



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Lenaola, & Ouko, SCJJ)*

**PETITION (APPLICATION) NO. E047 OF 2025**

**-BETWEEN-**

**MBAAZI AVENUE RESIDENTS' ASSOCIATION.....1<sup>ST</sup> APPLICANT**  
**MILLENNIUM GARDENS MANAGEMENT LIMITED..2<sup>ND</sup> APPLICANT**

**AND**

**METRICON HOME NAIROBI COMPANY LIMITED...1<sup>ST</sup> RESPONDENT**  
**NATIONAL ENVIRONMENT MANAGEMENT**  
**AUTHORITY..... 2<sup>ND</sup> RESPONDENT**  
**NAIROBI CITY COUNTY.....3<sup>RD</sup> RESPONDENT**

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*(Being an application for a Conservatory Order to stay the execution of the judgment and decree of the Court of Appeal at Nairobi (Musinga P., Nyamweya and Odunga JJAs) delivered on 3rd October 2025 in COCA/E1010/2024, and for leave to adduce additional evidence)*

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Representation

Mr. Ochiel Dudley for the Applicants  
*(Bond Advocates LLP)*

Mr. Brian Otieno for the 1<sup>st</sup> Respondent  
(*Brian Otieno & Co. Advocates*)

Mr. Jamal Bake for the 3<sup>rd</sup> Respondent  
(*Jamal Bake & Associates*)

### **RULING OF THE COURT**

**[1] UPON CONSIDERING** the applicants' Notice of Motion dated 28<sup>th</sup> November 2025, supported by the sworn affidavit of **Benard M. Kinaru**, the Chairperson of the 2<sup>nd</sup> applicant, and by submissions dated 18<sup>th</sup> November 2025 and filed on 20<sup>th</sup> November 2025, seeking, *inter alia*, urgent conservatory orders to halt or limit the 1<sup>st</sup> respondent's proposed development on L.R. No. 330/155 along Mbaazi Avenue, Lavington, Nairobi, pending the hearing and determination of the petition of appeal; and in the alternative, they seek orders restricting the development to a maximum of four floors. They also seek leave to adduce additional evidence comprising records of proceedings, votes, and papers laid before the Nairobi City County Assembly on 10<sup>th</sup> and 15<sup>th</sup> February 2022; and

**[2] NOTING THAT** the applicants contend that: the Court of Appeal dismissed their appeal challenging the 1<sup>st</sup> respondent's plan to construct three blocks of sixteen-storey residential apartments on a one-acre parcel of land within a low-density residential area; their intended appeal is arguable, principally on the basis that the Court of Appeal erred in law by relying on an unpleaded draft Nairobi City Development Policy, 2021, and by holding, without any evidentiary basis, that the policy had been approved by the Nairobi City County Assembly on 10<sup>th</sup> February 2022. They further argue that, even assuming the validity of the draft 2021 policy, the Court of Appeal failed to interrogate the question whether the Environment and Land Court (ELC) had misapplied the applicable zoning and height restrictions; the impugned development poses adverse environmental impacts and infringes their constitutional right to a clean and healthy environment under Article 42 of the Constitution, particularly in light of the precautionary principle,

which they contend was disregarded; and in support thereof they cite the decision in ***George Wanjohi Vs. Stephen Kariuki & 2 Others*** SC Petition No. 2A of 2014 [2014] eKLR to highlight the point that the appeal raises a cognizable constitutional controversy on the question whether the appellate court misinterpreted the Constitution in reaching its decision to dismiss their appeal; and

**[3] FURTHER NOTING** that, on the nugatory aspect of their appeal, the applicants assert that the proposed beacon-to-beacon high-rise development threatens the structural integrity of neighbouring properties, violates setback requirements, obstructs access to natural light, and strains existing infrastructure, with potentially irreversible consequences. They furthermore submit that the public interest favours the grant of conservatory orders to preserve the subject matter of the appeal, relying on this Court's decision in ***Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others*** [2014] KESC 30 (KLR); and

**[4] AWARE THAT** the applicants maintain that: on their prayer to adduce additional evidence: exceptional leave to adduce such additional evidence is warranted to clarify the true status of the Nairobi City Development Policy, 2021; the proposed evidence will demonstrate that the policy was not approved on 10<sup>th</sup> February 2022, but was merely approved for tabling and subsequently laid before the County Assembly on 15<sup>th</sup> February 2022; and that this evidence is directly relevant, potentially decisive, and was not obtainable with reasonable diligence at the appellate court stage; and

**[5] UPON ALSO** considering the 1<sup>st</sup> respondent's replying affidavit dated 9<sup>th</sup> December 2025, sworn by **Yu Tang**, a director of the 1<sup>st</sup> respondent, notice of preliminary objection and submissions, both dated 19<sup>th</sup> December 2025, contending that this Court lacks jurisdiction to entertain the application and the intended appeal: that the dispute does not raise questions of constitutional interpretation or application within the meaning of Article 163(4)(a) of the

Constitution, but instead seeks to reintroduce factual and policy matters already determined by the superior courts below; the appeal is incompetent, raises no issue of public interest, and concerns a private dispute between a duly licensed developer and neighbouring residents and to buttress the claim of lack of jurisdiction, the 1<sup>st</sup> respondent relies on the decisions in ***Lawrence Nduttu & 6000 Others Vs. Kenya Breweries Limited and Another*** SC Petition No. 3 of 2012; [2012] eKLR, ***David Mulwa Malamu Vs John Waweru Gukuru and Peter Murage Kamanja*** SC Petition (Appl) No. E002 of 2025, and ***Tong'i Vs. Bichage & 2 Others*** SC Petition No. 17 of 2014; [2015] KESC 22 (KLR); and

**[6] ALIVE** to the 1<sup>st</sup> respondent's further submission that the 1<sup>st</sup> applicant, having participated in the proceedings below only as an interested party, lacks the standing to institute the appeal, citing ***Muruatetu & another Vs. Republic; Kenya National Commission on Human Rights & 2 Others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)*** SC Petition 15 & 16 of 2015 [2016] KESC 12 (KLR) and ***Senate & 3 Others Vs. Speaker of the National Assembly & 10 Others*** SC Petition No. 19 (E027) of 2021 [2025] KESC 11 (KLR); and

**[7] FURTHERMORE NOTING** that, on the merits of the Motion before us, the 1<sup>st</sup> respondent maintains that the appeal is not arguable, it having obtained all requisite statutory approvals for the project, none of which have been revoked, and that both the trial court and the Court of Appeal correctly found that the suit property falls within Zone 4B within Nairobi County, in which developments of up to sixteen floors are permitted. It also contends that no breach of planning, environmental, or zoning regulations has been demonstrated, nor has any basis been laid for invoking the precautionary principle; and

**[8] COGNIZANT** of the contention that, on the question of whether the appeal would be rendered nugatory, the 1<sup>st</sup> respondent asserts that the alleged harm is speculative and incapable of meeting the requisite threshold for conservatory

relief; any harm suffered could be adequately remedied through damages or post-judgment directives, including downscaling of the development or environmental restoration, should the appeal succeed; the public interest militates against halting the project, citing the substantial financial investment already made, the risk of job losses, and the adverse economic and infrastructural consequences of suspending construction. In the alternative, it has urged that any conservatory orders be made conditional and upon the applicants providing security to cover potential losses. In this regard, they rely on the decisions in ***Luka & 3 Others Vs. Chairman Land Adjudication Committee, Lusha Land Adjudication Section & 6 Others*** (Civil Appeal (Application) E005 of 2022) [2023] KECA 1232 (KLR), ***Kenya Ports Authority Vs. Cemtec Engineering Limited*** (Civil Application E046 of 2023) [2023] KECA 1065 (KLR) and ***Reliance Bank Ltd Vs. Norlake Investments Ltd*** [2002] 1EA 227; and

**[9] FURTHER COGNIZANT** of the fact that the 1<sup>st</sup> respondent opposes the prayer for admission of additional evidence, arguing that the Nairobi County Assembly proceedings and Minutes thereof were not new, could have been obtained with reasonable diligence at trial, and that their introduction at this stage amounts to an impermissible attempt to reopen and reconstitute a case already conclusively determined by the courts below. It cites the decision in ***Jirongo Vs. Soy Developers Limited & 9 Others*** SC Petition 38 of 2019 [2020] KESC 38 (KLR) in support of that proposition; and

**[10] FURTHER CONSIDERING** the 3<sup>rd</sup> respondent's notice of preliminary objection dated 25<sup>th</sup> November, 2025, and written submissions dated 16<sup>th</sup> December 2025, contending that this Court lacks jurisdiction to entertain the appeal as of right under Article 163(4)(a) of the Constitution; the applicants did not seek or obtain certification from the Court of Appeal that the matter raises issues of general public importance, as required under Article 163(4)(b), Section 15B of the Supreme Court Act, and Rule 33 of the Supreme Court Rules; relying on

**Lawrence Nduttu (supra), B.N. Kotecha & Sons Ltd & Another vs. Amalo Company Limited** [2025] KESC 43 (KLR), and **Kenya Electricity Transmission Co. Ltd Vs Instalaciones Inabensa S.A** [2022] KESC 64 (KLR), the 3<sup>rd</sup> respondent maintains that an appeal lies as of right only where issues of constitutional interpretation or application are directly in contestation and were determined by both the High Court and the Court of Appeal; and finally, submits that this threshold has not been met in the present matter and urges the Court to dismiss the petition and the application for want of jurisdiction; and

**[11] NOTING** in the above context that the applicants filed rejoinder submissions dated 12<sup>th</sup> December 2025, maintaining that the petition of appeal properly invokes this Court's jurisdiction under Article 163(4)(a) of the Constitution, as it raises substantive questions of constitutional interpretation and application relating to the right to a clean and healthy environment under Articles 42, 69, and 70 of the Constitution; these issues were raised, considered, and determined by the superior courts below and have followed a constitutional trajectory to this Court through the normal appellate process; and that the appeal also engages the Court's inherent jurisdiction to correct jurisdictional errors committed by the superior courts in the discharge of their constitutional mandates; and

**[12] IN ADDITION**, on the question of *locus standi*, the applicants submit that an aggrieved interested party is not barred, either in law or procedure, from appealing. They argue instead that: an interested party with a demonstrable stake and legal interest is entitled to participate fully in appellate proceedings, relying on this Court's decision in **Trusted Society of Human Rights Alliance Vs. Matemo** [2014] KESC 32 (KLR), they urge the Court to find that an interested party has an identifiable stake, legal interest, and a duty in the Court's proceedings. They also note that in **Law Society of Kenya Vs. Centre for Human Rights and Democracy** [2014] KESC 29 (KLR), this Court entertained an appeal by the

Law Society of Kenya, an interested party at the High Court but which did not participate in proceedings at the Court of Appeal; and

**[13] FURTHER NOTING** that, as regards the plea for admission of additional evidence, the applicants reiterate that: the proposed evidence meets the statutory threshold under Section 20(2) of the Supreme Court Act, Cap 9; is directly relevant, potentially influential on the Court's determination; was not within their knowledge or obtainable with reasonable diligence at the earlier stages of their case; removes ambiguity from the record; is credible, and would not prejudice the respondents, while also disclosing alleged willful deception in the proceedings below; and

**[14] APPRECIATING** that, to properly examine whether the Court has jurisdiction, the Court must interrogate the record to ascertain whether issues of constitutional interpretation or application were raised and determined before the High Court and the Court of Appeal, or whether the matter can properly be said to have taken a constitutional trajectory. And noting that this approach accords with this Court's decisions in *Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others*, S.C App. No 5 of 2014; [2014] eKLR (*Munya 1*) and *Lawrence Nduttu (supra)*; and

**[15] FURTHER APPRECIATING** that the Court's position has always been that: an interested party cannot institute an appeal where none of the principal parties has done so and in that regard in *Macharia & Another Vs. Director of Public Prosecutions & 11 others* [2022] KESC 61 (KLR), we observed, partly, as follows;

***"4. Further, that the petitioners lack the requisite locus standi to institute the present proceedings for the reason that their participation has at all times been peripheral to the dispute between the principal parties as they were joined as interested parties in the judicial proceedings before the High Court. As***

**such, they cannot institute the instant appeal and seek substantive orders to set aside the judgments of the two superior courts below.**”; and

[16] **NOTING** that the guiding principles, as set out in *Munya No. 1*, to be considered before granting conservatory reliefs to an applicant are that: the applicant must demonstrate that the appeal or intended appeal is arguable and is also not frivolous; unless the conservatory order is granted, the appeal or intended appeal, if successful, would be rendered nugatory; and it is in the public interest to grant the order; and

[17] **EQUALLY NOTING** that Section 20 of the Supreme Court Act, Cap 9B, stipulates that the Court, in admitting additional evidence, shall consider whether the additional evidence is directly relevant to the matter before the Court; is capable of influencing or impacting on the decision of the Court; could not have been obtained with reasonable diligence for use at the trial; was not within the knowledge of the party seeking to adduce the additional evidence; removes any vagueness or doubt over the case; is credible and bears merit. In addition to the above principles, this Court in *Mohamed Abdi Mahamud Vs Ahmed Abdullahi Mohamad & 3 others*, (Petition 7 & 9 of 2018 (Consolidated)) [2018] KESC 62 (KLR), while setting out the principles to be considered before granting the said prayers, held that:

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***(i)The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.***

***(j)A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.***

***(k)The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”; and***

**[18] NOTING THE PLEADINGS** and submissions before us, **WE NOW OPINE** as follows:

- i. *On Jurisdiction*, the 1<sup>st</sup> applicant instituted proceedings before the ELC by way of a constitutional petition dated 12<sup>th</sup> October 2024. Among the reliefs sought were declarations that the intended development on L.R. No. 330/155 (Original No. 330/39/8), along Mbaazi Avenue in Nairobi County, infringed upon the members’ right to a clean and healthy environment, and that the development contravened Article 10 of the Constitution for want of proper and meaningful public participation.
- ii. In addressing the petition, the trial court expressly identified and determined certain constitutional questions. At paragraphs 102 and 103 of its judgment, for example, the court found that the dispute concerned land use and its environmental implications, and that the petitioner had specifically pleaded alleged violations of Articles 10, 42, 47, and 69(d) of the Constitution. The court proceeded to interrogate the petition within that constitutional framework, including the principles of public participation, sustainable development, and the right to a clean and healthy environment. On appeal, the Court of Appeal similarly engaged with several constitutional issues. At paragraph 61 of its judgment, it specifically framed one of the central questions for determination as to whether

the ELC erred in failing to find a threat to, or violation of, the right to a clean and healthy environment arising from the impugned development under Article 69(d) of the Constitution.

- iii. From our examination of the record, therefore, it is evident that the issues in contest before both the trial court and the Court of Appeal turned on the interpretation and application of the Constitution, particularly Articles 10, 42, and 69 thereof. The Court of Appeal's determination was also directly grounded on its understanding and application of these provisions. We are therefore satisfied, without saying more, that the appeal meets the jurisdictional threshold set out under Article 163(4)(a) of the Constitution. Accordingly, we find and hold that this Court has jurisdiction to entertain the appeal as filed.
- iv. On *locus standi*, the 2<sup>nd</sup> applicant has been the petitioner and appellant at the ELC and Court of Appeal, respectively, and we therefore do not understand the contention to the effect that it has no locus to file the appeal. Such a contention is, in any event, dismissed. We, however, share the respondents' difficulty as regards the 1<sup>st</sup> applicant's changed status from an interested party in the trial and appellate courts to being listed as a petitioner in this appeal.
- v. In the above context, in ***Macharia and Another (supra)*** we firmly held that an interested party cannot suddenly and on appeal transform itself into a substantive party and take over such a party's case. In the event, we agree with the 1<sup>st</sup> respondent that an appeal by an interested party cannot be sustained. That finding notwithstanding, Section 3A of the Supreme Court Act, Cap 9 grants this Court inherent powers to make such orders or provide such directions as may be necessary for the administration of justice. Section 23 of the Act also grants the Court powers to correct errors on the face of the record. In this instance, the 1<sup>st</sup> and 2<sup>nd</sup> applicants have

filed a joint appeal. The 1<sup>st</sup> applicant has been christened as an appellant, whereas its true character ought to be that of an interested party. Invoking the cited provisions of the law and noting that the dispute between the 2<sup>nd</sup> applicant and the respondents remains live while the 1<sup>st</sup> applicant's status as an interested party has not been denied nor contested, we hereby direct that henceforth, and during the pendency of these proceedings, the 1<sup>st</sup> petitioner/applicant herein shall maintain the status of and be referred to as an interested party. The record of the Court and all further pleadings shall reflect this change.

- vi. *Regarding the conservatory orders sought*, we have considered the parties' competing interests in this case. The 2<sup>nd</sup> applicant contends that the ongoing construction will irreversibly alter the environment and that, absent conservatory orders preserving the status quo, a successful appeal would be rendered nugatory. They therefore urge this Court to invoke the precautionary principle and issue urgent conservatory orders pending appeal. The respondents, on the other hand, submit that the 1<sup>st</sup> respondent obtained all the requisite statutory approvals and licences for the proposed development, which remain valid and have not been revoked. They further submit that inspections by the relevant regulatory agencies have consistently confirmed compliance with the applicable legal and environmental standards.
- vii. We note in the above context that the public interest implicated in this matter extends beyond the parties before us; it affects the residents of Mbaazi Avenue and has broader implications for Nairobi County's zoning policy, but that is not the only factor to be taken into account in determining the present application.

- viii. We agree with the respondents that any perceived harm suffered or may be suffered by the applicants may be mitigated through appropriate directives, including requiring the 1<sup>st</sup> respondent to downscale the development or to comply with an environmental restoration order, should the need arise. Any violation of rights or environmental concerns can also be adequately remedied through damages, which, in the circumstances of this case, constitute a more appropriate remedy than halting ongoing construction.
- ix. We further find that the applicants have not demonstrated, with sufficient precision, how their right to a clean and healthy environment, in its current state, is being infringed by the respondents' actions. Despite the applicants' claims that the project will have a significant impact on the environment, no indication of the project's current status and no reports have been filed to demonstrate clear and cogent evidence of a violation of their right to a clean, healthy, and safe environment (particularly concerning the alleged sewer burst and its impact on underground structures), warranting the grant of the conservatory orders sought.
- x. On *whether leave should be granted to the applicant to adduce additional evidence*, we note that the additional evidence sought to be introduced goes to the legal status of the Nairobi City Development Policy, 2021. That policy was first introduced by the trial court Judge in his determination of the dispute before him. It is not contested that the parties before the trial court were not afforded an opportunity to interrogate the policy, ascertain its authenticity, or present evidence of how it was enacted by the relevant organs of Nairobi City County. Although the Court of Appeal acknowledged this fact, it nevertheless held that the trial court was entitled to rely on it. The evidence, it is now contended, has the potential to fundamentally alter the status of

and the applicability of the policy and, in particular, raises the critical question of whether the policy had been duly passed by the County Assembly at the time the trial court relied upon it.

- xi. While the latter point may be valid, we must follow our previous decisions and ask the question whether the additional evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial court, or could not otherwise have been produced earlier, including at the Court of Appeal. This Court, in this consideration, has also to determine whether the evidence has always been available and could have easily been obtained- See ***Freedom Limited v Mbarak*** (Petition (Application) E009 of 2024) [2024] KESC 76 (KLR).
- xii. Having considered the matter against the law as set out in ***Freedom***, among other cases, we find that the applicants have failed to account for the delay in producing the evidence, particularly given that it had already been relied upon by the High Court and they specifically contested its authenticity at the Court of Appeal without demanding its production as they are now doing. The policy in question is a document of public notoriety, and the applicants ought reasonably to have been aware of it and taken steps to challenge it in the superior courts below. To permit the motions presented before the Nairobi County Assembly to be introduced at this appellate stage would effectively invite this Court to undertake factual determinations—an exercise it has consistently declined to entertain.
- xiii. We therefore find that the application dated 18<sup>th</sup> November 2025 lacks merit and is hereby dismissed, save for the directions issued regarding the status of the interested party. On the costs of the application, we deem it necessary to order that the costs shall abide the outcome of the appeal.

[19] ACCORDINGLY, we make the following orders:

- (i) The Motion dated 18<sup>th</sup> November 2025 and filed on 20<sup>th</sup> November 2025 lacks merit and is hereby dismissed.***
- (ii) The 2<sup>nd</sup> Appellant is hereby denoted an Interested Party to the Appeal.***
- (iii) The costs of the application shall abide the appeal.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of March, 2026**

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**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

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**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**S. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**  
**SUPREME COURT OF KENYA**