



Emkay (EA) Limited v KNP Investment Limited & 4 others (Environment and Planning Petition E026 of 2025) [2025] KEELC 5391 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E026 OF 2025**

**OA ANGOTE, J
JULY 21, 2025**

BETWEEN

EMKAY (EA) LIMITED APPLICANT

AND

KNP INVESTMENT LIMITED 1ST RESPONDENT

ELKAY & SONS LIMITED 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT

NAIROBI CITY COUNTY 5TH RESPONDENT

RULING

1. Before this court for determination are three applications. The Petitioner's Motion dated 13th June, 2025 seeking conservatory orders; the Petitioner's subsequent Motion dated 4th July, 2025 seeking orders for contempt of court; and the 1st and 2nd Respondents' Motion dated 3rd July, 2025 seeking to set aside the interim conservatory orders issued on 2nd July, 2025.
2. The 1st and 2nd Respondents sought to have the court set aside the interim conservatory orders aforesaid pending the inter-partes hearing of the Motion of 13th June, 2025. Given that this Motion is now under consideration, the Respondents' Motion of 3rd July, 2025 is accordingly spent.

The Petitioner's Notice of Motion dated 13th June, 2025

3. This Motion has been brought pursuant to the provisions of Article 42 of *the Constitution* of Kenya, Section 3 & 13(5) of the Environment and Land Court, Cap 8D, Section 3 of the Environment Management and Coordination Act, Section 1A & B of the *Civil Procedure Act*; and Order 40 Rule 1



of the Civil Procedure Rules, 2010 as well as Rules 3, 4 & 19 of *the Constitution* of Kenya (protection of rights and fundamental freedoms) Practice and Procedures, 2013 seeking the following reliefs:

- a. That this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents from continuing any construction or other related works on land parcel L.R No Nairobi/Block/3/1X9(Original No 1XX0/IV/1X3) pending hearing and determination of the Petition filed herewith.
 - b. That this Honourable Court be pleased to issue an order directed to the OCS Kileleshwa Police Station to supervise and ensure full compliance with the orders of this court.
 - c. That the costs of this application of be provided for.
4. The Motion is premised on the grounds on the face thereof and supported by the Affidavit of Joyce Umbima, the Director of the Petitioner/Applicant of an even date. She deponed that the Petitioner is the registered and beneficial owner of all that parcel of land known as L.R No Nairobi/Block 3/249 that borders land parcel L.R No Nairobi/Block 3/1X9(Original No 1XX0/IV/1X3) (hereinafter the suit property).
 5. According to Ms Umbima, the 1st and 2nd Respondents commenced construction of a fifteen (15) storey residential building on the suit property more than a year ago and that the construction has been emitting excessive cement dust and airborne particles as the Respondents have failed to install protective nets, barriers and other essential containment measures around the construction site.
 6. The Petitioner's Director deponed that as a direct consequence of the 1st and 2nd Respondents wilful negligence, all the tenants in its premises have been left to bear the brunt of the environmental degradation and that there is a constant haze of cement dust in the air, which has settled on outdoor and indoor surfaces including the floors and furniture requiring additional effort to dust and keep clean.
 7. She contends that the 1st and 2nd Respondents' failure to take reasonable precautions constitutes a blatant disregard for its neighbouring occupants' health, safety and well-being and that the prolonged exposure to these hazardous conditions exposes the Petitioner's tenants and other affected persons to a serious risk of respiratory illness and other health complications.
 8. Ms Umbima states that while she is aware and acknowledges that noise is inescapable from a construction site, the noise and vibration from the construction is excessive and has severely interfered with the operations and functionality of the Petitioner's property which comprises of office blocks where tenants conduct professional and business activities and need a peaceful serene and distraction free environment to ensure productivity.
 9. She states that there have been numerous complaints from businesses on the premises imploring the Petitioner to act; that the 1st and 2nd Respondents have also installed a construction crane which is perilously close to the Petitioner's perimeter fence and that the crane has repeatedly and unlawfully encroached on the Petitioner's land posing serious and imminent danger.
 10. Despite demands, she urges, the Respondents have failed to mitigate the harmful impacts of their construction leaving them with no recourse but to take immediate enforcement steps. She deponed that the court should grant the necessary reliefs to ensure that the Respondents are held accountable.
 11. In response to the Motion, the 1st and 2nd Respondents' site manager, Kaushik Kanti Patel, swore a Replying Affidavit on the 11th July, 2025. He deponed that the 1st Respondent is the registered owner of the suit property on which it intends to construct a hotel cum serviced apartments, while the 2nd



- Respondent is the 1st Respondent's project contractor duly certified by the National Construction Authority.
12. According to Mr. Patel, construction work on the property commenced after procurement of the requisite building/development approvals, which, inter alia, included change of user of the land; National Construction Authority (NCA) compliance certificate and a National Environment Management Authority (NEMA) license.
 13. He states that the site is duly fitted with a construction safety net to control dust debris and noise pollution; that on the 17th January, 2024, NEMA, vide its Improvement Notice serial number 4983 confirmed that the 1st Respondent had done holding up to prevent dust and undertaken a noise level report and that to demonstrate their compliance, NEMA undertook a variation of the environmental impact assessment of the project in line with the aforesaid improvement notice.
 14. According to Mr. Patel, not only have they complied with the environmental impact assessment, they have also undertaken a noise survey in respect of the noise emanating from the construction activities, which report confirmed that the noise is within the limits set out in the Factories and Other Places of Work (Noise Prevention and Control) Rules 2005.
 15. It was deposed by the 1st Respondent's site manager that the report concluded that the activities/operations on the 1st Respondent's property do not pose a significant noise related risk to the nearby offices or general community and recommended sustained compliance and minimal disturbance, which the 1st and 2nd Respondents have so done.
 16. It was deposed that the 1st and 2nd Respondents received a statutory notice on the 9th July, 2025 from the 5th Respondent as a result of the present application and which notice has since been complied with by dint of provision of the documents requested for.
 17. He urged that the 1st Respondent's development has a positive impact on the general community and urban development; that it has created employment and will upon completion improve the general urban outlook of the area, including enhancing the property prices in that area and that the positive impact alone outweighs the negative impacts which includes dust and noise pollution which are being appropriately addressed.
 18. As regards the issue of the crane, he stated that the same has been securely fitted on its property and is being operated well within the parameters prescribed by the *Occupational Safety and Health Act*; that an examination of the crane reached the foregoing conclusion further stating that the crane was of sound material and appropriate design. He denied the allegations that the crane poses danger to nearby properties and the general community.
 19. The 4th Respondent, through its Manager Compliance, Arch Stephen Mwilu, swore a Replying Affidavit on the 9th July, 2025. He deposed that the 4th Respondent, established under Section 3(1) of the *National Construction Authority Act*, Cap 118 is mandated to oversee the construction industry and coordinate its development, and that in furtherance of its mandate, it promotes and ensures quality assurance in the construction industry.
 20. He stated that the National Construction Authority Regulations, 2014 came into force on 6th June, 2014 through Legal Notice No. 74 and that upon fulfillment of the applicable requirements, the 4th Respondent is mandated, under Regulation 17(6), to issue the proprietor with a Compliance Certificate.
 21. Arch Mwilu stated that Sections 5 (2) (g), 23A and 23(2) of the Act empower the 4th Respondent to enter into any construction site where construction works are being carried out and ascertain whether



- there is compliance with the provisions of the Act or any regulations and that in so doing, they verify key checklist items on site.
22. It was deposed that where a site is found to be non-compliant, the 4th Respondent issues a suspension of works order to the developer and all construction works are suspended and that thereafter, a red NCA 'X' mark is placed on the construction site to indicate that several issues have not been adhered to as per the Act and Regulations.
 23. Upon completion of an investigation, it was deposed, and where an offence is revealed, the investigating officer of the 4th Respondent is required to immediately give all information relating to the offence to an officer in charge of a police station and that that officer may, by a warrant, arrest any person who may have committed such an offence.
 24. Mr. Mwilu stated that upon receipt of the pleadings herein, the 4th Respondent's compliance officers from the Nairobi Region, in line with Sections 5 (2) (g), 23A, 23 (1), and (2) of the Act, conducted a site inspection on 26th June 2025 to inspect the ongoing construction works on land parcel L.R. No. Nairobi/Block 3/1X9 (Original No. 1XX0/IV/1X3), Nairobi County and that the following observations were made: The development is under construction, and the works are at the 10th floor level; Multiple scopes of work are ongoing, including plastering on already completed frames and masonry works, among others; The developer, KNP Investment Limited, has acquired approval from the Nairobi City County Government vide Approval No. PLUPA-BPM-003719-N dated 30th November 2023 and an Environmental License No: NEMA/EIA/PSL/30XX5 dated 17th January 2024 from the National Environment Management Authority (NEMA); The proposed development has been issued with a NCA Certificate of Compliance No. 53XXXXXX710853 dated 23rd January 2024; The Contractor installed temporary netting on the lower floors at the early stages of the project. However, from the 7th floor upwards, the contractor has started installing permanent hoarding, which is safer than the initial safety netting. Nonetheless, the netting on the lower floors remains insufficient, despite minimal work in those areas; At the time of the visit, rains had washed most of the dust reported by Petitioner. There were spots of dust on the gazebos and the roofs of the Petitioner's buildings; There is a tower crane lifting materials on site and towering above the structure, and more often hovers above the Petitioner/Applicant's property. The contractor, Elkay and Sons Limited, provided a crane examination report confirming that the counterweights and all parts of the tower crane are of sound material, appropriately designed, and therefore safe to operate, as per the [*Occupational Safety and Health Act*, 2007](#).
 25. Arch. Mwilu stated that the 4th Respondent received a project registration application via its Online Project Registration System (OPRS) from the developer, KNP Investment Limited, the 1st Respondent herein and that upon submission of all the requisite documents, it issued the 1st Respondent with compliance certificate registration No. 53XXXXXX710853.
 26. It was deposed that the 4th Respondent plays an independent but complementary role alongside other agencies and regulators, including the 3rd and 5th Respondents and that it is the 3rd Respondent who is responsible for the supervision and coordination of all matters relating to the environment which is what most of the complaints in the Motion are centered on.
 27. Further, it was deposed, the EMCA (Noise and Excessive Vibration Pollution) (Control) Regulations regulates noise and excessive vibration whereas the Directorate of Occupational Safety and Health Services (DOSHS) is the primary body responsible for ensuring compliance with the [*Occupational Safety and Health Act*, 2007](#), and promoting safe and healthy working conditions, including regulations for cranes and other lifting equipment.



28. As advised by Counsel, he urged, the Motion does not disclose any reasonable cause of action against the 4th Respondent and the same should be dismissed.
29. The 5th Respondent filed Grounds of Opposition dated 11th July, 2025 based on the grounds that:
- i. The Application is incompetent, misconceived, and fatally defective, having been premised on generalized allegations unsupported by evidence, and does not disclose a sustainable cause of action against the 5th Respondent.
 - ii. The 5th Respondent has at all material times complied with its statutory mandates under the *Physical and Land Use Planning Act* 2019, the National Building Code, and EMCA, and has issued approvals and permissions lawfully within its regulatory framework.
 - iii. The Applicant has failed to demonstrate any direct or indirect administrative omission or environmental breach attributable to the 5th Respondent.
 - iv. The Applicant has not exhausted the statutory dispute resolution mechanisms, including review or appeal to relevant environmental or planning tribunals, and has prematurely invoked the jurisdiction of this Honourable Court.
 - v. The 5th Respondent is neither the developer nor executor of the project complained of, and cannot lawfully be directly or remotely enjoined from works it is not conducting.
 - vi. No prima facie case has been established against the 5th Respondent within the meaning of *Giella vs Cassman Brown* [1973] EA 358 and the orders sought are therefore unwarranted.
 - vii. The prayers sought in the Application are incapable of enforcement against the 5th Respondent as they are vague, speculative, and framed in a manner that violates the principle of legal certainty and fairness to public bodies.
 - viii. The Application amounts to forum shopping, abuse of court process and is intended to use the judiciary to micromanage public authorities without factual basis, legal justification, or exhaustion of lawful channels.
 - ix. The Petition and the Application as filed are fatally defective and ought to be struck out or dismissed against the 5th Respondent with costs.

The Petitioner's Notice of Motion dated the 4th July, 2025.

30. This Motion has been brought pursuant to the provisions of Section 5(1) of the *Judicature Act* and Order 51(1) of the Civil Procedure Rules seeking the following reliefs:
- i. The Honourable do find that the 1st and 2nd Respondents and their officers/directors are in contempt of Court for disobedience of the Orders of this Court issued on the 2nd July, 2025.
 - ii. That this Honourable Court be pleased to summon the directors of the 1st and 2nd Respondents to personally attend Court to show cause why they should not be cited for contempt of this courts orders issued on the 2nd July, 2025.
 - iii. That upon citation for contempt of court, the aforesaid officers of the 1st and 2nd Respondent be sanctioned by committal to civil jail for a period of 6 months' sequestration of property, payment of fine and/or any other further orders as this court deems fit.



- iv. That in the alternative or in addition to prayer(iv) above, this Honourable Court be pleased to impose an appropriate fine against the 1st and 2nd Respondents for contempt of court.
- v. That the costs of this Application be borne by the 1st and 2nd Respondents.
31. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Joyce Umbima, the Petitioner's Director of an even date, who deponed that on 2nd July, 2025 when the Motion of 13th June, 2025 was due for hearing, the court granted interim orders being prayers (b) and (d) of the Motion pending inter-partes hearing thereof on the 14th July, 2025 and that these orders were granted in the presence of Counsel for the 1st and 2nd Respondents.
32. According to the Petitioners' Director, the effect of order (b) was to restrain the 1st and 2nd Respondents from undertaking any construction or related activities on the suit parcel until the scheduled inter-partes hearing aforesaid; that vide a letter dated the 2nd July, 2025, they formally requested for a typed copy of the court order for the express purpose of facilitating service and that the court registry responded that the same would be duly uploaded in the courts case tracking system.
33. She states that this notwithstanding, the 1st and 2nd Respondents Counsel was present in court at the time of the issuance of the orders and their presence conferred actual knowledge on the 1st and 2nd Respondents. Despite this, she stated that the 1st and 2nd Respondents have continued with construction activities on the site.
34. She noted that even if the Respondents were to seek leniency based on compliance, there is partial non-compliance as the crane remains dangerously hanging over the roof of the adjacent property and that it is unclear why they would choose to locate the crane next to the Petitioner's property, yet they have space on the opposite side of the construction site.
35. In response to this clear act of disobedience, she stated, their Counsel wrote an email, followed up with a letter to the 1st and 2nd Respondents' Counsel, demanding immediate compliance and that the 1st and 2nd Respondents' Motion of 3rd July, 2025 affirms their knowledge of the orders and their attempts to rely on lack of a formal service is unsustainable.
36. As advised by Counsel, she stated, parties are not at liberty to choose whether or not to obey court orders and the same is mandatory. She urged the court to invoke its power and impose appropriate sanctions to protect the authority of the court and the integrity of these proceedings.
37. The 1st and 2nd Respondents, through Kaushik Kanti Patel, the 1st Respondent's site manager, swore a Replying Affidavit on the 9th July, 2025. He deponed that the Motion is misconceived, misguided, frivolous and is an abuse of the court. According to Mr. Patel, the orders alluded to restraining any construction or related activities on Land Title Number Nairobi/Block 3/1X9 were never personally served on the 1st and 2nd Respondents, neither was there was any penal notice.
38. According to Mr. Patel, at the time of the issuance of the orders, they were carrying out casting of a floor which needs a maximum period of 12 hours of curing, failing which the structural integrity of the building which is over ten stories would be compromised and would pose more danger to the occupants and neighbours. He urged the court to dismiss the Motion with costs.
39. The parties' counsel made oral submissions which I have considered.

Analysis and Determination.

40. In view of the foregoing, the issues that arise for determination are:



- i. Whether the 1st and 2nd Respondents are in Contempt of the Court Orders of 2nd July, 2025?
 - ii. Whether the Motion of 13th June, 2025 is competent and if so, merited?
41. The Black’s Law Dictionary (Ninth Edition) defines contempt of court as:
- “Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
42. Discussing contempt, the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another* [2019] eKLR posited thus:
- “There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court’s authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice”
43. Due to the repeal of the *Contempt of Court Act*, 2016, [see *The Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR] the substantive law governing contempt proceedings is the *Judicature Act*, Section 5 of which provides:
- “(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”
44. Additionally, Section 29 of the *Environment and Land Court Act* under the title offences provides as follows:
- “Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
45. It is trite that contempt proceedings are quasi-criminal in nature due to the severe consequences they attract. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases although not as high as beyond reasonable doubt. As stated by the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & Another* [2018] eKLR:
- “The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:
- “In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”



The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

46. In order to succeed in civil contempt proceedings, an Applicant has to prove that the terms of the order were clear, unambiguous and binding on the Respondent; knowledge of these terms by the Respondent; failure by the Respondent to comply with the terms of the order and deliberate conduct by the Respondent.

47. In the cases of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR and *Republic vs Attorney General & another Ex parte Mike Maina Kamau* [2020] eKLR Justice Mativo, dealing with the question of contempt relied on the exposition by the learned authors of the book “Contempt in Modern New Zealand”¹ who succinctly stated:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

48. By way of a brief background, vide the Motion dated the 13th June, 2025, the Petitioners sought inter-alia, temporary injunctive orders restraining the 1st and 2nd Respondents from continuing to undertake further construction on the suit property pending the hearing and determination of the Petition.

49. The Motion was due for hearing on 2nd July, 2025. On this date, the court issued the following orders:

“The Respondents have not filed their responses despite having been served twice. No good reason has been given as to why the 1st and 2nd Respondents were only instructed yesterday. Considering that the complaints raised are in the nature of environmental degradation and may affect the health of the Petitioners, if at all true and in the absence of a response to date, I shall grant prayer number (b) and (d) of the Notice of Motion dated the 13th June, 2023 until 14/7/25 when the application will be heard inter-partes..”

50. The Petitioners maintain that despite the clear and binding nature of those orders, which were issued in the presence of Counsel for the 1st and 2nd Respondents, their construction activities continued unabated. In support, the Petitioners have exhibited photographs taken on 4th July, 2025 showing workmen present on the site.

51. The 1st and 2nd Respondents argue that the contempt proceedings cannot lie in the absence of personal service of the order or an endorsed penal notice. They further contend that the activities observed on



the suit property were part of casting of the floor, which required up to twelve (12) hours to cure in order to preserve the structural integrity of the ten-storey building under construction.

52. Beginning with whether the court's orders were clear and unequivocal, the answer is plainly in the affirmative. The court expressly restrained the 1st and 2nd Respondents from continuing with any construction or related activities on the property pending the inter partes hearing of the Motion of 13th June, 2025 scheduled for 14th July 2025. There is no ambiguity in the language used, and indeed, the Respondents have not disputed the clarity of those orders.
53. Moving next to the aspect of knowledge, it is the 1st and 2nd Respondents' contention in this respect that they were never personally served with the court orders, neither was there any penal notice, and as such, the contempt orders sought cannot lie. Is this so? The court thinks not.
54. This court is alive to, and ascribes to the changes in the jurisprudence in this area of law to the effect that knowledge of an order supersedes personal service.
55. In this instance, counsel for the 1st and 2nd Respondents was present at the time the orders were made. It is well-established that where a party is represented by counsel during court proceedings, that party is deemed to have knowledge of all orders made. This position has been endorsed by the Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited (Civil Appeal 33 of 2012) [2015] KECA 945 (KLR)(Civ) (18 February 2015) (Ruling)* where the court held that:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”

56. Second, on the 3rd July, 2025, a day after the issuance of the orders in issue, the 1st and 2nd Respondents filed a Motion seeking to set aside the same. This being so, the court considers that personal service as well as a penal notice were not necessary in the circumstances. As expressed by the Court of Appeal in *Shimmers Plaza*(supra):

“On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved.”

57. The next question is whether the 1st and 2nd Respondents were in breach of the court orders of 2nd July, 2025. The Petitioner contends that this was indeed the case and adduced into evidence photos taken on the 4th July, 2025 showing crew men on the site. The 1st and 2nd Respondents do not dispute this and in fact state that at the time of the issuance of the orders, the 1st and 2nd Respondents were:

“carrying out casting of a floor which needs a maximum period of 12 hours of curing failing which the structural integrity of the building which is over ten stories would be compromised and would pose more danger to the occupants and neighbours.”

58. The orders of 2nd July, 2025 were unequivocal. All construction and related activities were to cease. The Respondents did not seek clarification, variation, or exemption at the time of issuance. The justification now offered was neither pleaded nor presented to the court at the appropriate time.



59. Even if the court were to consider the same, there is no evidence that slab curing was the specific activity that was taking place on the material day or that it could not have been paused in a manner consistent with the orders.

60. Ultimately, the court finds that the 1st and 2nd Respondents had full knowledge of the orders issued on 2nd July 2025 and proceeded to act in breach thereof in contempt of this court.

Whether the Motion of 13th June, 2025 is competent and if so, whether it is merited?

61. Vide its Grounds of Opposition, the 5th Respondent seeks to impugn the present Motion. It contends that the Petitioner has not exhausted the statutory dispute resolution mechanisms, including review or appeal to relevant environmental or planning tribunals, and has prematurely invoked the jurisdiction of this court. It pleads that the orders sought cannot lie against the 5th Respondent and that there is in any event no sustainable cause of action against it, and the Motion is an abuse of the process of the court.

62. Indeed, it is now generally accepted that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. To this end, the Court of Appeal in the case of *Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR) observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

63. The question of what invokes the doctrine of exhaustion before embarking on the court process was aptly discussed in the case of *William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others: Muslims for Human Rights & 2 others(Interested parties)* [2020]eKLR by the five judge bench as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...”

64. So which statutory mechanisms has the Petitioner bypassed? It is unclear. Apart from a general assertion in this regard laid out in the Grounds of Opposition, no reference was made, for instance, to a particular tribunal, authority, board, or administrative process under statute that the Petitioner bypassed. This was equally not submitted on during submissions, with counsel only stating that the pleadings do not disclose any cause of action against the 5th Respondent.

65. It is trite that parties are bound by their pleadings, and it is incumbent upon each party to properly plead and substantiate the legal and factual basis of their case. The court is not at liberty to speculate on matters not properly placed before it. As was aptly stated in “The Present Importance of Pleadings”



published in Current Legal Problems (1960) at p.174 referenced by the Court of Appeal in Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited [2015] KECA 870 (KLR):

“The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.”

66. In the absence of any specific statutory dispute resolution process being identified by the 5th Respondent, and a demonstration that the Petitioner has indeed sidestepped such a process, the court is unable to make a finding that the doctrine of exhaustion has been violated. The contention that the Motion amounts to forum shopping or an abuse of the court process having not been substantiated suffers the same fate.

67. Moving on to its merits, it is at the onset noted that the present Motion seeks an order of “temporary injunction” to restrain the 1st and 2nd Respondents from continuing with construction on the suit property. However, this being a constitutional Petition premised on alleged violations of the Petitioner’s rights under Articles 28, 40, and 42 of *the Constitution*, the appropriate relief is not an injunction in the traditional sense, but rather a conservatory order.

68. The court emphasizes that injunctions and conservatory orders are not synonymous and should not be used interchangeably. An injunction is a remedy available under the Civil Procedure Rules in ordinary civil litigation, while a conservatory order is a constitutional relief intended to preserve the subject matter of a petition and ensure that constitutional rights are not rendered illusory before the Petition is heard and determined.

69. Speaking to this distinction, the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR noted 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.”

70. That said, and despite the improper framing of the relief sought as a temporary injunction, the court will nonetheless proceed to consider whether the threshold for the grant of conservatory orders has been met in the circumstances of this case.

71. In *Judicial Service Commission vs Speaker of the National Assembly & Another* [2013] eKLR, the court described conservatory orders thus:

“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.”



72. The conditions for consideration by the court in granting conservatory orders were persuasively set out in Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others (2015) eKLR 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 orders 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.”

73. The court is also alive to the fact that in determining whether or not to grant conservatory orders, it must be careful not to make a final determination so as not to prejudice the main Petition. [See Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR.

75. The starting point is to determine whether the Petitioner/Applicant has established a prima facie case with a likelihood of success. The parameters of what constitutes a prima facie case were aptly expressed in the case of Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others (supra) thus:

“It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”

76. Further still, the court in Amir Lodges Ltd & another vs Mohammed Omar Shariff & another [2022] KEHC 26896 (KLR) quoted the case of In Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 where the court while expounding on what a prima-facie case or arguable case was, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

77. The Petitioner herein, the owner of L.R Nairobi/Block3/249, is aggrieved by the construction activities undertaken by the 1st and 2nd Respondents on the neighboring parcel L.R Nairobi/Block 3/1X9. It is its contention that the manner in which the construction is being undertaken is severely deleterious to the environment, and by extension, to the Petitioner and its tenants.

78. It complains of severe and excessive cement dust and lack of protective barriers, severe noise and vibration and the fact that the crane used for construction is perilously close to its perimeter wall.

79. It has in support of the foregoing adduced into evidence pictures evincing dust on the floor, open construction site, the crane, demand letters dated the 14th October, 2024, 27th January, 2025, 27th March, 2025 and 13th May, 2025. It also adduced a complaint letter directed to the 3rd -5th Respondents dated the 20th May, 2025



80. In response, the 1st and 2nd Respondents contend that the 1st Respondent is the lawful registered owner of the suit property, and is undertaking construction with all requisite approvals. They assert that safety nets have been installed around the site to mitigate dust, debris, and noise pollution.
81. The 3rd Respondent, through Improvement Notice No. 4983 dated 17th January 2024, confirmed that dust suppression measures have been implemented and a noise level report conducted, which found the noise levels to be within the limits set under the Factories and Other Places of Work (Noise Prevention and Control) Rules.
82. Additionally, the 1st Respondent received a statutory notice from the 5th Respondent on 9th July 2025, which has been complied with by furnishing the requested documents. Regarding the crane, they maintain it is securely positioned within their property and is being operated in accordance with the [Occupational Safety and Health Act](#).
83. The 1st and 2nd Respondents adduced into evidence approvals for change of user from single dwelling unit to multi-dwelling units dated the 20th July, 2023; approval for developmental permissions to develop 96 apartments, no 10 duplexes, 22 levels dated the 30th November, 2023; NEMA license: NEMA/EIA/PSL/30XX5 issued on 17th January, 2024; NCA certificate of compliance no 53XXXXXX710853.
84. They also adduced an NCA certificate of registration for Elkay & Sons Builders Limited, pictures of netting around the property, noise survey report dated the 9th July, 2025, copy of improvement notice dated 17th January, 2024 and the statutory notice dated the 9th July, 2025.
85. The 4th Respondent concedes to have issued the 1st and 2nd Respondents with the NCA compliance certificate as they had duly complied with all the requirements as per the NCA Act. It was deponed on its behalf that upon receipt of the pleadings with respect to this matter, its officers conducted a site visit which affirmed that the construction was being conducted as per the requisite parameters and on the basis of the requisite approvals and permissions.
86. The only concern noted in the site visit was the “insufficient netting on the lower floor despite minimal work in those areas and the spots of dust on gazebos’ and roofs of the Petitioner’s building”. They adduced a preliminary status report dated the 27th June, 2025, and the certificate of compliance registration No 53XXXXXX710853
87. The right to a clean and healthy environment is a paramount constitutional entitlement enshrined under Article 42 of [the Constitution](#). It is not only a self-standing justiciable right, but also one that is intertwined with the enjoyment of other rights and fundamental freedoms, including the rights to life, dignity, and health.
88. Its realization is essential for the wellbeing of individuals and communities, and it imposes both negative and positive obligations on the State and private actors alike. [See Peter K Waweru vs Republic [2006] eKLR]
89. In this context, the Petitioner’s Directors’ and tenants’ grievances implicate not only their environmental rights under Article 42 of [the Constitution](#), but also their broader entitlement to health, dignity, and quality of life. They assert that the cumulative effect of unmitigated dust, noise, vibration, and the presence of a crane allegedly operating close to their boundary wall poses both an environmental and personal hazard.
90. As aforesaid, in determining whether a prima facie case has been established, the court is guided by the principle that allegations of constitutional violation must be supported by cogent and verifiable



evidence. Applying that standard, the court observes that the Petitioner has filed photographic evidence and correspondences that indicate its discomfort and dissatisfaction with the ongoing construction.

91. On the other hand, the 1st and 2nd Respondents have furnished a comprehensive set of approvals and compliance documents from the 3rd-5th Respondents. The legitimacy of these licenses and approvals are not in issue. Regarding the specific complaints, they have shown vide a noise survey report dated 9th July 2025 that the noise levels are in compliance with statutory decibel limits. This report has not been impugned nor a contrary position established.
92. As regards the dust complaints, the 1st and 2nd Respondents have adduced an improvement notice by the 3rd Respondent, which states that holding up has been done to prevent dust and debris. The 4th Respondent vide its preliminary report of 25th June, 2025 noted that netting has been done. While the report states that the same is insufficient on the lower floors, it concedes that there is minimal work on the area.
93. The 1st and 2nd Respondents have tendered evidence, photographs demonstrating that additional netting has since been installed. Notably, the Petitioner, acknowledges that netting was installed during the pendency of these proceedings, but contends that some openings still remain, allegedly allowing dust to escape.
94. This position, however, appears to amount to a concession that significant remedial steps were taken following the NCA's findings. The court is not persuaded, at this interlocutory stage, that the remaining alleged dust emissions rise to the threshold of constitutional infringement sufficient to warrant the grant of conservatory orders.
95. The regulatory agencies have not issued any contrary findings after the remedial measures were put in place, and no independent technical report has been submitted to show that the current netting is inadequate in law or in fact.
96. In the court's view, the Respondents have made demonstrable efforts to comply with regulatory expectations, and the present netting measures appear reasonably sufficient, subject to continuing oversight by the relevant authorities.
97. As regards the crane, the letter dated the 17th October, 2024 from a Government approved Plant Inspector has indicated that the crane is safe to be operated. There is nothing to indicate the encroachment alleged. Neither is there any evidence showing that the location of the crane is impermissible, unsafe or contravenes any laws or regulations.
98. Accordingly, while the Petition raises legitimate environmental concerns deserving full adjudication at the substantive hearing, the court is not persuaded, at this interlocutory stage, that the Petitioner has established a prima facie case with a likelihood of success. The evidentiary material currently on record falls short of rebutting the Respondents' demonstrable adherence to regulatory and statutory frameworks.
99. Will the Petitioners therefore suffer any damage or detriment if the conservatory orders are not granted? It is common ground that whether or not the failure to grant conservatory orders will cause prejudice is a matter of fact and it behooves an Applicant to sufficiently demonstrate the alleged damage and/or



prejudice. As expressed by the court in *Okiya Omtatah Okoiti vs Parliamentary Service Commission; National Assembly & 4 others (Interested Parties)* [2021] eKLR;

“It is trite therefore, the damage or threat thereof to the rights and fundamental freedoms or to *the Constitution* must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent.”

100. In the present case, the court does not consider that any evidence has been shown demonstrating irreparable harm. It has also not been shown that the competent authorities have failed to respond to the Petitioner’s complaints or that enforcement mechanisms have proven inadequate. On the contrary, the record shows that the 3rd -5th Respondents have remained actively engaged in overseeing compliance.

101. As to whether the Petition will be rendered nugatory, the court thinks not. The reliefs sought in the Petition are predominantly declaratory and directional in nature, aimed at achieving compliance with environmental and constitutional standards, and not necessarily at halting the construction altogether. None of the prayers in the Petition seeks the demolition of the building or the nullification of the development approvals per se.

102. The substratum of the Petition remains intact and the rights invoked remain enforceable by way of damages, structural interdicts, or other remedial reliefs should the court find in the Petitioner’s favour.

103. The final aspect regards public interest which is defined by the Black’s Law Dictionary 10th Edition at page 1425 as:

“The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.”

104. Having regard to the facts of the case and having found that the Petitioner has failed to establish a prima facie case, the court opines that public interest militates against the halting of the construction activities at this juncture.

105. In the end, the court makes the following final determination:

- i. The Motion of 13th June, 2025 is found to be unmerited and is hereby dismissed with no order as to costs.\
- ii. The Motion of 4th July, 2025 is found to be merited and the court makes the following orders:\
 - a. The 1st and 2nd Respondent’s site manager, Kaushik Kanti Patel, is hereby directed to personally appear before this court for mitigation and sentencing.
 - b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF JULY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Otieno for 1st and 2nd Respondents

Mr. Ganya for 3rd Respondent



Ms Abiero holding brief for Mr. Mutembei for Petitioner

Court Assistant: Tracy

