



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC EP PETITION NO. E002 OF 2026

**RAPHAEL NZOMO (SUING ON HIS OWN BEHALF
AND ON BEHALF OF KUNDE ROAD RESIDENTS
WELFARE ASSOCIATION
PETITIONER**

=VERSUS=

**JOHN MWENDA RUTERE (SUED ON HIS OWN BEHALF
AND ON BEHALF OF THE ESTATE OF
ERASTUS PHARES RUTERE)1ST
RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT2ND
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR
BUILT ENVIRONMENT AND URBAN PLANNING,
NAIROBI CITY COUNTY3RD
RESPONDENT**

RULING

1. By a Notice of Motion dated 14th January 2025, the Petitioner seeks the following orders:

i. Spent.

ii. Spent.

iii. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue conservatory orders restraining the 1st Respondent whether by itself, its directors, officers, agents, servants, employees, contractors, workmen or any other person acting under its instructions or on its behalf from continuing with, or in any manner whatsoever carrying out any construction activities, building works or development at Land Reference Number Nairobi Block 15/291, located at the junction of Korosho Road and Argwings Kodhek Road, next to Rowan Heights Apartments and directly opposite Coco Jambo Restaurant in Nairobi;

iv. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an order directing and compelling the 2nd 3rd and 4th Respondents to produce and file in Court and serve upon the Petitioner copies of all development approvals and permits issued or granted in respect of the construction activities at Land Reference Number Nairobi Block 15/291, located at the junction of Korosho Road and Argwings Kodhek Road, next to Rowan

**Heights Apartments and directly opposite
Coco Jambo Restaurant in Nairobi;**

- v. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an order directing and compelling the 2nd, 3rd and 4th Respondents to prepare a county physical land use development plan and a local physical and land use development plans for Argwings Khodek Road, Kilimani, Lavington and its environs before authorizing, licencing and approving any development permissions, permits and approvals for construction activities specifically on Argwings Khodek Road and its environs, Kilimani and Lavington.**
- vi. That pending the hearing and determination of this Petition, this Honourable Court be pleased to issue conservatory orders restraining the 2nd, 3rd, and 4th Respondents whether by themselves, their officers, agents, servants, employees or any other person acting under their instructions or on their behalf from issuing, granting, approving, regularizing or in any manner whatsoever authorizing any development permission, development approval, building**

permit or any other authorization for the construction activities at Land Reference Number Nairobi Block 15/291, located at the junction of Korosho Road and Argwings Kodhek Road, next to Rowan Heights Apartments and directly opposite Coco Jambo Restaurant in Nairobi, pending the hearing and determination of this Petition.

vii. That the costs of this application be provided for.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Raphael Nzomo, the Chairman of Kunde Road Residents Welfare Association, sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that the 1st Respondent began construction on L.R. No. Nairobi Block 15/291, the suit property herein, several months prior to the filing of the application.
4. He further averred that from the inception of the said construction to the date of filing, he personally visited the site on several occasions and observed that the development lacked onsite construction signage. In this regard, he produced photographs to demonstrate that no construction board had been erected displaying the details required by law, including the identity of the developer, consultants and contractor, the nature of the project, and

approval details such as the county construction permit, National Construction Authority compliance certificate and National Environment Management Authority approval.

5. He contended that the absence of such signage violates Regulation 6(3) of the Physical and Land Use Planning (Building) Regulations, 2021, which requires the installation of a construction board prior to the commencement of development. Additionally, he asserts that this also constitutes a violation of enforcement under Regulation 9(1) of the Physical and Land Use Planning (Development Control Enforcement) Regulations, 2021.
6. He asserted that Section 36 of the Physical and Land Use Planning Act, 2019 requires the 2nd Respondent to prepare a County Physical and Land Use Development Plan at least once every ten years; that Section 40 of the Act requires the inclusion of public participation in the preparation of such plans; and that Section 45 of the Act mandates the preparation of local Physical and Land Use Development Plans for specific areas and zones.
7. He contended that in the absence of any displayed information, neither the Association nor the residents could establish whether the development had obtained the necessary approvals, the identity of the developer and professionals involved, the nature and extent of the project, or whether the development complied with relevant planning, environmental, and construction standards, including approvals from the National Environment

Management Authority and the National Construction Authority.

8. He stated that a banner was erected on the fence of the construction site on 8th December 2025, advertising a mini-shopping mall/arcade/centre, but it was swiftly taken down the following day, only to be re-erected again on 17th December 2025.
9. He argued that this lack of transparency violated the residents' right to access information under Article 35 of the Constitution and impeded their right to participate in environmental governance as envisioned under Article 69 of the Constitution.
10. He contended that the ongoing construction had caused adverse impacts on residents, including causing traffic congestion and straining the water supply along Korosho Road, which were exacerbated by lack of information, thereby hindering residents from lodging complaints or taking appropriate protective measures.
11. The Applicant also faulted the 2nd to 4th Respondents for failing to detect, investigate or stop the alleged violation, arguing that this failure demonstrated neglect of their statutory duties under the Physical and Land Use Planning Act and the applicable enforcement regulations.
12. The Applicant is apprehensive that, due to the absence of mandatory signage and the inaction of the regulatory authorities, the construction might proceed without the

necessary development approval in accordance with Section 57 of the Physical and Land Use Planning Act.

13. He argued that unless conservatory orders were granted, the ongoing construction would lead to the completion of structural developments that would be difficult and costly to reverse, thereby rendering the Petition nugatory.
14. Based on the foregoing, the Applicant urged the Court to allow the application as prayed.

THE 1ST RESPONDENT'S CASE

15. The 1st Respondent filed a replying affidavit dated 31st March 2026, in opposition to the application. He averred that he is the executor and administrator of the estate of the late Erastus Phares Rutere, the registered owner of the suit property. He stated that in mid-2024, Rutere Family Ventures Limited entered into a lease agreement with Lipton Investment Limited and that the lessee and developer of the suit property was required to obtain all necessary approvals for the development known as Rodeo Square.
16. He disputed the Petitioner's assertion regarding the commencement of construction, stating that construction began on 23rd June 2025 and not a few months earlier as claimed. He further maintained that a construction site board had been erected since the inception of the project, which he personally observed during site visits, including one conducted in January 2026.

17. He argued that the signage remained in place until mid-January 2026, when it was temporarily removed to allow for ground levelling, landscaping, and the removal of an overgrown kei apple hedge that partially obscured it. He maintained that the photographs relied upon by the Petitioner were taken during this brief period and were misleading, as they were captured from an angle that concealed the signage.
18. He further stated that the developer had obtained all necessary approvals from the National Construction Authority, the National Environment Management Authority, and Nairobi City County, which he attached to his affidavit. He maintained that the 2nd to 4th Respondents issued these approvals after being satisfied with the development's compliance.
19. He denied any knowledge of the Petitioner, asserting that no complaints had been made by immediate neighbours. He also denied allegations of adverse environmental and infrastructural impacts, including traffic congestion and pollution, arguing that no evidence had been presented to substantiate them.
20. Based on the foregoing, he argued that the Petition and the application were frivolous, vexatious, and an abuse of the Court process, and urged the Court to dismiss them with costs.

THE 2ND, 3RD AND 4TH RESPONDENTS RESPONSE

21. The 2nd, 3rd and 4th Respondents filed Grounds of Opposition dated 26th March 2026 in opposition to the application.
22. They contended that the application improperly invited the Court to make definitive findings on the substratum of the dispute at an interlocutory stage, effectively seeking final orders before the full hearing of the Petition.
23. They further contended that the orders sought by the Petitioner cannot be granted without giving the Respondents an opportunity to present their defence. They urged the Court to refrain from determining issues reserved for trial to avoid granting final relief at the interlocutory stage.
24. They contended that the Application does not meet the threshold for the grant of conservatory orders as outlined in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eKLR.**
25. They argued that the Application was bad in law, misconceived, incompetent, incurably defective and an abuse of the Court's process as it lacked any legal basis to justify the Court's intervention.
26. On that basis, the 2nd, 3rd and 4th Respondents urged the Court to dismiss the application with costs.
27. This application was canvassed by way of written submissions.

THE PETITIONER'S SUBMISSIONS

28. The Petitioner filed its submissions dated 9th April 2026.

29. On behalf of the Petitioner, Counsel outlined the following issues for determination:

a) Whether the application is properly constituted and competent.

b) Whether the Applicant has demonstrated a case for the grant of interlocutory orders.

30. Regarding the first issue, Counsel submitted that the application was properly constituted and competent, as it is anchored in the Constitution and the applicable law.

31. Regarding the issue of competence, Counsel contended that the objections raised by the 2nd to 4th Respondents were unfounded and lacked legal basis. Counsel submitted that the application was brought under Articles 22 and 70 of the Constitution, which grant this Court wide jurisdiction to grant appropriate relief for the protection and enforcement of fundamental rights. To support this argument, Counsel relied on **Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal No. 290 of 2012) [2013] KECA 445 (KLR).**

32. Counsel further submitted that the orders sought were interlocutory in nature and aimed at preserving the status quo pending the determination of the Petition. In this regard, reliance was placed on **Anami & 2 others v County Executive Committee Member, Built Environment and Urban Planning, Nairobi City County & 20 others (ELC Petition No. E030 of 2024) [2025] KEELC 128 (KLR),** which cited with approval the decision in **Fose v Minister of**

Safety and Security 1997 (3) SA 786 (CC), to underscore the Court's mandate to grant appropriate relief necessary to safeguard constitutional rights.

33. Counsel also invoked Article 23(3) of the Constitution and Section 13(3) of the Environment and Land Court Act to reinforce the Court's jurisdiction to grant appropriate relief. Counsel cited **Mugendi v Kenyatta University & 3 others (Civil Appeal No. 6 of 2012) [2013] KECA 41 (KLR)** to submit that the Environment and Land Court is competent to determine constitutional questions ancillary to land and environmental disputes.
34. Regarding the second issue, Counsel submitted that the test for granting conservatory orders was outlined by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (Application No. 5 of 2014) [2014] KESC 30 (KLR) (Ruling)**, which states that such orders are granted based on the inherent merit of the case, with due regard to public interest, constitutional values and proportionality.
35. Counsel further relied on **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] KEHC 2174 (KLR)**, which, drawing from **Centre for Rights Education and Awareness & 7 others v Attorney General (HCCP No. 16 of 2011)**, articulated the threshold for granting conservatory orders to include establishing a prima facie case with a likelihood of success, the likelihood of prejudice if orders are not granted, the need

to preserve the substratum of the Petition, and the consideration of public interest.

36. Counsel submitted that the Petition raised significant constitutional issues concerning alleged violations of Articles 35, 42, 47 and 69 of the Constitution arising from the failure to comply with Regulation 6(3) of the Physical and Land Use Planning (Building) Regulations, 2021, which mandates the erection of a construction site board before the commencement of development.

37. Counsel argued that the ongoing construction on the suit property without the necessary signage demonstrates a prima facie breach of statutory requirements with constitutional consequences on access to information and public participation. It was further contended that since construction was still underway and without conservatory orders, the development would continue to completion, rendering the Petition nugatory and any eventual relief illusory.

38. Counsel submitted that the orders sought serve the public interest by safeguarding the integrity of the planning and regulatory framework, ensuring transparency and enabling public participation in development processes. Counsel further submitted that the production of approvals and licences was necessary to enable the Court to interrogate the legality of the development and the extent of compliance by the Respondents. Counsel contended that restraining further approvals would prevent any attempt to

retrospectively regularise an otherwise unlawful development.

39. In conclusion, Counsel urged the Court to allow the application as prayed.

40. At the time of writing this ruling, the 1st Respondent had not filed his submissions as directed.

THE 2nd, 3rd and 4th Respondents Submissions

41. The 2nd, 3rd and 4th Respondents filed their submissions dated 21st April 2026.

42. On behalf of the Respondents, Counsel outlined the following issues for the Court's determination:

- a) *Whether the application meets the threshold to warrant the grant of conservatory orders; and*
- b) *Who should bear the costs of this application?*

43. Regarding the first issue, Counsel submitted that the application did not meet the threshold for granting conservatory orders and should be dismissed. To support this point, Counsel relied on **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, **Centre for Rights Education and Awareness (CREAW) v Attorney General [2011] eKLR** and **Wilson Kaberia Nkunja v The Magistrates and Judges Vetting Board & others (Constitutional Petition No. 154 of 2016) [2016] eKLR**.

44. Regarding whether the Petition disclosed an arguable case, counsel submitted that the Petitioner did not demonstrate any recognisable constitutional controversy. To support this

point, reliance was placed on **George Mike Wanjohi v Steven Kariuki [2014] eKLR** for the definition of an arguable case, and on **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, which defines a prima facie case.

45. Regarding the issue of public interest, Counsel submitted that the dispute was commercially motivated and disguised as a constitutional claim. Counsel further submitted that the 1st Respondent had obtained all necessary approvals, permits, and licences for the development. Counsel argued that no evidence was presented to demonstrate any public interest harm justifying the Court's intervention.
46. Counsel further submitted that the alleged threat to constitutional rights was speculative and did not justify granting conservatory orders. Counsel contended that conservatory orders, being remedies in rem, require a demonstrable public injury, which had not been established in the present case.
47. Counsel asserted that the reliefs sought against the 2nd, 3rd and 4th Respondents were in the nature of mandatory conservatory orders, which should only be granted in clear and exceptional circumstances. To support this argument, reliance was placed on **Kenya Breweries Ltd & another v Washington Okeyo (2002) EA 109** and **Locabail International Finance Ltd v Agroexport & others [1986] 1 All ER 901**.

48. Counsel submitted that the present matter was neither clear nor straightforward, and required full interrogation at trial.

49. Based on the foregoing, Counsel urged the Court to exercise judicial restraint, find that the Petitioner had failed to satisfy the threshold for the grant of conservatory orders, and dismiss both the Application and the Petition with costs.

ANALYSIS AND DETERMINATION

50. Having considered the application, the responses, and the rival submissions, the following issues arise for determination:

a. Whether the reliefs sought are interlocutory or final in nature

b. Whether the Applicant has met the threshold for the grant of a conservatory order.

51. Regarding the first issue, the 2nd to 4th Respondents argued that the reliefs sought are final and cannot be granted at this stage.

52. The purpose of interlocutory relief is to preserve the substratum of the dispute and to ensure that the proceedings are not rendered nugatory.

53. The prayers seeking to restrain further construction and to prohibit the issuance of development approvals pending the determination of the Petition are, on their face, preservative in nature. Conversely, the orders seeking to compel the preparation of county and local physical land-use development plans are mandatory. Although the order is

framed as interlocutory relief, if granted, it would amount to a final determination of issues reserved for the substantive hearing of the Petition and would improperly fetter the statutory authority of public bodies without a full hearing. No exceptional circumstances have been demonstrated to justify granting such relief at this stage. The Court is therefore satisfied that the prayer seeking to compel the preparation of development plans cannot be granted at this interlocutory stage.

54. Regarding the second issue, Article 23(3) of the Constitution empowers a Court to grant appropriate relief in any proceedings brought under Article 22 where there has been a violation or a threat of violation of a fundamental right or freedom. The relief may include a conservatory order.

55. The law regarding the issuance of conservatory orders is well settled. In **Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR**, the Court outlined the principles regarding the nature of conservatory orders as follows:

“Conservatory orders, in my view, are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other

words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

56. In **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others [2014] eKLR**, the Supreme Court outlined the principles governing the grant of interim conservatory orders as follows:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory stay orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the Applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

57. The conditions for consideration by the Court in granting conservatory orders were clearly set out in **Law Society of Kenya v Attorney General & another; Judicial Service**

[2020] KEHC 10496 (KLR) as follows:

“a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.”

58. The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case was defined in **Kevin K Mwiti & others v Kenya School of Law & others (2015) eKLR**, as follows:

“A prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to

show that he or she has a case which discloses arguable issues and, in this case, arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law, as that is the province of the court that will ultimately hear the petition. At this stage, the applicant is only required to establish a prima facie case with a likelihood of success.”

59. The Petitioner contends that the disputed development violates the relevant planning regulations, particularly the requirement to install a statutory construction board. They also assert that this failure violates the rights to access information and public participation under Articles 35 and 69 of the Constitution.
60. The Petitioner produced photographic evidence of a building under construction, identified as Rodeo Square, which, at the material time, did not display the statutory construction board in support of its case.
61. The Respondents contend that the development is legally authorized, and complies with all statutory requirements, with the necessary approvals having been obtained from the relevant authorities. The 1st Respondent attributed the alleged absence of signage to a temporary removal during site works, arguing that the Petitioner’s evidence is selective and misleading. They also denied any infringement of rights

or environmental harm and asserted that the application is frivolous and an abuse of the court process.

62. The evidence on record shows a contested factual background. While the Petitioner relies on photographs said to demonstrate the absence of statutory signage, the Respondents produced photographs depicting a site board, taken earlier. More importantly, the 1st Respondent produced documentary evidence of regulatory compliance, including a Certificate of Compliance issued by the National Construction Authority on 18th June 2025, an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/40186 issued on 11th June 2025, approved architectural drawings for a five-level commercial development, and development approval granted by the County Executive Committee Member for Built Environment and Urban Planning, Nairobi City County, on 31st October 2024. A copy of the title deed, along with a copy of the construction board, was also produced.

63. While the existence of statutory approvals does not, in itself, shield a development from constitutional scrutiny, especially if the process leading to their issuance is challenged, it is also well established that at the interlocutory stage, a party seeking to challenge such approvals must present prima facie evidence to the Court demonstrating either illegality, procedural impropriety, or breach of constitutional rights.

64. The applicable threshold in constitutional litigation is whether the material before the court discloses an arguable constitutional issue, supported by prima facie evidence.
65. The onsite construction board, required under Section 6(3) of the Physical and Land Use Planning (Building) Regulations, is not merely an administrative requirement. It serves as a prescribed mechanism for public notification, aimed at raising awareness of the development and enabling the exercise of participatory rights. The absence of a construction site board, while relevant for regulatory compliance, does not on its own indicate a failure of public notification or participation.
66. The Respondents did not produce the underlying Environmental Impact Assessment study or evidence of public participation, despite submitting the EIA licence. However, no direct challenge has been made against the EIA process itself. The failure to present the study does not undermine the prima facie validity of the approvals exhibited.
67. Although the Petitioner invokes Article 35 of the Constitution, no evidence has been presented to demonstrate that any request for information was made and denied, or that access to such information was otherwise denied. The claim remains unsubstantiated.
68. The Petitioner's case lacks clarity regarding the nature of the alleged deficiency in public participation. No evidence has been presented before the Court to demonstrate, on a

prima facie basis, that the approval process was constitutionally flawed.

69. Regarding the issue of prejudice, the claims concerning environmental damage, traffic congestion, and infrastructural strain remain unsubstantiated. No evidence has been presented to demonstrate that the Petitioner would suffer harm of such a magnitude that cannot be remedied after the Petition has been determined.
70. Regarding whether the Petition would be rendered nugatory, the Petitioner has not demonstrated that the continuation of the development would irreversibly defeat the substratum of the Petition.
71. Regarding public interest, the Court must weigh the interest in ensuring compliance with planning and environmental laws against the interest in allowing development that is legally authorized. If there is no evidence of illegality or harm, the balance favours denying the granting of conservatory relief orders.
72. The Court is therefore not satisfied that the threshold for the grant of conservatory orders has been met.
73. Given that the Respondents have presented the necessary development approvals and permits, the prayers seeking to compel their production, or to restrain their issuance or regularization during the course of the petition, have been overtaken by events and are therefore declined.

74. In the end, I find that the application dated 14th January 2026 is without merit and is hereby dismissed. Each party shall bear its own costs.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL 2026.

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HON. T. MURIGI
JUDGE

IN THE PRESENCE OF:

Baraza holding brief for Auma Okello for the Petitioner

Ms Wairimu for the 1st Respondent

Ahmed- Court assistant