

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCEPA NO. E001 OF 2026

GATONYE VICTOR KARIUKI

**PETER MURIITHI RITHO &
ANOTHER.....APPELLANT/APPLICANTS**

=VERSUS=

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST

RESPONDENT

ZFRC HOLDINGS LIMITED2ND

RESPONDENT

RULING

1. Before this Court is the Applicants' Notice of Motion dated **16th March 2026**, supported by the Affidavit of **Gatonye Victor Kariuki** sworn on even date together with a Further Affidavit sworn on 30th March 2026. The application is brought pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.** The principal orders sought are a stay of execution of the

ruling and orders of the National Environment Tribunal (NET) delivered on 15th December 2025 in NET Appeal No. 7 of 2025, and reinstatement of the Tribunal's judgment delivered on 31st October 2025 pending the hearing and determination of the appeal before this Court.

2. The application is opposed by the 2nd Respondent through the Replying Affidavit of **Joseph Mwanthi Mutuku** sworn on **27th March 2026**. The 1st Respondent did not file any response despite due service. The application was canvassed on 31st March 2026 by way of oral submissions wherein **Learned Counsel Mr. Katiku** appearing for the Applicants and **Learned Counsel Mr. Masese** holding brief Mr. **Njenga** for the 2nd Respondent.
3. The dispute concerns an Environmental Impact Assessment Licence issued by the 1st Respondent to the 2nd Respondent for the construction of a multi-storey residential development along Njumba Road. The Applicants, being officials of the Njumbi Road Residents Association, lodged NET Appeal No. 7 of 2025 challenging the said licence.

4. On 31st October 2025, the NET delivered a judgment allowing the appeal on the merits and directing the 2nd Respondent to cease construction. Aggrieved by that decision, the 2nd Respondent filed a review application dated 6th November 2025. Vide its ruling dated 15th December 2025, the NET allowed the review, set aside its earlier judgment and dismissed the Applicants' appeal.
5. Dissatisfied with the review ruling, the Applicants filed the instant appeal to this Court and later moved the Court by way of the present application for stay of execution and reinstatement of the original NET judgment.
6. The primary issue for determination is whether the Applicants have met the threshold for grant of a stay of execution pending appeal under **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. A subsidiary issue is whether the Replying Affidavit of Joseph Mwanthi Mutuku ought to be expunged from the record for alleged lack of authority.
7. It was submitted on behalf of the Applicants that NET became functus officio after delivering its judgment on 31st October 2025. The Memorandum of Appeal raises

serious questions of law with a high probability of success on appeal. Construction has continued unabated and, unless stayed, the appeal will be rendered nugatory. The application was filed without undue delay. Counsel further urged the Court to expunge the Replying Affidavit of Joseph Mwanthi Mutuku on the ground that there was no board resolution authorizing him to swear it on behalf of the 2nd Respondent.

8. Counsel for the 2nd Respondent opposed the application, contending that there was inordinate and unexplained delay in filing and serving the application a period of three months from 15th December 2025. The Applicants had failed to demonstrate substantial loss or that the appeal would be rendered nugatory. The project is at an advanced stage with the superstructure complete; only landscaping and finishing works remain. The prevailing rainy conditions pose a risk of damage to materials and possible overflow to neighbouring properties. The 2nd Respondent employs over 150 workers on site and stands to suffer substantial financial prejudice if a stay is granted. On the authority issue, it was submitted that the deponent had previously

sworn an affidavit in the NET proceedings without any objection.

9. The jurisdiction of this Court to grant a stay of execution pending appeal is derived from **Order 42 Rule 6 of the Civil Procedure Rules, 2010. Rule 6(1)** provides that no appeal shall operate as a stay of execution except so far as the Court may order. Rule 6(2) is in mandatory terms and stipulates that no order for stay shall be made unless: (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the Court orders for the due performance of the decree or order is given by the applicant. The power is discretionary but must be exercised judicially, having regard to the overriding objective under Sections 1A and 1B of the Civil Procedure Act and the inherent jurisdiction preserved by Section 3A.

10. The locus classicus on the principles governing stay of execution pending appeal remains **Butt v Rent Restriction Tribunal [1982] KLR 417**, where the Court of Appeal held that the discretion must be exercised so as

not to prevent the appeal from being heard, and that a stay ought to be granted where there is no overwhelming hindrance to the respondent and the appeal would otherwise be rendered nugatory. These principles have been consistently applied in numerous decisions, including **Selestica Limited v Gold Rock Development Ltd [2015] eKLR and Thuku v Muriithi & another (Environment and Land Appeal E025 of 2024) [2025] KEELC 7707 (KLR).**

11. In environmental and land matters involving residents' associations, the Court must additionally be guided by **Articles 42, 69 and 70 of the Constitution** and the precautionary principle under the **Environmental Management and Coordination Act (EMCA)**. Recent illustrations of this balanced approach are found in **Mbaazi Residents Association & another v Metricon Home Nairobi Co. Ltd & 2 others (Civil Application E018 of 2025) [2025] KECA 627 (KLR) (4 April 2025) (Ruling),** where the Court of Appeal granted limited conservatory orders to protect environmental and zoning rights pending appeal, and **Sangahani & 2 others (For and on Behalf**

of Parklands Residents Association) v Nairobi City County Government & 5 others; 108 (Interested Party) (Petition E012 of 2025) [2025] KEELC 6985 (KLR) (14 October 2025) (Judgment), which emphasised the important role of residents' associations in vindicating the right to a clean and healthy environment while insisting on proportionate relief.

12. The present application was filed on 16th March 2026, a lapse of three months. The Applicants have offered no cogent explanation for this period beyond a bare assertion that the application was filed without undue delay. In the absence of satisfactory justification, the Court finds the delay inordinate. Unexplained delay is a weighty factor that militates against the grant of discretionary relief as was stated in the cases of **Prilscot Company Limited v Monica Heho [2015] eKLR and RWW v EKW [2019] eKLR).**

13. As this is a stay application, the Applicants must demonstrate either irreparable injury not compensable by damages or that the appeal will be rendered nugatory if stay is refused as was stated in the cases of **(Butt**

(supra); Shell Kenya Ltd v Kibiru & Another [1986] eKLR; Kenya Power & Lighting Company Plc v Mwangi [2022] eKLR). The Applicants have generally asserted that continued construction will render the appeal nugatory. However, they have not specifically demonstrated that the outstanding finishing and landscaping works will cause irreparable environmental harm. On the contrary, the 2nd Respondent has shown, on affidavit, that these works do not adversely affect the environment; rather, they are necessary for vegetation restoration and to prevent the creation of an abandoned construction site, which would itself pose greater environmental and safety risks. The 2nd Respondent has further demonstrated substantial prejudice: the superstructure is complete, over 150 workers are engaged, and the ongoing rains expose materials to damage with possible overflow to neighbouring properties. The 2nd Respondent proceeded on the legitimate and reasonable belief that the matter had been finally determined by the NET's review ruling of 15th December 2025.

14. In light of the inordinate and unexplained delay, the Court is obliged to undertake a careful and rigorous balancing of the respective interests and conveniences of the parties, consistent with the overriding objective and the principles enunciated in **Butt (supra), Mbaazi Residents Association (supra) and Sangahani (supra)**. The Applicants' interest lies in the protection of their constitutional right to a clean and healthy environment (Article 42) and the prevention of potential irreversible harm. The 2nd Respondent's interest is in protecting its substantial investment, avoiding idle labour, preventing material damage from rains, and completing essential works to avoid an abandoned site. Upon balancing these competing interests, the Court finds that the scales do not tilt decisively in favour of an unconditional stay. The Applicants have not sufficiently shown irreparable harm from the remaining works, while the 2nd Respondent stands to suffer immediate and significant commercial prejudice exacerbated by the Applicants' delay. Nevertheless, to ensure that the appeal is not rendered wholly nugatory, a limited and conditional

stay is appropriate. Such an order preserves the subject matter of the appeal, upholds the precautionary principle where justified, and mitigates undue hardship to the 2nd Respondent.

15. As to whether the appeal raises substantial issues with a probability of success, it is noteworthy that the Memorandum of Appeal raises issues on the doctrine of *functus officio* and the scope of the NET's review jurisdiction. These makes the appeal arguable, though the delay and nature of the outstanding works weigh against a blanket unconditional relief. An unconditional stay might lead to an abandoned ghost site which can be a hazard in itself. Conversely, allowing the project to proceed to completion would render the appeal a mere academic exercise.

16. Regarding the Applicants' prayer to expunge the Replying Affidavit of Joseph Mwanthi Mutuku, the Court finds no merit in the objection. While the Court is alive to the requirement for corporate authorization, the Court must eschew the tyranny of technicalities which Article 159(2)(d) of the Constitution seeks to abolish. Since the

deponent has previously appeared in the record of the National Environment Tribunal (NET) without objection, his authority to depose in these appellate proceedings is presumed and the Applicants have failed to demonstrate any prejudice arising from the deponent's capacity. Following the principle in **Dharamshi Hansraj Shah v. National Bank of Kenya Ltd [2004] eKLR**, the Court will not struck out an affidavit for lack of a formal board resolution where the deponent's connection to the company is clear and undisputed. The objection is accordingly declined.

17. In the end, the application dated 16th March 2026 is hereby determined in the following terms;

i) Pending the hearing and determination of this appeal, the 2nd Respondent shall immediately cease all construction works including the construction of any additional floors on the subject development save for essential finishing and landscaping works necessary to prevent environmental runoff, soil erosion, or weather damage to the existing superstructure.

ii) The Applicants shall ensure that the Record of Appeal is compiled, filed and served within 21 days from the date of this ruling. Any Supplementary Record of Appeal, if deemed necessary, shall be filed within 5 days thereafter.

iii) The matter shall be mentioned on 30th April 2026 for further directions on the hearing of the appeal.

iv) Costs of this application shall abide the outcome of the appeal.

Dated, Signed and Delivered by email/CTS this 1st day of April, 2026.

**E. K. WABWOTO
JUDGE**