



**Mbaazi Residents Association & another v Metricon Home Nairobi Co. Ltd & 2 others
(Civil Application E018 of 2025) [2025] KECA 627 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KECA 627 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E018 OF 2025
W KARANJA, K M'INOTI & LA ACHODE, JJA
APRIL 4, 2025**

BETWEEN

MBAAZI RESIDENTS ASSOCIATION 1ST APPLICANT

MILLENNIUM GARDENS MANAGEMENT LTD 2ND APPLICANT

AND

METRICON HOME NAIROBI CO. LTD 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

NAIROBI CITY COUNTY 3RD RESPONDENT

*(Application for conservatory orders pending appeal from the judgment
and decree of the Environment & Land Court of Kenya at Nairobi
(Angote, J.) dated 19th September 2024 in ELC Pet. No. E121 of 2023)*

RULING

1. On 19th September 2024, the Environment and Land Court at Nairobi (ELC) (Angote, J.) dismissed a petition by the 2nd applicant, (Millennium Gardens Management Ltd. (Millennium) seeking, among others, a permanent injunction to stop the 1st respondent, Metricon Home Nairobi Company Ltd. (Metricon) from carrying out a contentious development on its property, LR No. 330/155 (original No. 330/39/8) situate along Mbaazi Avenue in Thompson area, Lavington, Nairobi County.
2. From the record, Millennium manages some 28 residential homes known as Millenniums Gardens developed on LR No. 330/1211. The development comprising the said houses is four storey in height and the houses are owned by members of the 1st applicant, Mbaazi Avenue Residents Association (MARA). Metricon's property and those of the residents of MARA share a common boundary. In the petition before the ELC, MARA, alongside with the 2nd respondent, National Environment



Management Authority (NEMA) and the 3rd respondent, Nairobi City County (the County) were named as interested parties.

3. The petition, which was supported by MARA, was founded on the assertion by Millennium that Metricon was developing on its one-acre property 512 units comprised in 16 storeys, one ground level parking, and two underground level parkings. Millennium contended that the development was irregular unlawful; that it was in violation of the area zoning policy and restrictions; that it would cut-off natural sunlight, affect air circulation; emit exhaust fumes from the anticipated numerous vehicles and interrupt aerial communication equipment, thus violating MARA's constitutional right to a clean and healthy environment; that due to deep excavation, the structural integrity of existing buildings was in danger; that the existing drainage system was bound to be overstretched; and that there was no proper public participation preceding initiation of the project. In all, Millennium and MARA contended that the project was in violation of the following Articles of *the Constitution*: Articles 10 (national values and principles of governance, in particular participation of the people), Article 42 (the right to clean and healthy environment), Article 47 (fair administrative action) and Article 69 (the State's obligations in respect of the environment).
4. Metricon opposed the petition, contending that prior to change of user of its property, it invited members of the public through a press notice on 24th March 2022 to raise any concerns or objections to the project and that after hearing the petitioners' concerns, it undertook an Environmental Impact Assessment (EIA) Study which provided mitigation measures to the concerns raised. It was further contended that the allegation of violation of zoning regulations was unsubstantiated because the existing zoning policy for the area was under review and that after Metricon complied with all the requirements, the County approved its application for change of user on 24th March 2022.
5. Metricon further pleaded that after the EIA Report was submitted to NEMA, the latter published several notices in the press on specified dates inviting members of the public to submit comments on the EIA Report; that Metricon itself carried advertisements regarding the issue on Ghetto Radio and held a public participation meeting on the suit property for residents of Mbaazi Avenue on 3rd June 2022, which was attended by members of the petitioner and MARA; that the issues raised in that meeting were further discussed in public participation meetings held on 20th August 2022 and 3rd September 2022; and that in all, Metricon held adequate public participation and complied with all requirements of the law prior to embarking on the project, as a result of which NEMA and the National Construction Authority issued it with the requisite approvals and licenses.
6. While admitting that on 4th October 2023 the County served upon it an Enforcement Notice, Metricon maintained that the Notice was irregularly issued and that after its architects responded to the County's concerns, the latter gave it the green light to proceed with the project on 23rd October 2023.
7. On its part, the County opposed the petition, contending that the project had 416 units and that prior to commencement, Metricon obtained the requisite change of user and development permission, and met the conditions under which the approvals were issued, including obtaining EIA from NEMA and relevant approvals from the Nairobi Water & Sewerage Company and the Water Resources Authority. The County explained the circumstances under which it had issued the Enforcement Notice and stated that it lifted the same after due investigations and that it has since been monitoring the project to ensure full compliance with all the conditions.
8. As regards zoning, the County confirmed that the zoning policy was under review and that there were already other projects in the area as high as 13 stories, so that the project was not incongruent with the surroundings. In the County's view, the petitioner's grievances were more apparent than real.



9. Also opposing the position was NEMA, which contended that Metricon undertook public participation and availed to it minutes thereof as well as a Traffic Impact Assessment. After satisfying itself that Metricon had complied with all the laws, rules and regulations NEMA issued it with an EIA licence to carry out the project.
10. Angote, J. heard the petition which was prosecuted through affidavit and documentary evidence and submissions, and isolated four issues for determination, namely:
 - i. whether the petition meets the specificity test;
 - ii. whether the petitioner has demonstrated the alleged violations and/or threats of violations of its rights protected under Articles 10, 42, 47 and 69 of *the Constitution*;
 - iii. whether the respondent's proposed project violates the area zoning policy; and
 - iv. what are the appropriate remedies, if any?
11. By the impugned judgment dated 19th September 2024, the ELC found no merit in the petition, dismissed the same, but ordered each party to bear their own costs. On the first issue, the only issue that the court found for Millennium and MARA, the court held that the petition had set out the petitioners' complaint with sufficient particularity.
12. On the second issue, as regards public participation, the court found that there was substantial compliance with the requirements of public participation and that Millennium and MARA were given adequate opportunity to air their views, which were duly considered. As regards the right to a clean and healthy environment, the court held that the petitioners had not demonstrated violation or threat to their enjoyment of that right, or that the measures adopted by the developer would not adequately mitigate their concerns.
13. Regarding the third issue on violation of zoning policy, the ELC found that the suit properties are within Zone 4 in which the types of developments allowed are only 4 storey maximum. The court however, noted that the policy was developed in 2004 and was under review and that the 2004 zoning had been superseded by unforeseen events and failed to take into account the dynamic and evolving nature of urban and environmental planning. The court found that the applicable policy was the Nairobi City County Development Policy, 2021.
14. Ultimately, as earlier indicated, the court dismissed the petition with no orders on costs. Millennium and MARA were aggrieved and have already lodged an appeal in this Court, being Civil Appeal No. E1010 of 2024, Millennium Gardens Management Ltd. & another v. Metricon Home Nairobi Company Ltd & others. In the meantime, they applied in the application now before us, for a conservatory order to stop the project, pending the hearing and determination of the said appeal.
15. In support of the application, and to demonstrate that their appeal is arguable, the two applicants through their learned counsel, Mr. Dudley relied on the affidavit of MARA's chairperson, Mr. Bernard M. Kinara, sworn on 16th January 2025, and their memorandum of appeal, in which they fault the ELC for, among others:
 - i. ignoring the fact that the Zoning Policy was under review and instead relying on the draft Nairobi City County Development Policy, 2021, which was neither pleaded nor addressed by any of the parties;
 - ii. translocating the applicant's estate from Zone 5 restricted to single house dwelling houses to far way Zone 4B where 16 storeys were allowed;



- iii. failing to hold that by planning to build 3 blocks of 16 floor abatements with a total of 512 units on a one-acre plot, Metricon had exceeded the plot ratio of 50;
 - iv. glossing over the significant health and environmental hazards raised by the applicants;
 - v. Holding that the commencement of the project was preceded by adequate public participant ; and
 - vi. failing to properly appreciate and apply the precautionary principle.
16. On whether the appeal risked being rendered nugatory, it was submitted that Metricon was hurrying the project and had reached the third floor; that completion of the buildings would obstruct natural light to the applicants, eliminate greenery, plant life and recreation spaces, thus affecting and undermining living conditions. It was also contended that the project threatened the structural integrity of the applicants' property; was above a natural aquifer; would generate excessive noise pollution; stretch existing infrastructure to the limit and irreversibly harm the environment, thus violating the applicants' right to a clean and healthy environment.
 17. Citing the decision of the Supreme Court in *Peter Gatirau Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, the applicants submitted that they had disclosed sufficient public interest as regards threat to the environment to entitle them to a conservatory order stopping progression of the project until the hearing and determination of the appeal.
 18. Metricon opposed the application vide a replying affidavit sworn by its director, Mr. Yu Tang, on 28th January 2025, submissions and a list of authorities dated 31st January 2025, and supplementary submissions dated 24th March 2025. The substance of the response, as urged by Mr. Chebon, learned counsel, was that the applicants' appeal is not arguable because, as found by the ELC, Metricon had obtained all the requisites statutory permits and approvals. Since the commencement of the project, there were regular inspections visits by the relevant authorities, which confirmed that Metricon was strictly complying with all the conditions. The decisions of this Court in *Nduati & 2 Others v. Malenya & Another* [2024] KECA 182 KLR and *Mavoko Water & Sewerage Co Ltd. v. Edermann Property Ltd & Another* [2024] KECA 918 (KLR) were cited in support of the submission that the applicants' appeal is not arguable.
 19. On whether the appeal would be rendered nugatory, Metricon urged the Court to weigh the competing claims of the parties and the particular circumstances of the application. It was contended that the appeal would not be rendered nugatory because if it succeeded, the Court could order the project to be downscaled or impose environmental restoration orders. It was also contended that the applicants can be adequately compensated by an award of damages.
 20. Counsel also contended that a conservatory order was not warranted because of the applicants' inordinate delay in waiting for four months before lodging the application for conservatory orders and while aware that the construction was on-going. Counsel added that Metricon stood to suffer greater prejudice if conservatory orders were issued. Due to the advanced stage of the construction, it was contended that Metricon would suffer great financial loses which could not be adequately compensated; that Metricon had already entered into binding contracts with purchasers, sub-contractors, service providers, suppliers of materials, and third parties; that halting the project would result in contractual breaches, penalties and interests; and that the applicants had no demonstrable ability to compensate the developer should the appeal fail with conservatory orders in force. In support of the contention Metricon cited the ruling of this Court in *Tatu City Ltd. v. Home Bridge Ltd.* [2025] KECA 66 KLR.



21. Lastly, as regards the appropriateness of issuing conservatory orders, it was contended that the project was creating jobs and was going to provide housing for members of the public and, therefore, it was not in public interest to issue conservatory orders. It was also submitted that the application served only the interests of the applicants rather than the larger public.
22. The County, represented by Ms. Odhiambo, learned counsel, also opposed the application, relying on a replying affidavit sworn by its Chief Officer, Urban Development and Planning, Mr. Patrick Analo Akivaga on 29th January 2024(sic), written submissions dated 29th January 2025 and a list of authorities of even date. The submissions by the County closely mirrored those of Metricon, that it will not serve any useful purpose to rehash them.
23. We have anxiously considered this application. As agreed by all the parties, to entitle the applicants to the orders sought, they must demonstrate that their appeal is arguable, that it will be rendered nugatory if it succeeds after the project has been completed and that it is in public interest to grant the conservatory order. There are a number of principles germane to relief pending appeal, which this Court addressed exhaustively in *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR. Among those principles is that an arguable appeal is not necessarily one which must succeed when the appeal is heard; that an arguable appeal need not raise a multiplicity of issues; that even one bona fide issue that deserves to be fully considered by the Court is sufficient; that whether or not an appeal will be rendered nugatory depends on the particular circumstances of each case; that the overriding concern of the Court is to ensure that a successful appeal is not reduced to a paper or pyrrhic victory; that in the application for relief pending appeal, the Court does not determine the issues in dispute definitively since that is the province of the Court when it hears the appeal; that the applicant must satisfy the Court on both scores, namely that the appeal is arguable and it risks being rendered nugatory; and lastly, that a party who satisfies only one of the two considerations is not entitled to the remedy.
24. Specifically, as regards a conservatory order, we bear in mind that by dint of Article 23(3) of *the Constitution*, a conservatory order is available and may be issued only in proceedings to vindicate rights and fundamental freedoms set out in the Bill of Rights, which is what the applicants are trying to do. We would also agree with the reasoning of the High Court in *Muslims for Human Rights (MUHURI) & 2 Others v. Attorney General & 2 Others* [2011] eKLR, where the purpose of a conservatory order was explained as follows:

“...strictly, a conservatory order is not an injunction as known in civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a conservatory order the court is able to give such directions as it may consider appropriate for the purpose of securing of the provisions of *the Constitution*...”
25. And in *Peter Gatirau Munya v. Dickson Mwenda Kithinji & 2 Others* (supra), the Supreme Court held that:

“Conservatory orders...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.”
26. Bearing the above principles in mind, we note that the applicants contend, among others, that the ELC erred by ignoring the existing zoning policy which is still under review, and by applying the Nairobi City County Development Policy, 2021, which none of the parties had hinged their cases on or had



an opportunity to address. They also cite a number of factors pertaining to the project, which they contend will translate to severe environmental degradation and violation of their right to a clean and healthy environment.

27. In our view, those are not idle complaints. They deserve full ventilation in this Court, granted the centrality of environmental protection and the reality of elevation in our constitutional order of the right to a clean and healthy environment into a constitutional norm. We are satisfied that the appeal is arguable.
28. As regards whether the appeal will be rendered nugatory, we have no doubt in our minds that it will. If the appeal succeeds after the project is completed, the project will stand as nothing but a monument to environmental degradation. It will not be a consolation or of any benefit to Metricon to be ordered to demolish the completed structures.
29. Metricon and the County point out at the progress of the project, and the financial losses that may attend stoppage of the project. While we agree that those are valid concerns, we must balance the same against the applicants' undisputed right of appeal and their right to an opportunity to ventilate their grievance as pertains to the question of environmental protection.
30. In the particular circumstances of this application, the order that best commends itself to us is to issue a limited and time-bound conservatory order to ensure that the pending appeal is fast-tracked and heard and determined as quickly as possible, so that whether the project will continue will be on a firm footing of established and confirmed legality and constitutionality.
31. To that end, we allow the notice of motion dated 16th January 2025 and issue a conservatory order for a period of sixty (60) days from the date of this ruling. The Registrar shall forthwith issue directions on the hearing of Civil Appeal No. E1010 of 2024, Millennium Gardens Management Ltd. & Another v. Metricon Home Nairobi Company Ltd & Others and thereafter list the appeal for hearing on priority basis, bearing in mind the period stipulated above.
32. As regards costs, we direct that costs of this application shall abide the outcome of the appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

