



REPUBLIC OF KENYA



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**Bhatt & 22 others v Alina Valley Co Limited & 7 others (Environment and Planning
Petition E024 of 2024) [2025] KEELC 627 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E024 OF 2024
AA OMOLLO, J
FEBRUARY 13, 2025**

**BETWEEN
JAGDISH CHANDRA J BHATT & 22 OTHERS & 22 OTHERS PETITIONER
AND
ALINA VALLEY CO LIMITED & 7 OTHERS & 7 OTHERS RESPONDENT**

RULING

1. The Petitioners filed notice of motion dated 28th November 2024 Under Articles 23(3)(c) of [The Constitution](#) of Kenya; Rules 3, 19 and 23 of [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 seeking for the following orders;
 - i. Spent.
 - ii. The Petitioners/Applicants be and are hereby granted reasonable time being not less than twenty one (21) days to review and ascertain through experts and make representations if necessary on the sufficiency or otherwise of the 1st Respondent’s “Structural & Civil Engineering Report” dated 18th November 2024 before the 1st Respondent is allowed to resume excavation and/or drilling works on Plot L. R. No. 209/9351, Kilimani, Nairobi County, situated along Likoni Lane off Dennis Pritt Road;
 - iii. The Honourable Court do and hereby appoints an independent expert to review the 1st Respondent’s Structural & Civil Engineering Report dated 18th November 2024 before the 1st Respondent is allowed to resume excavation and/or drilling works on Plot L. R. No. 209/9351, Kilimani, Nairobi County, situated along Likoni Lane off Dennis Pritt Road;
 - iv. Pending the hearing and determination of this Application and prayers (ii) and (iii) above an order be and is hereby issued barring the 1st Respondent from resuming excavation and/or drilling works on Plot L. R. No. 209/9351, Kilimani, Nairobi County, situated along Likoni Lane off Dennis Pritt Road;



- v. Any other reasonable and/or practicable orders as may be necessary to meet the ends of justice;
 - vi. Costs of this application be in the cause.
2. The motion is premised on the supporting affidavit and further affidavit both sworn by Jagdish Chandra J. Bhatt on 28th November and 18th December 2024 respectively and the grounds listed on the face of the motion. These include;
 - a. Their Petition impugns and challenges in its entirety the 1st Respondent's intended construction on Plot L. R. No. 209/9351, Kilimani, Nairobi County, situated along Likoni Lane off Dennis Pritt Road, through the Petition dated 26th June 2024
 - b. That the Court has not made or given directions confirming either its receipt, acceptance and/ or adoption of the 1st Respondent's Report as is legitimately expected.
 - c. From the photographic evidence annexed above, it is manifestly evident that the 1st Respondent is excavating right at the boundary of the subject Plot and River View Apartments i.e. beacon to beacon, in extremely close proximity to the River View Apartments.
 - d. They commissioned an engineer to review the 1st Respondent's Report which has identified extremely vital shortcomings, among others, failure to outline safeguards for adjacent properties contradicts international and local engineering best practices for excavation works.
 3. The Applicants stated that the residents in adjacent properties, including Kwifra Estate and River View Estate, report experiencing tremors caused by excavation activities, raising serious concerns over structural stability. That the 1st Respondent has also been conducting construction outside permitted hours, violating licensing conditions, with records showing construction commencing before 0800hrs and continuing beyond approved hours, exacerbating noise pollution and safety concerns.
 4. The Petitioners argue that these violations, along with the deficiencies in the 1st Respondent's Report, undermine the court's order of 13th November 2024. They emphasize that their concerns are valid and not an attempt to review the ruling but rather to enforce compliance. They seek an immediate court order to halt excavation and drilling until proper protective measures, including setbacks, are implemented to safeguard adjacent properties.
 5. In opposing the application, the 1st Respondent filed an affidavit sworn by Lucas Yu on 7th December 2024. He asserted that the application is an attempt to re-litigate issues already determined by this Court in its ruling of 13th November 2024. He deposes that the Petitioners' claim that the expert report should be reviewed before construction continues is deemed as an attempt to reinterpret the ruling.
 6. The 1st Respondent avers to have already filed a comprehensive expert report on the measures for setbacks to prevent impact on adjacent plots and the report was accessible to all parties, complies with legal and regulatory standards. That the court did not mandate service of the report to the Petitioners, and they cannot feign ignorance of its existence.
 7. He highlights that halting construction would lead to irreparable financial losses, structural risks, and increased costs due to exposure, deterioration, and workforce demobilization. The Petitioners have not provided evidence to challenge the expert report or demonstrate prejudice if construction proceeds. Instead, their actions seek to delay proceedings, contrary to the principles of expeditious resolution in constitutional petitions.



8. He asserts that reopening these issues would upset the balance struck in the 13th November 2024 ruling, which conditionally allowed construction to proceed. He urges the Honourable Court to dismiss the application to prevent unnecessary delays and ensure the enforcement of its prior ruling.
9. The 3rd, 4th, 6th and 7th Respondents filed replying affidavits sworn on 24th December 2024 by Patrick Analo Akivanga, the Chief Officer Development and Planning of the 3rd Respondent opposing the application. He posits that in abiding by the court's ruling, the 1st Respondent filed an expert report dated 18th November 2024 on measures for setbacks put in place while excavating /drilling the foundations for the construction project.
10. Mr. Analo deposed that the Petitioners' application is defective because it is a disguised effort to appeal/ challenge or review/reinterpret this court's previous orders, which contradicts the principle of finality in judicial decisions. Further, that the Applicants already filed an appeal against this court's ruling before the Court of Appeal in civ case No. E664 of 2024 and cannot simultaneously seek a review of the same orders in this court.
11. The Respondents contended that the motion seeks to have this Court assume an oversight role in the construction activities of the project and accepting such an invitation would be beyond its constitutional mandate and would infringe on the separation of powers principle. That the oversight and regulation of construction activities in Nairobi City County fall under the jurisdiction of the County Government, National Environmental Management Authority (NEMA), and National Construction Authority (NCA).
12. The Respondents argued that the Petitioners have deliberately bypassed these regulatory bodies, which are legally mandated to handle such matters under Article 185 and the Fourth Schedule of *the Constitution*, thus the Court lacks the jurisdiction and technical expertise to oversee the construction process, even with the assistance of an independent expert.
13. Further, they aver that the Applicants' attempt to bypass the statutory bodies and seek relief from this Court is procedurally improper and contrary to the principles of devolution and orderly urban governance. Therefore, the application should be dismissed for lack of jurisdiction and procedural impropriety.
14. Further, they depose that the Petitioners' photograph attached as Exhibit JCB-I is inadmissible as it lacks the electronic certificate required under Section 106B (4) of the *Evidence Act*. That the 3rd Respondent's committee of experts and the Physical Planning Department have reviewed the 1st Respondent's "Structural & Civil Engineering Report" and confirmed that the setback measures comply with relevant laws and best practices.
15. The 8th Respondent filed grounds of opposition dated 17th January 2025 stating that the application is an abuse of the Court process and offends Sections 7 and 99 of the *Civil Procedure Act*. They stated that the Applicant seeks to challenge the correctness of the Court's orders issued on 13th November 2024. That it is res judicata in that the Court already dealt with the issue in the Notice of Motion dated 26th June 2024. They also mention the filing of appeal by the Petitioners to the Court of Appeal against the Court's orders issued on 13th November 2024 under Court of Appeal No. E664 of 2024.

Submissions

16. The Petitioners filed submissions dated 10th February 2025; the 1st Respondent filed submissions dated 23rd January 2025; the 3rd to 7th Respondents filed theirs dated 4th February 2025; and the 8th Respondent filed submissions dated 6th February 2025.



17. The Petitioners submitted that the 1st Respondent's "Structural & Civil Engineering Report" failed to comply with the Court's Order of 13th November 2024, which required measures put in place to prevent excavation and drilling from negatively impacting adjacent plots. They argued that the report is superficial and does not provide substantive measures for setbacks. That their commissioned Review Report highlights critical deficiencies, including a lack of specific setback distances, failure to comply with relevant planning laws, and absence of protective structures such as retaining walls.
18. Additionally, no monitoring mechanisms for structural stability, like vibration limits or inclinometers, have been included and the Petitioners assert that the 1st Respondent has continued excavation without addressing these concerns, demonstrating a clear disregard for the Court's directive. It is their submission that the Respondents have focused on procedural formalities rather than substantive compliance. That the 2nd to 8th Respondents, who are public officials or agencies, have dismissed the Petitioners' Review Report and ignored the clear deficiencies in the 1st Respondent's submission.
19. The Petitioners also point out that some public officials appear to have an undue interest in the matter, raising concerns about conflicts of interest and a potential cover-up of non-compliance. Regarding the issue of res judicata, the Petitioners argue that the Respondents' claim is a distraction from the core issue of non-compliance with the Court Order.
20. They cited Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), while citing its decision in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) defining res judicata and emphasize that the current application concerns the enforcement of the Court's Order rather than re-litigating previous matters.
21. The 1st Respondent in opposition submitted that the application is a veiled attempt to relitigate issues already determined by the Court in its Ruling of 13th November 2024 as affirmed by 3rd to 7th Respondents and the 8th Respondent in their submissions. That it fully complied with the Court's directive by presenting a detailed expert report on setback measures before commencing excavation.
22. On whether this court is functus officio in so far as the application seeks the grant of conservatory orders, the 1st, 3rd to 8th Respondents submitted that doctrine of functus officio precludes a court from revisiting or altering a decision it has already made, ensuring finality in judicial proceedings and in support cited various precedents, including *Odinga v. IEBC* and *Telkom Kenya Ltd v. John Ochanda*, where courts have affirmed that they cannot sit in appeal of their own decisions.
23. That in this case, the application seeks conservatory orders that have already been addressed in a prior ruling, thus the Court should decline to engage in a merit-based re-evaluation of its prior ruling. They urged that the Court should decline to appoint an independent expert because there is already filed a detailed expert report addressing concerns regarding structural integrity and environmental impacts.
24. It is their submission that regulatory authorities such as NEMA are responsible for evaluating and approving construction projects, as reaffirmed by precedent cases, including *Hosea Kiplagat & 6 Others v NEMA & 2 others* [2018] eKLR and *Kopoa Developers Limited v Endesk Properties Limited* [2024] eKLR. Thus, courts should not interfere in technical and operational matters already within the jurisdiction of these regulatory bodies.



Analysis and Determination:

25. I have considered the application and the facts presented in support and against the grant of the orders sought. The issues arising for my determination are twofold:
 - a. Whether the orders sought can issue.
 - b. Whether the application is res judicata.
26. It is my considered opinion that some of the prayers are already spent. For instance, prayer (ii) of the motion partially sought for reasonable time to allow the Applicants to also engage an engineering expert to review the report filed on 18th November, 2024 by the 1st Respondent. They have since the filing of this application submitted their own “civil and structural engineering report” prepared by Eng. Kaburu Richard. That report is annexed as “JCB -1” in the further affidavit in support of the application. Prayer (iv) of the application is also spent as it was seeking for non-resumption of the excavation/drilling works on the suit plot pending the hearing and determination of the application.
27. In the second part of prayer (ii) of the motion, the Applicants are asking that they be granted 21 days to review and ascertain through their experts the sufficiency or otherwise of the 1st Respondent’s expert report dated 18th November, 2024. In prayer (iii), they urged this court to appoint an independent expert to review the report filed by the 1st Respondent before allowing the resumption of excavation/drilling works.
28. There is no dispute that a report has been filed as the order directed which according to the 1st Respondent has provided for setbacks which then allowed for construction to begin once the report was filed. It is argued by all the Respondents that the orders sought herein amount to re-litigating issues that were already determined in the previous application.
29. The Petitioners have reproduced the impugned order dated 13.11.2024 under paragraph 4 of the grounds in support of the application. A plain reading of the order required of the 1st Respondent to, “file a fresh report on measures for setbacks put in place while excavating/drilling its foundations for the project to prevent it from negatively impacting on the immediate adjacent plots of the Petitioners/Applicants.”
30. The Applicants have admitted receipt of the said report but they fault it for want of sufficiency in providing for the standard setbacks. Consequently, the Applicants proceeded to file their own expert’s report and which report has pointed out gaps in the 1st Respondent’s expert report. However, the order that I issued did not go beyond requiring the 1st Respondent to file a fresh report to show measures for the setbacks. I did not include as part of that order that the court was to determine the sufficiency or otherwise before the commencement of the impugned works.
31. The order urging this Court to appoint an independent expert to review the impugned report by the 1st Respondent and or to compare now the two reports filed are new issues which were not part of what was granted. It is my considered view that in the event the Petitioners wanted the Court to review her orders to provide for interrogating the impugned report, the law allows them to do so by way of review orders under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The present application though not brought as a review application would have been considered as such under the heading of sufficient cause if arguments were made to that effect.
32. Besides the right to review, if the Applicants were unhappy with orders issued pursuant to the determination of their application dated 26th June, 2024, they had the right to appeal. The Respondents have expressly stated by their responses that indeed the Applicants exercised that right



by filing an appeal against the Ruling to the Court of Appeal. The appeal is pleaded to be registered as case number E664 of 2024. The effect of the Applicants' exercising the right of appeal then takes away this Court's authority/powers to review the orders of 13th November 2024 as per the provisions of order 45(1) of the Civil Procedure Rules.

33. Order 45 only allow a party to apply for review where no appeal has been filed. It states that "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;
34. On the issue of the application being res judicata as raised by the Respondents, I am not persuaded the application meets the threshold. The application seeks prayers revolving around the import of the expert report as filed by the 1st Respondent. They only asked the court to delay the resumption of works pending their being given time to file a report to counter the 1st Respondent's expert report already filed and or that the court does appoint an independent expert to review the report filed by the 1st Respondent.
35. None of the two prayers were in issue in the application dated 26th June 2024 that sought for conservatory orders stopping continuation with constructions works by the 1st Respondent. The grounds upon which the current application is premised on is also different. Hence the averment that the motion dated 28th November, 2024 is res judicata is without merit.
36. On the last prayer seeking any other reasonable orders this court deems just to grant is to direct parties to fast track the hearing of the main petition so that the parties can present their case. Costs of the application is ordered in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025

A. OMOLLO

JUDGE

