REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION NO. E037 OF 2024

DENNIS PRITT RESIDENTS ASSOCIATION……1ST PETITIONER

LAVENDER NAMDIERO……2ND PETITIONER

IRUNGU HAUGHTON……3RD PETITIONER

MOSES WAIHARO……4TH PETITIONER

YUSUF AHMED……5TH PETITIONER

VERSUS

NAIROBI CITY COUNTY GOVERNMENT……1ST RESPONDENT

GODFREY AKUMALI……2ND RESPONDENT

PATRICK ANALO AKIVAGA……3RD RESPONDENT

PATRICK MBOGO……4TH RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY……5TH RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY…..6TH RESPONDENT

GIRINI COMPANY LIMITED……7TH RESPONDENT

RULING

Background

1. Before this court for determination is the Petitioner's/Applicant's application dated 16th February, 2026 brought pursuant to the provisions of **Articles 22, 69** and **70** of the **Constitution of Kenya 2010, Rules 3, 4, 5, 18, 19** and **23** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, **Sections 3** and **10** of the **Environment and Land Court Act, Section 80** of the **Civil Procedure Act,** and **Order 45 Rule 1** of the **Civil Procedure Rules 2010** seeking the following reliefs:

i. ***THAT the Ruling and Orders made and given on 27th February 2025 be set aside, varied and/or reviewed.***

ii. ***THAT this Honourable Court be pleased to grant conservatory orders stopping, halting and discontinuing the 7th Respondent, their***

servants/agents/proponents, or any other person, from undertaking any further development and construction activities on the property known as Nairobi/Block 19/696- (formerly LR No. 1/1380) Turbo Road, Kilimani Area, Nairobi pending hearing and determination of the Petition hereof.

iii. THAT this Honourable Court be pleased to grant conservatory orders compelling the 1st, 2nd, 3rd and 4th Respondents jointly and/or severally to take immediate measures to stop, prevent or discontinue any further construction and development activities, or any act or omission deleterious to the environment on the property known as Nairobi/Block 19/696 (formerly LR NO. 1/1380) -Turbo Road, Kilimani Road, Nairobi including arresting and prosecuting any person or equipment being used to undertake further construction and development on the said property by the 7th Respondent, their agents/proponents, or any other person pending the hearing and determination of the Petition hereof.

iv. THAT this Honourable Court do give any further orders and/or directions deemed just, fair and necessary.

v. THAT costs of the application be provided for.

2. The application is based on the grounds on the face thereof and supported by the affidavit of Lavender Namdiero, the 2nd Petitioner/Applicant on her own behalf, and on behalf of her co-Petitioners.

3. The 2nd Petitioner deponed that she and her co-Petitioners are residents and occupiers of properties referred to as Ithingu Court erected on the property known as Nairobi/Block 19/734 which is adjacent to Nairobi/Block 19/696-Turbo Road, Kilimani Area (*suit property*).

4. It is her deposition that on 16th October 2024, they filed the present Petition seeking, *inter alia,* declarations that the relevant authorities had failed to prepare and publish both county and local physical and land use development plans for Nairobi City County as required under the Physical and Land Use Planning Act, 2019(*PLUPA*), and that the construction of residential apartments on Nairobi/Block 19/696, Kilimani, was illegal, irregular, and environmentally harmful. She further sought orders compelling the Respondents to restore the suit property to its original condition within ninety (90) days.

5. According to Ms Namdiero, simultaneously with the Petition, they filed a Motion seeking interim conservatory orders stopping development activities on the subject property and that the application was filed and proceeded on the basis of

the information on the project signboard erected on the suit property identifying the 7th Respondent as the developer and/or proponent of the said land.

6. Further, it was deposed that the development was at the demolition stage and the alleged development permissions and licences were invalid, illegal and irregular and that the court, vide its ruling of 27th February 2025 dismissed the same.

7. Ms Namdiero stated that they have since discovered that the subject property was initially registered in the name of Elmwood Properties Limited and later transferred to the 7th Respondent and that the aforesaid lease restricts development to not more than 50% site coverage, or such lesser limit as may be prescribed under the applicable planning regulations.

8. Further, it was deposed, under the Nairobi City County Development Control Policy, 2021, the property falls within Zone 4D (Kilimani), where development is limited to a maximum site coverage of 60% and a height of up to four levels and that the said development control policy further restricts developments within the Kilimani and Kileleshwa areas that fall within a radius of 3 kilometres from State House to a maximum height of four levels.

9. It is the Petitioners' case that the aforesaid Nairobi City County Development Control Policy, 2021 has since been

held by the Environment and Land Court, and the Court of Appeal in the case of **Claire Kabuchi Anami & Others (Suing as Officials of Rhapta Road Resident's Association) Vs County Executive Committee Member (CECM) Built Environment and Urban Planning and 20 Others** to be the operative benchmark against which zoning decisions, development permissions and land use classification must be assessed.

10. She stated that, to the best of their knowledge and on the advice of counsel, both State House and the Department of Defence Headquarters are strategic national installations. She averred that the suit property is located within less than three kilometres of those installations, contrary to the restrictions contained in the lease, and that it further exceeds the four-storey height limit prescribed under the County Development Control Policy, 2021.

11. She explained that there are clear indications that the intended development is likely to exceed 19 levels and that the ongoing construction has also violated **Regulations 6, 7, 8, 10, 15, 16, 18, 20** and **25** of the **Physical and Land Use Planning (Buildings) Regulations, 2021,** in that the building as presently constructed does not comply with the applicable regulatory standards.

12. Further, the 2nd Petitioner averred, the construction between beacons AH41 and AH49, marking the boundary between the

suit property and Nairobi/Block 19/726–734, as well as between beacons AH49 and AH50, violates the prescribed siting and building lines and that the failure to comply with the requirements relating to siting, building lines, plot coverage, height, safety, security, lighting, and access has exposed them to violations of their rights to dignity and to a clean and healthy environment.

13. She further stated, on the advice of counsel, that any development permission purportedly issued in respect of the ongoing project would be in violation of the requirements of the Physical and Land Use Planning (Development Control Around Strategic Installations) Regulations, 2021.

14. She maintained that unless the ongoing development and construction activities are restrained by conservatory orders, the Petition will be rendered nugatory and a mere academic exercise, while their fundamental rights will continue to be exposed to irreparable, irreversible and irredeemable loss and damage.

15. In response to the Motion, the 1st -4th Respondents, through Mr Patrick Analo Akivaga, the Chief Officer Urban Development and Planning of the 1st Respondent filed a replying affidavit dated 9th March, 2026. He deponed that, as advised by counsel, the present application is incompetent, misconceived and an abuse of the court process and that this

court has already pronounced itself on the issues raised herein and is therefore *functus officio*.

16. The Respondents deponed that the Petitioners had previously filed an application dated 16th October 2024 seeking conservatory orders to restrain further development on the suit property; that the application was heard and dismissed by this court in a ruling delivered on 27th February 2025 and that the present application similarly seeks to halt construction on the same property.

17. Having not appealed the said ruling, he noted, the Petitioners cannot properly seek to re-litigate the same issue through a disguised or renewed application. Further, the lease in question was issued in 1970, and since then, the legal and regulatory framework governing urban planning, zoning, and development control in Nairobi has undergone significant transformation.

18. According to Mr. Akivaga, contemporary development approvals are now governed by modern statutory frameworks and planning policies, and therefore cannot be assessed solely on the basis of planning considerations that prevailed several decades ago. He contended that this is a position that this court has previously acknowledged, as illustrated in the case of ***Millennium Gardens Management Limited Vs. Metricon Home Nairobi Company Limited & 3 others [2023] eKLR***.

19. He explained that the Kilimani area has, over the years, undergone significant urban development and increased densification, resulting in the emergence of numerous multi-storey residential developments within the neighbourhood. He stated that several existing developments in the area exceed four levels and, consequently, the development complained of is neither anomalous nor inconsistent with the prevailing development pattern in Kilimani.

20. The Chief Officer Urban Development and Planning of the 1st Respondent further explained that development approvals issued by the Nairobi City County Government are not applied uniformly but are instead assessed on a case-by-case basis by the Urban Planning Technical Committee (UPTC), which considers a range of planning factors including zoning requirements, building setbacks, plot coverage, urban density, compatibility with surrounding developments, public safety, and overall planning compliance.

21. Mr. Akivaga stated that, although the Petitioners rely on the Nairobi City County Development Control Policy, 2021, the Court of Appeal in **Claire Kubochi Anami & Others v Nairobi City County & Others** held that the policy is not binding law but a persuasive planning guide pending legislative adoption and public participation.

22. He further noted that the Court of Appeal preserved approvals already issued unless specific illegality is

demonstrated. In his view, the Petitioners have not shown any illegality in the approvals granted to the 7th Respondent, and as the implementation and interpretation of the policy remain under the supervisory jurisdiction of the Court of Appeal, the issues raised are *sub judice* and intertwined with the ongoing proceedings.

23. He explained that the allegation that the development exceeds the 60% plot coverage requirement being unsupported by any credible evidence such as a professional planning report, architectural analysis, or survey report is speculative.

24. As regards the allegations that the suit property lies within three kilometres of State House and the Department of Defence Headquarters, Mr Akivaga stated that proximity alone does not automatically restrict development and that the UPTC considers various factors before authorising development including but not limited to topography, natural barriers, trees and vegetation cover, urban context and planning compatibility.

25. In any event, he stated, the Petitioners have neither specified the nature of the alleged security risks nor explained how the proposed development would compromise those installations.

26. It was urged that the Petitioners' challenge is directed at the alleged illegality of the approvals issued for the project and that granting conservatory orders on that basis would

require the court to determine, at an interlocutory stage, whether those approvals were lawful. Such a finding, it was urged, would effectively amount to a final determination of the core issues in the Petition and would therefore improperly prejudge the matter.

27. As regards allegations regarding violations of the right to a clean and healthy environment, he stated that the same fall within the mandate of the National Environment Management Authority (NEMA), the National Environment Tribunal (NET), and the internal dispute resolution mechanisms established under the PLUPA, none of which the Petitioners have pursued.

28. He maintained that the development undertaken by the 7th Respondent was approved by the relevant authorities after consideration of setback requirements, planning standards, safety concerns, and overall compliance, and that no complaint has been raised by any Government entity occupying the nearby installations.

29. The Chief Officer Urban Development and Planning of the 1st Respondent deposed that the project is consistent with both the vision of the Nairobi City County Government and the broader national policy favouring high-density residential developments to optimise land use and address housing shortages, and that halting the project at this stage would occasion substantial financial prejudice and losses to the 7th

Respondent, who has already lawfully obtained approvals and invested significant resources in the development.

30. The 7th Respondent, through its manager, Deng Xin, swore a replying affidavit on 13th March 2026. He noted at the onset, that the application has been brought inordinately late being approximately one year after the ruling of 27th February, 2025. Further, that the Motion is frivolous and vexatious, and is devoid of merit as it constitutes an attempt to re-litigate issues already determined by this court.

31. He noted that the Petitioners previously filed an application dated 16th October 2024 seeking, *inter alia*, conservatory orders restraining the 7th Respondent from continuing with the construction and development being undertaken on the suit property on various grounds including that the development would adversely affect the surrounding neighborhood and infringe upon the Petitioners constitutional right to a clean and healthy environment and that it allegedly contravened zoning regulations and posed environmental concerns.

32. According to the 7th Respondent, the said application was heard and fully canvassed before this court, culminating in a ruling delivered on 27th February 2025 dismissing the same; that in declining to issue the conservatory orders, the court noted that there existed an approved development plan in favour of the 7th Respondent, which approvals could not be

withdrawn or interfered with at an interlocutory stage in the absence of proof of illegality, and that the Petitioners had not demonstrated how the development in question would be deleterious to the environment or how it would violate their constitutional rights.

33. According to Mr Xin, as advised by counsel, if the Petitioners were dissatisfied with the said ruling, the proper recourse would be to file an appeal rather than attempt to reopen the matter through a review application, and that allowing such an approach would undermine the principle of finality in litigation.

34. He stated that the determination of a subsequent case by a superior court does not operate retrospectively so as to reopen matters that have already been determined by a competent court and cannot be a basis to review an earlier decision.

35. In any event, it was deposed, in the said decision relied upon by the Petitioners, the court expressly emphasized under paragraph 107 (d) (1) that nothing in its orders invalidated approvals or environmental licences that had already been lawfully issued and acted upon in the absence of demonstrated illegality.

36. Mr Xin stated that the Petitioners have not placed before this court any evidence demonstrating that the approvals issued to the 7th Respondent by the relevant authorities

including the 1st, 2nd, 3rd and 4th Respondents were unlawful, irregular or obtained in contravention of the applicable legal framework.

37. Further, that the Draft Nairobi City County Development Control Policy, 2021 has been in existence since its formulation and has long been relied upon by parties and courts in matters concerning development control within the City of Nairobi.

38. It cannot, he urged, therefore constitute new evidence that was not within the Petitioners' knowledge or could not, with the exercise of due diligence, have been discovered earlier, as it was available and accessible to them at the time the earlier application dated 16th October 2024 was filed and prosecuted. He urged that the Motion be dismissed.

Submissions

39. The Petitioners filed submissions on 19th March 2026.Counsel submitted that as discussed in ***Telkom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR*** as well as ***Kabansora Millers Ltd vs Nyangena (Civil Appeal E665 of 2022) [2025] KEHC 4754 (KLR),*** the doctrine of *functus officio* dictates that once a court has rendered its final decision, it ceases to have jurisdiction over the matter, save for specific exceptions such as review or correction of clerical or arithmetical errors.

40. It was submitted that the present Motion, having been brought pursuant to **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules,** falls within one of the recognized exceptions of the doctrine.

41. It was urged that the plea for review is anchored on the discovery of new and important evidence and that following the impugned ruling, the Petitioners became aware of the Nairobi City County Development Control Policy, 2021, which had been referred to in various Petitions, including ***Claire Kubochi Anami(supra)*** in which the Court of Appeal held that the policy is the operative administrative guide governing zoning decisions, development permissions, and land use classifications within Nairobi County.

42. Further, it was submitted, they have undertaken a survey report through which they have discovered that the suit property lies within less than three kilometres of both State House and the Department of Defence Headquarters, as gazetted strategic installations and that the evidence on development control could not have been obtained or relied upon at the time of the ruling delivered on 27th February 2025 because the decision introducing the Nairobi City Development Control Policy, 2021 and the subsequent Court of Appeal judgment on its applicability were only delivered on 19th September 2025.

43. Further, that at the time of the earlier ruling, the development had not reached its present stage and it was therefore not possible to rely on the facts as they now stand, namely that the building covers the entire parcel, blocks air and lighting to neighbouring houses, damages rooftops and other infrastructure, and has adversely altered the surrounding neighbourhood.

44. As regards conservatory orders, it was submitted that as explained in ***Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR (as cited in Invesco Assurance Co. Ltd vs MW (Minor suing through next friend and mother (HW)) [2016] eKLR)*** and ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others, Supreme Court Civil Application No. 5 of 2014 [2014] eKLR,*** conservatory orders are public law remedies aimed at preserving the subject matter and safeguarding constitutional values.

45. Counsel urged that the Petitioners have demonstrated that the ongoing construction exceeds the height restrictions under the Nairobi City County Development Control Policy, 2021, and threatens their rights to life and to a clean and healthy environment.

46. It was argued that, although the Court of Appeal in the **Claire Kubochi Anami case *(supra)*** held that the policy is only persuasive, the Respondents failed to comply with

Sections 55 and **60** of the **Physical and Land Use Planning Act, 2019,** and the **Physical and Land Use Planning (Development Control Around Strategic Installations) Regulations, 2021,** by failing to consult the relevant security agencies before granting approvals warranting the grant of conservatory orders. Cited in support was ***Tom Brown Limited & Another v County Executive Committee Member in Charge of Planning & 2 Others; Attorney General & 4 Others (Interested Parties) [2025] KEELC 8231 (KLR)***

47. Accordingly, it was urged that in light of the new evidence, the alleged breach of planning and environmental controls, and the applicable legal principles, the court ought to review and set aside the ruling of 27th February 2025 and grant conservatory orders restraining further construction pending determination of the Petition.

48. The 1st to 4th Respondents filed submissions on 26th March 2026. Counsel submitted that this court is *functus officio*, having already conclusively determined the question of conservatory relief in its ruling delivered on 27th February 2025. Reliance was placed on ***Raila Odinga & 2 Others vs Independent Electoral and Boundaries Commission & 3 Others, Petition No. 5 of 2013, [2013] KESC 8 (KLR),*** in which the Supreme Court explained the doctrine of functus officio as giving effect to the principle of finality in litigation.

49. Counsel further submitted that the application is barred by the doctrine of *res judicata* under **Section 7** of the **Civil Procedure Act**, a principle applicable not only to substantive suits but interlocutory applications as well. Counsel cited ***Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others, Civil Appeal No. 36 of 1996, [1996] eKLR, Mungai vs Ngunya & 3 Others, Land Case E154 of 2023, [2024] KEELC 5820 (KLR),*** and ***Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another, Civil Appeal No. 276 of 1997, [2017] eKLR***.

50. On the question of review, it was stated that the Petitioners have not met the threshold under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**. Reliance was placed on ***Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR, Nyong'o & Others vs Attorney General, Civil Appeal No. E005 of 2025, [2026] KECA 200 (KLR),*** and ***Mutai (Suing as the Administrator of the Estate of John Kimutai Soi) & Another vs Mwangi (Sued as the Administrator of the Estate of the Late Lily Waruguru Mwangi) & 4 Others [2026] KEELC 554 (KLR),*** for the principle that review cannot be founded on a subsequent decision of a superior court, nor on matters that were already within a party's knowledge or would have been discovered through due diligence.

51. Counsel contended that the Petitioners already knew, or ought to have known, the nature and scale of the proposed development, the alleged 1970 lease conditions, the Nairobi City County Development Control Policy, 2021, and the proximity of the property to State House and the Department of Defence Headquarters.

52. Counsel also relied on ***Millennium Gardens Management Limited vs Metricon Home Nairobi Company Limited & 3 Others [2023] eKLR*** and ***Claire Kubochi Anami & Others vs Nairobi City County & Others, Civil Appeal No. E160 of 2025,*** to argue that the aforesaid policy is only persuasive and that development approvals predating that decision remain valid unless specific illegality is shown.

53. On the prayer for conservatory orders, Counsel submitted that the Petitioners had failed to establish a prima facie case, demonstrate imminent prejudice, or show that the Petition would be rendered nugatory in the absence of conservatory relief. Reliance was placed on ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others, Supreme Court Application No. 5 of 2014, [2014] eKLR*** and ***Law Society of Kenya vs Officer of the Attorney General & Another; Judicial Service Commission (Interested Party), Petition No. 454 of 2019, [2020] KEELRC 569 (KLR)***, for the principles governing the grant of conservatory orders.

54. It was urged that the allegations of illegality, environmental harm, and planning non-compliance were speculative and unsupported by expert evidence, and that many of the complaints fall within the mandate of the National Environment Management Authority and the National Environment Tribunal. In any event, it was submitted, granting the orders sought would require the court to make definitive findings on legality and environmental compliance at an interlocutory stage, thereby prejudging the Petition.

55. The 7th Respondent filed submissions on 30th March 2026. Counsel submitted that the power of review is a specific statutory remedy under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**, and that review is not an appeal in disguise.

56. On the element of review on the basis of discovery of new evidence, Counsel further relied on ***Guardian Coach Limited vs Terer & 2 Others (Civil Appeal E044 of 2022) [2025] KEHC 4150 (KLR)*** and ***Rose Kaiza vs Angelo Mpanju Kaiza [2009] KECA 422 (KLR),*** for the proposition that discovery of new evidence must be approached cautiously and that an applicant must demonstrate due diligence.

57. Counsel submitted that the Petitioners' reliance on the decision in the **Anami case** is legally untenable because a review cannot be based on a subsequent judgment of a

superior court. It was further argued that the Nairobi City County Development Control Policy, 2021, cannot constitute newly discovered evidence since it has existed and been publicly accessible since 2021, and the Petitioners had every opportunity to rely on it in the original application filed in October 2024.

58. It was further submitted that the current application is barred by the doctrine of res judicata, relying on ***Republic vs Ministry of Roads and Another Ex Parte Vipingo Ridge Limited and Another 2015 (eKLR),*** where the court held that the doctrine applies equally to applications. It was submitted that issues relating to the scale of the development, zoning, and environmental impact were fully canvassed and determined in the ruling of 27th February 2025, and the present Motion is merely an attempt to re-litigate the same matters under the guise of review.

59. Counsel urged that the present application lacks any evidentiary foundation and falls far short of the threshold required for review. He submitted that the 7th Respondent has already incurred significant costs in defending repetitive and malicious proceedings, and accordingly urged the court to dismiss the application with costs.

Analysis and Determination

60. Having considered the pleadings and submissions, the issues that arise for determination are:

i. *Whether the Motion is competent?*

ii. *Whether the Petitioners/Applicants have met the threshold for the grant of review sought?*

61. Vide the present Motion, the Petitioners seek a review of this court's decision delivered on 27th February 2025 together with the grant of conservatory orders. In their respective responses, the 1st –4th Respondents and the 7th Respondent challenge the propriety of the Motion, principally contending that it is barred by the doctrines of *functus officio* and *res judicata*.

62. The **Black's Law Dictionary, 9th Edition** defines *functus officio* as:

> ***"[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."***

63. In ***Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR***, the Court of Appeal observed that *functus officio* is a long-standing principle that bars a court from reopening a matter once it has rendered a final decision.

64. The court noted that the doctrine is rooted in common law and applies once a formal judgment has been issued and entered, subject only to limited exceptions, namely where there has been a slip in drawing up the judgment or where there is an error in expressing the manifest intention of the court.

65. On the other hand, the doctrine of *res judicata*, as set out in **Section 7** of the **Civil Procedure Act,** bars a court from re-hearing a matter that has already been finally determined between the same parties, or those claiming under them, by a court of competent jurisdiction.

66. The doctrine was exhaustively discussed by the Supreme Court in ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment),*** thus:

> ***"...The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject***

of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case¾to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James

Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision."

67. It is apparent from the foregoing that the doctrines of *functus officio* and *res judicata* are closely related, both serving the purpose of bringing litigation to a final and conclusive end. While *res judicata* bars the re-litigation of matters that have already been heard and determined between the same parties, *functus officio* prevents a court from revisiting or re-opening a matter once it has rendered its final decision, save in limited circumstances provided by law.

68. It is now settled that the doctrine of *res judicata* applies not only to suits but equally to applications where the parties, issues and reliefs sought are substantially the same as those previously determined.

69. In the present case, the Petitioners have invoked the court's review jurisdiction under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules,** alleging discovery of new and important evidence which was not within their knowledge at the time of the ruling delivered on 27th February 2025. The question whether the Petitioners

have met the threshold for review has not previously been determined by this court.

70. To that extent, the plea for review is not barred by *res judicata* and this court cannot be said to be *functus officio*, review being one of the recognized exceptions to the doctrines.

71. That said, the position is different in relation to the conservatory orders sought. The court had already heard and determined the earlier application dated 16th October 2024 in which the Petitioners sought conservatory orders restraining further development on the suit property.

72. That application was fully canvassed and dismissed in the ruling delivered on 27th February 2025. The present Motion once again seeks orders stopping, halting and discontinuing the construction pending the hearing and determination of both the application and the Petition.

73. Insofar as the Petitioners seek conservatory orders in isolation, divorced from the question whether the ruling of 27th February 2025 ought to be reviewed, the court finds that it is both *functus officio* and barred by *res judicata*.

74. Consequently, the only question properly before this court is whether the Petitioners have satisfied the legal threshold for review of the ruling delivered on 27th February 2025. It is only if the court finds merit in the plea for review that it can revisit the issue of conservatory orders.

75. The law governing the framework of review is set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1(1)** of the **Civil Procedure Rules, Section 80** of the Act provides as follows:

> ***"80. 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."***

76. Whereas **Order 45 Rule 1(1)** of the **Civil Procedure Rules, 2010** provides as follows:

> ***"Rule 1 (1) 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 review of judgment to the court which passed the decree or made the order without unreasonable delay."

77. Discussing this, the Court of Appeal in ***Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited [2014] eKLR*** observed 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 range 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."***

78. By way of a brief background, the Petitioners instituted the present Petition seeking *inter-alia*, declarations that the 1st Respondent is yet to prepare and publish a county physical

and land use development plan, local physical and land use development plan, violated their rights to access information, right to life, human dignity, rights to a clean and healthy environment and that the same violated provisions of PLUPA.

79. Simultaneously with the Petition, the Petitioners filed a Motion in which they sought among others conservatory orders stopping any other person from undertaking any development and construction activities on the suit property pending determination of the Petition. It was their contention, *inter-alia,* that the development violated provisions of PLUPA and EMCA, in that no proper development permissions were applied for and granted as per the law neither was any Environmental Impact Assessment Study conducted. Further that the development violated their constitutional rights.

80. The Respondents denied these allegations asserting that due process was undertaken and that the 7th Respondent issued with all the requisite permissions and approvals. Upon considering the matter, the court found the Motion to be unmerited and declined to grant conservatory orders.

81. The Petitioners now seek a review of that decision on the basis that they have discovered new and important evidence which, according to them, was not within their knowledge at the time the ruling was delivered. In this regard, they assert that they discovered that the interest under which the

subject property is held is leasehold and that the Lease contains conditions limiting development to no more than 50% site coverage of the land.

82. They further contend that they subsequently became aware of the provisions of the Nairobi City County Development Control Policy, 2021, which was upheld by the Court of Appeal in the **Anami Case (supra)** as a binding planning instrument.

83. Further, that they have since realized that the Development Control Policy limits development within the Kilimani and Kileleshwa area, where the property falls, to a maximum of four levels for properties situated within a radius of three kilometers from State House. They contend that the subject property lies within less than three kilometers of both State House and the Department of Defence Headquarters, which they describe as gazetted strategic installations.

84. They further assert that the ongoing construction has exceeded the 50% site coverage limitation contained in the lease and has also surpassed the four-level height restriction allegedly imposed by the Nairobi City County Development Control Policy, 2021, with indications that the development may ultimately rise beyond 19 levels. In addition, they contend that the project has been undertaken in breach of **Regulations 6, 7, 8, 10, 15, 16, 18, 20** and **25** of the

Physical and Land Use Planning (Buildings) Regulations, 2021.

85. This position is disputed by the 1st–4th and 7th Respondents, who maintain that the matters now relied upon by the Petitioners do not amount to new and important evidence within the meaning **of Order 45 Rule 1** of the **Civil Procedure Rules.**

86. They contend that the Petitioners are merely seeking to re-open and re-litigate issues relating to zoning, environmental impact, building height, site coverage, and the legality of the approvals, all of which were previously canvassed and determined in the ruling delivered on 27th February 2025.

87. Moving to the pre-requisites for review, the court will first consider whether the Motion has been brought without unreasonable delay as this is a crucial aspect pursuant to **Order 45 Rule 1** of the **Civil Procedure Rules**. This was buttressed by the Court of Appeal in the case of ***Francis Origo & another vs Jacob Kumali Mungala [2005] eKLR*** when it held thus:

> ***"...most importantly, the applicant must make the application for review without unreasonable delay."***

88. In the present matter, the ruling sought to be reviewed was delivered on 27th February 2025, whereas the present motion

was not filed until 16th February 2026, approximately one year later. That delay is plainly inordinate. More significantly, the Petitioners have not made any attempt to explain why it took close to one year to move the court.

89. The absence of any explanation for such delay is itself fatal to the plea for review. Nevertheless, for purposes of completeness, this court will proceed to consider whether the Petitioners have met the substantive threshold for review.

90. As aforesaid, the Petitioners premise their plea for review on the discovery of new and important matter or evidence. Discussing this aspect, the Court of Appeal in ***Rose Kaiza v Angelo Mpanju Kaiza [2009] KECA 422 (KLR),*** held as follows:

> ***"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence***

but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

91. The Court of Appeal reiterating this position noted in ***Nyong'o & Others vs Attorney General (Civil Appeal 250 of 2019) [2026] KECA 200 (KLR) (6 February 2026) (Judgment)*** thus:

> "***Discovery" in Order 45 is directed at matters which, despite the exercise of due diligence, were not within an applicant's knowledge or could not be produced at the time of original litigation."***

92. Beginning with the alleged discovery of the lease, the court is not persuaded that this constitutes new and important evidence which was not within the Petitioners' knowledge or could not, with the exercise of due diligence, have been obtained earlier.

93. I say so because the Petitioners have all along known the identity and location of the suit property and the nature of the development being undertaken thereon. Nothing

prevented them, at the time they filed the earlier application, from carrying out an official search, obtaining the relevant lease documents, or investigating the tenure and conditions attached to the property. This constitutes a matter that could have been discovered earlier through ordinary diligence and inquiry.

94. Moving to the Nairobi City County Development Control Policy, 2021, the same cannot by any stretch constitute newly discovered evidence. The policy has been in existence since 2021 and has long been publicly available. Indeed, even prior to the decision in **Claire Kubochi Anami**, parties and courts alike had referred to and relied upon it in matters concerning development control within Nairobi.

95. The subsequent Court of Appeal decisions did not create the policy nor transform it into new evidence. At best, it was a later judicial pronouncement on an already existing policy framework, and as was observed in ***Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR*****,** a subsequent decision of a superior court cannot found a basis for review.

96. Similarly, the fact that the suit property lies within three kilometres of State House and the Department of Defence Headquarters does not amount to new evidence. The location of the suit property, the location of those installations, and the applicable planning restrictions were all matters capable

of being ascertained with reasonable diligence well before the ruling of 27th February 2025.

97. Indeed, the Petitioners have not explained why a survey report could not have been commissioned earlier if they considered proximity to strategic installations to be central to their case. Review cannot be founded on evidence which a party could, through ordinary diligence, have procured and presented at the time of the original application.

98. The Petitioners' reliance on the fact that the development has since progressed, allegedly covering the entire parcel, blocking light and air, and damaging rooftops and neighbouring infrastructure, equally cannot sustain a review. These are subsequent events which arose after the ruling sought to be reviewed. They point to a changed factual position and to fresh grievances arising from the continued progression of the development.

99. A review is concerned with whether there existed material evidence at the time of the impugned decision which, despite due diligence, could not be produced. It is not a mechanism for introducing subsequent developments or building an entirely new case on facts that arose later.

100. Ultimately, what the Petitioners seek to do is to advance a substantially new case, founded on additional allegations. These are not merely supplementary facts in support of the original case, but constitute a substantially expanded and

altered case which was neither pleaded nor canvassed at the time of the earlier application.

101. For those reasons, the court finds the Motion dated 16th February, 2026 to be unmerited. The application is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

O. A. Angote

Judge

In the presence of;

Mr. Ndambiri for Petitioners

Ms Munguti holding brief for Beka for 1st – 4th Respondents

Court Assistant: Tracy