



Ndambiri & another v Nairobi Metropolitan Services & 6 others; Harambee Sacco & Co-operative Society Limited & 6 others (Interested Parties) (Environment & Land Petition E026 of 2022) [2024] KEELC 6205 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E026 OF 2022
OA ANGOTE, J
SEPTEMBER 23, 2024**

BETWEEN

DAVID ALFRED NJERU NDAMBIRI 1ST PETITIONER

TITUS KITONGA 2ND PETITIONER

AND

NAIROBI METROPOLITAN SERVICES 1ST RESPONDENT

LT GEN MOHAMED BADI 2ND RESPONDENT

STEPHEN GATHUITA MWANGI 3RD RESPONDENT

STEPHEN MWADIME 4TH RESPONDENT

RICHARD MUMO 5TH RESPONDENT

FREDRICK OCHANDA 6TH RESPONDENT

THE HON ATTORNEY GENERAL 7TH RESPONDENT

AND

HARAMBEE SACCO & CO-OPERATIVE SOCIETY LIMITED INTERESTED PARTY

SUSTAINABLE DEVELOPMENT SOLUTIONS LIMITED INTERESTED PARTY

ALI IBRAHIM HAMAMED INTERESTED PARTY

AMEEY HOMES LIMITED INTERESTED PARTY

ARCH SALIM KOMORA INTERESTED PARTY

ENG WILSON LEPARTOBIKO INTERESTED PARTY



RULING

1. Before this Court for determination is the 2nd and 3rd Interested Parties/Applicants' Notice of Motion Application dated 19th June, 2023 brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 and Orders 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:
 - i. Spent
 - ii. That the Honourable Court be and is hereby pleased to discharge, vary or set aside the Ruling and Order of 25th May, 2023 including particularly as far as it directed the 1st -7th Respondents, to jointly and severally stop further development on L.R 209/7549 City Park Drive, Parklands by the 1st -5th Interested Parties, their agents and/or servants or any other person.
 - iii. That costs of this Application and the Petition be provided for on a full indemnity basis.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Ali Ibrahim Hamamed, the 3rd Interested Party and the 2nd Interested Party's Director, who deponed that they seek to invoke the Courts' jurisdiction under Rule 25 of *the Constitution* of Kenya, (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 to discharge, vary or set aside the Ruling and Order of the Court made on 25th May, 2023.
3. The 3rd Interested Party deponed that whereas the 2nd Interested Party has high regard for the rule of law, it remains displeased with the Orders aforesaid as they expose it to disproportionate harm; that the subject development is valued at approximately Kshs 600 million as evinced by the approvals from the National Construction Authority(NCA), National Environment Management Authority(NEMA), Nairobi Metropolitan Services(NMS) and the Nairobi City County Government(NCCG).
4. It was deposed by the 3rd Interested Party that they have expended huge financial resources and the development is 70% complete; that they have further entered into numerous commercial contracts most of which are time bound and for which they will incur penalties for delays and disruptions and that the Petitioners' Petition and interlocutory application were characterized by bad faith, patent misrepresentation and gross-mis apprehensions fashioned to mislead the Court into granting the injunctive orders.
5. According to the 3rd Interested Party, the 2nd Interested Party's projects have a deliberate and conscientious focus on sustainable use of various elements of the environment and that prior to commencing the project, the 2nd Interested Party undertook an EIA and drafted a Project Report pursuant to Section 58 of the EMCA as read with Legal Notices No 31 and 32 of 30th April, 2019 and the Environmental (Impact Assessment and Audit) Regulations, 2003.
6. It was further deposed that pursuant to Legal Notice 31 of 30th April, 2019, multi-dwelling developments not exceeding one hundred units are classified as medium risk projects necessitating an EIA Project Report and that NEMA, being satisfied with the evaluation that evinced that the developer had proposed adequate mitigating measures, issued an EIA License No NEMA/EIA/*PSL/9860* dated 23rd November, 2020.
7. It was his deposition that equally, pursuant to Section 58 of PLUPA, the 2nd Interested Party applied for and received approval for the development vide a construction permit issued by the NMS dated the 25th



September, 2020; that minded of the need to ensure proper waste management, they obtained approval to construct a privately developed sewer line from the Nairobi City Water and Sewerage Company as confirmed by the approval letter dated 8th June, 2021 and that it is apparent from the foregoing that the 2nd Interested Party obtained the requisite approvals.

8. According to the deponent, with respect to the allegations of supposed potential negative impacts, in particular high vehicular and human traffic, the same, as well as other issues, were addressed in the EIA Project Report dated 23rd December, 2020 and NEMA found that adequate mitigating measures had been proposed.
9. Mr Ali urged that it is untrue that the 2nd Interested Party demolished 50 plus houses on the suit property and the photographic evidence affirms that a single four bedroomed mansion was the only structure existing structure prior to demolition; that additionally, the demolition was undertaken with the approval of the 1st Respondent who issued the 2nd Interested Party with a development approval which includes authorization for demolition; that the NCCG also issued them with a demolition permit on 10th September, 2020 and that the NCA did not, as alleged, stop the project, but rather, vide a letter dated the 17th December, 2021, they authorized the 2nd Interested Party to continue with the project.
10. The 3rd Interested Party further deponed that the claims of non-involvement in the lead up to the issuance of the licensing project are unwarranted as the NEMA EIA Lead expert had engaged all project affected persons as evinced from the project report; that the Petitioners' claim on ownership of the subject property are outlandish and designed to mislead the Court and that it is the interest of justice that the Court invokes its discretion under Rule 25, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules, 2013 to discharge the conservatory orders herein.
11. The 3rd Interested Party urged that the lower risk of injustice and balance of convenience tilt in favour of the 2nd Interested Party and the grant of the reliefs sought herein and that not only is there demonstrable compliance with the law, but the Petitioners have approached the Court with unclean hands.
12. The Petitioners responded vide Grounds of Opposition as well as a Replying Affidavit. Vide the Grounds of Opposition dated 27th June, 2023, they averred that:
 - i. The Applicants review application dated 19th June 2023 is not based on the discovery of any new or important matter or evidence which affects the ruling delivered on 25th May 2023.
 - ii. The Applicants review application dated 19th June 2023 is not based on account of some mistake or error apparent on the face of the record.
 - iii. The Applicants review application dated 19th June 2023 is not based on any other sufficient reason that was not available to the Applicant at the hearing and submissions leading to the ruling to which the review is sought.
 - iv. All the facts raised in the grounds in support of the Application and the supporting affidavit to the review application were all articulated by the Applicants in their affidavits and submissions leading to the ruling to which the review is sought and the same were considered by this Honorable Court.
 - v. The Application has been made after unreasonable and unexplained delay and the same is an afterthought and reaction to the contempt proceedings initiated by the Petitioners against the



Interested Parties and in particular the 2nd Interested Party who is the developer disrespecting and defying this Court's orders.

- vi. The Application and its grounds therein do not meet the legal scope of review applications as enshrined under S80 of the CPA and O45 Rule 1 of the CPR and as developed by the Courts.
 - vii. The Applicant has no authority, and has no audience to file and argue the Application dated 19th June 2023 until and unless he has purged the contempt in respect to the orders given on 25th May 2023.
 - viii. The 2nd Applicant had not, just like the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents and also the 1st, 3rd, 4th, 5th, 6th and 7th Interested Parties responded to, or opposed the Petitioner's Notice of Motion Application dated 14th June 2023.
 - ix. The Application was filed after the Applicant was served with the contempt of court application by the Petitioners and is an obvious knee-jerk reaction to the said Petitioners' application.
 - x. The Application as filed is intended to, and is aiding and abetting further disobedience, disregard and disrespect of the Honourable Courts Orders given on 25th May 2023.
 - xi. The Applicants in the application have been, and continue to be in contempt of the court orders given on 25th May 2023 by inter alia, continuing with development and construction activities on L.R. No 209/7549- Taza Lane off City Park Drive jointly and/or severally with the 1st, 3rd, 4th, 5th, 6th, 7th Interested Parties and other persons.
 - xii. The Application is defective and irregular and is based and founded on erroneous provisions of law.
 - xiii. The grounds upon which the Application is based and also the facts alleged in the Supporting Affidavit do not support the prayer for discharge, vary or set aside the ruling and orders made on 25th May 2023.
 - xiv. The Applicant company as described in the Application is not the lawful owner of the property known as L.R. No. 209/7549 (the subject property in the Petition).
 - xv. The Application is scandalous, vexatious and an abuse of the court process.
 - xvi. The Application has no merit and ought to be dismissed.
13. Vide the Replying Affidavit sworn on 3rd July, 2023, the 1st Petitioner on his own behalf and on behalf of his co-Petitioner deposed that the Motion is incurably defective, null and void having been brought under the provisions of the Civil Procedure Rules yet the Ruling and order sought to be reviewed was based on the provisions of *the Constitution* of Kenya(Protection of Rights and Fundamental Freedoms)practice and procedure rules, 2013 and that the Motion discloses no reasonable cause of action, is frivolous and is intended to delay the fair trial of the Petition and the Petitioners' Motion of 14th June, 2023.
14. The 1st Petitioner deposed that the Motion is not based on discovery of any new or important evidence nor on account of some mistake or error apparent on the face of the record or any sufficient reason not available to the 2nd and 3rd Interested Parties at the hearing and submissions of the Petitioners' Motion dated 22nd June, 2022 and that the grounds alluded to in support of the Motion are issues that were canvassed before the Court in the Motion of 22nd June, 2022 and duly considered.



15. According to the Petitioners, the Motion has been made after unreasonable and un-explained delay; that not being a Director of the 2nd Interested Party, Mr Hamamed has no capacity to swear this Affidavit on its behalf; that he has further not annexed any resolutions of a meeting of the Directors authorizing him to swear the Affidavit aforesaid; that whereas the deponents assert that the company Sustainable Development Solutions Limited changed its name to Property Sustainability and Services Limited, the records from the Registrar of companies shows that Sustainable Developments Solutions Limited is duly registered under the Company Act and that similarly the 2nd Interested Party is not the owner of the suit property.
16. It is the Petitioners' position that the 3rd Interested Party, jointly with the other Interested Parties continually disregard the orders of this Court and are currently disobeying the orders of the Court in CMCC 146 of 2022-Sustainable Development Solutions Limited vs Nairobi Metropolitan Services and 2 Others where status quo orders were issued and that the impugned development has never been approved by either the NCA, NEMA nor the NCCG.
17. In particular, the 1st Petitioner urged that the NCA permit of 18th March, 2021 was issued to a company that had applied for it using another company's name; that the aforesaid permit was issued when several suspension orders were in existence and NCA knew or ought to have known that there was non-compliance with the suspension orders and that the permit was in breach of the NCA rules and regulations in that the engineer who had been named and touted as the Project Engineer had long withdrawn from the project and the project architect disowned the same.
18. It was his assertion that the EIA License was issued to a company that used another's name and the 2nd Interested Party has never applied for the same and that NMS and NCG disowned the authority purportedly granted by them rendering the development to be in breach of Section 57 of PLUPA.
19. Mr Ndambiri contended that no evidence was adduced showing that the facts presented to Court in the Motion of 22nd June, 2022 were misrepresented, mischaracterized or falsified; that despite the Court's direction that they file responses to the Motion, they opted to file a Notice of Preliminary Objection; that the claim that 50 plus houses were demolished is a typo in the ruling, the true position being that there were 3 four bedroom maisonettes and servants quarters together with 50plus year old trees and fauna which were demolished.
20. It was his averment that as advised by Counsel, the orders granted on the 25th May, 2023 are conservatory orders which cannot be set aside under the provisions of Rule 25 of *the Constitution* of Kenya (Protection of Right and fundamental Freedoms) Practice and Procedure Rules, 2013 and that there is no evidence that the 2nd and 3rd Interested Parties have complied with *the Constitution* and the PLUPA or that they have approached the Court with unclean hands.
21. The Respondents and the other Interested Parties did not participate in the Motion.

Submissions

22. The 2nd and 3rd Interested Parties filed submissions in support of their Motion on 21st July, 2023. Counsel submitted that pursuant to *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 this Court retains jurisdiction and discretion to discharge, vary or set-aside the said conservatory orders on application by any party dissatisfied therewith.
23. According to Counsel, as expressed by the Court in Kenya Electricity Transmission Company Limited vs Kibotu Limited [2019] eKLR, non-disclosure of material facts and misrepresentation of facts



is a grave issue that could warrant a court to set aside or vary interlocutory orders and that the Petitioners are guilty of perjury, having deliberately presented false facts to the Court whose intent was to intentionally disadvantage them.

24. It was submitted that the orders of 25th of May, 2023 have exposed the 2nd Interested party to disproportionate harm, loss and prejudice – with the risk of rendering the project unviable and 2nd Interested Party insolvent, and out of business and that should the Petition be decided in their favour, the harm caused to the 2nd -5th Interested Parties will be irreparable.
25. Counsel urged that the Petitioners are seeking vide the present suit to re-prosecute a matter which has already been decided before the National Environment Tribunal in NET Appeal No. 24 of 2021 and that as stated by the Court in Republic vs National Environment Tribunal; National Environment Management Authority & 4 Others ex-parte Erdemann Properties Limited ELC Machakos JR 75 of 2019, the finality principle precludes a party from re-litigating an issue previously raised and decided on the merits in an earlier action between the same parties. Reliance in this regard was also placed on the case of Pop-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich [1990] eKLR.
26. Counsel urged that the 2nd and 3rd Interested Parties have placed before the Court sufficient materials setting out sufficient and compelling reasons for the Court to consider and review its orders/directions; that the application for review has the effect of not only reopening the case but disposing off the whole Petition and that no prejudice will be suffered by the Petitioners should the Motion be granted.
27. The Petitioners filed submissions on the 28th November, 2023. Counsel submitted that Order 45 Rule 1 of the Civil Procedure Rules deals with the review of decrees and orders as opposed to discharge, variation and setting aside of judgements, decrees, rulings and orders.
28. Counsel posited that as stated by the Court in Evans Bwire vs Andrew Nginda, [2000] LLR 8340, a Motion for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh and that in the circumstances, the material produced by the Applicants and on which they seek to have the Courts decision reviewed were pleaded and produced at the hearing of the Motion of 22nd June, 2022 and are the subject of the Petition wherein the Petitioners question their authenticity.
29. It was submitted that the Court nonetheless fully interrogated the documents and made a conscious decision on the matters in controversy and that there is no evidence to show that the documents aforesaid are different from those filed in the Petition and/or documents by the Petitioners as evidence were and are misrepresented, mischaracterized and falsified for ulterior purposes.
30. It was urged that if the 2nd and 3rd Interested Parties were of the opinion that the Judge reached a wrong conclusion of law on the basis of the evidence adduced by the Petitioners, the same would have been a good ground of appeal not a review. Reliance was placed on the case of Hosea Nyandika Mosagwe & 2 Others vs County Government of Nyamira [2022] eKLR.
31. According to Counsel although Rule 25 of *the Constitution* of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rules 2013 provides for setting aside, varying or discharging of orders, the discharge, variation or setting aside is pursuant to Rule 4 of the Rules; that interim orders are remedies provided for under *the Constitution* meant to keep the subject matter in situ and that as posited by Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR, conservatory orders are meant to facilitate orderly functioning within public agencies as well as to uphold the adjudicatory authority of the Court.



32. It was deponed that in the case of Bloggers Association of Kenya vs Attorney General & 5 Others[2018]eKLR and Marion Njeri Njoroge vs James Karanja Nyoro & Another[2019]eKLR, the Courts held that the Courts powers under Rule 25 must be exercised to correct an error or oversight to effect a review of the proposed order and that in the circumstances, allowing the application cannot be in the best interests of administration of justice.

Analysis and Determination

33. Having considered the Motion, responses and submissions, the issues that arise for determination are:
- i. Whether the present Motion is competent?
 - ii. Whether the Court should vary, discharge or set aside its orders of 25th May, 2023?
34. At the onset, the Petitioners contend that the present Motion is fatally defective. It is their claim in this regard that the application is largely founded on the provisions of the Civil Procedure Rules whereas the Ruling and Order sought to be reviewed was based on the provisions of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The 2nd and 3rd Interested Parties did not respond to this assertion.
35. Further, it was argued that the 3rd Interested Party, not being a Director of the 2nd Interested Party has no authority to sign the Affidavit on its behalf.
36. Looking at its heading, the present Motion is indicated to have been brought inter-alia pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules which lays out the Courts scope and jurisdiction of review.
37. The foregoing notwithstanding, the 2nd and 3rd Interested Parties seek vide the Motion to “discharge, vary or set aside” the Ruling of the Court delivered on 25th May, 2023. In the body of the Motion and the Affidavit in support thereto, the 2nd and 3rd Interested Parties are categorical that they seek to “invoke this Court’s jurisdiction under Rule 25, *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (‘the Mutunga Rules’). The aforesaid Rule indeed grants this Court the jurisdiction to discharge, vary or set aside orders issued pursuant to Rule 23.
38. It is apparent that the 2nd and 3rd Interested Parties seek to rely on both Rule 25 of the ‘Mutunga Rules’ and Order 45 Rule 1 of the Civil Procedure Rules. Does this render the Motion fatal?
39. It is undisputed that the present suit is a constitutional Petition. This Court is therefore sitting as a constitutional Court. The Motion, the subject of the impugned Ruling, was brought pursuant to inter-alia, Rule 4 of the *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter Mutunga Rules) which provides thus:
1. Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules”
40. Rule 23 thereof provides:
1. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”



41. Rule 25, under the head setting aside, varying or discharge provides:

“An order issued under rule 22[sic]23 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.”

42. Considering the foregoing, it is apparent that the ‘Mutunga Rules’, under Rule 25, makes provision for the discharge, vary and setting aside of conservatory and/or interim orders. It is however not specific on the manner in which such orders may be set aside and reviewed.

43. The Courts have been categorical that whereas the Civil Procedure Rules ordinarily do not apply to constitutional matters, where there is a lacuna, regard may be had to the Civil Procedure Rules. The Supreme Court in *Deynes Mureithi & 4 Others vs Law Society of Kenya & Another* [2016] eKLR placed reliance on the exposition by the High Court in *Peter Ochara Anam & 3 Others vs CDF Board & 4 Others*, *Constitution Petition No. 3 of 2010* [2011] eKLR, where the Judge had noted as follows:

“In as much as the constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence, for instance should not apply, be ignored nor witnesses should not be sworn, pleadings should not be signed and questions in cross examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agreed or subrule to the subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in a vacuum.(emphasis by the Supreme Court).”

44. More recently, the Court of Appeal in the case of *Karl Wehner Claasen vs Commissioner of Lands & 4 others* [2019] eKLR, stated as follows:

“[I]n the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.”

45. Ultimately, the 2nd and 3rd Interested Parties reliance on the provisions of the Civil Procedure Rules was not erroneous. In any event, even if the Court was convinced otherwise, it would not be sufficient to warrant a preliminary dismissal of the Motion. As persuasively stated by the Court in *Abdisalam Hassan Ismail & 2 Others vs Kenya Railways Corporation & 3 Others* [2015] eKLR:

“I reject the Petitioner’s submission that the application is incompetent for having been brought under the provisions of the *Civil procedure Act*. I hold the view, that technicalities of procedure should not be entertained in matters of enforcement of constitutional rights. I put reliance to the case of *Vallerie Namtilu Wafula & Another V Kenya National Union Of Teachers (knut) & 2 Others* [2012] eKLR where it was held as follows:

“It is the second respondent’s contention that in petitions of this nature the civil procedure Rules have no place and therefore any application expressed to be brought under the latter is incompetent. First and foremost, it must be noted that under Article 22(3), the Chief Justice is enjoined to make rules inter alia providing for the court proceedings which shall satisfy the



criteria that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Although the said Rules are yet to be promulgated (the rules have since been promulgated hereinbefore referred to as Mutunga Rules), the spirit of the foregoing provision as read together with the provisions of Article 159(2) (d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of Rights, should not be entertained. Even prior to the promulgation of the current Constitution the relevance of the Civil Procedure Rules was considered in should put the second Respondent's position on the applicability of Civil Procedure Rules to Constitutional Petitions to rest."

46. Similarly, the apex Court in *Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscione* [2013] eKLR, while affirming that a Court has to be moved under the correct provisions of the law, was clear that a failure to do so is not fatal. The learned Justices held as follows:

"The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of *the Constitution*, as stipulated in Article 259 of *the Constitution*. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant's cause."

47. The Petitioners have questioned the 3rd Interested Party's locus in swearing the Affidavit on behalf of the 2nd Interested Party as named, not being its Director. The 3rd Interested Party in his Affidavit indicated that while initially incorporated as Sustainable Development Solutions Limited, the 2nd Interested Party changed its name to Property Sustainability and Services Solution Limited.
48. It is not disputed that the 3rd Interested Party is a Director of Property Sustainability and Services Solution Limited. The 3rd Interested Party asserts, and which information is admitted through the Petitioners' own evidence, that there was indeed a change of name of the company from Sustainable Development Solutions Limited to Property Sustainability and Services Solution Limited.
49. However, the Court notes that there are serious contentions as to the directorship of Sustainable Development Solutions Limited vis Property Sustainability and Services Solutions Limited considering the fact that despite the change of name, the two companies continue to co-exist. This contention also touches on the ownership of the suit property. Indeed, the Court notes that the Petitioners had sought to cross-examine the 3rd Interested Party on this very issue but ultimately did not do so.
50. What the Court is now faced with is an application for discharge of the conservatory orders issued. In contending that the mover of the Motion does not have the requisite locus, the Applicant is asking the Court to make a determination of the company ownership and by extension ownership of the suit property at this stage.
51. As these are contentious issues which have been raised in the substantive Petition, the Court will defer its determination thereof to the main Petition. To do otherwise at this stage will be tantamount to making a substantive determination of the Amended Petition at the application stage.
52. As regards the contention that the 3rd Interested Party should not have audience on account of being in contempt of Court Orders, the issue is now moot contempt proceedings having been fully concluded.



53. This Courts' jurisdiction to vary or set aside its orders issued under Rule 23 of the 'Mutunga Rules' is found in Rule 25 thereof which provides as follows:

“Setting aside, varying or discharge an order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on Application by a party dissatisfied with the order.”

54. As aforesaid, the 'Mutunga Rules' do not specifically provide for the form in which a conservatory order may be set aside or reviewed and recourse will be had to the [Civil Procedure Act](#) and Rules.

55. The Court finds further support in this regard in Rule 3(8) of the same rules which provide as follows:

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

56. The jurisdiction of the Court to review its own orders is found in Section 80 of the [Civil Procedure Act](#), and Order 45, Rule 1(1) of the Civil Procedure Rules, 2010. Section 80 of the Act provides as follows:

“80. Any person who considers himself aggrieved-

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

57. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

“Rule 1 (1)Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

58. The legal position in respect of applications for review was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR, which observed that;

“In the High court, both the [Civil Procedure Act](#) in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new



and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”

59. A reading of the above provisions makes it is clear that while Section 80 of the *Civil Procedure Act* grants the Court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
60. By way of brief background, the Petitioners instituted the present Petition seeking to impugn the development on L.R 209/7549(now Nairobi/Block/37/11) by asserting that the developer, inter-alia, did not get the requisite approvals, and that the development violated a host of their constitutional rights. Simultaneously with the Petition, they filed a Motion seeking temporary injunctive orders compelling the 1st -7th Respondents to stop any further development on the suit property by the 1st -5th Interested Parties.
61. The Motion was canvassed by the parties and the Court rendered its determination on 25th May, 2023 in which it granted the temporary injunctive orders sought.
62. Before delving into the merits of the current application, the Court will first consider whether the same has been brought without unreasonable delay, this being a crucial aspect pursuant to Order 45 rule 1 of the Civil Procedure Rules. This position was buttressed by the Court of Appeal in the case of Francis Origo & another vs Jacob Kumali Mungala [2005] eKLR when it held thus:
- “...most importantly, the applicant must make the application for review without unreasonable delay.”
63. It is trite that what constitutes delay is a matter of fact and where un-explained, even a day may constitute unreasonable delay. The Ruling in question was delivered on 25th May, 2023 whereas the instant Motion was filed on 19th June, 2023. This constitutes a period of about 25 days. No explanation has been rendered for this delay and the Court considers it unreasonable. The Court will nonetheless delve into the merits of the Motion for purposes of completion.
64. Having keenly considered the Motion, it is apparent that the same is predicated on the grounds of sufficient reason. The scope of the ground “for any other sufficient reason” has been subject to different interpretations by the Courts. There are two schools of thought, first being that the “sufficient reason” alluded to must be analogous to the grounds pertaining to discovery of new evidence or error on the face of the record and second, that the “sufficient reason” need not be analogous to the previous grounds.
65. The position that the sufficient reason ought to be analogous to the grounds of discovery of new and important evidence and error apparent on the face of the record was embraced by the Court in *Nasibwa Wakenya Moses vs University of Nairobi & Another* [2019] eKLR, where Mativo J (as he was then) observed as follows:

“An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar Mohamed vs Charan Singh and Another* [13] where the court held that: -

“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”



Mulla in the Code of Civil Procedure [14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment. Perhaps it is worth citing *Evan Bwire vs Andrew Nginda* [15] where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.'

66. Similarly, the Court of Appeal in the case of *Assets Recovery Agency vs Charity Wangui Gethi & 3 others* [2020] eKLR stated that:

“The ground “other sufficient reason” has been held to be consonant with the first two grounds: See *Kuria v Shah* [1990] KLR 316.”

67. Taking a contrary position, the Court of Appeal in *Official Receiver and Liquidator vs Freight Forwarders Kenya Ltd* [2005] eKLR held, inter alia, that:

“With respect, the learned Judge erred in his conclusion that “for any (sic) sufficient reason” had to be e*jusdem generis* with the first two grounds set out in Order 44 r. 1(1) or analogous to them. This Court in the well-known case of *Wangechi Kimita v Wakibiru* (1982-88) 1KAR 978, which was determined in 1985, and which was binding on the learned Judge, espoused the contrary view of the law. Nyarangi JA. in his judgment in this case, had this to say on the issue:

“I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly s 80 of the *Civil Procedure Act* confers an unfettered right to apply for a review and so the words ‘for any other sufficient reason’ need not be analogous with the other grounds specified in the Order: See *Sadar Mohamed v Charan Singh* [1959] EA 793.”.

In his concurring judgment, Hancox JA. as he then was, made the following observation:

“I would add that I also agree with the reasoning of Nyarangi JA that the third head under Order 44 r. 1(1), enabling a party to apply for review, namely ‘or for any other sufficient reason’ is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to be analogous.”.

Kneller JA's brief concurring judgment was as follows:

“Nyarangi JA's judgment embraces the essential facts and the relevant law to be applied to them in this appeal, and, with respect, I am in agreement with the conclusions he has reached.”

68. Similarly, the Court of Appeal in *Pancras T. Swai vs Kenya Breweries Limited* [2014] eKLR stated as follows:

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds



specified in the order. In *Sarder Mohamed v. Charan Singh Nand Singh and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)* this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & Another vs Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

69. The Court adopts the position that “any sufficient reason” must not be analogous to the grounds of discovery of new evidence and/or error apparent on the face of the record.
70. As to what constitutes sufficient cause, the Court will be guided by the exposition of the Supreme Court of India in the case of Civil Appeal 1467 of 2011 *Parimal vs Veena Bharti* (2011) which stated:

“Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man...”
71. According to the 2nd and 3rd Interested Parties, the Petitioners’ interlocutory application was characterized by bad faith, patent misrepresentation and gross-mis apprehensions fashioned to mislead the Court into granting the injunctive orders.
72. It is the 3rd Interested Party’s deposition that the 2nd Interested Party applied for and received all the requisite approvals and licenses; that in having been so granted, the relevant authorities were satisfied that the necessary environmental safeguards were in place and that further, public participation was duly undertaken.
73. He stated that it is untrue that 50 plus houses were unlawfully demolished from the property, the true position being that there was a single four bedroomed mansion and a demolition permit had been granted in that respect.
74. In response, the Petitioners assert that the issues raised herein were duly canvassed before the Court and a determination was made on the same and that consequently, they do not constitute sufficient cause in the circumstances.
75. Vide the Motion of 22nd June, 2022, the Petitioners sought temporary injunctive orders seeking to have the 1st -5th Interested Parties restrained from carrying out further development on the property. It was their case that the development on the impugned property began with demolition of buildings and cutting down of trees without approval, and that the property has no existing sewer line and the activities are deleterious to the environment.



76. Further it was the Petitioners' case that there were various Court orders and administrative decisions stopping development on the subject property and that waste was flowing from the suit property into the storm water drainage flowing to Mathare River.
77. In response to the Motion, the 2nd and 3rd Interested Parties filed a Notice of Preliminary Objection. It was their contention vide the Objection that the Motion violated the principle of particularity as set out in *Anarita Karimi Njeru vs Republic* [1979] eKLR and that there was a pending dispute before the National Environment Tribunal and the objections by the Petitioners were ultimately found to be unmerited by the Tribunal.
78. The Court notes that apart from the Preliminary Objection, the 2nd and 3rd Interested Parties did not file a substantive response to the Motion. This being so, the factual averments the by Petitioners remained uncontroverted. As stated by the Court of Appeal in Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') vs Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020)* [2022] KECA 1240 (KLR) albeit discussing the import of responding to a Motion vide a Grounds of Opposition stated as follows:

“What then is the import of filing Grounds of Opposition in response to an application filed in the Court of Appeal? A “ground” is in this regard defined in Black’s Law Dictionary, Ninth Edition at page 772 as “the reason or point that something, (as a legal claim or argument), relies on for validity”. An Affidavit on the other hand is defined at page 66 as “a voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths”. Therefore, any facts sought to be introduced in an application before this Court can only be done by way of an Affidavit, and cannot be by way of Grounds of Opposition...”

79. In the case of *Faustina Njeru Njoka vs Kimunye Tea Factory Limited* [2022]eKLR, the Court persuasively stated thus:

“A preliminary objection and grounds of opposition though means of opposing an application they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.”

80. The 2nd and 3rd Interested Parties now claim that the facts as set out in the Motion aforesaid were false and misrepresented. In so doing, they seek to have a second bit at the cherry and re-litigate the Motion. This is not unacceptable.
81. On the other hand, if the Interested Parties herein opine that the Court made an erroneous determination on the basis of the facts before them. The remedy open to them would be an appeal. As expressed by Bennet J in “*Abasi Balinda vs Fredrick Kangwamu and Another* [1963] 1 EA 557 (HCU)” cited in *Abdalla & 6 Others vs Khansa Developers Limited & 3 Others (Constitutional Petition 16 of 2022)* [2024] KEELC 3667 (KLR) (30 April 2024) (Ruling):

“a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal.”



82. The Court duly considered the Motion before it taking into account the parties' contentions and was satisfied that a prima facie case had been made. The Court further took into account the precautionary principle, a guiding principle for the Court as set out in Section 8 of the *Environment and Land Court Act* in granting the temporary injunctive orders.
83. Ultimately, the Court is not satisfied that sufficient cause has been established warranting the discharge or variation of its orders of 25th May, 2023.
84. For those reasons, the Court finds the 2nd and 3rd Interested Parties' Motion dated June 19, 2023 to be unmeritorious and proceeds to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF SEPTEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wageni for Petitioners

Mr. Bashir for 2nd, 3rd, 4th and 5th Interested Party

Mr. Bashir for Njenga for 6th and 7th Interested Party

Ms Gichuhi for 1st Interested Party

Mr. Beki for 1st, 3rd, 4th, 5th and 6th Respondent

