



REPUBLIC OF KENYA



**Mutua & 4 others v Joy Gardens & 2 others (Environment and Planning
Petition E014 of 2025) [2025] KEELC 5943 (KLR) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEELC 5943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E014 OF 2025**

**AA OMOLLO, J
AUGUST 14, 2025**

BETWEEN

KIOGORA MUTAI & 4 OTHERS & 4 OTHERS PETITIONER

AND

JOY GARDENS 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

NEMA 3RD RESPONDENT

RULING

1. The Petitioners besides lodging the petition dated 3rd April, 2025 also filed the notice of motion application dated 3rd April 2025. The application is premised on the provisions of article 23 and 35 of *the Constitution* and the applicable Rules. The Petitioners urge this court to grant them at the interlocutory stage these orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of the petition, a conservatory order be issued restraining the 1st Respondent by itself and or agents, employees, assigns or any other person acting under it from carrying out any further construction over property title no Nairobi/Block/99/120.
 - e. Costs of the application be borne by the Respondents.
2. The application is grounded on the supporting affidavit, further affidavit and the reasons stated on its face. The grounds include but not limited to the following;



- i. The Petitioners are some of the neighbours of the 1st Respondent's property L.R No Nairobi/Block/99/120.
 - ii. The 1st Respondent began construction on its property without public participation or consultation with the neighbours in contravention of the applicable laws.
 - iii. The 2nd and 3rd Respondents have failed to take any measures to tame the continued acts of the 1st Respondent.
 - iv. The 2nd Respondent has also failed to supply the Petitioners with the approved plans in respect of the subject development.
3. The 1st Petitioner deposed that the petition was brought on his behalf and on behalf of other residents whose names appear in the list annexed as KM3. That it is within his knowledge and as per development control policy (annex KM4) that Runda area fall within zone 13 in Nairobi and is designated as low-density user zone. He listed the type of developments allowed within this zone as single dwelling upto 5 bedrooms, max level of 2 floors and the development be up to 255 of the built-up area within the plot. That the setback is required to be beyond 6 meters from the road frontage.
 4. He deposed further that in the year 2023, the 1st Respondent without public participation purported to have obtained approvals from the 2nd and 3rd Respondents to carry out development of residential dwelling on the suit property. The Petitioners aver that some of the details of the residents were used without their consent while filling in questionnaires on alleged public participation.
 5. Further, they depose that the extent of the proposed development going by the building plan is much more than for a residential house and the 1st Respondent is using shortcuts to sidestep applying for change of user.
 6. The application is opposed by the 1st and 2nd Respondents who both filed replying affidavit and preliminary objection respectively. In response, the 1st Respondent refuted the claims of the Petitioners that there was no stakeholder engagement before obtaining the development approvals.
 7. Through its director, Stephen Kimani Mwangi, the 1st Respondent deposes that it purchased the suit property with intent to build a family home. That they were admitted into the residents' association on 20th April 2024 after payment of the requisite charges of Kshs 50000.
 8. It is the 1st Respondent's assertion that they began construction after a year of continuous engagement and were even issued with a gate pass by the Resident's association for movement of materials. That the construction continued undeterred until 23rd September, 2024. The 1st Respondent insists that they are only putting up a single dwelling residence as defined under EMCA and for which approvals were obtained.
 9. They add that on 19th March 2025, following complaints from the Petitioners, the 3rd Respondent carried out site inspection which confirmed that the construction was proceeding as per the approvals as shown by annex SKM-19.
 10. Its is also their contention that upon obtaining of the approvals, there is a presumption of regularity of the actions taken thereto and the licenses given are legal until such time as the contrary may be proved and which remains a function of the hearing and determination of the petition on merit.
 11. The 1st Respondent averred that the orders sought in prayer 2 and 4 are far-reaching and which calls for the court to balance the rights of either of the parties. That as a sign of good faith, it submitted a



- revised development plan to the 2nd Respondent although they are yet to pay the invoiced amount. It urged the court to consider its constitutional right under article 40 and dismiss the application.
12. In the preliminary objection, the 2nd Respondent pleaded that this court lacks jurisdiction to consider and determine the petition under the doctrine of exhaustion. Further that the petition does not meet the threshold of a constitutional petition.
 13. The 2nd Respondent in its replying affidavit sworn on 27th June, 2025 by Wilfred Wanyonyi Masinde acknowledged receipt of developments plans of the 1st Respondent on 4th August, 2023 for a single residential house being a maissonette with a flat roof. They proceeded to approve the application stating it was in compliance with the zoning policy for the area in terms of density and character.
 14. The 2nd Respondent further confirmed receipt of proposed alteration to previously approved vide plan no. PLUPA-BPM-003016 and which revised plan was approved on 22nd May 2025. The 2nd Respondent denied the approved development is commercial.
 15. Vide a further affidavit sworn on 2nd July, 2025, the 1st Respondent filed an architect's report showing the extent of their drawings/structure already put up and the possible adjustments they were willing to make to respond to the complaints raised by its neighbours (the Petitioners).
 16. The Petitioners and the 1st Respondent filed written submissions which I have read and considered. The 1st Respondent cited cases which set parameters to be considered in application for conservatory orders such as this. Inter alia, in the case of Board of Management of Uhuru Secondary School vs City County of Director of Education and 2 Others [2015] eKLR the court found as thus:

“It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is: An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*; Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and The public interest must be considered before grant of a conservatory order.”
 17. This court's mandate at this stage is to determine whether this court has jurisdiction to hear the application and if yes, to proceed to consider whether the application meets the cited threshold.
 18. It is settled law that the doctrine of exhaustion does not necessarily oust the jurisdiction of this court since the powers of the court is granted to it by *the Constitution*. Rather, the doctrine is to be applied to allow parties to start from the least available dispute resolution mechanisms. Secondly, the doctrine of exhaustion is to be applied when it is suitable.
 19. The application is seeking conservatory orders at this stage and the and Respondent has not satisfied this court that Physical Liaison Committee has capacity to grant such. Similarly, the Applicants have raised allegations of constitutional violations and it is not open to this court now to analyse whether there is merit in the said alleged violations. A preliminary objection is supposed to be self-explanatory and does not require proof from facts.
 20. The PO in this instance is asking the court to analyse those facts to determine whether there is merit in the petition (meeting the threshold of a petition) at the interlocutory stage. I hold that it is the preliminary objection which has not met the threshold of a p.o as established in the case of Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors (1969)EA 696. The same is dismissed.



21. One of the issues raised is that there was no stakeholder engagement when the application for the development licenses were made. The Petitioner stated that some of the persons whose names were listed to have filled the questionnaires as part of public participation have since denied doing so by way of affidavit.
22. The 1st Respondent refers to engagements with the neighbours before processing the EIA license. It also deposed that the evidence of the license is a presumption that due process was followed which may not be a correct presumption in so far as the principle of public participation as provided in *the constitution* is concerned. This makes the issue of whether or not public participation was undertaken a triable issue.
23. The second issue raised in the petition was that the development as approved breached the zoning policy for this area by taking more than 25% of the plot. There seems to be no contestation on this point as the 1st Respondent decided to revise the plan and has submitted the revised plans which the 2nd Respondent confirms was approved. Despite this revision, the Petitioners are not persuaded that their complaints are resolved.
24. They raised other issues such as the impact of the development on the land in the area which is swampy and is likely to cause flooding in the area. As rightly submitted by the 1st Respondent, all these can only be determined by evaluating the evidence presented during the hearing. Therefore it is imperative that the statusquo be preserved to give parties a chance to argue their case.
25. Consequently, in balancing the rights of both parties as argued, I shall grant the interim conservatory orders for a limited period of time of six (6) months to push the Petitioners to fast track the hearing of their petition. In the event the petition is concluded in less than the six months, the orders shall be vacated. The orders shall only be extended if the Petitioners persuade the court the delay is not attributed to them.
26. This court thus issue the following orders:
 - a. That pending the hearing and determination of the petition, a conservatory order in the nature of a temporary injunction is issued for a period of six (6) months from this date, restraining the 1st Respondent by itself and or agents, employees, assigns or any other person acting under it from carrying out any further construction over property title no Nairobi/Block/99/120.
 - b. The preliminary objection dated 17th April, 2025 is dismissed for lack of merit.
 - c. Costs of the application and the PO to abide the determination of the Petition.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 14TH AUGUST 2025.

A. OMOLLO

JUDGE

