied, it will not render the appeal nugatory. Therefore, the application should be dismissed with costs.

18. The applicant filed written submissions dated 14th April 2025, through the firm of M/s Githara & Associates Advocates and urged that the main issue for determination is whether a grant for injunction pending the hearing and determination of the appeal is merited. He cited the case of Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 others, Civil Application No.31 of 2012, where the Court stated that for an interim injunction to be granted, the applicant must demonstrate that the appeal is arguable and that should the appeal succeed, it will be rendered nugatory if the injunction is not granted. He also referred to the case of The County government of Bomet and Moi University & 2 others, Civil Appeal No.59 of 2016 where the court noted that in Gatirau Peter Munya - vs- Dickson Mwenda Kithinji & 2 others (2014) the Supreme Court had added a third condition that the order of stay may be granted where it is in the public interest to do so.

19. The applicant submits that the appeal is arguable on the basis of the unprocedural issuance of change of user approval and on the deficiency of public participation. That if the injunction is not granted, the appeal will be rendered nugatory due to continuing environmental degradation. He refers to a case with similar facts in Petition E018 of 2025, Mbaazi Residents Association & another and Metricon home Nairobi and two others, where an injunction was granted to avoid rendering the case nugatory. The applicant submits that having sued on behalf of KRRWA and the construction having implications on the general public, the application has also met the threshold of public interest.

20. The firm of Ahmednasir Abdulahi Advocates LLP, filed submissions dated 6th May 2025, on behalf of the 1st respondent and contends that the instant application is unmeritorious as it does not raise any substantive issues of appeal to warrant appellate interrogation, nor is it demonstrated that the appeal will be rendered nugatory should it succeed. Furthermore, the appeal was lodged seven months post-judgment, a period in which the property has been substantively developed to near completion. That the long inaction affirms that there was no genuine harm to the applicant and this application is a kneejerk reaction, an abuse of the court process and is prejudicial to the 1st respondent who has committed a lot of resources to the ongoing development. Counsel submits that the trial court evaluated the evidence and found the case wanting on both the facts and the law and that the appeal will not be rendered nugatory since the damages would be compensable.

21. Counsel referred to the case of Reliance Bank Limited v Norlake Investment Limited [2002] EA 227, cited with approval in the case of Kenya Power & Lightning Company v Eunice Nkirote Ringera [2020 eKLR, where the Court stated that the factors that would render an appeal nugatory are to be considered within the circumstances of the case and the conflicting views of the case should be considered. The applicant must satisfy both limbs which the applicant has failed to do. Therefore, the application is unmerited and is ripe for dismissal with costs.

22. The 2nd respondent filed submissions through the firm of M/s Ondieki A. Advocates in opposition to the application, urging that the application does not satisfy the principles of the appeal being rendered nugatory, since it does not alter the well-reasoned judgment of the court. Therefore, the application should be dismissed with costs.

23. We have considered the application, the reply thereto, the rival arguments and authorities relied on and the applicable law. The jurisdiction of this Court under rule 5(2)(b) is original and discretionary. In the exercise of this jurisdiction the Court must be satisfied on the twin principles: first, that the intended appeal is arguable, which means that it is not frivolous and second, that if the orders sought are not granted, the appeal will be rendered nugatory should it eventually succeeds. It suffices if the intended appeal raises a single bona fide arguable point worthy of consideration by the Court.

24. In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, the Supreme Court added a third consideration in specific circumstances, which is the public interest test. This is a factor which the Court may consider where the rights of a larger community are demonstrably at stake.

25. The applicant contends that its appeal is arguable on grounds of the procedural validity of the change of user approval, the adequacy of public participation, and the learned Judge's failure to consider the area's zoning regulations. He invokes the provisions of Section 53 of the *Physical and Land Use Planning Act*, 2019, and the constitutional principles of public participation under Article 10 and on the right to a clean and healthy environment under Article 42. In rebuttal, the respondents assert that the appeal is unmeritorious, since these issues were fully canvassed before the trial court and the applicant failed to follow the statutory procedure for challenging development permissions under the then applicable law.

26. The applicant's claims regarding the alleged failure of procedural propriety in the grant of approvals for change of user from a single to a multi-dwelling residential area, and the alleged deficient public participation raise questions of law and fact concerning the interpretation and application of the *Physical and Land Use Planning Act*, 2019 (and its predecessor), and constitutional rights. In the case of Safaricom Limited v Ocean View Residents Management Limited & 2 Others [2010] eKLR, the Court of Appeal emphasized the importance of planning laws and adherence to statutory procedures. In our view, the questions as to whether the process was flawed, or the learned Judge misinterpreted the law warrant appellate interrogation on appeal. Therefore, we find that the appeal is arguable.

27. On whether the appeal will be rendered nugatory, the applicant fears that if the construction proceeds to completion, the appeal, should it succeed, will be rendered nugatory because the character of the neighbourhood will be irreversibly altered, leading to irreparable harm. The respondents strongly oppose this, argument. The 1st respondent, states that the development is already at completion stage, having resumed construction seven months after the judgment of the superior court. That any damage caused can be compensated by way of damages, relying on the principle articulated in Reliance Bank Limited v Norlake Investment Limited [2002] EA 227. Further that granting the stay will prejudice the 1st respondent, who has invested substantial resources based on the duly issued approvals.

28. Whether an appeal is rendered nugatory depends on the peculiar facts and circumstances of each case. In cases involving construction and changes to the environment, restoration of the status quo is often

complex and expensive, if not physically impossible. However, the Court must balance this against the right of the 1st respondent under Article 40 as the registered proprietor to develop its land having obtained all the approvals and licenses.

29. On whether or not to grant the injunctive orders sought, we have considered whether the harm to the applicant outweighs the prejudice to the 1st respondent. The 1st respondent's assertion that the development has progressed and is at the completion stage and halting it may lead to substantial financial loss for the developer, was not disputed by the applicant. Furthermore, after a full hearing on the merits of the petition, the learned Judge found that the approvals from the relevant authorities were valid. On the other hand, the irreparable harm to be suffered by the applicant is primarily, a change in the aesthetic and environmental character of the neighbourhood. We also note that having failed to promptly move the Court after judgment was delivered on 19th August 2024, until 20th February 2025, when the construction was near completion, the applicant contributed to the very state of affairs (advanced construction), that he now argues will render the appeal nugatory. This delay weakens the applicant's claim for urgency and irreparable harm.

30. In balancing the competing interests we find that the 1st respondent's substantial investment and the advanced stage of construction, coupled with the applicant's delay, mean that the prejudice to the 1st respondent outweighs the risk of the appeal being rendered nugatory. Should the applicant succeed on appeal, a quantum of damages may be a viable remedy. This limb is therefore not satisfied.

31. Under rule 5(2)(b) both limbs of the twin principles must be satisfied conjunctively. Therefore, the failure to satisfy the second limb in this case is fatal to the application. Consequently, the Notice of Motion dated 20th February 2025 is found to be unmeritorious and is dismissed. The costs of this Application shall be borne by the applicant.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR