



Ndambiri & another v Nairobi Metropolitan Services & 6 others; Harambee Sacco & Co-operative Society Limited & 6 others (Interested Parties) (Environment & Land Petition E026 of 2022) [2023] KEELC 17731 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E026 OF 2022**

**OA ANGOTE, J
MAY 25, 2023**

BETWEEN

DAVID ALFRED NJERU NDAMBIRI 1ST PETITIONER

TITUS KITONGA 2ND PETITIONER

AND

NAIROBI METROPOLITAN SERVICES 1ST RESPONDENT

MOHAMED BADI 2ND RESPONDENT

STEPHEN GATHUITA MWANGI 3RD RESPONDENT

STEPHEN MWADIME 4TH RESPONDENT

RICHARD MUMO 5TH RESPONDENT

FREDRICK OCHANDA 6TH RESPONDENT

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

SALIM KOMORA INTERESTED PARTY

WILSON LEPARTOBIKO INTERESTED PARTY



RULING

1. The Petitioners have filed a Notice of Motion application dated 22nd June 2022 in which they have sought the following orders:
 - a. That an order of temporary injunction be and is hereby given compelling the 1st, 2nd, 3rd, 4th 5th, 6th and 7th Respondents jointly and severally to stop and enforce any further development on L.R. No. 209/7549 City Park Drive, Parklands by the 1st, 2nd, 3rd, 4th and 5th Interested Parties, their agents and/or servants or any other person pending the hearing and determination of this petition.
 - b. Costs in the Petition.
2. The application is supported by the Affidavit of the 1st Petitioner who has deponed that he occupies and resides on House No. G erected on property known as L.R. No. 209/7546- Taza Lane, off City Park Drive, which is opposite L.R. No. 209/7549, the subject property where construction and development activities are ongoing.
3. The 1st Petitioner deponed that the Respondents have been and continue to be aware of the development activities on the subject property; that the said development started with the demolition of buildings and cutting of trees and other flora by the Interested Parties without approval from the Respondents herein and that the Respondents have confirmed that the alleged authority to demolish the houses and cut down the trees on the suit property is not genuine and was not issued by themselves.
4. It is the Petitioners' case that the impugned activities are in respect to the construction and development of a massive residential building on the subject property, which property has no existing public sewer line next to or adjacent to it and that these activities are deleterious to the environment.
5. It was deponed that the Respondents are aware of the various court orders and administrative decisions stopping development activities on the subject property, including that by the National Construction Authority in October 2020, the National Environment Tribunal and the National Environmental Management Authority and that waste is flowing from the suit property into the storm water drainage that flows to Mathare River.
6. The 1st Petitioner averred that unless stopped by way of a compelling order, there is every likelihood that the Respondents will continue with their deleterious activities on the subject property.
7. The 1st Respondent opposed the application by way of a Notice of Preliminary Objection dated 26th September 2022. It was averred by the 1st Respondent that this court lacks jurisdiction to hear and determine the Petition and application by dint of Section 129 (1) (a) of the Environmental Management and Coordination Act as read together with regulation 46(1)(f) of the Environmental (Impact Assessment and Audit) Regulations, 2003.
8. According to the 1st Respondent, there is already another suit pending at the National Environmental Tribunal in NET Appeal No. E24 of 2021, David Njeri Ndambiri vs Director General NEMA & Others; that this suit has the same parties and concerns the same subject matter and that the suit offends the doctrine of avoidance.



9. The 1st Interested Party responded to the application vide a Replying Affidavit sworn by its Chief Executive Officer in which he deponed that the application is defective as the mandatory orders sought to compel the 1st -7th Respondent's to stop the 1st-5th Interested Parties and their agents from further developing on the suit property is pending determination before the National Environmental Tribunal in NET Appeal No. E24 of 2021.
10. It was deposed by the Chief Executive Officer of the 1st Interested Party that the mandatory order sought by the Petitioner cannot be granted at the interlocutory stage unless the applicant demonstrates exceptional and special circumstances, which he has failed to do, and that the dispute before NET is pending determination and it is only reasonable that the Petitioner awaits the determination of the Tribunal in respect to the development of the suit property.
11. The 1st Interested Party deponed that the Sacco has been wrongly enjoined as an Interested Party because it was a previous owner of the suit property; that on 10th October 2016, the 1st Interested Party entered into a sale agreement for sale of the suit property and that it relinquished all its rights and responsibilities over the suit property, having transferred the property to the 2nd Interested Party.
12. The 2nd and 3rd Interested Parties filed a Notice of Preliminary Objection seeking for the dismissal of the application and the Petition herein on the grounds that the Petition does not specify with particularity the alleged violations of constitutional rights, offending the principles set out in *Anarita Karimi Njeru vs Republic* [1979] eKLR.
13. It is the position of the 2nd Interested Party that the Notice of Motion and the Petition are an abuse of court process as this dispute is pending before the National Environmental Tribunal in NET Appeal No. E24 of 2021, and that the reliefs sought by the Petitioners in this suit are the very same reliefs sought by the Petitioner before NET.
14. The 4th and 5th Interested Parties also filed a Notice of Preliminary Objection seeking dismissal of the Notice of Motion and the Petition on the grounds that the Petitioner is seeking to litigate before this court issues that are pending before the National Environmental Tribunal in NET Appeal No. E24 of 2021, which case is pending delivery of a ruling on notice and that the proper recourse is for the Petitioner to await the determination by NET, and if dissatisfied with the decision delivered, file an appeal before this court.
15. The 1st Petitioner filed a Supplementary Affidavit in which he deponed that the dispute before the National Environment Tribunal, NET Appeal No. E24 of 2021, was dismissed by a ruling of the Tribunal dated 14th July 2022 and that the subsequent appeal dated 28th July 2022 in ELCA No. E056 of 2022, *David Njeru Ndambiri vs Director General NEMA* was withdrawn.
16. It was the deposition of the 1st Petitioner that the appeal was withdrawn because NEMA, who had previously failed/refused to monitor and conduct an environmental audit had monitored and conducted an environmental audit on the development being undertaken on L.R. 209/7549 thus rendering the appeal superfluous.

Submissions

17. The Petitioners' Counsel submitted that as the Interested Parties responded to the application vide preliminary objections and have not filed Replying Affidavits, the Petitioner's evidence is neither opposed nor contradicted.



18. It was Counsel's submission that the preliminary objections raised are incompetent because the parties in the NET Appeal are different from those in this Petition and that the prayers and the two grievances are at variance.
19. It was submitted that the prayers in the NET appeal are in respect of NEMA's decision not to conduct an environmental audit of the suit property while this Petition contends that the 1st to 7th Respondents infringed on the Petitioner's rights and fundamental freedoms under Article 35 of *the Constitution* by failing or refusing to grant them access to information in respect to the subject matter property.
20. It was counsel's submissions that the development of the suit property is being conducted contrary to Section 56 of the Physical Land Use and Planning Act; that the Respondents failed or refused to perform their statutory duties to order the Interested Parties to restore the suit land to its original condition before September 2020 because the development was undertaken without approval by the county executive committee.
21. It was submitted by the Petitioners' counsel that the Petitioners' right to a clean and healthy environment have been infringed by the Respondents' refusal to stop construction of residential apartments in the area without an existing public sewer line and that the construction of the proposed Privately Developed Sewer Extension line is not possible.
22. It was submitted that the National Environmental Tribunal (NET) has no jurisdiction in respect of violation or infringement of rights and freedoms under Articles 35, 42, 47 and 70 of *the Constitution*; that on the other hand, this court in accordance with Articles 22, 23 read together with Article 162, has the jurisdiction to hear this Petition and that the Petitioners' complaints cannot be heard and determined by the NET.
23. Counsel further submitted that the Preliminary Objections are misplaced as the Petitioners have specified the Articles of *the Constitution* that they contend have been infringed upon, specifically Articles 28, 35, 42, 43(1)(b), 47(1), 69(1) and 75(1).
24. With respect to the prayer for injunctive orders, counsel submitted that they have met the conditions set out in *Giella vs Cassman Brown* (1973) EA 358; that they have established that they have a prima facie case, as they have proved that their right to access information has been infringed and that the suit land is being developed without obtaining the necessary approvals.
25. It was submitted that despite the knowledge of illegality, the Respondents have refused or ignored to take any enforcement action under Article 72 of the *Physical and Land Use Planning Act* and that the Interested Parties have continued with construction despite suspension notices having been issued by the National Construction Authority in September 2020, January 2021, May 2021 and September 2021 and by an injunction order of NET of 13th October 2021.
26. Counsel submitted that the Petitioners face immeasurable damage if the court fails to grant the injunctive orders because the Petitioners are not aware the extent to which the high-rise apartment is expected to reach and if the Petitioners succeed, there is no surety that a restoration order to restore the suit land will be enforceable. The Petitioners' counsel relied on numerous authorities which I have considered.
27. Counsel for the 1st Interested Party submitted that the Petitioners do not have a prima facie case with a probability of success having previously filed a suit in NET with the same course of action and seeking the same prayers.



28. Counsel submitted that Section 130 of EMCA provides that it is only where a person has been aggrieved by a decision of NET that he can appeal to the High Court; that this court should exercise its discretion under section 27(1) of the *Civil Procedure Act* to award the 1st Interested Party costs and that the 1st Interested Party was wrongly enjoined.
29. Counsel for the 4th and 5th Interested Parties submitted that this suit and application are an abuse of court process as the Petitioner are seeking to litigate before this court the same issues that were before NET; that NET delivered its ruling on 14th July 2022 in which it struck out the appeal before the tribunal for non-compliance with Section 129(1) of EMCA and that it is only proper that this Petition be struck out.

Analysis and Determination

30. Having considered the pleadings, the annexures and submissions, the issues for consideration are as follows:
 - a. Whether this court has jurisdiction to determine this dispute.
 - b. Whether this court should grant the injunctive orders sought by the Petitioner.
31. This court has noted that the Petitioners purported to file an Amended Notice of Motion dated 4th May 2023 without the leave of this court. This application was filed after the court had reserved its Ruling. It would be an abuse of court process and unjust for this court to consider the amended application because the Respondents and the Interested Parties have not had an opportunity to consider its contents and to respond to the same.
32. This court will therefore restrict itself to the pleadings that were procedurally filed by the parties, and served, which have been summarized above.
33. The factual matrix underlying this suit is that the Petitioners have brought this suit on behalf of the public and in their capacity as owners of properties on Taza Lane, City Park Drive, which properties, including the suit property, stretch to Mathare River.
34. The Petitioners' claim is that the development on the suit property is being done illegally as the alleged authority to demolish the houses and cut down the trees on the suit property is not genuine and that the Respondents have granted permission for the construction and development of a massive residential building on the subject property, which property does not have an existing public sewer line next to or adjacent to it and that these activities are deleterious to the environment.
35. The 1st Respondent, together with the 1st-5th Interested Parties, have raised preliminary objections. Their objections are generally on two fronts: the first is that the Petition does not specify with particularity the alleged violations of constitutional rights, offending the principles set out in *Anarita Karimi Njeru vs Republic* [1979] eKLR and secondly, that the Petitioner lodged a similar claim before the National Environment Tribunal, NET Appeal No. E24 of 2021 which is pending determination.
36. A preliminary objection constitutes a point of law, which, if argued, may dispose of the suit. This was defined in the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 as follows:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation



or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

37. In the same case, Sir Charles Newbold, P. stated as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

38. The first objection raised is that the Petition offends the principles in *Anarita Karimi Njeru vs Republic* [1979] eKLR as it fails to specify with particularity the alleged violations of constitutional rights. The principle established in the *Anarita Kairimi Njeru* case is that it is imperative for constitutional claims to be pleaded with precision. The court held as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

39. The Court of Appeal in *Mumo Matemo vs Trusted Society of Human Rights Alliance* [2014] eKLR, expounded on the principle set out in the above case as follows:

“...The principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

40. In the Petition filed herein, the Petitioners claim is that the Respondents have failed to uphold and defend the national values and principles set out in Article 10 of *the Constitution* by failing to perform their constitutional and statutory duties, which has led to the violation, infringement of and threat to the Petitioners’ and the general public’s rights and freedoms by the Interested Parties.

41. The Petitioners particularly allege that the following rights have been infringed: their right to access information held by the state; their right to a clean and healthy environment under Article 42 and the right to fair administrative action under Article 47.

42. The Petitioners have stipulated the facts upon which the Petition is grounded. The facts and issues in the Petition are clear, including the allegedly violated and threatened rights and freedoms. This court is therefore satisfied that the principle of specificity and particularity in pleading constitutional provisions has been met by the Petitioners.

43. The second objection raised by the 1st Respondent and the Interested Parties is that this court lacks jurisdiction to determine this Petition by dint of Section 129 of EMCA. According to the



Respondents, the Petitioners, or people acting under their directions, have filed a dispute identical to this one before the National Environment Tribunal.

44. The 1st Petitioner, in his Supplementary Affidavit, has averred that this objection has been overtaken by events as the NET Appeal No. E24 of 2021 was dismissed by a Ruling of the Tribunal dated 14th July 2022 and that the subsequent appeal dated 28th July 2022 in ELCA No. E056 of 2022, David Njeru Ndambiri vs Director General NEMA was withdrawn for reasons that NEMA, which had previously failed/ refused to monitor and conduct an environmental audit had monitored and conducted an environmental audit on the development being undertaken on L.R. 209/7549.

45. The Supreme Court in Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR stated as follows on the issue of jurisdiction:

“Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

46. The jurisdiction of the Environment and Land Court emanates from Article 162(2)(b) of *the Constitution* and section 13 of the *Environment and Land Court Act*, which prescribes the court’s jurisdiction as follows:

“In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

47. Section 129 of the Environmental Management and Coordination Act (EMCA) provides as follows:

- “(1) Any person who is aggrieved by-
- (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) the revocation, suspension or variation of the person’s licence under this Act or its regulations;
 - (d) the amount of money required to paid as a fee under this Act or its regulations;



- (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
- (2) Upon any appeal, the Tribunal may—
- a. confirm, set aside or vary the order or decision in question;
 - (b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
 - (c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
 - (d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
 - (e) if satisfied upon application by any party, review any orders made under paragraph (a).”

48. The Appellate jurisdiction of this court over decisions made by the National Environment Tribunal is prescribed under Section 130 of EMCA as follows:

- “(1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.
- (2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.
- (3) Notwithstanding the provisions of subsection (2), where the Director-General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director-General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking, until the appeal is finalised or the time for appeal has expired.
- (4) Upon the hearing of an appeal under this section, the Environment and Land Court may—
- (a) confirm, set aside or vary the decision or order in question;
 - (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;



- (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
- (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
- (5) The decision of the Environment and Land Court on any appeal under this section shall be final.”

49. This court is also guided by Section 6 of the [Civil Procedure Act](#) which provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

- 50. The court takes note that the NET Appeal No. E24 of 2021 was heard and determined by the National Environment Tribunal and the Appeal to that decision, which was pending before this court, was withdrawn. The Petitioner has averred that the issues before the Tribunal differ substantively with those in this case.
- 51. The Appeal to NET, which is annexed to the 1st Petitioner’s Affidavit as ‘DNN25’, was against the Director General, National Environment and Management Authority (NEMA), Bill Orange Okemwa and the 2nd, 4th and 6th Interested Parties in this suit. As pleaded by the Petitioners, the subject matter of the appeal was NEMA’s failure to monitor, audit or suspend the development on L.R. No. 209/7549, City Park Drive Parklands, the suit land in this Petition.
- 52. On the other hand, the Petition herein is against the now defunct Nairobi Metropolitan Services (NMS), its Director General, Lt. Gen. Mohamed Badi, Stephen Gathuita Mwangi, the County Chief Officer of Land, Stephen Mwadime, Richard Mumo and Fredrick Ochanda, who are all Officers of the Physical and Land Use Department of NMS (Nairobi City County) and the Hon. Attorney General.
- 53. In addition, the Petitioner joined the seven (7) Interested Parties in the Petition, including the previous owner of the suit land, the 1st Interested Party, and the current owner, the 2nd Interested party.
- 54. While the NET Appeal and the Petition herein are generally concerned with the same matter, being the development on L.R. No. 209/7549, City Park Drive Parklands, the causes of action in the two suits are against different entities, raising different issues, which I have enumerated above.
- 55. This Petition is challenging the actions or inactions of the Nairobi Metropolitan Services, which at the time was undertaking the duties of land and development planning in Nairobi County. Under the [Physical and Land Use Planning Act](#), Section 57 prescribes that any person carrying out a development within a county must be granted a development permission by the respective county executive committee member. This includes applications for change of user, extension of user, extension of lease, renewal of lease, subdivision and amalgamation.
- 56. The obligations of the then NMS, now the Nairobi City County, pertaining to approvals of developments in the county was not a subject in the suit that was before NET. That being so, it is



evident that these two matters are distinct and consequently, this court has jurisdiction to hear and determine this Petition.

57. The Petitioners herein have sought for an injunction to compel the Respondents to stop and enforce any further development on the suit land pending the hearing and determination of the Petition. The Applicants are, in other words, seeking for a mandatory injunction.

58. The law on grant of interlocutory injunctions is found under Order 40 Rule 1 of the Civil Procedure Rules which provides as follows:

“Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution if any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

59. The *Giella vs Cassman Brown* (1973) EA 358 case sets out the essential conditions to be satisfied for a court to issue injunctive orders as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

60. In *Mrao Ltd vs First American Bank of Kenya and 2 Others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 Others vs Jane W Lesaloi and 5 Others*, (2014) eKLR, the Court of Appeal defined a prima facie case as: -

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

61. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and



(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

62. With regards to mandatory injunctions, courts have been reluctant to grant such orders at an interlocutory stage. However, courts have granted mandatory injunction where it is clear that a party against whom such an order is sought is on the wrong and where there are special circumstances. This was held in *Shariff Abdi Hassan vs Nadhif Jama Adan* [2006] eKLR as follows:

"The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case."

63. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows as regards mandatory injunctions.

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

64. In the case of *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, the Court of Appeal stated as follows:

"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in



prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

65. The Petitioners’ claim is that the development on the suit property is being constructed illegally as the alleged authority to demolish the houses on the land to pave way for the development, and cutting down the trees on the suit property is not genuine; that the Respondents have granted the Petitioners permission for the construction and development of a massive residential building on the subject property, which property has no existing public sewer line next to or adjacent to it.
66. According to the Petitioners, these activities are deleterious to the environment, including waste flowing into the river. In addition, the Petitioners claim that the Respondents have breached their right to access information by failing or refusing to grant them access to information in respect to the subject matter property.
67. To buttress their arguments, the Petitioners have attached an Environmental Impact Assessment Project Report which was received by NEMA on 4th November 2020; an Environmental Impact Assessment Authority dated 23rd December 2020; a letter from the Nairobi City Water and Sewerage Company Limited dated 8th June 2021 approving a privately developed sewer for the suit land; a letter from the Nairobi Metropolitan Services dated 3rd November 2021 confirming that the Architectural Plan was approved by NMS on 15th October 2020 and a Notification of Approval of Development Permission issued on 18th September 2020.
68. In the letter dated 15th October 2020, NMS stated that the demolition permit No. UP/PCED/03113/4857/125 dated 15th October 2020 did not originate from it and that they did not issue the construction notice dated 15th October 2020. Further, the Petitioners have annexed orders from the National Construction Authority against the developments on the suit property suspending construction works due to non-compliance of the conditions contained in the letters dated 18th January 2020 and 5th January 2021.
69. On the claim for infringement of their right to information, the Petitioners have annexed letters dated 8th November 2021 and 14th October 2021 requesting information from the Nairobi Metropolitan Services and another letter dated 11th January 2022 addressed to the Director General, NMS.
70. The Petitioner has also annexed a letter from the Commission on Administrative Justice dated 27th May 2022, in which it stated that it visited the Director-General’s office on 23rd May 2022 and found that the architectural drawings shown to their representative were undated and were very different from those circulated, and the civil and architectural drawings were not available for perusal.
71. On the basis of the documents annexed on the 1st Petitioner’s Affidavit, and especially the letters by the then NMS, the National Construction Authority and the Commission on Administrative Justice, this court is satisfied that the Petitioners have established a prima facie case with a likelihood of success, especially on the validity of the demolition notice, and compliance with the requirements that had been stipulated by the National Construction Authority and other statutory bodies.
72. The next issue to consider is whether the Petitioners are likely to suffer irreparable injury which would not be compensated by an award for damages. In Halsbury’s Laws of England [Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352, it is stated that:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where



the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is “irreparable harm”? Robert Sharpe, in "Injunctions and Specific Performance," [Robert Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.”

73. The Petitioners in this instance have averred that they will suffer irreparable damage as the construction is going on unabated and the activities being undertaken are deleterious to the environment and infringing on their right and the public’s right to a clean and healthy environment, particularly due to the lack of connection to a public sewer, which may result in waste seeping into the Mathare river.
74. Indeed, these alleged harms cannot be quantified in monetary terms and would cause irreparable harm to the environment. That being the case, and being guided by the precautionary principle, it is the finding of this court that the Petitioners have established that irreparable harm not only to the Petitioners, but also to the environment, may be occasioned unless the orders of injunction are given pending the hearing of the Petition.
75. This court is also persuaded that special circumstances pervade the Petition herein, considering the magnitude of the impugned development, and the deleterious environmental concerns that may arise unless the mandatory order directed to the Respondents is issued.
76. There is a significant mushrooming of high-rise developments in Nairobi which are gaining permission swiftly from the County government and other agencies. These agencies do not sometime seem to take into account the impacts of approving multi-dwelling developments on the environment, particularly on waste management systems.
77. It is therefore essential for this court to determine this matter conclusively by interrogating the allegations raised by the Petitioners, particularly on whether the 50 + houses that were on the suit property were demolished with the permissions of the 1st Respondent, and if the waste management system has been put in place, amongst other measures required under the [Physical and Land Use Planning Act](#).
78. Having found that the Petitioners have a prima facie case with chances of success, it is in the interests of justice that the subject matter of this suit be preserved pending final determination of the Petition.
79. The upshot of the foregoing is that this application is allowed as follows:
 - a. That an order of temporary injunction be and is hereby given compelling the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents jointly and severally to stop and enforce any further development on L.R. No. 209/7549 City Park Drive, Parklands by the 1st, 2nd, 3rd, 4th and 5th Interested Parties,



their agents and/or servants or any other person pending the hearing and determination of this Petition.

- b. Costs shall be in the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF MAY, 2023.

O. A. Angote

Judge

In the presence of;

Ms Wageni for Petitioners

Mr. Dayib for 1st Respondent

Mr. Isaac Rene for 4th and 5th Interested Party

Ms Gichuhi for 1st Interested Party

Mr. Bashir for 2nd Interested Party

Court Assistant - Tracy

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RULING

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