



Karim H. P. & 12 others v Hwaok IM & another; NEMA (Interested Party) (Environment & Land Petition E027 of 2021) [2023] KEELC 17931 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E027 OF 2021**

AA OMOLLO, J

JUNE 9, 2023

BETWEEN

NABATKHANU KARIM H. P. 1ST PETITIONER
SHRIKESH GHEEWALA 2ND PETITIONER
KAMLESH V. GOHIL 3RD PETITIONER
NAGIB POPAT 4TH PETITIONER
PIUSH PATEL 5TH PETITIONER
SHAMIT SHAH 6TH PETITIONER
NAWAZ GULAMHUSSEIN C. P. 7TH PETITIONER
TRUSHA PATEL 8TH PETITIONER
PANKAJ PATEL 9TH PETITIONER
SHEMZIN SHUJA D. 10TH PETITIONER
HAMIDA SHUJA D. 11TH PETITIONER
SUSHMA SHAH 12TH PETITIONER
NAMISH SHAH 13TH PETITIONER

AND

HWAOK IM 1ST RESPONDENT
INTERNATIONAL CHRISTIAN KINDERGARTEN 2ND RESPONDENT

AND

NEMA INTERESTED PARTY



JUDGMENT

1. Vide an amended Petition, the 1st – 13th Petitioners pleaded in summary that the Respondents have breached their legitimate expectation of the Petitioners that no development activities will be undertaken contrary to the user of the impugned property, the Zonning Policy of the area and or the relevant environmental laws unless they are in compliance with the EMCA Act and the Constitution of Kenya. That the Respondents have breached and threatened to further breach the duty to stop or eliminate the environmental degrading activities on the property L.R. No 209/8349.
2. They urged the Court to issue the following reliefs:
 - i. A declaration that the Respondents proposed establishing, operating, carrying on any school and such school related activities whether as international Christian Kindergarten School or otherwise school establishments including but not limited to infrastructural changes or constructions of school learning facilities or school related user activities on the residential low density single family house o. 49 comprised in property known as L.R. No. 209/8349 situate in Paradise Valley estate in Kyuna in Nairobi or any infrastructural changes, activities such as opening more gates into Paradise Valley Estate in Kyuna area or parking facilities in Kyuna area in or around Paradise Valley Estate for the above stated school establishment, a Project Report dated 1/10/2021 and any EIA Lisense issued thereto without prior licensing and or compliance with public participation legal and constitutional requirements contrary to provisions of part VI of the Environment Management & Coordination act, Fair Administrative actions Act and the Constitution of Kenya is illegal, unlawful, unconstitutional, null and void.
 - ii. An Order of injunction to prevent, stop discontinue or restrain the Respondents and or anyone claiming under her from establishing, operating, carrying on any school and such school related activities whether as international Christian Kindergarten School or otherwise school establishments including but not limited to infrastructural changes or constructions of school learning facilities or school related user activities on the residential low density single family house no. 49 comprised in property known as L.R NO. 209/8349 situate in Paradise Valley Estate in Kyuna in Nairobi or any infrastructural changes, activities such as opening more gates into Paradise Valley Estate in Kyuna or parking facilities in Kyuna area or in or around Paradise Valley Estate for the above stated school establishment without prior licensing and or compliance with the public participation, legal and constitutional requirements contrary to provisions of Part VI of the Environment Management and Coordination act, Fair Administrative actions Act and Constitution of Kenya.
 - iii)
 - aa) An Order of calling into this Court for and cancellation and or revoking the Environment Impact Assessment License No. Nema/EIA/PSI/14982 dated 9th November 2017 issued to the 1st Respondent approving the purported Renovation/ alteration and addition to an existing education centre comprising 3 DSO, 4 new classrooms, 2 kitchens, 5 pool house, 6 swimming pools and other associated amenities/facilities located plot known as L.R. No. 209/8349 situate in Paradise Valley Estate in Kyuna in Nairobi.
 - iii. Costs of the Petition



- iv. Any other relief that the Court may deem fit to grant in the circumstances of the Petition.
3. The Petitioners pleaded that Paradise Valley estate within Kyuna Estate does not have a sewer line hence the houses are using single septic tank and any activity or user of the houses with more than one family must obtain approvals from the Petitioners, the Interested Party (NEMA) and the County Government of Nairobi through public participation. The Petitioners state that in mid July 2021, the 1st Respondent informed them of her intention to carry out infrastructural changes on their property which included opening of new gates and establishing parking facilities for the proposed school along Kyuna road.
4. The Petitioners averred that the infrastructural changes by the Respondent which is establishment of a school and related infrastructure for learners is categorized as both low and high risk developments under Rule 1(1) and 3(3)(h) of the 2nd Schedule to the EMCA. That high risk developments particularly an activity and structures out of character with the surrounding and major changes in land use of the area under Rule 3(1 & 2) of the 2nd schedule of the EMCA particularly from one family dwelling to school activities. They pleaded that medium risk projects which include creation and establishment of gates and car parks as well as addition of toilets and waste management facilities which are activities under Rule 2(2) (f) and 2(10) of the 2nd schedule of the EMCA and related activities incidental to establishment of a school are activities which pose high environmental risks under Rule 3 (15) of the 2nd Schedule and which require prior compliance and approvals under Part VI of the EMCA.
5. Further, the Petitioners contend that the EIA license issued to the Respondents is illegal, unlawful and unprocedural as it was obtained ultra vires and without compliance with article 42 and 69 of [the Constitution](#) and Part VI of EMCA. The licence and project report is an admission that the Respondents commenced the impugned project without approval of the Interested Party and the same was obtained through non-disclosure of material facts. The material facts being that there was no existing school or school related facilities or such on the Respondent's plot.
6. The Petitioners pleaded that there is no legal provision for regularization or application of EIA licenses retrospectively to projects commenced or undertaken prior to the Interested Party's approval under Part VI of the EMCA Act. Hence the purported EIA License and Project Report obtained by the Respondents for the impugned project herein are ultra vires the law and are nullities ab-initio.
7. The Petitioners listed the violations of their constitutional and fundamental rights and freedoms under paragraph 34 – 42 of the amended Petition. The list includes violation of the right of equality before the law, equal protection and equal benefit before the law, the right to privacy, and the right to a clean and healthy environment.
8. The Respondents opposed the Petition vide their replying and further affidavits sworn by the 1st Respondent. They gave the details of approvals they obtained and dates given as follows:
- i. From P.P.A 2 granting permission for Change of User from Nairobi County Government (Nairobi Metropolitan Services) was issued on the 9th of July 2021 under the [Physical and Land Use Planning Act](#) (Annexed hereto and is contained at page 13 of the bundle of documents attached hereto).
 - ii. Renovation/Repair Permit from the Nairobi County Government (Nairobi Metropolitan Services) was issued to Evangelical Mission for Africa on the 26th July 2021 (Annexed hereto and is contained at page 14 of the bundle of documents attached hereto).



- iii. National Construction Authority approval for the renovations was issued under NCA approval number 202108121212 (Annexed hereto and is contained at page 15 of the bundle of documents attached hereto).
 - iv. The Kenya Urban Roads Authority permit dated 12th August 2021 approving intended road adjustments and access into the suit property through the main Kyuna road without having the need to enter Paradise Valley Estate was accordingly issued (Annexed hereto and marked 'HI 6' is contained at page 111 of the bundle of documents attached hereto).
 - v. Nema EIA License dated 9th November 2021 along with EIA project report dated 1st October 2021 (Annexed hereto and marked 'HI 7' is contained at page 16 to 122 of the bundle of documents attached hereto).
 - vi. Drawing approval by County Government of Nairobi dated 1st November 2021 approving proposed alterations and extensions of an existing residential house to a Nursery School and Kindergarten (Annexed hereto and marked 'HI 8' is contained at page 123 of the bundle of documents attached hereto).
9. The Respondents denied the existence of sub-leases to each of the owners of properties within Paradise Valley estate as pleaded in the Petition. The 1st Respondent deposed that the sub-lease only applies to the 12th and 13th Respondents who occupy one property. The 1st and 2nd Respondents argue that the allegations of zoning of the suit property as low density area does not bar them from renovating the property as long as it is done within the permitted range. That the renovations do not in any way affect the Petitioners right to a clean and healthy environment.
 10. In paragraph 18 of the replying affidavit, the 1st Respondent deposed that they engaged and adequately consulted the Petitioners on their intended renovations. Further, they aver to having invited immediate neighbors through public participation exercise and several neighbors did not object to the project. It is their contention that some of the Petitioners elected not to participate in the consultative process hence the Respondents should not be punished for their nonparticipation. They stated that seven of the plots listed in the amended Petition are 500 metres from the suit property.
 11. The Respondents pleaded that they advertised relevant notices for change of user over the suit property from the preliminary stages but there was no reaction from the Petitioners. They added that the Petitioners have failed to demonstrate how their project is likely to affect the Petitioners right to vast resources in the estate and adequate water and that each house has its own water connection that does not interfere with any other house which are run by individual meters. That the 1st and 2nd Respondent as occupier act in good faith and have absolutely no interest in interfering with and/or destroying the quiet peace and enjoyment by the Petitioners of their respective properties.
 12. In reacting to the complaint on pollution, the Respondents stated that:
 - a. Three housing units/plots are situated along the estate perimeter wall facing the northern bypass and two of those housing units/plots are represented in this Petition.
 - b. Eight housing units/plots are situated at the valley of the estate close to the northern bypass and five of those units/plots are represented in this Petition and they are all exposed to considerable noise and air pollution due to the large number of vehicles plying through the bypass. In addition, the Kyuna road being a public road is the subject of use by numerous vehicles on a daily basis. Furthermore, majority of the Paradise Valley residents have Guard dogs which cause noise pollution during the night.



13. The Respondents deposed that the only steps taken within the suit property is to renovate the already existing residential houses structure and not alterations or additions to the existing structures. They wonder how establishing or setting up a Kindergarten to cater for educational needs of children below 5 years of age would adversely affect the environment within the suit property.
14. It is the Respondents averment that if the Petitioners were aggrieved with the change of user/development permission then they ought to have lodged a complaint with the County Physical and Land Use Planning liaison committee instead of rushing to file this case. They explained that the project report refers to the suit property as an existing educational nursery by virtue of the approved change of user but on the ground, the school is not operational neither has development alterations/additions been commenced since final approvals had not been secured. The Respondents urged the Court to dismiss the Petition.
15. The parties opted to prosecute the Petition by filing of written submissions. The Petitioners filed their submissions dated 14th November 2022 and supplementary submissions dated 8th March 2023. The Respondents submissions are dated 1st March 2023. In the introduction of their submissions, the Petitioners gave brief facts as pleaded by both sides and thereafter proceeded to identify two issues which they submitted on.
16. The first question they submitted on is whether the Respondents had complied with the laws in acquiring their various licences and approvals and whether the Petitioners right to a clean and healthy environment has been violated. The Petitioners reproduced the provisions of article 42 and 70 of *the Constitution* which addresses the right to a clean and healthy environment. The Petitioners then referred to the provisions of article 69(d) of *the Constitution* and Section 3(5)(a) of EMCA that requires for public participation in the management, protection and conservation of the environment.
17. It is the Petitioners' submissions that Kyuna Estate is zoned by the City County and Government under the Nairobi City Development Ordinances and Zone Regulations 2004 as low density residential area. That the zoning was developed by the State Agency to safeguard the Petitioners and Public right to a clean and safe environment. It is their argument that the proposed activities by the Respondents fall under the 2nd Schedule categorized as low and high risk developments under Rule 1(1) and 3(3) of the EMCA. Therefore, it was incumbent upon the Respondents and the Interested Party to ensure that they comply with sections 3(3) and 58 of EMCA and articles 42, 69 and 70 of *the Constitution* to ensure public participation was conducted.
18. The Petitioners submitted that the Respondents produced 4 questionnaires found at pages 21 – 32 of the Replying Affidavit. That the questionnaires were answered by Nyaku Ltd who sold the Respondents the land; Joy Tuja-Kionga who owns L.R No. 2019/7935 and Mary Mwangi owner of L.R 2019/7849 who are not residents of Paradise Valley. They aver that the public participations undertaken was superficial, cosmetic, flawed and failed the legal threshold. To support this argument, they cited the case of Mary Waithira Njoroge vs Muranga South Water and Sanitation (2022) eKLR where it was held thus:

“Public participation is not a mere formality. An entity must show that the said public participation was real, both qualitatively and quantitatively. Based on the above, this Court finds and holds that the alleged Public Participation by the Respondent did not meet the constitutional standards of public participation.”
19. The Petitioners further stated that because of the failure to conduct a real public participation that passes both the qualitative and quantitative tests, the Project Report was inadequate to give the



Interested Party sufficient information to issue the EIA license to the Respondents. The National Environmental Tribunal (NET) in *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR quoted with approval the case of Supreme Court of Belize in Claim No. 223 of 2014 as follows:

“*Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and Belize Electric Company Limited* stated as follows:

“... As Linden JA said with reference to the Canadian legislation in *Bow Valley Naturalists Society v Minister of Canadian Heritage* [2001] 2 FC 461 (in a passage quoted by the Chief Justice in this case):-

“The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but, as long as they follow the statutory process, it is for the responsible authorities.”

20. It is further submitted by the Petitioners that the importance of public participation is not a minimal but is a substantial requirement that bears constitutional basis. They referred the Court to the case of *S. Muiru & 2 others Vs Tigonu Treasures Limited & 2 others* (2014) eKLR which found that public participation is a critical requirement in safeguard of the right to clean and healthy environment. They noted that the EIA license was issued after the commencement of the project contrary to section 58 of EMCA hence The EIA license is void and nullity.

21. The Petitioners went on to submit that the EIA license and the Project Report were procured through non-disclosure and misrepresentation of material facts because there was no existing education center in the suit property. It is their contention that there was also lack of stakeholders engagement as provided for in Rule 9 of the Environmental (Impact Assessment & Audit) Regulations 2003 which states;

“ 1. Where the project report conforms to the requirements of regulation 7(1), the Authority shall within seven days upon receipt of the project report, submit a copy of the project report to –

- a. each of the relevant lead agencies;
- b. the relevant District Environment Committee; and
- c. where more than district is involved, to the relevant Provincial Environment Committee, for their written comments which comments shall be submitted to the Authority within twenty one days from the date of receipt of the project report from the Authority, or such other period as the Authority may prescribe.

2. On receipt of the comments referred to in sub-paragraph (1) or where no comments have been received by the end of the period of thirty days from the date of receipt of the project report, the Authority shall proceed to determine the project report.”



22. On the question whether the orders sought in the amended Petition should issue, the Petitioners submit that their Petition has met the evidential and legal threshold for granting of the orders sought. They state that the declarations prayed for should be given as they have demonstrated that the EIA license was issued irregularly illegally and ultra vires the Interested Parties' powers. To buttress this position, they cited the case of Communist Party of Kenya Vs Nairobi Metropolitan Services & 3 others (2022) eKLR which held thus:

“i) That it is hereby declared that the commencement of the impugned project before the issuance of the Environmental Impact assessment License was unconstitutional and contrary to the applicable environmental laws and regulations.”

23. The Petitioners in support of prayer 2 of the Petition cited Munyao J in Ken Kasing'a Vs Daniel Kiplagat Kirui & 5 others (2015) eKLR at paragraph 73 thus:

“I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefit are found to far outweigh the adverse effects to the environment ...”

24. The Petitioners urged the Court to find merit in the Petition and grant all the orders sought with costs.

25. For their part, the Respondents framed the following three issues which they submitted on as follows;

- i. Whether the Respondent complied with the relevant requirements of the law in acquiring approval and licences for the development of alterations and additional structures on the suit property.
- ii. Whether the Petitioners right to clean and a healthy environment has been infringed/violated by the Respondents.
- iii. Whether the Orders sought in the Amended Petition should be allowed?

26. In answering the first point, the Respondents restated the provisions of section 57(1), 58 and 61 of EMCA. Section 61(4) provides that:

“ 61

- (4). An applicant or an Interested Party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”

Section 78 of the *Physical and Land Use Planning Act* Provides that:

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to: -

- a. hear and determine complaints and claims made in respect to applications submitted to the planning authority in the County;



- b. hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the County;
 - c. advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
 - d. hear appeals with respect to enforcement notices.”
27. It is submitted by the Respondents that the Petition was prematurely presented to the Court since they (Respondents) had not started alterations and additional structure developments because they had been waiting for the final approvals from NEMA and the County Government. They added that they had advertised for change of user on 31/5/2021 which application was granted on 9/7/2021. That the Petitioners ought to have lodged an appeal under section 61(3) & (4) within 14 days of the decision.
28. The Respondents cited *James Mungai Munene & Another Vs Joseph Githinji Kamau & 3 Others* (2021) eKLR where Eboso J stated thus:

“Through this Petition, the Petitioners have challenged the development permission granted to the 1st Respondent by the 2nd Respondent. In response, the 1st Respondent contested the jurisdiction of this Court and contended that under section 61(3) of the *Physical and Land Use Planning Act*, the primary adjudicatory body vested with jurisdiction to adjudicate this dispute is the County Physical and Land Use Planning Liaison Committee.”

“From a proper reading of the above framework, it is clear that the PLUPA vests primary adjudicatory mandate in the County Physical and Land Use Planning Liaison Committee. The Act vests in this Court appellate jurisdiction over decisions made by the County Physical and Land Use Planning Liaison Committees. The Court therefore agrees with the 1st Respondent that in so far as this Petition challenges the land use approval and development permission granted to the 1st Respondent by the 2nd Respondent, the primary adjudicatory body to hear and determine the dispute in this Petition is the County Physical and Land Use Planning Liaison Committee.”

29. It is their further submission that they wish to establish a Kindergarten and will not be handling any toxic and/or hazardous waste that would pose a threat to the Petitioners right to a clean and healthy environment and that they (Respondents) have complied with the terms of clause 3(1) of the Environmental Management Co-ordination Act No. 8 of 1999 (EMCA). That if permitted, they shall engage in the development with proper mitigation measures in place to ensure the Petitioners peaceable enjoyment of their respective properties.
30. At paragraph 18 – 25, the Respondents submitted that they complied fully with the requirements of article 42 and 69 of *the Constitution*. They added that if the Petitioners feel aggrieved by the issuance of the EIA license, they ought to have invoked the provisions of Section 129(1) of EMCA and lodged a complaint at the National Environment Tribunal (NET). They placed reliance on the provisions of Section 129 which states thus:

- “ 1. Any person who is aggrieved by:-
- a. The grant of a licence or permit or a refusal to grant a license or permit, or the transfer of a license 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;

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)

(3) 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;

31. With regard to the effectiveness of the public participation they did, the Respondents submitted that all the affected parties were invited. That some of the Petitioners elected not to participate in the consultative process and the Respondents should not be punished for the same. It is their defence that some of the Petitioners who reside within Paradise Valley estate where the suit property is located are over 500 metres away from the suit property and would not in any way be affected by the activities conducted on the suit property.

32. The Respondents cited the case of Mui Coal Basin Local Community & 17 others vs P.S. Municipality of Energy & 15 others (2015) eKLR where the trial Court observed that:

“Public participation did not mean that everyone must give their views, which is impracticable. Rather that there ought to be evidence of “intentional inclusivity” in the participation program and which, on the face of it, took into account the principle that “those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account.” That notwithstanding, there is no attendant requirement that each individual’s views will be included ... the public authority has no duty to accept any and every view, the opposite of which would effectively neutralize and stall the exercise of the authority’s mandate.

In the final analysis, the rule of the thumb is that a reasonable opportunity is given to the public and all Interested parties, with timely access to information that is relevant to a process ... to facilitate the appreciation of the issue for consideration, and an opportunity to make a response.”

33. The Respondents concluded by saying that the Petitioners right to a clean and healthy environment has not been violated. They urged the Court to dismiss the amended Petition with costs.



34. In their supplementary submissions, the Petitioners reiterate that the Respondents did not comply with the provisions of section 58 of EMCA because they applied for the license on 1/10/2021 and which license was granted on 9/11/2021 post fact. The Petitioners state that article 69(d) of *the Constitution* provide that public participation in the management and conservation of the environment and in this case the public participation was not attained as required by the law.

35. The Petitioners in urging the violation of section 58 of EMCA relied on the decision of *Taib Investments Limited Vs Fahmi Salim Said & 5 Others (2020) eKLR* at paragraphs 36 & 37 thus:

“ 36. There was, in my view, a violation of Section 58 of EMCA which provides as follows:-

1. Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.”

“ 37. The defendants cannot argue that they have an EIA Project Report for the premises, for the simple reason that what is displayed is a project report for the site 13425/I/MN, which is not the suit property and it has been demonstrated that the coordinates given in that EIA Project Report are for the suit property. Indeed, the case of the 5th defendant is that it never issued any EIA licence for a project falling within the suit property. I agree that none was issued. The import is that the defendants allowed a project to be undertaken on the suit property without an EIA Project Report and without an EIA licence. Assuming that the EIA Project report was for the suit property, it wouldn't be a good report upon which a licence could be issued, firstly because it would have mis-described the plot number, and there are also very many discrepancies in the report, as pointed out by the plaintiff in her pleadings and also through her witness.”

36. They also referred to the case of *Charles Ongadi Nyambuga & 7 Others Vs NEMA & Ano (2019) eKLR* at paragraph 25 – 26 where the NET held thus:

“ 25. The Tribunal further finds that it is not in dispute that the construction of the Project started and had substantially progressed before the issuance of the EIA License. All Parties agreed that it was the 1st Respondent's action of stopping ongoing works and ordering that a Project Report be prepared that caused the 2nd Respondent to attempt compliance with the provisions of EMCA. We are satisfied that the Project Report was a foregone conclusion rather than a genuine and independent exercise.”

“ 26. With regard to the second issue for determination, the Tribunal finds that in the circumstances of this case, and in light of the fact that the 2nd Respondent



had been constructing and was stopped by the 1st Respondent through a Stop Order issued by it, the 1st Respondent should have taken proactive measures greater than in a situation where Section 58(1) of EMCA had been complied with by the Proponent. It would have been prudent for the 1st Respondent to take additional steps to seek comment from the Lead Agencies before issuing of the EIA License.”

37. I have read and analyzed the pleadings filed and the submissions rendered together with case and Statutory law referred to by both parties. I frame the following issues for this Court’s determination:
- i. Whether or not this Petition is premature? And if the answer is NO;
 - ii. Whether or not the Respondents breached the requirements on obtaining of EIA license and other relevant approvals?
 - iii. Whether or not there was public participation as envisaged in article 69(d), 10 of *the Constitution* and section 3(3) of EMCA?
 - iv. What orders should this Court grant?
38. The Petitioners pleaded that the EIA license held by the Respondents was illegal, unlawful and un-procedurally obtained for non-compliance with the provisions of article 42 and 69 of *the Constitution* and or Part VI of the EMCA. Article 42 gives every Kenyan citizen the right to enjoy a clean and healthy environment while article 69(d) requires the State (and its agencies) to encourage public participation in the management, protection and conservation of the environment.
39. The Petitioners are praying for an order cancelling or revoking the EIA license number NEMA/EIA/PSI/14982 dated 9th November 2017 (should read 2021) issued to the 1st Respondent. The question raised by Respondents is whether the time is ripe to issue such an order taking into account the provisions of section 129 of EMCA. The Petitioners are challenging the license issued and referred this Court to several decisions inter alia Ken Kasinga Vs Daniel Kiplagat Kirui supra. In the Ken Kasinga’s case, Munyao J at paragraph 73 of his judgement stated thus;
- “I am prepared to hold where a procedure for the protection of the environment is provided for by law, and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, have potential to harm the environment”
40. The second limb of the complaint touches on the change of user and planning permission/license which granted the Respondents permission to operate and or carry out a school or related activities on residential low density family house No. 49 comprised on property L.R NO. 209/8349. The change of user permission was granted by the Nairobi Metropolitan Services City Planning Department on 9/7/2021 under the Physical Planning Act No. 6 of 1996 (repealed) now replaced by the Physical Planning and Land Use Act No 13 of 2019.
41. Section 78 of the Physical Planning and Land Use Act thus provides thus:
- “The functions of the County Physical and Land Use Planning Liaison Committee shall be to: -
- a. hear and determine complaints and claims made in respect to applications submitted to the planning authority in the County;



- b. hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the County;
- c. advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- d. hear appeals with respect to enforcement notices.”

42. The Respondents were equally granted permission on 1/11/2021 under the Building Order 1968 L.N. 15/1969 for the proposed alteration and extension of an existing residential house to nursery school and Kindergarten on L.R 209/8349. The impugned planning lincense is governed by the provisions of PLUP Act No. 13 of 2019.

Munga J in the Ken Kasinga case proceeded to cancel the license that had been issued to the developer. However, the Court of Appeal in the same case now cited as Eaton Towers Kenya Ltd Vs Kasing’a & 5 others (2022) KECA 645 at paragraph 34 held thus:

“From our reading of the Petition, we concur with the appellant that the heart of it was a challenge on procedural issues. A look at the prayers sought in the said Petition which included; the suspension of all the licences and approvals issued to the appellant is tell-tale sign as to what the Petition was primarily about. We find that the 1st Respondent creatively couched his complaints as a constitutional Petition, when he could easily have lodged them with the tribunal on the issuance of the EIA licence and to the committee concerning the development approval. This Court has made numerous pronouncements on this issue. It stated in Gabriel Mutava & 2 Others -vs- Managing Director Kenya Ports Authority & Another [2016] eKLR. In saying all these, we are not oblivious to the fact that a Party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes?”

43. The Court of Appeal went further to state that the 1st Respondent (Ken Kasing’a) was free to pursue all the available avenues but instead chose to skip them for convenience and therefore the Petition ought not to have been entertained by the Environment and Land Court. According to the Court of Appeal, the Judge misdirected himself when he held that the Court had jurisdiction to entertain the claim. They went further to cite the case of John Harun Mwawu Vs Peter Gastrow & 3 others (2014) eKLR that:

“It is an established practice that where a matter can be disposed of without recourse to *the Constitution, the Constitution* should not be involved at all. The Court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.” (See also Ashwander V. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) And S V. Mhlungu, 1995 (3) SA 867 (CC).”



44. The complaints herein were premised on the approvals issued by the Interested Party and the City Council of Nairobi. The Court of Appeal addressed itself where the claim/Petition is multifaceted thus:

“We state categorically and without equivocation that the multifaceted nature of any Petition, or suit for that matter, is not a basis to find a Court to arrogate jurisdiction to itself. This Court already made a finding on this issue and castigated such reasoning in *Kibos Distillers Limited & 4 Others -vs- Benson Ambuti Adegwa & 3 Others* [2020] eKLR.”

45. Still on the question of whether the Petition was premature, the Supreme Court in the case of *Benson Ambuti Adegwa & 2 Others Vs Kibos Distillers Ltd & 5 Others* Petition No. 3 of 2020 (2020) eKLR at paragraph 50 observed thus:

“The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court “in the interests of justice.” It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised its discretion to hear and determine the Petition.”

46. The Respondents in their submissions cited the case of the speaker of the National Assembly Vs James Njenga Karume (1992) eKLR which also discussed the doctrine of exhaustion before the jurisdiction of our superior Courts are invoked. It was held as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

47. Similarly, not too long ago, the Court of Appeal in *Kibos Distillers Limited & 4 others Vs Benson Ambuti & 3 Others* [2020] eKLR laid down the following principle relevant to these objections:

“Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legitimately been mandated to hear and determine a dispute.”

48. Lastly, the 1st Respondent’s objection was anchored on Section 16 of the *Government Proceedings Act* which provides as follows:

“1. In any civil proceedings by or against the Government the Court shall, subject to the provisions of this act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require;

Provide that:-

i. where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not



grant an injunction or make an order for specific performance,
but may in lieu thereof make an order declaratory of the rights
of the parties; and

49. In the Petitioners' supplementary submissions, they referred this court to the case of Charles Ongadi Nyambuga & 7 others Vs NEMA supra which case was actually decided by the National Environment Tribunal (NET) the body mandated with handling complaints such as these raised by Petitioners in accordance with section 129 of EMCA. This explains that indeed the Petitioners complains would be properly addressed under the provisions of section 58 by the NET before invoking the jurisdiction of this Court.
50. It is my considered opinion which opinion if formed based on the pleadings and the cases cited that the amended Petition was prematurely presented to this Court. This is confirmed by the fact the irregularity or otherwise of the licenses issued to Respondents ought to be challenged FIRST before the NET and the Nairobi City County Physical Planning Liaison Committee as established in law. It flows from the pleadings that the violations of the rights by the Petitioners were pegged on the non-compliance with the process in the acquisition of the licenses issued to the Respondents. It means that the violation of the rights cannot stand on their own without mentioning for instance, failure by the approving authority to consider that the proposed development fell under the category of high risk under Rule 3 in the 2nd Schedule of the EMCA.
51. Consequently, the Petition is struck out. Since the issues raised are mundane and ought to be addressed hence the Petition was not maliciously filed, I make no order as to costs.

JUDGMENT, DATED, SIGNED & DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2023.

A. OMOLLO

JUDGE

