



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAIROBI

ELC PETITION NO. E090 OF 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLE
1, 3, 10, 19, 21, 22, 23, 27, 31, 42, 43, 69, 70, 232,
258 AND CHAPTERS 6 AND 13 OF THE CONSTITUTION
OF KENYA, 2010**

-AND-

**IN THE MATTER OF SECTION 3 AND 13 OF THE
ENVIRONMENT & LAND COURT ACT**

-AND-

**IN THE MATTER OF SECTIONS 3, 3A, AND PART VI AND
XI OF THE ENVIRONMENT MANAGEMENT & CO-
ORDINATION ACT**

-AND-

**IN THE MATTER OF THE ENVIRONMENTAL (IMPACT
ASSESSMENT AND AUDIT) REGULATIONS, 2003**

-AND-

**IN THE MATTER OF THE NAIROBI CITY COUNTY
DEVELOPMENT CONTROL POLICY, 2021**

-AND-

**SECTIONS 57, 58, 71, 72, AND 73 OF THE PHYSICAL
AND LAND USE PLANNING ACT, NO. 13 OF 2019**

-BETWEEN-

**THE NORTHERN BLOCK
RESIDENTS**

LIMITED

.....PETITIONER/APPLICANT

=VERSUS=

**ASGODOM BERREKET GITOM.....1ST
CONTEMNOR MEDHANIE GHEBREBRHAN
OKBAZGHI.....2ND CONTEMNOR**

AND

**CANAAN RESIDENCES LLP
....RESPONDENT**

-AND-

**NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST INTERESTED
PARTY**

**NAIROBI CITY COUNTY
GOVERNMENT2ND INTERESTED
PARTY**

RULING

1. Before me are two applications for determination. The first application is a Notice of Motion dated 4th April 2025, brought under Article 159(1) of the Constitution of Kenya 2010, Section 5(1) of the Judicature Act, Section 63(c) of the Civil Procedure Act, and Order 40, Rule 3 of the Civil Procedure Rules, in which the Petitioner seeks the following orders:

1. Spent

2. The 1st and 2nd Contemnors, being directors of the Respondent Company, be found to be in contempt of court for wilfully disobeying the orders issued on 20th December 2024 by Lady Justice Mogeni.

3. The Contemnors be committed to civil jail for a period of six months for wilfully disobeying the court orders.

4. An order that the Respondents remove, demolish, or pull down any structures on the suit property illegally put up subsequent to the said order within fourteen days of the making of the order herein.

5. The Officer Commanding Station Spring Valley Police Station be directed to ensure compliance with the orders sought herein.

6. The Honourable Court be pleased to grant any other order to ensure the ends of justice are met.

7. The costs of this application be provided for.

2. The application is premised on the grounds appearing on its face, together with the supporting affidavit of Raju Bid sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that on 20th December 2024, the court issued a conservatory order halting construction activities on the suit property to preserve the environment and to protect the Petitioner's members' rights. He stated that despite having served the order on the Respondent and/or their legal representatives, the Respondent has continued construction activities on the suit property in blatant violation of the court order.

4. He explained that the OCS, Spring Valley Police Station, visited the site on 19th February 2025, 11th and 13th March 2025, and arrested individuals present at the site. Nevertheless, the Respondents continue to disobey the court order.
5. The deponent asserts that the Respondent's deliberate disregard of the court orders constitutes contempt of court, thereby undermining the dignity and authority of this court. He argued that unless the Respondent and the contemnors are punished, they will continue to disregard the court orders.

THE 1ST AND 2ND CONTEMNORS CASE

6. The contemnors filed a replying affidavit sworn by the 2nd contemnor in opposition to the application.
7. The deponent denied the allegations that they had violated the court orders. He stated that none of their employees had been engaged in construction work since the order was issued and that he had no knowledge of any arrests.
8. He claimed that only deep excavation up to the foundation level had been completed, leaving an unguarded, deep pit with unreinforced walls that had already collapsed. He also claimed that the remaining walls were on the verge of collapsing before the Petition was filed and the order was issued.
9. He contended that the closure of the construction site had led to the accumulation of stagnant water, creating a

breeding ground for waterborne diseases and rendering the site a health hazard.

10. He stated that no structures had been erected since the order was issued. In conclusion, he urged the court to dismiss the application with costs.

THE 1ST INTERESTED PARTY'S CASE

11. The 1st Interested Party filed a replying affidavit sworn by Samuel Lopokoiyit on 9th May 2025 in opposition to the application.
12. The deponent averred that the 1st Interested Party approved the project on the suit property, which has since been halted pursuant to a court order.
13. He further averred that upon learning of the alleged violations of the court orders from the CTS, the 1st Interest Party's Advocate instructed him to inspect the site to verify the Applicant's averments and to prepare a report.
14. He stated that during the inspection, the officers of the 1st Interested Party observed no ongoing construction activities or construction workers at the site, apart from security personnel.
15. He urged the court to consider the provisions of Section 130(3) of EMCA and to permit the Respondent to undertake reinforcement work on the excavated sides adjacent to two properties, given the risk of property damage and personal injury.

THE 2ND INTERESTED PARTY'S CASE

16. The 2nd Interested Party filed a replying affidavit sworn by Patrick Analo Akivaga, the Chief Officer of Urban Development and Planning, in opposition to the application.
17. The deponent confirmed that the 2nd Interested Party was aware of the court order dated 20th December, 2024.
18. He explained that, to verify the Applicant's claims of contempt, the 2nd Interested Party instructed Mr. Richard Mumo Mutuku, a Planning Officer, to visit the construction site on 2nd April, 2025, to ascertain whether any construction was underway.
19. That upon inspection, the officer noted that the Respondent had obtained approval from the 2nd Interested Party, that the development was at the foundation level, and that the site was inactive, with only a security guard present.
20. He maintained that the 2nd Interested Party through the site Inspection Report recommended that the Respondent be required to complete the reinforced concrete wall around the development to safeguard neighbouring properties from flooding caused by rainwater accumulated at the construction site and flowing into adjacent properties.
21. He further maintained that the Respondent should not be held in contempt since it has complied with the conservatory orders.

THE RESPONSE

22. The Applicant filed a further affidavit, sworn by Sameer J Patel, in response to the 2nd Contemnor's and the 2nd Interested Party's responses.
23. The deponent contended that the ongoing construction constitutes a clear violation of the court's orders.
24. He asserted that the Petitioner had attached photographic evidence of ongoing construction. He further asserted that the Respondent and the contemnors have continued to sell off-plan apartments to unsuspecting third parties, as evidenced by the sale agreements signed after the Petition was filed and/or after the order was issued.
25. He maintained that public safety and environmental preservation are paramount and should not be compromised for the contemnors financial convenience. He further maintained that the 2nd Interested Party lacks authority to discharge or vary the orders issued by the court. He contended that in the absence of construction on the suit property, the OCS would not have made any arrest.
26. The application was canvassed by way of written submissions.

THE PETITIONER/APPLICANT'S SUBMISSIONS

27. The Applicant filed its submissions dated 26th September 2025.
28. On behalf of the Applicant, Counsel submitted that the Applicant has satisfied the conditions required to establish

civil contempt. It was further submitted that the contemnors were aware of the order and wilfully disobeyed it.

29. Regarding wilful disobedience, Counsel contended that the contemnors' claim of halting construction is false and contradicts Raju Bid's sworn testimony. Counsel pointed out that on 19th February 2025 and on 11th and 13th March 2025, the OCS Spring Valley police arrested individuals at the site, indicating that illegal construction was ongoing. Counsel further submitted that the photographs presented by the Applicant clearly show the date, time, and month, aligning with these arrest dates. It was submitted that the time stamp on the photographs is months after the court order was issued.
30. Counsel argued that the contemnors continued to market and sell units to unsuspecting buyers for a project that had been legally halted. It was further argued that the 2nd Interested Party proposed to the Respondent to complete the reinforced concrete wall after the court order was issued, thereby demonstrating that unauthorized activity was ongoing at the site. Counsel maintained that the 2nd Interested Party had no mandate to advise that construction continue, as only a court can vary the orders. Counsel contends that the County is biased and that its actions are intended to alter the court order to protect the Respondent's contemptuous conduct.

31. It was submitted that the contemnors' conduct, as evidenced by multiple police arrests, demonstrates that the disobedience was intentional and deliberate.
32. Counsel argued that the contemnors, as the Respondent's Directors, should not be permitted to hide behind the corporate veil to evade responsibility for the deliberate violation of the court order. To support this claim, Counsel relied on the cases of **Econet Wireless Kenya Ltd v Minister for Information & Communication & Another (2005) eKLR** and **Shimmers Plaza Limited v National Bank of Kenya Limited (2015) eKLR**.
33. In conclusion, Counsel urged the Court to allow the application as prayed.

THE 1ST AND 2ND CONTEMNORS AND RESPONDENTS SUBMISSIONS

34. The 1st and 2nd Contemnors filed their submissions dated 23rd September 2025.
35. On their behalf, Counsel submitted that the issue for determination is whether the Respondent is in contempt of the orders issued by this court.
36. Counsel argued that the application, together with the further affidavit, contains unproven and fabricated allegations of contempt. It was further argued that the application aims to create unwarranted fear, coupled with a threat of committal to civil jail.

37. Counsel contends that the contemnors were aware of the conservatory order issued on 20th December, 2024, and immediately ceased all construction activities in strict compliance with the order.
38. Counsel asserted that the deponent of the supporting affidavit is a masquerader because he has not demonstrated that he is a member of the Petitioner.
39. It was argued that the Petitioner failed to provide any longitude or latitude coordinates to show that the photographs of the construction site depict the Aura Peponi project. Additionally, it was contended that the Petitioner had not proven contempt, as the photographs could depict any construction activity occurring anywhere in Kenya.
40. It was submitted that the photographs lacked a timestamp, indicating that the ongoing construction occurred after the issuance of the conservatory orders. It was further submitted that the images, bearing an Isuzu truck registration No. KDS 642R, showing legs of individuals and construction workers holding pipes at a construction site, dated 27th March 2025, at 10.01 am, does not amount to contempt. It was further submitted that the photographs are inadmissible under Section 106B (4) of the Evidence Act, because the mandatory certificate of electronic record has not been provided. To support this argument, reliance was placed on the Court of Appeal case of **County Assembly of Kisumu**

& 2 others v Kisumu County Assembly Service (2015) eKLR.

41. It was further submitted that Raju Bidi did not specify in his supporting affidavit who was arrested at the site or provide copies of the OB. It was submitted that none of the Respondent's employees were arrested at the site, as no construction was ongoing there. Counsel argued that the further affidavit sworn by Sameer R J Patel reiterates the same unproven allegations of contempt that allegedly occurred. It was submitted that Sameer Patel did not present any evidence to support his allegation of off-plan sales to unsuspecting third parties entered into after the issuance of the conservatory orders.
42. It was argued that no construction has been carried out to reinforce the walls despite the 2nd Interested Party's recommendation due to the conservatory orders.
43. Counsel asserted that the replying affidavits filed by the 1st and 2nd Interested Parties verified the absence of ongoing construction during their site inspections, thereby indicating that there was no contempt.
44. In urging the court to dismiss the application, Counsel relied on the Supreme Court case of **Rai & 3 others v Rai & 4 others (Petition 4 of 2012) (2014) KESC (KLR) (4 March 2014) (Ruling).**

THE 1ST INTERESTED PARTY'S SUBMISSIONS

45. The 1st Interested Party filed its submissions dated 29th September 2025.
46. On behalf of the 1st Interested Party, Counsel submitted that the sole issue for determination is whether the alleged contempt meets the requisite legal threshold.
47. Counsel argued that the Applicant's view that all activity on the site constitutes contempt of court fails to distinguish between development work prohibited by the conservatory orders and the remedial or safety work necessary to prevent imminent environmental and public danger.
48. Counsel submitted that the deep excavations on the suit property, left unsupported, are unstable and accelerate soil erosion, sediment runoff, and the risk of collapse. It was further submitted that implementing reinforcement and stabilization measures would prevent harm to motorists and pedestrians, safeguard neighbouring properties, and protect riparian zones from sedimentation and degradation. Counsel contended that reinforcing the trenches and stabilizing the perimeter wall would not hinder the Respondent's project, as these are short-term interventions.
49. While acknowledging the order dated 20th December 2024, Counsel submitted that its scope is contested, particularly regarding emergency safety and reinforcement works, which do not constitute construction activities that would breach the order. To support this argument, Counsel relied on the

case of **Cherotich Kiprono Ruto v Reuben Kipngetich & 4 others (2020) KEELC 881 (KLR)**.

50. Regarding the alleged knowledge and wilful breach of the court order, Counsel submitted that mere allegations of arrests, without corroborating copies of charge sheets, OB extracts, or sworn testimony from arresting officers, constitute hearsay and are inadmissible. It was further submitted that no evidence was presented to show that the persons allegedly arrested were employees or agents of the Respondent. To support this argument, reliance was placed on the case of **Cherotich Kiprono Ruto v Reuben Kipngetich & 4 others (supra) and Kengere v Aisha Motor Dealers Ltd & 2 others (Civil Appeal E007 of 2023)**.
51. Counsel submitted that no evidence was presented to substantiate the allegations of marketing and sale of the units, insinuating that construction was ongoing after the issuance of the conservatory orders.
52. Counsel further argued that the conservatory orders cannot override the 1st Interested Party's statutory authority to prevent environmental damage by addressing reported violations. It was contended that the Applicant failed to report the violations to any relevant authority for action, given that the project in question had already been licensed. It was submitted that the allegations of contempt lack sufficient evidentiary foundation because the Applicant failed

to specify the dates and duration of the alleged violations and to report them to NEMA.

53. It was submitted that the contemplated scenarios are remedial, not developmental, and do not advance the Respondent's project but instead avert imminent danger. Counsel argued that punishing the Respondents would be unjust and would contravene the precautionary principle enshrined in environmental law. To support this point, reliance was placed on the case of **Kenya Human Rights Commission v Attorney General & another (2018) eKLR.**
54. In conclusion, Counsel urged the court to dismiss the application with costs and discharge the 1st and 2nd Contemnors from any liability for contempt.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

55. The 2nd Interested Party filed its submissions dated 5th September 2025.
56. On its behalf, Counsel submitted that the only issue for determination is whether the Respondent and its officials should be punished for contempt.
57. Counsel submitted that the photographs attached to the supporting affidavit are inadmissible and should be expunged from the record because the Petitioner failed to file a certificate of electronic evidence as required by Section 106B (4) of the Evidence Act. To support this point, reliance was placed on the cases of **County Assembly of Kisumu &**

2 others v Kisumu County Assembly Service Board & 6 others (2015) KECA 397 (KLR) and Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others (2018) KECA 41 (KLR).

58. Counsel further submitted that the Petitioner failed to discharge its burden of proving the elements of contempt as set out in **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) KECA 954 (KLR) and Mengich tla Mengich & Co. Advocates & another v Joseph Mabwai & 10 others (2018) eKLR.**
59. It was submitted that Mr. Rahsid Mumo, a Planning and Compliance Officer, visited the site on 24th April, 2024, and confirmed that the site was inactive and that only a security officer was present.
60. Counsel explained that the County Director of the 1st Interested Party visited the site on 15th April, 2025, and confirmed that no construction was underway, contrary to the Petitioner's allegations. It was submitted that the reports confirmed the construction was still at the foundation level and that the reinforcement was unfurnished, thereby demonstrating that no construction was underway.
61. In conclusion, Counsel urged the court to dismiss the application with costs.
62. The second application is a Notice of Motion dated 29th July 2025 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Sections 3 and 19(2) of the Environment and

Land Court Act, Order 40 Rule 7, Order 51 Rules 1, 4, 10 and 15 of the Civil Procedure Rules and Articles 50(1), 159(2)(a), 2(d) and 162 (2)(b) of the Constitution in which the Respondent/Applicant seeks the following orders:

1. Spent.

2. Spent.

3. THAT pending the hearing and determination of the substantive Petition, this Honourable Court direct that the Respondent/Applicant be permitted to enter onto the property to reinforce the perimeter walls on the site.

4. THAT this Honourable court does vacate and/or discharge the ex parte conservatory orders issued on 20th December 2024.

5. THAT in the alternative to prayer (4) above, this Honourable Court does vary the Order for the Petitioner/Respondent to give an undertaking as to damages by depositing Kshs 100 million (being 50% of the projected loss) as security for damages in an interest earning joint account held by the respective advocates pending the hearing and determination of the main suit.

6. THAT any other order or relief that this Honourable Court may deem just and fit to grant.

7. THAT the costs of this application be provided for.

63. The application is premised on the grounds appearing on its face together with the supporting affidavit of Yohannes Kidane, sworn on even date.
64. The deponent averred that the Applicant had obtained all the requisite consents and approvals from NEMA, the National Construction Authority, and the Nairobi City County Government, in compliance with the legal requirements.
65. He further averred that the halted construction has exposed excavated trenches and deteriorating walls on the site that have not been reinforced, creating an imminent risk to public safety. He stated that the Applicant is prepared to undertake urgent remedial measures at its own expense to prevent any catastrophic failure.
66. He asserted that the development is compatible and consistent with the existing land use and zoning regulations, as it is located in an area dominated by high-density residential housing, comprising multi-story apartment blocks of similar scale.
67. He further asserted that the Applicant had entered into more than 150 sale agreements with prospective buyers, financed by multiple financial institutions through mortgage

- arrangements, before the orders were issued. He explained that the Applicant had received numerous threats to rescind the purchase agreements, attributable to the court's orders.
68. He contended that the continued suspension of construction has imposed considerable financial pressure on the Respondent due to the accrued interest on the Kshs 200,000,000/= loan from KCB and the Respondent's failure to meet its contractual obligations.
 69. He maintained that the harm suffered by the Respondent, including purchases and contractor-related costs, outweighs any prejudice the Petitioner might suffer.
 70. He asserted that the existing ex parte orders constitute an abuse of the court process because they were obtained without full disclosure and are being used to frustrate a legally approved development.
 71. He further asserted that the public interest favours discharging the orders because the development contributes to housing, employment, and the country's economic growth.
 72. He urged the court to allow the application and added that the Petitioner would not be prejudiced if the orders sought are granted.

THE PETITIONER'S CASE

73. The Petitioner filed a replying affidavit sworn by Sameer R.J Patel on 4th September 2024 in opposition to the application.

74. The deponent averred that the application is an abuse of the court process and a blatant attempt to subvert the protective orders, thereby undermining the fundamental principles of the Petition. He further averred that the order was issued after hearing all the parties, not ex parte as alleged.
75. The deponent asserts that the contents and approvals relied on by the Respondent are disputed in the Petition because they were issued without proper public participation, in breach of the applicable zonal regulations, and in disregard of the environmental concerns raised by the Petitioner.
76. He asserted that the County Report shows that the reinforcement of the walls was completed by 24th April, 2025.
77. He further stated that the area's zoning regulations restrict the types of buildings that may be constructed to serene properties and a limited number of multi-story apartments that comply with the existing zoning regulations or are subject to a separate legal challenge.
78. He maintained that the Respondent failed to address the substantive concerns raised by the Petitioner, who had commissioned an infrastructure impact assessment report stating that the project's negative impact cannot be mitigated if it is allowed to continue. He argued that the Respondent must demonstrate how it intends to mitigate the serious infrastructure and environmental risks posed by the

development, so that the balance of convenience may shift in its favour.

79. He argued that the Respondent's agreements with third parties do not override the fact that the proposed construction violates established zoning laws, ignores key environmental concerns, traffic, and sewage issues, and is unsupported by the existing infrastructure.
80. He contended that the agreements threatened with termination violated the court order because they were executed after the Petition was filed or after the order was issued.
81. He maintained that the order was issued in the public interest and that setting it aside would cause irreparable harm to the Petitioner's members, which cannot be remedied by an award of damages.
82. He averred that they had attached a report showing that a development of the magnitude proposed by the Respondent poses a significant risk to the structural integrity of surrounding properties, including those of the Petitioner's members, thereby imposing irreversible strain on the existing infrastructure.
83. He argued that the accrued interest on the loan does not justify allowing the illegal construction to continue. He also argued that the Respondent's financial hardship stems from their failure to comply with the law and the required regulatory processes.

84. Regarding the security for damages, the Petitioner contended that the Respondent is precluded from seeking compensation for losses arising from unlawful activities, as such a pursuit would implicitly condone and legitimize illegal acts.
85. He maintained that the balance of convenience favours the maintenance of the conservatory orders.
86. The application was canvassed by way of written submissions.

THE RESPONDENT/APPLICANT'S SUBMISSIONS

87. The Respondent filed its submissions dated 18th November 2025.
88. On behalf of the Applicant, Counsel submitted that the sole issue for determination is whether the conservatory orders should be set aside.
89. Counsel relied on the case of **Okiya Omatatah Okoiti v. Commissioner General, Kenya Revenue Authority & others (2017) KEHC 9600(KLR)** to support their argument regarding the conditions necessary for lifting conservatory orders.
90. It was submitted that the consent and approvals obtained by the Respondent from the Interested Parties and the National Construction Authority have never been challenged. It was further submitted that these consents and approvals were obtained in accordance with the required threshold for public participation. To support this point, reliance was placed on

the case of **Mui Coal Basin Community & 15 others v Permanent Secretary, Ministry of Energy & 17 others (2015) Eklr, Constitutional Petition Nos. 305 of 2012, 34 of 2013, and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)**.

91. Counsel further submitted that the allegation that the area falls within Zone 13B of the Nairobi City County Development Control is obsolete because all conflicts regarding zoning areas in Nairobi City County have been addressed and settled by the Court of Appeal in the case of **Anami & 2 others (Suing as Officers of Rhapta Road Residents Association) v County Executive Committee Member (CECM) Built Environment and Urban Planning, Nairobi City County & 20 others (2025) KEELC 128 (KLR)**. It was further submitted that the Court of Appeal issued structural interdicts requiring the 2nd Interested Party to enact and gazette zoning guidelines within six months of the judgment date. Counsel further submitted that the Court's position was reaffirmed in **Mbaazi Residents Association & Another v Metricon Home Nairobi Company Limited & 2 others (2025) KECA (KLR)**. Counsel asserts that the 2nd Interested Party has published the Nairobi City County Government Ordinance 2025, which was to review the 2021 zoning Ordinance in compliance with the Court of Appeal decisions.

92. Counsel relied on the evidence in the supporting affidavit and on the case of **Mrao Ltd v First American Bank of Kenya and 2 others (2003) KLR 125** to submit that the Respondent had established a prima facie case with a likelihood of success.
93. Counsel further submitted that the Applicant has suffered significant financial loss and reputational damage due to the conservatory orders that halted construction. It was further submitted that the Petitioner has been reluctant to prosecute the Petition for close to one year, which clearly suggests that they are willingly harming the Respondent. It was further submitted that the balance of convenience favours the Applicant, who will suffer more harm if the orders are not set aside.
94. Counsel argued that continued construction advances the public interest, as suspending work might result in the collapse of the excavated zone, thereby endangering both the community and the environment.
95. Counsel submitted that the Petitioner failed to disclose to the court that the Respondent had obtained all the required licenses from the Interested Parties, the National Construction Authority, the Water Resources Authority, and the Kenya Roads Authority, as required under the Physical and Land Use Planning Act and EMCA.

96. It was submitted that the Petitioner does not dispute that the project is designed in line with the neighbourhood's existing and upcoming developments.
97. In conclusion, Counsel urged the court to lift the conservatory order or, alternatively, to require the Petitioner to provide an undertaking regarding damages by depositing Kshs 100 million, which is 50% of the estimated loss, as security.

THE PETITIONER'S SUBMISSIONS

98. The Petitioner filed its submissions dated 26th November 2025.
99. On behalf of the Petitioner, Counsel submitted that the application for discharge is unmerited and an abuse of the court's process as the Respondent's development is a deliberate subversion of the legal planning framework.
100. Counsel further submitted that the Respondent has failed to demonstrate any lawful basis for lifting the orders.
101. Counsel submitted that the Respondent violated the court order by proceeding with construction on the suit property and concluding off-plan sale of apartments to unsuspecting purchasers without disclosing that construction had been halted.
102. Counsel submitted that the delay in prosecuting the Petition was caused by the numerous applications filed by the Respondent and by their defiance of the court orders.

103. Counsel maintained that the Respondent has not met the threshold for discharge of the orders because it has not shown a material change in circumstances, that the balance of convenience favours discharge, or that it has a strong case with a high likelihood of success. Counsel contended that the claim of financial loss alone is not enough to justify lifting the orders.
104. Counsel further submitted that the purported approval by the 2nd Interested Party is ultra vires because the suit property falls within Zone 13B, which is designated for low-density residential areas. Counsel contended that the Court of Appeal affirmed that the Nairobi City County Development Control Policy 2021, which designates the suit property as low-density residential, was in operation. Counsel further contended that the 2025 Ordinance does not exist as it has not been enacted into law. Counsel maintained that the approvals granted to the Respondent preceded the alleged 2025 Ordinance; hence, the applicable policy is the 2021 policy.
105. Counsel further submitted that the Respondent has not explained how its project mitigates the serious infrastructure and environmental risks posed by an estimated 201 duplex units.
106. Counsel further submitted that the Respondents' allegations that the halted works have left the site unsafe are misleading, as the 2nd Interested Party admitted in its

replying affidavit that the reinforcement of the walls had been completed as of 24th April 2025. Additionally, Counsel submitted that the Respondent breached the order by continuing construction on the subject property months after the order was issued.

107. Counsel argued that the financial harm relied on by the Respondent is quantifiable and reversible, whereas the harm the Petitioner and the public will suffer is substantial and irreversible.
108. In conclusion, Counsel urged the court to dismiss the application with costs.
109. On 8th October 2025, Learned Senior Counsel Ahmed Nassir for the Respondent made oral submissions explaining why the conservatory orders should be lifted. In this regard, Learned Senior Counsel relied on the Court of Appeal decisions in Civil Appeal No E160 of 2024 and E1010 of 2024, where the court issued similar structural interdicts relating to zoning and building plans.
110. Senior Counsel submitted that the judgments are in rem because they apply to every development, approval plan, and zoning controversy in Nairobi City County. Senior Counsel further asserted that the Court of Appeal stated that it was not the work of judges, courts, or the neighbourhood watch to challenge construction of buildings.
111. It was submitted that the court found the development plans in a state of confusion, with no one aware of which plan was

in effect. To address these issues, the court granted City Hall a period of six to twelve months to establish appropriate building plan approvals and zoning regulations to provide guidance to all stakeholders.

112. As a result of this confusion, the Court held that City Hall should continue approving building plans and zoning regulations in accordance with either the 2021 or 2025 draft Policy.
113. It was submitted that the Court held that the entire Westlands area is designated within Zone 3E or D, which permits the development of 16 to 20 units.
114. Senior Counsel submitted that the order has caused significant trouble because the Respondent has sold 150 units, and those buyers are demanding refunds or that the Respondent commences construction.
115. It was further submitted that the Court of Appeal had assumed full control of the process and that governance shortcomings at City Hall do not prevent the progression of development plans in Nairobi.
116. Senior Counsel submitted that the Respondent should be allowed to construct, since the Court of Appeal ordered that construction should proceed, provided that approvals issued by City Hall have been acted upon.
117. Senior Counsel contends that residents should not usurp the County Assembly's legislative powers.

118. In light of the foregoing, Senior Counsel urged the Court to discharge the orders in accordance with the dicta in the two judgments.

THE PETITIONERS SUBMISSIONS

119. On behalf of the Petitioner, Ms. Impano concurred with Senior Counsel that there was significant confusion at City Hall regarding the applicable zoning regulations. Counsel submitted that the County relied on the Nairobi County Development Control Policy 2021, which had been approved but not gazetted.

120. Counsel argued that the zoning policy relied on by the Court of Appeal delineates zones in Nairobi. Counsel further argued that in the Rhpata Case, the Court of Appeal directed that construction should continue, as the suit property falls under Zone 4B, which allows buildings up to 25 floors.

121. Counsel submitted that the suit property falls within Zone 13B, which permits a single dwelling and classifies the property as low-density residential use for mansions and family houses, which is distinct from zone 4B, which the court determined in the Rhpata case.

122. It was submitted that the Court of Appeal's decision recognizes that the 2021 policy is currently governing the County and, therefore, the proposed construction violates that policy.

123. Counsel submitted that the conditional approval granted to the Respondent violates the Physical Planning Act and

Nairobi County policy. Counsel contended that the Court of Appeal's decision does not determine the Petitions but instead guides this court on the policies to consider in determining whether the construction aligns with policy.

THE RESPONSE

124. In rejoinder, Mr. Mosota submitted that the 2021 policy has been overtaken by events, given that the Nairobi City County Zoning Ordinance of 2025 is in effect.
125. Counsel submitted that, pursuant to the ordinance, the zoning has been amended, and the suit property now falls within the Westlands Zone, which permits construction of up to 16 floors.
126. Counsel further submitted that the County Assembly will consider the Ordinance in implementing the structural interdicts issued by the Court of Appeal. It was further submitted that the ordinance was subjected to public participation and that all residents, including the Petitioner, participated in the process.
127. Counsel argued that the cause of action has been rendered moot by the Court of Appeal's judgments and therefore, the court should refrain from engaging in an academic exercise.
128. Counsel urged the court to take judicial notice of a development plan authorizing the construction of the apartments.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

129. Mr Bake for the 2nd Interested Party, associated himself with the submissions made by Senior Counsel for the Respondent.
130. Counsel contends that the Petitioner is inviting the court to descend into the arena of supervising construction notwithstanding the existence of a regulatory framework governing approvals and construction.
131. Counsel asserted that the Court of Appeal stated that the ELC should exercise restraint when dealing with issues of construction and approvals.
132. Counsel informed the court that the 2nd Interested Party had started the process of implementing the regulation in accordance with the structural interdicts issued by the Court of Appeal.
133. Counsel further submitted that this court is bound by the Court of Appeal's decision. Counsel contended that public policy requires the orders to be discharged, as thousands of young Kenyans have been rendered jobless, and that the County is losing millions in revenue.

THE RESPONSE

134. In response, Ms. Impano submitted that the fact that the orders had left youths jobless is not a reason for the court to permit illegal construction.
135. Counsel submitted that the Court of Appeal recognized that Nairobi County was relying on a policy in the interim, pending the gazettelement of the structural interdicts.

136. It was submitted that the Court of Appeal did not state that this court should down its tools or that it should not consider construction, but rather that if the County has issued permits based on the appropriate zonal regulations, the court should not interfere.
137. It was further submitted that the construction should not continue as the Respondent has not shown that that it has complied with the regulation.
138. Counsel contends that the 2nd Interested Party cannot change its position to state that the Respondent was granted approval since it had stated in its letter to the Respondent that the concerns raised by the Petitioner were serious and should be addressed, or the construction should stop.
139. In rejoinder, Mr. Mosota submitted that the operative policy is the 2025 ordinance. Counsel argued that it would be a great injustice to consider a policy that has been rendered obsolete or will be rendered obsolete shortly after enactment. It was further submitted that the ordinance had undergone public participation and the first reading, and it is likely to be enacted.
140. Counsel argued that they were relying on the ordinance as the basis for having the orders discharged, and that since the dispute arose under an obsolete policy, it had been rendered moot

ANALYSIS AND DETERMINATION,

141. Having considered the applications, the respective affidavits, and the rival submissions, the following issues arise for determination:

a) *Whether the Contemnors are in contempt of the order issued on 20th December 2024.*

b) *Whether the Respondent is entitled to the orders sought.*

WHETHER THE CONTEMNORS ARE IN CONTEMPT OF THE ORDER ISSUED ON 20TH DECEMBER 2024

142. **Black's Law Dictionary, 9th Edition**, defines contempt of court as follows:

“conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

143. Section 5 of the ***Judicature Act*** provides that:

1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

2. An order of the High Court made by way of punishment for contempt of court shall be

appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

144. In **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (2005) eKLR**, the court observed as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect to whom an order is made by the court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

145. The law applicable to the present application is Order 40 Rule 3(1) of the Civil Procedure Rules, which states that:

In cases of disobedience, or of breach of any such terms, the Court, granting an injunction, may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

146. The High Court of South Africa in the case of **Carla Burchell v Barry Grant Burchell, Eastern Cape Division, Case No 364 of 2005**, held that to succeed in civil contempt proceedings, an Applicant must prove:

i) The terms of the order;

ii) Knowledge of these terms by the Respondent;

iii) Failure by the Respondents to comply with the terms of the order.

147. In **Samuel M.N. Mweru & Others v National Land Commission & 2 Others (2020) e KLR**, the court set out the elements to be proved in an application for contempt of court as follows:

“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand, who succinctly stated, ‘there are essentially four elements that

must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases, which is higher than civil cases) that:

a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

b) The defendant had knowledge of or proper notice of the terms of the knowledge.

c) The defendant has acted in breach of the terms of the order and

d) The defendant's conduct was deliberate".

148. The first issue for determination is whether the terms of the order were clear. The order at the centre of this application was issued on 20th December 2024, pursuant to the application dated 31st October 2024. The terms of the order were as follows:

1. THAT conservatory orders are hereby issued stopping the Respondent from proceeding with the construction on the suit property which has been commenced in violation of zoning regulations, environmental impact requirements and

infrastructural considerations including traffic and sewerage disruptions.

2. THAT the OCS Spring Valley Police Station or any other nearby Police Station is directed to ensure compliance with the order issued by the court.

3. THAT the costs of this application are awarded to the Petitioner.

149. The order stopped the Respondent from proceeding with construction on the suit property. To this end, I find that the terms of the order were clear and binding on the Respondent.

150. The next issue for determination is whether the Respondent was properly served or duly notified. The Applicant contends that the order was served on the Respondent and/or their legal representative. The Respondent acknowledged that it was aware of the orders issued on 20th December 2024. Based on the foregoing, I am convinced that the Respondent was aware of the terms of the order.

151. Regarding whether the Respondent deliberately breached the court order, the Applicant must prove its case beyond a balance of probabilities. This is because contempt of court is in the nature of criminal proceedings, and the liberty of the subject is usually at stake. To succeed in contempt proceedings, the Applicant must prove wilful and deliberate disobedience of the court order as outlined in the case **of**

Gatharia K. Mutikika v Baharini Farm Ltd (1985) KLR,

where the court held that:-

“A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than proof on a balance of probabilities, almost but not exactly beyond a reasonable doubt. The standard of proof beyond a reasonable doubt ought to be left where it belongs, to wit, criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal nature.”

152. Similarly, in **Peter K. Yego & Others vs Pauline Wekesa Kode ACC NO. 194 of 2014,** the court held that:

“It must be proved that one had actually disobeyed the court order before being cited for contempt.”

153. In the matter at hand, the Petitioner contends that the Respondent wilfully disobeyed the conservatory orders by continuing construction activities on the suit property. To support this claim, the Petitioner relied on photographs and reports of alleged arrests of persons found on the site.

154. On the other hand, the Respondent contends that it ceased all construction activities upon issuance of the conservatory orders, including activities related to securing the excavations and implementing safety measures.

155. The 1st Interested Party contended that a site inspection carried out after the orders were issued showed no evidence of ongoing construction activity. Similarly, the 2nd Interested Party filed a report confirming that it found no ongoing construction and that only security personnel were present at the site.
156. The Respondent and the Interested Parties challenged the admissibility of the photographs, arguing that they were inadmissible for want of a certificate as required under Section 106B(4) of the Evidence Act. The record shows that the Applicant filed a certificate of electronic evidence in compliance with the law. The objection on admissibility is therefore without merit.
157. I have carefully considered the photographs relied upon by the Petitioner. The photographs bear the date and time stamps and show Motor Registration No. KDS 642R loaded with pipes, men carrying pipes, items commonly associated with construction activities. Some of the photographs also show a concrete mixer lorry parked on the side of the road. The court accepts that this evidence raises a legitimate concern. However, contempt proceedings require more than suspicion or inference.
158. While the materials depicted in the photographs are construction-related, the photographs do not conclusively demonstrate that construction work was actually being undertaken as opposed to preparatory or unrelated activity.

No excavation, structural alteration, or permanent works are clearly visible from the photographs.

159. The Petitioner did not present any locational evidence, such as coordinates, a surveyor's report, or a site map, linking the photographed activities to the suit property subject to the court's orders. In land-related contempt proceedings, such evidence is essential.
160. Similarly, there is no evidence indicating that the men carrying the materials were employees, agents, or contractors acting under the authority of the contemnors.
161. The Petitioner stated that they reported the matter to the police and that arrests were effected. No occurrence book extracts, charge sheets, or outcomes of the arrest were produced to demonstrate that the contemnors were implicated or that the arrest related to disobedience of the court orders.
162. The Interested Parties conducted site visits and filed reports indicating no construction was ongoing. These reports were not displaced by independent technical evidence from a qualified professional. There is no nexus to the alleged contempt.
163. Based on the foregoing, I find that the evidence falls short of the high evidentiary threshold required to prove contempt.

WHETHER THE RESPONDENT IS ENTITLED TO THE ORDERS SOUGHT

164. The Respondent seeks permission to enter the property to reinforce the walls around the suit property. It was contended that the halted construction has exposed excavated trenches and deteriorating walls on the site, posing a danger to public safety.
165. The Applicant asserted that according to the County's Site Inspection Report, the walls were reinforced as of 24th April 2025. The Interested Parties urged the court to allow the Respondent to reinforce the excavated sides and to compel the Respondent to finish the RC wall around the site.
166. The Court has considered the Interested Parties' reports, which state that excavation and preliminary work were undertaken before the conservatory orders were issued. The Court also notes that the Interested Parties' Reports indicate that the site is unsecured and poses risks to public safety and property.
167. At this juncture, it is important to distinguish between substantive development works and risk mitigation works. Not every physical activity on land constitutes development in the planning sense. Works whose sole purpose is to stabilize, secure, fence, or prevent environmental harm do not advance the project commercially or structurally and do not undermine the substratum of the Petition.
168. Maintaining a total cessation of all activity in the face of express regulatory warnings on safety and environmental

risk would expose the public and the environment to foreseeable and avoidable harm.

169. Under Rule 25 of the Mutunga Rules, conservatory orders may be discharged, varied, or set aside either on the court's motion or on application by a dissatisfied party. Based on the reports filed by the Interested Parties, the court finds it necessary to invoke the precautionary principle and accordingly vary the conservatory orders so as to allow the Respondent to secure the site solely for the purposes of averting risks to public safety.
170. Allowing remedial work to proceed under strict regulatory oversight will ensure that interim judicial protection operates in harmony with the statutory framework. In balancing the competing interests, including the Petitioner's right to a clean environment, the Respondent's right to property, and the public interest in safety as articulated by the Interested Parties, the Court finds that the Conservatory Orders must be varied to permit only those activities necessary to secure the safety of the site and the integrity of the works, thereby aligning with the recommendations by the Interested Parties to prevent environmental harm and safeguard public safety.
171. The Respondent seeks to have the conservatory orders lifted.
172. Conservatory orders are public law remedies issued by the court to preserve the substratum of the Petition pending its determination. In the case of **Board of Management of**

Uhuru Secondary School v City County Director of Education & 2 others (2015) eKLR, the court held that:

“Conservatory orders may be reviewed, varied, or set aside where there is proof of changed circumstances or where it is shown that they were obtained through non-disclosure of material facts.”

173. A party seeking discharge must demonstrate sufficient cause to warrant interference with the court’s earlier orders. Such a cause may arise where there has been a material change in circumstances, where the orders were obtained through nondisclosure or misrepresentation, or where the orders have been overtaken by events and no longer serve the purpose for which they were issued.
174. The Respondent cites changed circumstances, including site hazards, financial losses and delay in prosecuting the Petition. The Respondent’s affidavit also details valid approvals from the Interested Parties. It is not disputed that regulatory approvals were in place when the conservatory orders were issued. Their existence is therefore insufficient to establish a material change in circumstances warranting the discharge of interim protection.
175. The Respondent contends that the Court of Appeal Judgments rendered the cause of action moot and therefore, proceeding with the Petition is an academic exercise. The

Respondent relied on the structural interdicts to urge the court to discharge the conservatory orders.

176. It is not dispute that the Court of Appeal issued structural interdicts in Civil Appeal No. E160 of 2024 and E1010 of 2024, and set out the timetable for compliance. The Court of Appeal neither invalidated, suspended, nor set aside the 2021 policy, nor did it declare the proceedings founded on it moot. In Civil Appeal No. E1010 of 2024, the Court of Appeal agreed with the trial Judge that the operational Policy was the 2021 Policy. It was held that the 2025 ordinance was undergoing public participation and could not, therefore, be deemed to have substituted for the 2021 policy. The fact that a proposed ordinance has undergone public participation and first reading does not confer upon it the force of law. Importantly, the Court of Appeal did not direct courts seized of related matters to stay proceedings or vacate interim reliefs. In the circumstances, I am not persuaded that the cause of action has been rendered moot or that the conservatory orders have been overtaken by events.
177. Regarding the security of damages, Article 22 of the Constitution guarantees every person the right to institute proceedings to enforce the Bill of Rights, while Article 23 vests this court with the authority to grant appropriate relief.

178. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**, the court of appeal held that:

“Courts must guard against imposing conditions that have the effect of limiting or discouraging access to justice in constitutional petitions.”

179. Security for damages is a remedy that is ordinarily associated with private law disputes.

180. Conservatory orders are issued to preserve the subject matter pending the hearing and determination of the constitutional issues raised.

181. The Respondent has not demonstrated by evidence any exceptional circumstances warranting the imposition of security for damages at this interlocutory stage.

182. Given that the Petition challenges the legality of the building approvals issued to the Respondent, the proceedings are constitutional in nature and an order for security for damages would be inconsistent with Articles 22 and 23 of the Constitution.

183. In the end, I find that the application dated 4th April 2025 is devoid of merit and is hereby dismissed.

184. Regarding the application dated 29th July 2025, the prayer for the discharge of the Conservatory Orders is hereby dismissed.

185. The Conservatory Orders dated 20th December 2025 shall be varied in the following terms:

- a) The orders shall continue to prohibit any construction on the suit property.
- b) Notwithstanding the prohibition, the Respondent is hereby authorized to carry out the following limited works:
 - i. To undertake only such measures as are strictly necessary and contemplated in the Site Inspection Reports to secure and stabilize the site.
 - ii. The measures shall be expressly approved and supervised by the Interested Parties and other regulatory agencies.
 - iii. The Respondent shall submit a detailed work plan for the approved activities to the Petitioner and the Court within 14 days of this Ruling.
 - iv. The Respondent shall file a report to the court and the Interested Parties detailing the remedial measures undertaken.
 - v. No construction, excavation or development beyond these remedial measures shall be undertaken.
 - vi. All activities must comply with the directives issued by the Interested Parties and any other competent agency.

- vii. Parties are at liberty to apply for further directions in the event of unforeseen circumstances.
- viii. Parties are at liberty to move the court in the event of non-compliance.
- ix. The Respondent/Applicant's alternative prayer seeking an order compelling the Petitioner to furnish an undertaking as to damages and costs is hereby dismissed.
- x. Costs shall abide with the outcome of the Petition

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS DAY, 27TH OF JANUARY, 2026.

.....
T. MURIGI
JUDGE

IN THE PRESENCE OF;

Ms Impano for the Petitioner

Mosota for the Respondent

Ms Munguti holding brief for Bake for the 2nd Interested Party

Ahmed-Court Assistant

ORIGINAL