

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAKURU
ELC PETITION NO E010 OF 2025

MUSTI INVESTMENT LIMITED
.....**APPLICANT**

VERSUS

**THE CABINET SECRETARY, MINISTRY OF LANDS, PUBLIC
WORKS, HOUSING AND URBAN
DEVELOPMENT.....**
.....**1STRESPONDENT**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT FOR
HOUSING DEVELOPMENT.....2ND**
RESPONDENT

THE ATTORNEY GENERAL.....3RD
RESPONDENT

DAMA SERVICES LIMITED4TH
RESPONDENT

MODERN PRECAST (K) LIMITED5TH
RESPONDENT

**KENYA AIRPORT AUTHORITYINTERESTED
PARTY**

THUO COMMERCIAL AGENCIES LTD....2ND INTERESTED PARTY

R U L I N G

1. This ruling is in respect of the Notice of Motion dated 23rd February 2026 brought under **Order 40 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A,1B & 3A of the Civil Procedure Act, Articles 10,43 & 201 of the Constitution of Kenya).**
2. It seeks orders:-
 1. Spent
 2. Spent
 3. Spent
 4. That the orders issued on 15th January 2026 be set aside, discharged and/or varied to allow the Applicant to resume construction of the affordable housing project.
 5. That the costs of this Application be in the cause.
3. The grounds are on the face of the Application and are set out in paragraph 1 to 8. The Application is supported by the affidavit sworn by Charles M Hinga, CBS, the Principal Secretary in the state Department for Housing and Urban Development, on the 23rd February 2026.
4. The Application is opposed. There is a Replying Affidavit sworn by Daniel Kamau Ngugi, Advocate for the Petitioner, on the 19th March 2026.

5. There is also a Replying Affidavit sworn by Maina Ndua, a director of the 2nd interested party on the 19th March 2026.
6. On the 24th March 2026, the court with the consent of the parties, directed that the Notice of Motion be canvassed by way of written submission.

THE 1ST TO 3RD RESPONDENT'S SUBMISSIONS

7. They are dated 23rd March 2026. The sole issue raised is whether the Application is merited.
8. It is submitted that the suit land is a public utility hence the Respondents ought to continue with the construction of Affordable Houses on the suit land. Further that the Petitioner's title was obtained fraudulently hence he has no *locus standi* to lay claim on the suit land.
9. It is further submitted that the issue of ownership was dealt with by Hon. Ombwayo J in Nakuru ELC 340 of 2015.
10. Counsel further submitted that the circumstances have changed since the orders issued on the 15th January 2026, to the extent that this court has since declared that ownership of the suit land by the Petitioner was obtained illegally.
11. It is submitted that the Orders of 15th January 2026 were obtained through concealment of material facts. A determination has been made to the effect that the suit land was lawfully and compulsorily acquired by the government in

1983 and the same amalgamated to form LR.No. 23166 which is part and parcel of the public land.

Reliance is placed on the cases of ***James Juma Muchemi & Partners Ltd Vs Barclays Bank of Kenya & Another (2012) KEHC 5844 (KLR)***; ***Atlas Copco Customer Finance AB Vs Palarize Enterprises (2016) KEHC 7640 (KLR)***

They pray that the Application be allowed.

THE PETITIONER'S SUBMISSIONS

12. They are dated 23rd March 2026. They raise two issues for determination: -

(i) Whether an application can be used to set aside or vary a Ruling already appeal; and

(ii) Whether a Judgment delivered in a different suit can be relied upon to vary orders issued in this Petition.

13. Counsel submitted that the Respondents filed a notice of appeal against the entire ruling yet they have filed this application seeking the same outcome Reliance is placed on the case of ***Mumo Matemo Vs Trusted Society for Human Rights Alliance & 5 Others (2013) eKLR.***

It is the petitioner's submissions that the Respondent's cannot run two proceedings at once for the same relief. That this application be found to be incompetent and be dismissed with costs.

14. Counsel also submitted that the Petitioner herein is the 8th Defendant in ELC 340 of 2015 and has filed a Notice of Appeal against the said judgment. Reliance is placed on the case of ***Kariuki Vs Kariuki (1986) KLR 275.***
15. It is also submitted that the two suits though related remain distinct in parties, reliefs and procedural history. That the Judgment in ELC 340 of 2015 is not final and cannot constitute “a change of circumstances” capable of varying the orders in this petition.
16. It is further submitted that lifting the conservatory orders merely on the strength of that judgment would amount to determining the entire Petition at the interlocutory stage without a full hearing. That this would violate the Petitioner’s right to a fair hearing under Articles 50 of the constitution and render both the suit and the pending appeal in ELC 340 of 2015 completely nugatory. It prays that the Application be dismissed with costs to the petitioner.

THE 2ND INTERESTED PARTY’S SUBMISSIONS

17. They are dated 16th March 2026. It is submitted that the application lacks merit. Reliance is placed on Section 80 of the Civil Procedure Act.

It is also submitted that the moment the Respondents filed a Notice of appeal, the remedy for review was ousted and it is not available to it.

18. It is submitted that the Respondents have not introduced any new issues that were not available to them at the time of the orders of 15th January 2026 were issued.
19. Further that no error has been demonstrated or shown to exist Reliance placed on the cases of ***Republic Vs Reuben Kandugu Kahihania & 2 Others; John Karugo Kuria (Interested party/applicant) (2020) eKLR*** where the Court quoted with approval the case of ***West Bengal Vs Kamal Sengupta AIR 2009 SC 476; National Bank of Kenya Ltd Vs Njau Civil Appeal (No.211 of 1996.)***
20. It is submitted that though the court has been granted discretionary Powers, such discretion ought to be exercised lawfully. That the Respondents have not laid out any basis to warrant a review of the orders and the ruling of 15th January 2026 hence the application ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

21. I have considered the Notice of Motion, the affidavit in support, the response thereto, the written submissions and the cited authorities. The issue for determination is whether this Application is merited.
22. It is the 1st to 3rd Respondents' case that ownership of the suit property has been decided in ***ELC 340 of 2015; Kenya Airports Authority Vs Nakuru Teachers Housing Co-***

operative Society Ltd & 7 others vide the judgment by Hon. Ombwayo J delivered on the 16th February 2026.

Further that the circumstances have changed hence the orders issued on the 15th January 2026 ought to be varied and or discharged.

23. The Petitioner on the other hand contends that it has filed a Notice of Appeal against the said judgment. Further that the two suits are distinct and the determination of one cannot be used to discharge the orders issued in another.
24. The Interested Party supports the petitioner's position
25. I have gone through the judgment in ELC 340 of 2015. The Petitioner herein is the 8th Defendant in that suit. The gist of this Petition is that the Petitioner Lawfully acquired the suit property from the 2nd Interested Party, (the 2nd Defendant in the suit) As stated earlier, ownership has been decided in that suit; ELC 340 of 2015.
26. It appears to the court that the circumstances have changed with the entry of the judgment dated 16th February 2026. In the case of **James Juma Muchemi & Partners Ltd Vs Barclays Bank of Kenya & Another** (supra) the court stated thus:

“some of the things I believe the Court will look at is if the circumstances have changed from the time the injunctive order sought to be varied was made, the position of the parties Vis a vis compliance with the order sought and generally the justice of the case. There are no firm rules of

law or practice that have been set down and I do not intend to pretend to set any here, The fact is that discretion is perfectly clear”

Similarly, in ***Altas Copco Customers Finance Ab Vs AB Vs Polarize Enterprises (2016) KEHC 7640 (KLR)*** (supra) the court stated thus;

“it is imperative therefore that care be exercised to ensure that the plaintiff is not merely out to have a re-think of the matter; and in this regard it is now trite that some of the factors that guide the exercise of the court’s discretion in tis area of law are, but no limited to:

- (a) Proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction.*
- (b) A radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction*
- (c) Proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defence or achieve an ulterior purpose;*
- (d) Proof that the sustenance of the injunction would cause an injustice.”*

27. I agree with the 1st to 3rd Respondents' submissions that the fact that the suit property is public utility land they ought to be allowed to continue with the construction of the Affordable Houses on the suit land.
28. The petitioner's claim that it has filed a Notice of Appeal against the said judgment cannot prevent this court from discharging the orders. The Petitioner will have a remedy should the judgment be set aside ultimately.
29. In the case of ***St Patrick's Hill School Ltd Vs Bank of Africa Kenya Ltd (2018) eKLR*** the court observed thus;
- “Similarly, this court has unfettered discretion to discharge or vary or even set aside set aside an injunction order if the ends of justice so demand or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is so otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction”
30. I am guided by the above authority in finding that to allow the orders to subsist will expose the Government of Kenya to substantial financial loss and contractual liabilities given that the project is publicly funded and the continued suspension constitutes loss and wastage of Public funds
31. In conclusion, I find merit in this application and I grant the orders sought namely: -

- a. That the orders issued on the 15th January 2026 are hereby set aside and or discharged to allow the 1st to 3rd Respondents to resume construction of Affordable Housing Project
- b. That there be no orders as to costs.

Ruling dated signed and delivered virtually at Nakuru this 22nd April 2026.

L KOMINGOI
JUDGE

In the presence of :-

Ms. Odhiambo for Mr. Ngugi for the Petitioner

Ms. Chepkirui for the 1st - 3rd Respondents

No Appearance for the 4th Respondent

Mr. Rotich for the 5th Respondent

Mr. Ntoogo for the 1st Interested Party

Mr. Githui for the 2nd interested Party

Court Assistant: Derick

