



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO E034 OF 2025

ABDIRIZACK BISHAR ARESS.....1ST

PETITIONER/APPLICANT

ZEITUN NZALIN ELKINGTON.....2ND

PETITIONER/APPLICANT

**(Suing in their capacity as residents of phase 11
Diamond Estate Association)**

=VERSUS=

ABDIWELI ADAN KALICHA

ABDULLAHI IBRAHIM MOHAMMED

ABDIKADIR AHMED ALI

MOHAMED HUSSEIN OMAR

MOHAMED ABDULLAHI

MAHAT DAHIR NOOR (Sued as the

officials of Diamond Estate Phase 11.....1ST - 6TH

RESPONDENTS

REGNOIL KENYA LIMITED.....7TH

RESPONDENT

**CARBON PETROLEUM LIMITED.....8TH
RESPONDENT**

AND

**COUNTY GOVERNMENT OF NAIROBI.....1ST
INTERESTED PARTY**

ETHICS AND ANTI-CORRUPTION

**COMMISSION.....2ND INTERESTED
PARTY**

RULING

1. Before me for determination is the Notice of Motion dated 27th February 2026, brought under Articles 10, 27, 40, 47, 50 and 159 of the Constitution of Kenya 2010, Order 45 Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, and Section 13 of the Environment and Land Court Act, in which the 7th Respondent seeks the following orders;

1. Spent.

2. THAT the ruling of this Honourable Court delivered on 19th February 2026, granting interlocutory injunctive orders against the Respondents, be reviewed and/or set aside.

3. THAT consequent upon prayer 2 above the orders of temporary injunction restraining the Respondents from developing, constructing, selling, transferring, leasing, charging and/or in any way dealing with the properties L.R. No.

209/17902 (now converted to Nairobi Block 160/698 and L.R. No. 209/17536/2 (now converted to Nairobi/Block 160/938) be vacated and/or discharged forthwith.

4. THAT the costs of and incidental to this application be borne by the Petitioners.

5. THAT this Honourable Court be pleased to grant such further and other relief as it may deem just and expedient in the circumstances.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of **Mohamed Maalim Kulmiye**, the Director of the 7th Respondent, sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that on 19th February 2026, this Court issued an injunction restraining the Respondents from developing, constructing, selling, transferring, leasing, and dealing with L.R. No. 209/17902(now converted to NAIROBI/BLOCK 160/698 and L.R. No. 298/17536/29, (now converted to NAIROBI/BLOCK 160/938), pending the hearing and determination of the Petition. He further averred that the 7th Respondent, in its replying affidavit sworn on 13th October 2025, presented clear and uncontroverted evidence showing that the development of Phase 11 Diamond Estate complied

with the approved amended subdivision Plan dated 6th April 2007. He contended that the Plan designated the area intended for commercial use as a shopping arcade for estate residents and the public, and emphasized that at no time was the land reserved for public use.

- 4.** He argued that the Petitioners' entire claim was based on an outdated subdivision plan that had been superseded by the amended subdivision plan dated 6th April 2007. He maintained that the Petitioners did not establish a prima facie case against the 7th Respondent because the Plan was not in effect when the Petition was filed.
- 5.** He argued that the Court erred in considering the competing subdivision plans as representing an equally balanced dispute and in endorsing the legality of the approved amended subdivision plan, thereby reaching an incorrect decision. He asserted that this constitutes a clear error on the face of the record, justifying a review.
- 6.** He further asserted that the Court erred in finding that there was irreparable harm in favour of the Petitioners, who failed to establish any proprietary or legal interest in the suit property,

as they have never held title or beneficial interest in the properties, which have at all material times been registered in the names of the 7th and 8th Respondents.

- 7.** He stated that at the time the ruling was issued, L.R. No. 209/17902 had already been transferred to a bona fide third-party purchaser for value, who was not a party to these proceedings and had completed construction on the side parcel. He maintained that L.R. No. 209/17536 had been sold to a third party.
- 8.** He argued that the Court lacked sufficient grounds to conclude that the threshold for irreparable harm was met, as the Petitioners' harm was speculative, unquantified, and legally unsubstantiated.
- 9.** He argued that, by granting the injunctive relief, the Court effectively froze the use and enjoyment of private property belonging to bona fide third-party owners, thereby causing them irreparable harm.
- 10.** The deponent contended that the Court erred by failing to consider the doctrine of exhaustion of statutory remedies,

thereby rendering the Petition and application fatally premature.

11. He argued that the Court dismissed the exhaustion argument on the grounds that it was raised through submissions rather than pleadings. He asserted that the failure to address the jurisdictional issue rendered the proceedings invalid from the outset and the orders resulting therefrom untenable.

12. He argued that the balance of convenience favours discharging the injunctive orders, as the Petitioners lack proprietary or legal interests worth protecting. He maintained that the Petitioners would not suffer prejudice if the orders are reviewed or set aside.

THE RESPONDENT'S CASE

13. The Petitioners filed a replying affidavit of Abdirizack Bishar Aress in opposition to the application.

14. The deponent asserted that the Applicant has not presented any new evidence, identified any error apparent on the face of the record, or provided any valid reason to justify the grant of the orders sought.

- 15.** He argued that the grounds outlined by the Applicant are for appeal rather than review. He maintained that the Court's findings that the Petitioners had established a prima facie case, that they would suffer irreparable harm, and whether the Court considered the doctrine of exhaustion of statutory remedies are not errors apparent on the face of the record, nor new evidence discovered.
- 16.** The deponent argued that the application is incompetent, frivolous, and an abuse of the Court process, and should be dismissed with costs.
- 17.** The application was canvassed by way of written submissions.
- 18.** At the time of writing this ruling, the Applicant had not filed its submissions as directed.
- 19.** The Petitioners filed their submissions dated 24th March 2026, which I have duly considered.

ANALYSIS AND DETERMINATION

- 20.** Having considered the application, the respective affidavits, and the Petitioners' submissions, the sole issue for determination is whether the ruling delivered on 19th February 2026 should be reviewed.

17. The law governing applications for review is outlined in Section 80 of the Civil Procedure Act and in Order 45 Rule 1 of the Civil Procedure Rules.

18. **Section 80 of the Civil Procedure Act** provides that;

Any person who considers himself aggrieved -

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

b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

19. **Order 45 Rule 1 of the Civil Procedure Rules** provides that: -

Any person considering himself aggrieved -

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

b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake

or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

20. The Court of Appeal restated the provisions of Order 45 in the case of **Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR**, where the Court held that:

“In the High Court, both the Civil Procedure Act in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered, ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason, but section 80 gives the High Court greater amplitude for review.”

21. Similarly, in **Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR**, the court held that:

“Section 80 gives the power of review, and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”

- 22.Regarding the first requirement, the Applicant must demonstrate that there is discovery of a new or important matter of evidence which, after due diligence, was not within his knowledge or could not be produced at that time. The Applicant has not demonstrated that there is discovery of a new or important matter of evidence that they could not have produced before during the hearing of the application.
- 23.Regarding the second requirement, the Applicant must demonstrate that there is an error apparent on the face of the record. In **Nyamogo & Nyamogo vs Kogo (2001) EA 170**, the Court held that;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature, and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning, where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by

the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review, though it may be one for appeal.”

24. Similarly, in **Timber Manufacturers and Dealers vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992**, Emukule J held that:-

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

25. The Applicant contends that the court erred in finding that the Petitioners had established a prima facie case and that they would suffer irreparable harm if an injunction is not granted. They further contended that the Court erred by failing to consider the doctrine of exhaustion of statutory remedies, thereby rendering the Petition and application premature.

21. These grounds substantially challenge the manner in which the Court exercised its discretion and applied the law to the facts before it. Essentially, the Applicant is inviting this Court to reconsider whether it correctly applied the principles for granting an injunction

22. To determine whether a prima facie case existed or whether irreparable harm was established requires re-evaluation of the

pleadings, affidavits and submissions that were presented to the Court at the time of the initial application, which falls within the purview of an appellate court. A review court is not concerned with the correctness of the decision but the existence of specific grounds outlined under Order 4 Rule 1.

23.Regarding the alleged failure to apply the doctrine of exhaustion of remedies, the Court notes that this is a substantive legal argument that should have been raised and determined during the hearing of the application for injunction. Whether the doctrine applies and whether it was satisfied are matters for judicial interpretation. They cannot constitute an error apparent on the face of the record.

26. In light of the foregoing, I find that the Applicant has not pinpointed the errors that are apparent on the face of the record.

27. The Court is also mandated to consider whether there are sufficient reasons to warrant a review of its ruling. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of **The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR** stated that:

28. *“These words only mean that the reason must be one that is sufficient to the court to which the application*

for review is made, and they cannot, without at times running counter to the interest of justice, limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

29. Based on the material before me, the Applicant has not presented any sufficient reason to warrant the review of the ruling.

24. In the end, I find that the application dated 27th February 2026 is without merit and is hereby dismissed. Each party shall bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL, 2026.

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**HON. T. MURIGI
JUDGE**

IN THE PRESENCE OF: -

Adan for the Plaintiff/Applicant

Achola for the 1st Interested Party

Ms Biwott for the 2nd Interested Party