



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 43 OF 2019

IN THE MATTER OF: ARTICLES 19, 20, 22 AND 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED THREATS TO AND CONTRAVENTION OF RIGHTS UNDER ARTICLES 27, 28, 29, 35, 40, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 50(4), 156(6), 157(10) AND 245(4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE BASIC EDUCATION ACT NO 14 OF 2013

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: THE ALCOHOLIC DRINKS AND CONTROL ACT NO 4 OF 2010

AND

IN THE MATTER OF: CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

LONDON DISTILLERS (K) LTD.....PETITIONER

AND

THE CABINET SECRETARY,

MINISTRY OF EDUCATION.....1ST RESPONDENT

THE COUNTY DIRECTOR OF EDUCATION,

MACHAKOS COUNTY.....2ND RESPONDENT

KITENGELA INTERNATIONAL SCHOOLS.....3RD RESPONDENT

JUDGEMENT

The Parties

1. The Petitioner is described in this petition as a limited liability Company incorporated under the Companies Act, Cap 486 Laws of Kenya, with its registered office in Nairobi and its multibillion distillery plant spread in over 350 acres of land in the Athi River area off Mombasa–Namanga Road Interchange, Machakos County with a reputation of excellence in the production of its products and being the lead manufacturer of distilled substances in Kenya and the entire East Africa with a substantial market not only in Kenya but worldwide.
2. The 1st Respondent is the Cabinet Secretary for the Ministry of Education, charged with the responsibility for matters relating to Basic education and training; the Cabinet Secretary in consultation with Education, Standards and Quality Assurance Council, and the relevant stakeholders are charged with the responsibility to establish guidelines and prescribe rules and regulations for the establishment, licensing, accreditation and registration of basic education and training institutions.
3. The 2nd Respondent is the Secretary of the County Education Board, which Board mandates the relevant registration of basic education institution in Machakos County, where the 3rd Respondent is located.
4. The 3rd Petitioner is a learning institution that has leased out and or bought some of the apartments at the **Great Wall Gardens Housing Development Phases 1**, from the 4th Respondent herein to establish Kitengela International Schools for purposes of setting up a mixed day Primary and Pre-school.
5. The 4th Petitioner is described as a company duly registered in the Republic of Kenya which is involved in the Real Estate industry to wit it has constructed residential houses known as **Great Wall Gardens Housing Development Phases 1, 2 and 3** on **LR. No. 12581/2, LR. No. 12581/14** and **LR. No. 12581/13**, which neighbour the Petitioner’s distillery plant.
6. The 5th Respondent is the legal government advisor.

The Petition

7. This petition was presented by the Plaintiff which described itself as a limited liability company incorporated under the laws of Kenya being a multibillion distillery plant spread over 350 acres of land in Athi River Area off Mombasa-Namanga Road Interchange involved in manufacture of distilled substances in Kenya and the entire East Africa with substantial market worldwide.
8. According to the Petitioner, its sister company Galot Industries Limited owned a large plot of land pursuant to an allocation made in its favour in 1982 In an area zoned off for industrial development in Athi River where the Petitioner’s plant is situate. The said Galot Industries subdivided the said piece of land into several plots some of which it sold to Kenya Commercial Bank Ltd in order to offset some of its financial obligations.
9. The petitioner then commenced major industrial developments on some of the remaining plots particularly LR No. 12867/9 neighbouring LR No. 12867/10 where it set up its factory as an alcoholic distillery plant in 1986 with an intention of constructing further industrial plants thereat. According to the petitioner several other industries have been set up within the area.
10. However, in 2016 the petitioner realised that the user of the plots it had sold earlier had been converted from industrial development to mixed-use including for residential plots when the construction of several massive residential apartments by 4th Respondent, known as Great Wall Gardens Housing Development Phases 1, 2 and 3 started sprouting in the neighbourhood. According to the petitioner, it was not involved in the process leading to the change of user due to the lack of involvement process of the issuance of the Environmental Impact Assessment (EIA).
11. Being apprehensive of the likelihood of future conflicts resulting therefrom the petitioner filed National Environment Tribunal Appeal NET No. 21 of 2019 (the appeal) challenging inter alia the change of user and the issuance of the EIA Licences to the 4th Respondent to commence the said construction of the said residential houses known as Great Wall Gardens Housing Development Phases 1, 2 and 3 by the 2nd Respondent respectively on LR No. 12581/2, LR No. 12581/14 and LR No. 12581/13 amidst pre-existing industrial plants including the Petitioner. Though the said Tribunal on 4th September, 2019 stayed further construction or development thereon, the 1st Respondent filed before this Court JR No. 41 of 2019 - **Erdermann Property Ltd vs. National Environment Tribunal and Others** where it obtained leave and stay of the orders of the Tribunal. However, on an application by the Petitioner, the said orders were vacated.
12. It was pleaded that resulting from the said change of user on the land developed by the 4th Respondent several suits were instituted between the Petitioner and the 4th Respondent resulting from the conflict in the change of users of the neighbouring properties. It is the Petitioner’s case that the 4th Respondent is keen in eliminating the Petitioner’s presence in the said areas by deliberately and maliciously engaging in projects that will easily oust the petitioner and lead to the closure of its distillery plant from where it has been in occupation for a very long time. It was alleged that the 4th Respondent has engaged various state agencies in a bid to taint the Petitioner’s image as non-compliant with various regulations and the petitioner enumerated the various events including the vandalization of its sewer line and institution of cases which in its view were meant to condemn it unheard.

13. It was pleaded that the 4th Respondent has further leased out or sold some of the apartments at the said Great Wall Gardens to Kitengela International Schools, the 3rd Respondent herein for the purposes of setting up a mixed day Primary and Pre-School and the 3rd Respondent has established a learning institution thereat barely 8 metres apart from the wall of the Petitioner's distillery immediately next to where the petitioner's molasses storage tank and digester for biogas within the distillery is situated contrary to the provisions of the **Alcoholic Drinks Control Act**, No 4 of 2010, particularly section 12 thereof. This action, it is contended is meant to oust the Petitioner on the ground that the Petitioner is a distillery handling alcoholic beverages which can easily fall on the hands of school-going children and hence instigate a process by which the Petitioner's distillery would be closed in what the petitioner terms as economic sabotage.

14. The Petitioner contended that the 2nd Respondent ought to have put into consideration the likelihood of future conflicts emanating from the proximity of the 3rd Respondent's school to its distillery and should thereby have not licenced the establishment of the said school in the 4th Respondent's property, an act which it reiterated was contra the provisions of the **Alcoholic Drinks Control Act** and various provisions and regulations of the **Basic Education Act**.

15. The petitioner lamented that despite requesting the 1st and 2nd Respondents to investigate the issue no response has been forthcoming yet the 4th Respondent is determined to and has continuously violated the petitioner's right to property by deliberately and knowingly setting up projects that will affect the petitioner's proprietary rights over the petitioner's land on which its distillery is based.

16. The said action it was contended have and will occasion great prejudice to the petitioner and amounts to violation of its fundamental rights and freedoms such as the right to fair hearing, right to property, right to preservation of dignity, right to equal protection and equal benefit of the law, freedom from cruel and degrading treatment, right to access to information.

17. The petitioner therefore sought the following orders;

a) A declaration that the establishment of the school by the 3rd Respondent within Great Wall Gardens Housing Development Phase 1 is unlawful and in contravention of the principles established under the Constitution, the Children's Act, the Alcoholic Drinks Control Act and the Basic Education Act.

b) An order of prohibition be issued restraining the 1st, 2nd and 5th Respondents from issuing any licence/approval to operate the 3rd Respondent's School at Great Wall Gardens Housing Development Phase 1 and or commencing or carrying out any intended learning activities thereat forthwith.

c) An order of permanent injunction stopping any further enrolment and or advertisements to the general public on the commencement of Kitengela International School campus at Great Wall gardens Housing Development.

d) An order of certiorari bringing to this Court the decision to grant the Licence to the 3rd Respondent to operate a school within Great Wall gardens Housing Development Phase 1.

e) Costs of and incidental to this Petition.

f) Any other or further relief this Honourable Court may deem fit and just to grant.

18. In the supporting affidavit it was added that the petitioner and Galot are sister companies founded by **Mohan Galot**. Following the Petitioner's protest as to the manner in which the 4th Respondent obtained its EIA Licences for the construction of Great Wall Housing Development Phase 1, the 4th Respondent falsely reported to Parliament that the petitioner was polluting the environment by discharging effluent into River Athi as well as polluting the air and hired layabouts and residents to demonstrate outside the petitioner's distillery to shut the same down. It was contended that the 4th respondent has continued to be driven by the singular motive to have the petitioner's distillery shut down by relentlessly funding unwarranted and adverse medial campaigns against the petitioner thereby precipitating a defamation suit filed against it by the petitioner being Nairobi HCCC No. 221 of 2019.

19. It was contended that as result of the dismantling of the petitioner's sewer line and the filling of its manhole by hired goons and Mavoko Water & Sewerage Company at the instigation of the 4th Respondent, connecting it to EPZA main Trunk Sewer on the said allegations of discharge of toxic waste into EPZA line, the subsisting contract between the petitioner with EPZA was frustrated thereby resulting in the shut down of the petitioner's distillery for about one and a half months resulting into massive losses of revenue. It is that action that led to the filing of ELC No. 104 of 2019. The said vandalism however continued even after the court issued orders allowing the petitioner to reconnect to the EPZA Main Trunk Sewer line.

20. According to the petitioner at no time were its views taken when the use of the residential apartments were being converted to a commercial facility for provision of education services. It was contended that the application for licencing, registration and accreditation in basic education as sought to be carried out on the suit property was to be made by the 3rd Respondent to the 2nd Respondent which in liaison with the Education, Standards and Quality Assurance Council to make recommendations for the licencing, accreditation and registration of an institution. It was deposed that the 2nd Respondent is to ensure that the facilities where an applicant wants to set up a learning institution is appropriate for learning and that the premises are suitable in light of the provisions of the **Alcoholic Drinks and Control Act** criminalises the sale of alcoholic beverages within 300 metres. The petitioner therefore stated that the proximity of the Great Wall Gardens Housing Development Phases 1 to the petitioner's distillery is not suitable for a learning institution as it falls within the impugned parameters set by the said Act.

21. The petitioner lamented that if the 3rd Respondent is allowed to commence its learning as proposed there is a real threat that the 4th

Respondent who has been colluding with several public institutions to frustrate the petitioner by giving it bad publicity will facilitate fresh round of assault against the petitioner to have the same shut down by the authorities on allegations of violation of the law by manufacturing and selling alcohol within the outlawed parameters.

22. It was on the foregoing basis that the petitioner sought the orders hereinabove.

3rd Respondent's Response

23. In response to the Petition, the 3rd Respondent, Kitengela International Schools, averred that the 4th Respondent is the registered proprietor of LR No. 27317/3 situated at Mavoko-Machakos County where it has developed a mixed used development project comprising of residential units (on six floor blocks), a three floor commercial centre, a school, green space, associated facilities and amenities known as Greatwall Gardens Estate Phase 1 (the Project). It was averred that the 4th Respondent obtained development permission from the County Government of Machakos (the County Government) to change the use of the 3rd Respondent's leased property from single dwelling to multi dwelling (flats) before commencing the said Project. Further, the National Environment Management Authority (NEMA) had granted an Environmental Impact Assessment Licence (EIA Licence) to the 4th Respondent to undertake construction of the said Project. It was further averred that the 4th Respondent was issued with a Certificate of Compliance by the National Construction Authority before commencement of the Project.

24. The 3rd Respondent therefore believed that the 4th Respondent satisfied all legal and regulatory requirements in undertaking the Project.

25. It was averred that by a lease dated 11th September, 2019, the 4th Respondent leased all those premises known as the School Premises comprising of twenty-one classrooms and eight toilet facilities per floor and the back fenced yard within Greatwall Gardens Estate – Mavoko County LR No. 27317/2 (the School) to the 3rd Respondent for the purposes of establishing and operating a private mixed day nursery/primary school for a period of eight (8) years from 1st September, 2019. Subsequently, the 3rd Respondent applied to the Machakos County Education Board for registration of the School and on 23rd September, 2019, the County Government's Department of Health and Emergency Services inspected the 3rd Respondent's premises and upon being satisfied that the 3rd Respondent had met all the requirements set out in the **Public Health Act** Cap 242 and met all the requirements set out under the **Public Health Act** Cap 254 and the Food, Drugs and Chemical Substances Act Cap 254 and health requirements issued the 3rd Respondent with a Health Clearance Certificate dated 25th September, 2019.

26. Following the inspection of the 3rd Respondent's premises on 23rd September, 2019 by the County Government's Department of Health and Emergency Services and being satisfied with the state of the school facilities, including the School's water supply and waste management systems, the 3rd Respondent's School was recommended for registration. On 3rd October, 2019 the County Government's State Department of Early Learning and Basic Education which is responsible for Quality Assurance and Standards Assessment sent a team of its officers who assessed the 3rd Respondent's School's leadership and management, administrative and legal documents, rallying statements, teaching and non-teaching staff, enrolment, curriculum organisation and education standards, physical resources and infrastructure before forming the opinion that the school had provided the requisite physical, teaching and learning facilities and teaching staff suitable for basic quality education and report was prepared recommending the provisional registration of the school as a private mixed day nursery/primary school.

27. It was therefore the 3rd Respondent's position that it had satisfied all legal and regulatory requirements for the establishment of a private mixed day nursery/primary school and the decision of the County Education Board on provisional registration was being awaited ahead of the intended date of opening of the school pending notification of full registration. In the meantime, the school was allowed to enrol pupils to start classes in January, 2020 and the 3rd Respondent had by then enrolled three hundred and 5 (305) pupils in various classes ranging from Playgroup to Standard Six who had already paid fees, purchased the required uniforms and were ready to start classes in January, 202. In preparation for the teaching the school had recruited thirteen teachers.

28. Regarding the allegation that the petitioner was not involved in the change of use from industrial development to mixed use, it was contended that the development permission in respect of the subject premises was issued on 30th September, 2015, and if the petitioner was aggrieved, it ought to have lodged its objections to the County's liaison committee pursuant to section 26 of the **Physical Planning Act** (now repealed) or to lodge an appeal under section 13 of the said Act. By failing to do so, it was contended that the petitioner's complaint in respect thereof is premature and an abuse of the court process.

29. As regards the allegations of illegal obtaining of an EIA Licence, it was contended that such allegations are premature and an abuse of the court process as the petitioner ought to have appealed against its issuance to the National Environment Tribunal (NET).

30. It was the 3rd Respondent's case that the petitioner's objections are now overtaken by events as the Greatwall Gardens Estate Project including the school was completed before the objection was filed.

31. Regarding the allegations that the premises comprising the School are not suitable for a learning institution due to their proximity to the Petitioner's distillery plant, it averred that those allegations are false and misleading for the following reasons:-

a) There is the access road distance between the gates of the 3rd Respondent's School and the Petitioner's gate is more than eight hundred (800) metres which is much greater than the distance contemplated under Section 12(1)(c) of the **Alcoholic Drinks Control Act, 2010**;

b) The entrance for the Petitioner's premises faces in a different direction from that of the 3rd Respondent's premises and one is not

visible from the other;

c) Both the Petitioner's property and that of the 3rd Respondent have boundary walls;

d) The trucks ferrying products from the Petitioner's premises do not pass any closer than seven (700) hundred metres from the 3rd Respondent's premises;

e) The 3rd Respondent's boundary wall and gate is guarded on a twenty four (24) hour basis which are manned twenty four hours by security guards thereby ensuring that no alcoholic can be smuggled out to the school and no student can find their way into the Petitioner's factory;

f) The Petitioner's premises are not used for consumption of alcohol but for manufacture and sale of alcohol to distributors; and

g) The possibility of pupils from the 3rd Respondent's school accessing alcoholic drinks from the Petitioner's premises is nil/remote.

32. The 3rd Respondent averred that Section 12(1) of the **Alcoholic Drinks Control Act, 2010** prohibits the issuance of licences for sale of alcoholic drinks in institutions of basic education, including primary, secondary schools and residential areas and no licence has been obtained for sale of alcoholic drinks in the 3rd Respondent's School, neither is there an intention to sell alcoholic drinks within the School. Consequently, there is no violation of any of the provisions of Section 12(1) of the **Alcoholic Drinks Control Act**. Further, Section 12(1)(c) of the **Alcoholic Drinks Control Act, 2010** prohibits the issuance of licences for the sale of alcoholic drinks to be consumed in the premises which are not more than three (300) metres from any nursery, primary or secondary school. The Petitioner does not sell alcohol for consumption in the Petitioner's premises and that the Petitioner is a manufacturer who sells to distributors who ferry the products out of the Petitioner's premises for distribution away from the Petitioner's premises. In the circumstances, the provisions of Section 12(1) (c) of the **Alcoholic Drinks Control Act, 2010** have not been violated. The Petitioner's apprehension that the Petitioner's distillery will be closed due to its proximity to the School, according to the 3rd Respondent, has no legal basis in view of the foregoing.

33. It was in any event contended that if indeed the Petitioner had any objections regarding the suitability of the 3rd Respondent's premises for use as a school, the Petitioner ought to have lodged an appeal to the County Education Board in the manner prescribed under Sections 85 and 93 of the **Basic Education Act Cap 14 of 2013** and by failing to do so, the Petitioner's Petition is premature, and an abuse of the court process.

34. According to the 3rd Respondent, since the Petitioner's premises and distillery is also surrounded by residential estates which house families and school going children, it would be discriminatory and a violation of the 3rd Respondent's rights under Article 27 of the Constitution if the 3rd Respondent's School is stopped from operating on grounds of its proximity to the Petitioner's distillery whereas families with young school going children are allowed to reside next to the Petitioner's distillery.

35. It was therefore the 3rd Respondent's position that the Petitioner has not demonstrated any violation of its constitutional rights by the 3rd Respondent, and hence the Petitioner does not have a reasonable cause of action against the 3rd Respondent. Further, the Petition herein does not raise any constitutional issues and that the matters raised can be canvassed in appropriate forums provided under various statutes.

4th Respondent's Case

36. In opposing the Petition, the 4th Respondent, **Erdermann Property Ltd**, averred that this Petition has no legal or factual merit but has solely conjured up as part of the continuing elaborate attacks and onslaught of suits designed nefariously to punish it. In its view, the Petitioner, is certainly making good its threat to fiercely fight and lash back to frustrate and cripple any of its lawful venture, its subsidiaries and partners; with a view to demanding it ceases and desists from complaining and challenging the Petitioner's hitherto unchallenged, unmitigated and unremedied pollution in the larger Mavoko area. It contended that it is in fact the 4th Respondent, and indeed the 3rd Respondent herein which are the real victims of actual onslaught on their fundamental rights and freedoms. It disclosed that the fact of the Petitioner's unbridled pollution is evinced on numerous instances including *vide*:

(i) A Report of the National Assembly's Departmental Committee on Natural Resources and the Environment (*which report has been adopted as a Report of the whole House and to date remains unchallenged*). The Report expressly found that the Petitioner is culpable of various environmental polluting activities and the National Assembly directed that various reasonable mitigating measures be adopted by the Petitioner under supervision from the National Environment Management Authority (NEMA).

(ii) In respect of the proceedings before the *National Assembly Departmental Committee on environment and Natural Resources* the Petitioner and the NEMA are on record in the Hansard, as reporting on 'continuous' compliance and mitigation measures (*the fact of which is disputed*) being adopted by the Petitioner.

(iii) The NEMA, the Export Processing Zone Authority (EPZA) and the Machakos County Government have in exercise of their lawful mandate previously issued closure and/or remedial notices, to the Petitioner indeed after their investigations had disclosed unlawful operations at the distillery operated by the Petitioner.

(iv) That the NEMA has sought to take legal action against the EPZA and its officers under Section 72, EMCA on account of ostensible failure to reign in on pollution activities of the Petitioner; constraining the EPZA to seek legal protection in light of EPZA's clear enforcement action against the Petitioner.

37. According to the 4th Respondent, the Petitioner is demonstrably an undeserving party of the orders sought in its Petition; its admitted and documented violations militate against any grant of equitable discretionary orders; in addition to the absence merit in its petition.

38. The 4th Respondent deposed that it is the registered owner of all that Parcel of land known as L.R No. 12581/14 situated at Athi River, Machakos County where it has embarked on the process of construction of a mixed use development known as Great Wall Garden Estate Phase III which shall comprise 576 units, parking spaces and shop units. This development is the third phase of Great Wall Gardens I and II, which were developed LR 12867/13, 27317/2 and have already been sold and occupied. According to the 4th Respondent, it has demonstrably undertaken and received all lawfully required statutory and regulatory approvals in respect of its ALL subject developments including undertaking an elaborate EIA Study and lodging an EIA Project report against which an EIA Licenses were lawfully issued. It asserted that this is not only a most unfortunate abuse of court and legal process: but also a veil concealing vested malicious commercial interests of the Petitioner, masked as violations as opposed to furthering social justice or public interest objectives, which a Constitutional court cannot countenance and that the Petition does not disclose any arguable case there is absolutely no plausible nexus between the school by the 3rd Respondent and the fears of the Applicant.

39. The 4th Respondent averred that the 3rd Respondent school was amongst the best nationally performing school in the 2019 Kenya Certificate of Primary Education (KCPE); with an established track record for excellence – public interest must lie in allowing the extension of these facilities to more desirous Kenyans and that all lawful prerequisites have been sought and obtained, in the lead-up to the establishment of the school.

40. It was averred that the Petition herein is based on admissions of current and possible future unlawful conduct, and they equally represent a manifest misapprehension of facts and the law in as far as it mischievously invites the Court to sanitize and legitimize, an apparent admission of unlawful operations at the Petitioner's distillery the Petitioner's failure to effectively control, manage and mitigate its waste, to avoid pollution and possible harmful health complications that may be visited on its neighbours in fact and in law. The Petition, according to the 4th Respondent further reveals a manifest misconception and misapprehension of the obtaining law in seeking to hold the 4th Respondent responsible and fault it speculatively on unfounded possible claims/causes, and the same is for dismissal in limine.

41. It was deposed that the 4th Respondent is a real estate developer focusing on pristine affordable housing with an extensive establishment known as Great Wall Apartments situate on LR 12867/13, 27317/2 and 12581/14 located in Athi River, Mavoko Sub-County, Machakos County. The vision of the 4th Respondent, also happens to cohere with a primary challenge for Kenya as a developing nation i.e. provision of affordable quality housing. The 4th Respondent's property, it was revealed abouts *inter alia* the Applicant, who manufactures alcoholic beverages; but besides the 4th Respondent's property, developed within the subject area there is already another school Nova Pioneer Academy, there are also numerous other housing estates and residential dwellings within the neighboring vicinity of the Petitioner - which developments include Everest park, Sunset Boulevard, Crystal Rivers Estate and mall, China WU Yi mall, Coloho mall and Hotel, inter alia Mavuno Church as well as informal settlements carton city and jam city. Assertions on subject area being predominantly industrial is a clear misrepresentation.

42. While admitting that the zoning of the subject area is mixed user, it was averred that the 4th Respondent lawfully acquired its property and the user of the properties being regularly obtained with the requisite approvals even before acquisition of the property from the relevant authorities. Indeed, multiple parties, over the years, use the neighboring properties for non-industrial use in accordance with their titles – no merited legal challenge exists anywhere, if at all, on the question of the user or change of the titles. In the 4th Respondent's view, it is therefore surprising and indeed curious, that the Petitioner appears to single out the 4th Respondent and purport to impute illegality thereto on account of having receiving approvals to establish a residential property within the area whereas the user is undisputedly mixed-user with approvals granted to other developers as well.

43. The 4th Respondent accused the Petitioner of deliberately misrepresenting the depositions referenced thereto all in attempt to steal a march and secure undeserved orders from Court. It was its case that the industrial emissions from the Petitioner and various interventions have been made by the various agencies whose interventions have been sought and these interventions include orders to submit stack emission compliance reports, site verification visits, verification inspections, review of standard operating procedures as well as strategic environmental assessment and closure orders on various occasions so as to regulate its. The Petitioner, in the 4th Respondent's view has been the offender as far as environmental pollution is concerned and it is surprising that it would brazenly seeks to legitimize its illegalities. In fact, NEMA has previously issued a shut-down Order due to the pollution and disregard for directives to mitigate the pollution. On the contrary, the Petitioner (who is supposed to champion the rights of consumers) seeks conservatory orders to aid the continuing wrongs which mischief we ask the court to read and penalize accordingly.

44. The 4th Respondent insisted that since the Petitioner is co-existing with the 4th Respondent and other developments in the same area, the concern before this Court must be for the Petitioner therefore to comply with not only the Constitution but the **Environment Management and Coordination Act, 1999** (and the regulations made thereunder) in its operations so as to safeguard its neighbors from dangers of environmental pollution.

45. It was asserted that the clearly unrelated matters on supposed defamation, appeal(s) before the National Environment Tribunal (NET) and resultant suits to the high Court and the Environment and Land Court as raised by the Petitioner a merely a 'red-herring'; as not only is there is no merit to the averments but the same have no probative value to the instant petition and/or application and merely serve to obfuscate the solitary question of whether the supposed fears and apprehensions are 'real' and merited. To the 4th Respondent, there is a clear pattern of abuse of legal process and exploitation of court process through multifarious suits, contrived from the most imaginative of causes of action strewn together to find any and all avenues of frustrating the 4th Respondent. Unfortunately, the Petitioner has succeeded in some instances, as currently phase 3 of GWG is enjoined by virtue of a status quo order issued by the NET in NET Appeal 21 of 2019, nonetheless most of the claims in the said appeal were struck out for absence of merit.

46. The 4th Respondent also contended that the Petition is manifestly flawed as it fatally fails to meet the legal threshold established in

Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154 as it does not particularise with precision, if at all, the rights alleged to be violated by the 4th Respondent and/or any Respondent; neither the constitutional provisions alleged infringed with sufficient particularity and specificity nor the manner in which these rights have been infringed to invoke this Court's jurisdiction. In its view, the orders sought herein do not in any way further the rights under which the Petition is said to be brought, and the Orders sought if granted will only unduly inhibit the 3rd and 4th Respondents, from exercising their lawful right to property under Article 40 but also deprive so many other desirous Kenyans of access to quality and affordable education.

47. It was therefore sought that the petition be dismissed with costs.

The Petitioner's Submissions

48. According to the Petitioner, the issues that fall for determination in this petition are:

i) Whether or not the actions of the Respondents violate and or threaten to violate the Constitutional rights of the Petitioner?

ii) Whether the Orders sought in the Petition should be allowed.

49. On behalf of the Petitioner, it was submitted that the actions of the Respondents have violated and continue to threaten various of its rights as envisaged in the Constitution.

50. The Petitioner relied on Article 50(1) of the Constitution and submitted that by the 4th Respondent knowingly and to its exclusion, undertaking the environmental impact assessment leading to the change of user and more particularly for setting up facilities for a school barely 8 meters away from its distillery, it breached its right to a fair hearing. The Petitioner's views were not sought and as such, it did not have a platform for it to raise its concerns on the change of use and the high potentiality and likelihood of future conflict arising due to the mixed-use. Owing to this, it only came to learn of the same, too late, and its appeal before the National Environment Tribunal challenging change of user and construction of Phase 1 and 2 of Great Wall Gardens Housing Development, was already time-barred. The Petitioner has never been involved as a project affected person in the processes towards authorization of the premises to be used as a school was condemned unheard, thus denied the right to a fair hearing. In this regard the Petitioner relied on the decision in **Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR** and **Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639** on the right to be heard.

51. Vide its letter dated 18th November 2019, the Petitioner wrote to the 1st and 2nd Respondents and raised the issue of the licensing of the 3rd Respondent's school within the proximity to its distillery and dispensing outlet. Despite this protest, the 1st and 2nd Respondent have to date chosen to ignore, continue to and or neglect to respond to the Petitioner's inquiry, yet again the Petitioner is condemned unheard and equally denied its right to access to information as envisaged in Article 35 of the Constitution.

52. According to the Petitioner, in the said letter, it raised very vital issues as to whether the due procedure was followed precipitating the issuance of a license by the County Education Board, Machakos County, in liaison with the Quality Assurance Control Council, for the establishment of the 3rd Respondent's school. It was submitted that the Petitioner sought this information in order to inform its decision on the proper avenue for redress, to enable it challenge the decision of the 1st and 2nd Respondent and to equally protect itself from the evident and documented economic sabotage by the 4th Respondent resultant from the continuous vandalism of its sewer lines and sabotage of its operations by the same 4th Respondent which led to the closure of its distillery for a period of one and a half months against it which equally threatened its right to quiet enjoyment and utilization of its property under Article 40 of the Constitution.

53. According to the Petitioner, a plain reading of Article 35(1)(a) of the Constitution reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 1st and 2nd Respondents and referred to the decision in the case of **Nairobi Law Monthly vs. Kengen (2013) eKLR** where the Court dealt with the applicability of the right to information.

54. It was submitted that the law enjoins the decision-maker to give written reasons for any action or decision taken as prescribed by Article 47(2) of the Constitution or give a statement of reasons for any decision reached pursuant Section 4(3) (d) of the ***Fair Administrative Action Act 2015***. Such written reasons may be given voluntarily or upon request; see **Section 6 of the Fair Administrative Action Act 2015**.

55. According to the Petitioner, Section 12 of the ***Alcoholics Drinks Control Act***, expressly provides that premises handling liquor should be established 300 metres away from schools. As such the 3rd Respondent in collusion with the 4th Respondent, by deliberately establishing the said school outside the parameters set out by the Act, and further, the 1st and 2nd Respondents ignoring these provisions together with the ***Basic Education Act*** amounts to a breach of the Petitioner's rights under Article 27(1 and 2) and 28 of the Constitution of which the former provides that all persons are equal under the law. All laws passed must apply to and benefit all persons whom they cover and must not be applied impartially.

56. According to the Petitioner its rights under Articles 47 and 48 of the Constitution have been violated in so far as it sought to query the process precipitating the authorization for the establishment of the 3rd Respondent's school but the same was ignored by the 1st and 2nd Respondent.

57. Further, the Petitioner asserts if or at all due process was followed, that the 2nd Respondent ought to have put into consideration the likelihood of future conflicts emanating from the proximity of the 3rd Respondent, school to its distillery and should not have authorised the establishment of the school. It was noted that the 3rd Respondent has in its pleadings admitted that it has not been licensed to manage/operate

a school but nevertheless it continues to operate a school within the premises contrary to Section 78 of the **Basic Education Act**, in collusion with the 4th Respondent who is hell-bent on ousting the Petitioner out of business and to equally economically sabotage it. Further, under Section 50 of the **Basic Education Act** it is provided that no person shall maintain a private school unless it is registered and at subsection (2) it is clear that no private school shall be registered if the school premises or any part of it is unsuitable for being a school.

58. The 4th Respondent has always waged a war against the Petitioner by alleging that the fumes from the distillery cause environmental pollution thereby resulting into poor productivity of workers, affecting the respiratory systems of the residents and especially children in the area thereby making the area uninhabitable as set out in its letter dated 22nd January 2018. Section 52(d) of the **Basic Education Act** provides that a private school is to maintain premises that meet occupational health safety standards. However, it is now the same 4th Respondent who has leased and or sold out space for the purposes of a school barely 8 metres away from the same distillery it complains about.

59. In addition to the above, the Petitioner submits that failure by the 1st and 2nd Respondents to participate in these proceedings, despite being served with the pleadings and the letter of 18th November 2019, and equally failing to controvert through a Replying Affidavit the facts set out in the Petition as well as the Affidavit in support thereof or a response to the said letter, further violates its right to fair administrative action as envisaged under the Constitution and the **Fair Administrative Actions Act**. Reference was therefore made to the decision of **Onguto J**, in **Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR**.

60. According to the Petitioner Article 40 of the Constitution which provides for the protection of a person's property and the guarantee that private property is not to be arbitrarily expropriated has been violated by the 4th Respondent who continues to be driven by the singular motive to have the Petitioner's distillery shut down, by relentlessly engaging in actions that will warrant its closure, for instance, making endless allegations, even before the National Assembly, that the existence of the said distillery is causing pollution, whereas knowingly letting and or leasing premises to the 3rd Respondent to establish a school, despite existence of a distillery within close proximity so as to launch a fresh front of assault against the Petitioner.

61. These and among other actions, it was submitted, have condemned the Petitioner to untold agony and anxiety over the magnitude and the effects of the anticipated conflicts arising from the mixed users in the area. The Petitioner contends that these conflicts may eventually culminate in its distillery being closed, thus leading to pecuniary losses, loss of employment and source of livelihood for all its employees. Due to this uncertainty, the Petitioner can neither make any further investments to expand its plant and that these actions by the 4th Respondents jointly with others culminated in a well-calculated scheme to economically sabotage it in blatant threat to and consequent violation of Article 43 of the Constitution which provides for the Economic and Social Rights of every person.

62. Further, as submitted above, the previous and continued conduct of the 4th Respondent, who leased the property occupied by the 3rd Respondent's school, knowingly and deliberately so, reeks of bad faith. The 4th Respondent knows very well that there already exists a myriad of disputes before the Courts, the Tribunal and the Parliamentary Committee on Environment and Natural Resources, which matter is well within public knowledge as the same has received wide media coverage.

63. That regardless of the existing conflicts, the 3rd Respondent proceeded to establish the school within the premises, which is a subject of various litigations, owing to the mixed user conflict between the Petitioner and 4th Respondent. The Petitioner contends that by their conduct, the two parties continue to threaten its rights under Article 40 of the Constitution to the extent that, owing to the alleged claims of pollution, the 3rd Respondent is likely to come before this Court in a very near future, or in its usual mannerism collude with other Government institutions alleging that the rights of its students as provided by Article 53 of the Constitution as read together with Article 43(1)(f) of the Constitution are being violated by the Petitioner. This will undoubtedly lead to the closure of the Petitioner's distillery.

64. It was submitted that on 2nd January 2020, this Court in dismissing the 3rd Respondent's Preliminary Objection on the question of its jurisdiction found that it is indeed seized with the jurisdiction to hear and determine this Petition. It was thus the Petitioner's submission that this Court has the jurisdiction to grant the Orders and relied on the finding of the **Maraga, CJ** in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate of & 4 Others [2013] eKLR**.

65. Having proven that the Petitioner's rights and fundamental freedoms as envisaged by various provisions of the Constitution as read together with Article 19, have been threatened and violated, the Petitioner called upon this Court in exercising its jurisdiction and in promoting the spirit of the Constitution and to make a finding in favour of the Petitioner and grant the Orders as sought.

3rd Respondent's Submissions

66. On behalf of the 3rd Respondent, it was submitted that From the pleadings filed by the parties, the following issues fall for determination:-

- a) Whether the Petitioner's Constitutional rights under Articles 27, 28, 29, 35, 40, 43, 47, 48 and 50 of the Constitution have been threatened or violated;**
- b) Whether the matters raised constitute constitutional issues/questions which ought to be heard by a Constitutional Court;**
- c) Whether the public interest militates against issuance of the orders sought;**
- d) Whether the Petitioner is guilty of laches and indolence and the effect thereof on the Petition.**

67. It was submitted that besides listing the Articles allegedly violated, the Petition does not specifically identify the manner in which the

said Articles have been violated; neither is there proof in the manner in which they have been violated and reliance was placed on the decision of **Mwita, J** in the case of **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR**. As regards the issue of discrimination, the 3rd Respondent relied on the case of **Jacqueline Okeyo Manani & 5 Others vs. Attorney General & Another [2018] eKLR**.

68. It was submitted that s perusal of the Petition and the Supporting Affidavit filed in this matter does not show the manner in which the Petitioner has been distinguished, excluded or preferred on the basis of differences of groups or persons based on race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between the Petitioner and the 3rd Respondent or any other party at all.

69. The allegation that the 3rd Respondent is in violation of Sections 12 of the **Alcoholic Drinks Control Act** and Sections 78 and 50 of the **Basic Education Act** is neither merited nor can it justify any finding of discrimination.

70. According to the 3rd Respondent, whereas the premises which are the subject of the Section are premises which are for use of sale of alcoholic drinks to be consumed on the premises, the Petition clearly indicate that the Petitioner is using its premises for manufacture of alcoholic drinks and not for sale for purposes of consumption at the premises. The manufactured drinks are thereafter sold to distributors who ferry them to other outlets for sale. In the circumstances, the said Section is not applicable in the circumstances of this case and in any event, there is no violation of Section 12(1)(c) of the **Alcoholic Drinks Control Act**.

71. Further, as indicated by **QS Paul Mwangangi** in his Affidavit, the distance by access road from the 3rd Respondent's School to the Petitioner's premises is more than eight hundred (800) metres. In addition, both properties are walled, and are guarded by security guards on a twenty four hours basis. The possibility of pupils accessing the Petitioner's premises is nil.

72. Regarding the allegation of violation of Sections 78 and 50 of the **Basic Education Act**, it was submitted that 3rd Respondent has completed the registration period and is now fully registered and accredited under the **Basic Education Act**. Consequently, there is no violation of Section 50 of the **Basic Education Act** as alleged or at all. Further, as demonstrated by way of annexures, the 3rd Respondent's School had undergone a quality review and approved in accordance with Section 82 of the **Basic Education Act**. Further and without prejudice to the foregoing, the Petitioner has not demonstrated by evidence nor argument how the said provisions have been applied in a discriminatory manner against it. The allegation of discrimination has not been proved at all.

73. As regards Article 28 of the Constitution which provide for the right to dignity, it was submitted that the Petitioner has not demonstrated by evidence or argument how its inherent dignity has been threatened or violated by the Respondents.

74. According to the 3rd Respondent, Article 29 of the Constitution provides for the right to freedom and security of the person, including the right not to be deprived of its freedom, detained without trial, subjected to violence, subjected to torture, subjected to corporal punishment and treated or punished in a cruel and inhumane manner. There is no allegation in the Petition or in the Supporting Affidavit that any of the Respondents has threatened the freedom and security of the Petitioner nor has any evidence been adduced in support of such allegations.

75. Regarding the violation of the Petitioner's rights under Article 35 of the Constitution on account of failure by the 2nd Respondent to respond to its letter dated 18th November 2019, it was submitted that the Petitioner being a juridical person and not a natural person cannot seek to enforce the right under Article 35 of the Constitution and reliance was placed on the decision of **Majanja, J** in **Famy Care Limited vs Public Procurement Administrative Review Board & Another & 4 Others [2012] eKLR**.

76. Further, the Petitioner has not demonstrated how the information sought which of its fundamental rights and freedoms it intends to protect with the information sought and the manner in which it will utilize the information sought and in this respect the 3rd Respondent relied on the decision of **Lenaola, J** (as he then was) in the case of **Timothy Njoya vs. Attorney General & another [2014] eKLR**, that where the Petitioner fails to demonstrate how the information sought will be utilized to enforce his Constitutional rights, an Order to enforce Article 35 of the Constitution will not be granted.

77. Responding to the allegation of violation of Article 40 of the Constitution that the 4th Respondent is likely to use the School to close down the Petitioner's distillery, it was submitted that as demonstrated above, Section 12(1)(c) of the **Alcoholic Drinks Control Act** cannot be used as a basis for interfering with the Petitioner's distillery as the Petitioner's property is not being used as premises for sale and consumption of alcoholic drinks. In addition, the distances between the School and the Petitioner's premises are more than the prescribed distances. Further and without prejudice to the foregoing, the Petition is premised on speculation and unfounded apprehension. From the time the construction and development of 4th Respondent's property was completed in 2016, the Petitioner has always known that there will be a school. In addition, the 4th Respondent leased the School and started undertaking works to ready the School for operation from the month of September 2019. If indeed, the intention of the 3rd and 4th Respondents was to use the School to force the closure of the Petitioner's distillery, how is it possible that no steps have been taken to implement such intention? It is not disputed that at the moment, there is no allegation by the Petitioner nor is there evidence tabled that the establishment of the school has actually interfered with the Petitioner's distillery. All there is speculation that in future, the 3rd and 4th Respondents may use the School to force closure of the Petitioner's distillery. The entire Petition is premised on speculation. In support of this position the 3rd Respondent relied on the decision of the Court of Appeal in the case of **Rose Nafula Wanyama v Nusra Nasambu Chibanga & Another [2020] eKLR**.

78. Regarding violation of Article 43 of the Constitution, that the Petitioner has been unable to expand its investment premised on the fear that the 3rd and 4th Respondent may in future use the School to seek for closure of the distillery in violation of its Constitutional rights under Article 43 of the Constitution, it was submitted that this allegation is not supported by any evidence. The Petitioner has not adduced any

evidence of such investment plans, and evidence of any threats by the 3rd and 4th Respondents. The allegation regarding threatened violation of Article 43 of the Constitution is thus speculative, to say the least.

79. Dealing with the allegations of violation Articles 47 and 48 of the Constitution as read together with Section 4(3) and 6 of the **Fair Administrative Actions Act** by the failure of the 2nd Respondent to respond to its letter dated 28th November 2019, it was submitted that a careful reading of Section 4(3) of the **Fair Administrative Actions Act** indicates that the obligation for the administrative body to give a statement of reasons to a person as alleged arises only if the administrative action is likely to affect the rights or fundamental freedoms of the person. From the foregoing, there is no evidence adduced by the Petitioner demonstrating how the opening of the School is likely to affect the rights and fundamental freedoms of the Petitioner. A perusal of the letter dated 28th November 2019 will demonstrate that the Petitioner did not satisfy the criteria set out under Section 4(3) of the **Fair Administrative Actions Act**. Consequently, the 2nd Respondent did not violate the provisions aforesaid.

80. As regards alleged violation of Article 48 of the Constitution, it places an obligation on the state to ensure access to justice for all parties. The Petitioner has not demonstrated in the Petition or by evidence how the Respondents have hindered the Petitioner from accessing justice.

81. It was further noted that the Petitioner alleges violation of its rights under Article 50 of the Constitution on the grounds that it was not granted a chance to be heard before the EIA Licence was issued to the 4th Respondent with regard to the 4th Respondent property. First, it was submitted that the allegation that denial of a right to be heard with regard to the issuance of the EIA licence, even if true, is a violation of Article 50 of the Constitution is not merited nor legally sound. The Petitioner has not demonstrated that the process for collection of public views before issuance of the EIA Licence was a process conducted before a Court, impartial tribunal or body created to resolve the dispute. In the circumstances, the provisions of Article 50 of the Constitution are not applicable in the context of this matter and reliance was placed on the decision of **Majanja, J** in the case of **Dry Associates Ltd vs. Capital Markets Authority & Others (2012) eKLR**.

82. It was the 3rd Respondent's position that a careful perusal of the Petition shows that the Petitioner's Petition is only premised on alleged violation of Sections 12 of the **Alcoholic Drinks Control Act** and Sections 50 and 78 of the **Basic Education Act** yet as demonstrated above, there is no violation of those provisions by the Respondents in this matter. It was further submitted that the allegations that the Petitioner was not heard regarding the EIA Licence is a matter which ought to have been raised by way of an appeal under Section 129(1) (a) of the **Environmental Management and Coordination Act Cap 8 of 1999** ("EMCA") which provides that any person who is aggrieved by 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 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. The Tribunal referred to in this provision is the National Environment Tribunal ("NET") created under Section 125 of EMCA.

83. Further, the Petitioner may also have lodged a complaint under Section 33(3) as read together with Section 13 of the **Physical Planning Act** provides that any person aggrieved by the grant or refusal of the development permission is required to first appeal to the liaison committee within sixty (60) days of the decision.

84. It is not a disputed fact that the Petitioner has not and has never lodged any appeal to NET in respect of the NEMA Impact Assessment licence issued in respect of the School premises or an appeal to any liaison committee in respect of development permission in respect of the School premises or the 4th Respondent's property which is the subject of this Petition.

85. It was further submitted that if the Petitioner was aggrieved by the establishment of the 3rd Respondent's School, it ought to have moved to the Education Appeals Tribunal to appeal the decision of the 2nd Respondent licencing the school under Sections 85 and 93 of the **Basic Education Act**.

86. The 3rd Respondent therefore submits that if indeed the Petitioner was aggrieved by the decision of the 2nd Respondent in authorizing the establishment of the 3rd Respondent's school, as alleged in paragraph 25 of the Petition, the 3rd Respondent ought to have lodged its appeal to the Education Appeals Tribunal, and not rushed to court to challenge the process by way of a Constitutional Petition. In support of this position, the 3rd Respondent relied on the decision of the Court of Appeal in Case of **Samson Chembe Vuko vs. Nelson Kilumo & 2 Others (2016) eKLR**.

87. To the extent that the Petitioner is asking this Honourable Court to exercise jurisdiction without justifying why it cannot follow the clear procedure and mechanism set out in Sections 85 and 93(2) of the **Basic Education Act**, the Petition is incompetent and in violation of Article 159(2)(c) of the Constitution which requires this Honourable Court to promote alternative dispute resolution mechanisms.

88. Further and without prejudice to the foregoing, it was submitted that even if there was violation of Section 12 (1) (c) of the **Alcoholic Drinks Control Act** and Sections 50 and 78 of the **Basic Education Act**, the effect would be that offences under those statutes would have been committed, for which appropriate sanctions have been provided under the statutes. Violation of those statutes would not raise the matter to be one of a Constitutional stature.

89. It follows therefore that to the extent the Petition herein is premised in alleged violation of Section 12 (1) (c) of the **Alcoholic Drinks Control Act** and Sections 50 and 78 of the **Basic Education Act**, it does not raise constitutional questions, warranting to be heard and determined by a Constitutional court. The Court is obligated to discourage invocation of the constitutional process where parallel or alternative remedies exist or where questions on interpretation of statutes are raised. In this regard the 3rd Respondent relied on the findings of your brother **Mativo, J** in **Kiambu County Tenants Welfare Association vs. Attorney General & Another [2017] eKLR** and the sentiments of **Mwita, J** in the case of **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**.

90. This Court was urged to find and hold that the Petition does not raise Constitutional issues and that the issues raised can be appropriately handled under the various forums provided under the various statutes.

91. In the 3rd Respondent's submissions, the crux of the Petitioner's case is that due to proximity between the 3rd Respondent's school and its distillery plant, there is a likelihood of its licence being cancelled on account of violation of Section 12(1)(a) of the ***Alcoholic Drinks Control Act***. The Petitioner is seeking to protect its commercial rights and individual property rights under Article 40 of the Constitution based on fears and apprehensions that in future, it may be required to shut down on account of its proximity to a school. No basis for such speculation has been presented to court. The rights which the Petitioner seeks to enforce ought to be weighed against the rights of the children to access education and ease of access to education institutions and facilities which are enshrined under Articles 53 of the Constitution. Grant of the orders sought will also interfere with the right of teachers and other suppliers and those of the 3rd Respondent whose rights have already crystallized by virtue of contracts having been entered into by way of payment of school fees, contracts to teach and contracts to supply teaching material and other items required for use in school by January 2020.

92. In addition, there are children at the school who are living with disabilities who are protected by Article 54(1)(b) of the Constitution. These children, including those living with disabilities, who have already paid school fees and commenced learning will be forced to interrupt their learning and start searching for schools in the midst of the school programme, thereby seriously affecting their access to education and an educational institution and facility.

93. The 3rd Respondent cited Article 24(1)(d) of the Constitution and submitted that even as the Petitioner seeks to enforce its rights, its rights ought not to prejudice the rights and fundamental freedoms of the pupils, teachers and the 3rd Respondent. No basis which is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom has been set out by the Petitioner in the Petition or by way of evidence for limiting the rights of the pupils, teachers of the 3rd Respondent's school or the school, to warrant grant of the orders sought and reliance was placed on the decision of ***Lenaola, J*** (as he then was) in the case of ***Robert N Gakuru & Another vs. County Government of Kiambu & Another [2015] eKLR***.

94. As explained in the 3rd Respondent's Affidavit and above, the 4th Respondent's property which included the school was completed in the year 2016. The Petitioner did not take any steps to enforce his constitutional rights herein for a period of over three (3) years. No explanation has been rendered at all to explain the delay in approaching the courts to advance the claims which it is doing now. Consequently, it was submitted that the Petitioner is guilty of laches and indolence and the effect of the said finding is that the Petition ought to be dismissed with costs based on the case of ***Peter Ngari Kagume & 7 Others vs. Attorney General [2009] eKLR***.

95. For the reasons aforesaid, the 3rd Respondent urged the Court to find that the Petition lacks merit and ought to be dismissed with costs to the 3rd Respondent.

4th Respondent's Submissions

96. In opposing the petition, the 4th Respondent relied on the decision in of ***R vs. PPARB ex-parte Symphony Technologies (K) Ltd & 2 Others [2016] eKLR***.

97. According to the 4th Respondent, the following (2) two issues are germane for adjudication in resolving the dispute before the Hon. Court:

i. Whether the Petition before the Honorable Court is justiciable to warrant adjudication herein, especially as it runs afoul the legal principle of justiciability and its supplementary doctrines of ripeness, avoidance and mootness? and,

ii. Whether, the alleged claims of violations of the Petitioner's fundamental rights and freedoms are merited?

98. It was submitted as a preliminary, that the Petition before Court is fatally defective and incurably so, as it runs afoul the doctrine of justiciability, and the supplementary doctrines of ripeness, avoidance and mootness. At the crux of the Petition before Your Lordship is that the establishment of the school is part of a future grand scheme for the 4th Respondent to collude with government institutions who will in turn proceed to close the Petitioner's distillery. Such that this supposition in itself is anchored on a dependent variable, that there would be somewhat premise to close the distillery on account of the proximity; but that there are government institutions that will actualise this – but that the 4th Respondent would for some reason coordinate this. In support of this position, the 4th Respondent relied on the decision of ***Onguto, J*** in ***Wanjiru Gikonyo & 2 Others vs. National Assembly of Kenya & 4 Others [2016] eKLR***.

99. According to the 4th Respondent, this petition alludes to a speculatively possible violation of its rights, accruing from a future possible collusion to seek closure of the Petitioner's distillery: so that the running of the school would only supposedly violate the Petitioner's rights, if at all, through the execution of a grand scheme through supposed collusion of the 4th Respondent with the aid of the 3rd Respondent's school alongside complicit government officials. That is the incredulous dispute urged, it is not only most remote but at best so futuristic that cannot be ripe for adjudication: the supposed dispute on future possible attempts at closure of the Petitioner, does not lie and fails the justiciability test.

100. According to the 4th Respondent, the Petitioner cannot abuse the Court's time to interrogate such elaborately strewn and unfounded conspiracy theories, there is simply no issue of judicial controversy therein for adjudication. The Court was therefore urged to dismiss the petition for being an abuse of the court process based on the holding in the ratio in the Court of Appeal decision in ***Muchanga Investments limited vs. Safaris Unlimited (Africa) Ltd 2 Others Civil Appeal No 25 of 2002 [2009] KLR 229***.

101. It was submitted that even if the issue left for determination can be regarded as an apprehension of violation of fundamental rights and

freedoms (which is not the petitioner's case) such apprehension must be founded and proximately so, to the facts upon which the Petition is grounded. Reliance was placed on **Okiya Omtatah Okoiti vs. Communication Authority of Kenya & 8 Others [2018] eKLR.**

102. From the foregoing, it was submitted that issues relating to threatened violation of the Constitution can only be determined by the High Court, on the premise of an actual threat not a conjured-up, theoretical assertion devoid of any evidential or legal backing. The Court was urged to decline the invitation to venture into possibilities that for all intents and purposes will never occur/materialize in keep with the doctrine of legality. The 4th Respondent also relied on the decision of **Mumbi Ngugi, J** in **Abdalla Rhova Hiribae & 3 Others vs. Attorney General & 7 others [2013] eKLR.**

103. So that in as far as what is alleged to be violated herein references most improbable speculative possibilities of the future, then such fatally fails this threshold, preceding propriety of a constitutional petition. Equally, the complaints on matters change of user, is admittedly part of what the petitioner has presented before the Hon NET in NET 21 of 2019. The Petitioner has admitted that it has sought to challenge the EIA Licenses issued to the 4th respondent in respect of GWG I, II and III, in accordance with Section 129(1), EMCA, 1999 as against the Court of Appeal decision in **Speaker of National Assembly vs. James Njenga Karume [1992] eKLR.** On the same issue the 4th Respondent relied on **Geoffrey Muthinka Kabiru & 2 Others vs. Samuel Munga Henry & 1756 others [2015] eKLR,** the **Matter of the Mui Coal Basin Local Community [2015] eKLR, Save Lamu and 5 Others vs. NEMA and Another [2019] eKLR** where the decision in the Canadian decision of **Bow Valley Naturalists Society vs. Minister of Canadian Heritage [2001]2FC461,494.**

104. It was the 4th Respondent's position that the centrality of responsible authorities herein including the NET, NEMA and the County Government's department of Land and urban Development, as well as the appeal mechanisms under the EMCA and the ***Physical Planning Act*** are even more critical – as against the afore-cited authorities on exhaustion. The contestations on change of user and EIA study for GWG I, II and III: regardless of the clear absence of merit on the challenge mounted thereof, is certainly moot, not ripe and certainly nor justiciable in as far as the petition herein is concerned.

105. In light of the preceding it was submitted that the Honorable Court is divested of jurisdiction to entertain the Petition before it in as far as whether the operation of the school will in future possibly occasion the closure of the Petitioner's distillery on collusion; and the effect, if any on supposed contestations as to change of user and EIA Licenses for the subject development.

106. The solitary question that abounds in the Petition, if at all, is whether the school's current operation presently violates the petitioner's fundamental rights and freedoms.

107. It was submitted, based on the replying affidavit by the 3rd Respondent and its submissions, without prejudice to the preceding (i.e. this Hon Court is divested of jurisdiction to hear and/or determine the instant Petition) that the Petition does not expressly urge that the existence and operation of school in and of itself violates the any of its rights, in fact the operation of the school in GWG I does not, at all, violate any of the Petitioner's fundamental rights and freedoms and cited the decision of **Mumbi, J** in **Nairobi Law Monthly Company Ltd vs. KENGEN & 2 Others [2013] eKLR** which cited the US Supreme Court decision in **Pembina Consolidated Silver mining and Milling Company vs. Pennsylvania 125 US 181; 8 S Ct 737;31 L. Ed. 650; 1888 US LEXIS.**

108. From Paragraph 1 of the petition, it was submitted that the Petitioner has described itself as a limited liability company, incorporated under the ***Companies Act***: admittedly dispossessing it of any claim to this constitutional right, or any supposed violation thereof.

109. The Petition, it was submitted, therefore fails to demonstrate a actual harm, real danger or imminent harm on violation of any constitutional rights. Indeed, the Court is treated to speculative possible future prejudice which is neither real, nor legally plausible that can allow the court to address itself to militate against this prejudice if at all. Indeed, there is no certainty that such collusion will ever be occur, worse still indeed no legal basis would lend itself to actualize this, seeing that the said Section 12(1)(c), ***Alcoholic Drinks Control Act*** is inapplicable. The supposed fears of a possible future "collusion with other governmental agencies to shut down the petitioner's distillery" is not only remote, hypothetical and speculative, it obtains from conjecture and possibilities nay improbabilities with no lawful premise.

110. The 4th Respondent therefore prayed that the Petition herein be dismissed with costs.

Determination

111. I have considered the issues raised in this petition and I agree with the PETITIONER that the issues for determination are broadly two and they are:

i) Whether or not the actions of the Respondents violate and or threaten to violate the Constitutional rights of the Petitioner?

ii) Whether the Orders sought in the Petition should be allowed.

112. Before delving into the issues that fall for determination it is important to deal with what issues meet the threshold of a constitutional determination. This being a constitutional petition, it is important to set out the parameters that determine whether a matter raises issues for determination in a constitutional petition or whether the issues ought to be dealt with as an ordinary suit. It is important to note that even in ordinary civil disputes, it is not difficult to find that there is some underlying constitutional principle involved. However, the mere fact that some underlying principle may be gleaned from the pleadings does not necessarily raise the matter to the level where it may qualify for determination as a constitutional issue.

113. In **Muiruri vs. Credit Bank Ltd & Another [2006] 1 KLR 385,** Nyamu, J held that a constitutional issue is that which directly arises from the court's interpretation of the Constitution; for example – what is a fair trial is a constitutional issue and the courts have interpreted what is the meaning of a fair trial. In **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193,** Court the expressed itself as hereunder:

“We find that the making of an allegation of contravention of chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court’s intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings. Indeed there is a wealth of authorities on the point...Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry... It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters... In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court. Abuse of process includes using the court process for a purpose or in a significantly different way from its ordinary and proper use. My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one... The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

114. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:**

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

115. Therefore, it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution, including ordinary civil courts, are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

116. It is in that light that I understand the Court’s position in **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR** that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked 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.”

117. Similarly, in **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR**, Lenaola, J (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

118. Accordingly, it was held in **Jeminah Wambui Ikere vs. Standard Group Ltd and Anor Petition No. 466 of 2012** that:

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under Article 23(1) of the Constitution.”

119. The rationale for this was given in **Rapinder Kaur Atwal vs. Manjit Singh Amrit Petition No. 236 of 2011** where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

120. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that:

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing...Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

121. So, in **General Plastics Limited vs. Industrial Property Tribunal & Another [2009] eKLR, Wendoh, J** expressed herself as hereunder:

“The only conclusion I can arrive at is that, it seems the Applicant is dissatisfied with the decision of the Respondent and that being so, their recourse lies in filing an appeal to the High Court under S. 115 (1) of the Industrial Property Act. In my considered view the Applicants have abused the court process by unnecessarily protracting this matter and making what is not a constitutional issue into one and in the meantime, the Applicant is benefiting from interim orders against the disputed design. The statute under which the 1st Respondent is created provides procedure for a party aggrieved by that decision, that procedure must be followed instead of camouflaging every such grievance as a constitutional issue. The court must prevent abuse of its process by disallowing such applications. (See Ben Kipeno & Others vs. AG Pet15/07 and Bahadur vs. AG (1986) LRC Const 297 where the court said;

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can find a claim under substantive law, the proper cause is to bring the claim under that law and not under the Constitution.”

In Speaker of National Assembly vs. Njenga Karume (1990-1994) EA 546 the Court of Appeal reiterated the above principle, that where the Constitution or A Statute provides a certain procedure to be followed, that procedure must be adhered to. In this case, failure to follow the procedure set out in the Regulations disentitles the Applicant to the Constitutional remedy sought herein. See also Harrikisson vs. AG (1979) 3 WLR 63.”

122. Further afield, in **NM & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)** the Constitutional Court of South Africa stated that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

123. Similarly, in **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755, Georges, CJ** held as follows;

“It is an established practice that where a matter can be disposed off 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 (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22).”

124. The judge added that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

125. Our own Supreme Court has clarified its position with regard to appeals filed in accordance with Article 163(4)(a) and in **Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo Petition No. 2 of 2012** in declining to hear an appeal expressed itself as hereunder:

“In the petitioner’s whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court...the guiding principle is to be that the chain

of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court.”

126. Subsequently, in Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board Petition No. 5 of 2012 the Court held that:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

127. Mwita, J in Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR held as follows:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure. In that regard, it is worth remembering the warning sounded by Lord Diplock in the case of *Harrikissoon V Attorney General of Trinidad and Tobago* [1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court...for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action...the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

128. They also referred to the case of Benard Murage vs. Fine serve Africa Limited & 3 Others [2015] eKLR where the Court stated:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

129. In this petition, it was contended by the petitioner that by the 4th Respondent knowingly and to its exclusion, undertaking the environmental impact assessment leading to the change of user and more particularly for setting up facilities for a school barely 8 meters away from its distillery, it breached its right to a fair hearing since its views were not sought and as such, it did not have a platform to raise its concerns on the change of use and the high potentiality and likelihood of future conflict arising due to the mixed-use. Owing to this, it only came to learn of the same, too late, and its appeal before the National Environment Tribunal challenging change of user and construction of Phase 1 and 2 of Great Wall Gardens Housing Development, was already time-barred. The Petitioner has never been involved as a project affected person in the processes towards authorization of the premises to be used as a school was condemned unheard, thus denied the right to a fair hearing in Article 50(1) of the Constitution.

130. It is important at this stage to set out what Article 50(1) of the Constitution provides. The same states that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

131. It is clear that the above provision embodies the rules of natural justice and I agree broadly with the decision in Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR and *Halsbury Laws of England*, 5th Edition 2010 Vol. 61 at para 639 that:

“The Rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This Rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a Court.”

132. However, Article 50(1) of the Constitution was the subject of the decision of Majanja, J in the case of Dry Associates Ltd vs. Capital Markets Authority & Others (2012) eKLR where he held as follows:-

“Article 47 and 50(1) protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the Article deals with criminal trials. Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.

What is clear to me though, is that Article 50 is not applicable to the circumstances of this case. The petitioner did not contend that it was entitled to a public hearing as required by Article 50(1) nor did I hear it state that it was an accused facing a criminal trial for Article 50(2) to apply.”

133. I agree with the learned Judge since that Article refers to an existence of a dispute. In this case, an intention to issue an Environmental Impact Assessment Licence per se does not necessarily connote the existence of a dispute so as to invite the application of Article 50(1) of the Constitution.

134. It was further contended that despite the petitioner’s letter of protest to the 1st and 2nd Respondents regarding licensing of the 3rd Respondent’s school within the proximity to its distillery and dispensing outlet the 1st and 2nd Respondent have to date chosen to ignore, continue to and or neglect to respond to the Petitioner’s inquiry, hence the Petitioner has been condemned unheard and equally denied its right to access to information as envisaged in Article 35 of the Constitution. The said Article provides as hereunder:

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

135. I agree with the holding in the case of Nairobi Law Monthly vs. Kengen (2013) eKLR where the Court expressed itself on the said Article as follows:

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to pro-actively publish information in the public interest...this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State.”

136. Whereas that decision expressed the general position of the law, as regards who can invoke the Article 35(1) of the Constitution in its aid, the provision is clear that the person must be a citizen. Dealing with the said expression, **Majanja, J** in Famy Care Limited vs. Public Procurement Administrative Review Board & Another & 4 Others [2012] eKLR, held that:

“The rights protected under Article 35(1) and 38 are essential for the purpose of organising a democratic state. The exercise of these rights excludes juridical persons as they are not “the people” referred to in the Preamble to the Constitution. A reading of the Constitution and an examination of words “person” and “citizen” within the Constitution can only lead to one conclusion; That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution.”

137. Similarly, and cited the decision of **Mumbi Ngugi, J** in Nairobi Law Monthly Company Ltd vs. KENGEN & 2 Others [2013] eKLR while cited the US Supreme Court decision in Pembina Consolidated Silver mining and Milling Company vs. Pennsylvania 125 US 181; 8 S Ct 737; 31 L. Ed. 650; 1888 US LEXIS, held that:

“corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only such attributes as the legislature has prescribed.”

138. In this case the Petitioner is clearly a juridical body hence it cannot invoke the provisions of Article 35(1) of the Constitution.

139. I however disagree with the Respondents that the Petitioner was obliged in the circumstances of this petition to demonstrate that the information sought was required for the exercise or protection of the petitioner’s right or fundamental freedom. The decision of **Lenaola, J** (as he then was) in the case of Timothy Njoya vs. Attorney General & Another [2014] eKLR, held that:-

“While it is crystal clear to me that one would enforce the provisions of Article 35(1) (b) where such information is required for the exercise or protection of a fundamental right and freedom, in the present Petition, the Petitioner has not stated what fundamental right or freedom he intends to protect or exercise were he to be given the information he is seeking.”

140. My understanding of that decision is that the learned Judge was dealing with Article 35(1)(b) which applies to a situation where information is sought from another person other than the State. Article 35(1)(a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in ***The Public's Right to Know: Principles on Freedom of Information Legislation – Article 19*** at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information. Where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. I also endorse the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions.

141. The South African Constitutional Court decision of ***The President of RSA vs. M & G Media (CCT 03/11) [2011] ZACC 32*** para 10 expressed itself as hereunder:

“The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

142. ***Brummer vs. Minister for Social Development and Others(CCT 25/09) [2009] ZACC 21*** para 62 it was noted that:

“[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”

[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

143. Additionally, the Inter-American Court of Human Rights in the case of ***Claude-Reyes et al. vs. Chile*** judgment of September 19, 2006 [http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf] at para 86 stressed the importance of the right to access to information by noting that:

“In this regard, the State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.”

144. That the freedom of information is also an inseparable part of freedom of expression, was emphasised by the Supreme Court of Appeal in South Africa in ***Hoho vs. The State. Case No. 493/05 (2008)*** in para 29 in the following terms:

“The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. (See also the European Court of Human Rights case of *Tarsasag a Szabadsagjogokert v. Hungary, Application No. 37374/05 (2009)*.”

145. The European Court of Justice has also taken the view that disclosure should be the norm and exceptions should be strictly construed and this position was restated in ***Youth Initiative for Human Rights vs. Serbia (Application no. 48135/06)*** where it was held that:

“The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions...The access to information law should, to the extent of any inconsistency, prevail over other legislation...National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who willfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law.”

146. The rationale for right to access information was explained by ***Majanja, J*** in ***Nelson O Kadison vs. The Advocates Complaints &***

Another NBI HC Petition No. 549 of 2013 as follows:

“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”

147. I also wish to defer to the decision of Ngcobo, J in Steffans Conrad Brummer vs. Minister for Social Development & Others Constitutional Court of South Africa Case No. CCT 25/09 where the learned Judge expressed himself as follows:

“...section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”...Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.”

148. Where information is required from the State it is my view that no such requirement is necessary.

149. It was submitted that the law enjoins the decision-maker to give written reasons for any action or decision taken as prescribed by Article 47(2) of the Constitution or give a statement of reasons for any decision reached pursuant Section 4(3) (d) of the *Fair Administrative Action Act 2015*. Such written reasons may be given voluntarily or upon request; see **Section 6 of the Fair Administrative Action Act 2015**. Article 47(2) of the Constitution provides as hereunder:

If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

150. It is therefore clear that as a condition precedent to the application of the said Article, there must be a right or fundamental freedom of the petitioner which has been or is likely to be adversely affected by the actions of the 1st and 2nd Respondents. The letter dated 18th November, 2019 was based on the allegation that the 3rd Respondent intended to establish its school within 300 metres from the petitioner’s alcohol manufacturing and dispensing outlet. In this regard the petitioner relied on Section 12 of the *Alcoholics Drinks Control Act*, which in its view expressly provides that premises handling liquor should be established 300 metres away from schools. Section 12(1)(c) of the *Alcoholic Drinks Control Act* provides as follows:-

(1) The District Committee shall not grant a new licence for the sale of an alcoholic drink to be consumed on the premises unless the District Committee is satisfied—

c) that the premises in respect of which the application is made are located at least three hundred metres from any nursery, primary, secondary or other learning institutions for persons under the age of eighteen years.

151. It is clear that the said Section only applies to premises which are for use of sale of alcoholic drinks to be consumed on the premises. In this case however, the Petitioner states that it is using its premises for manufacture of alcoholic drinks as opposed to sale for purposes of consumption at the premises. In this case the 3rd Respondent in its replying affidavit states that the distance by access road from the 3rd Respondent’s School to the Petitioner’s premises is more than eight hundred (800) metres and in addition, both properties are walled, and are guarded by security guards on a twenty four hours basis hence the possibility of pupils accessing the Petitioner’s premises is nil. These averments have not been challenged by the petitioner.

152. In those premises I agree that the said Section is not applicable in the circumstances of this case hence there is no violation of Section 12(1)(c) of the *Alcoholic Drinks Control Act*. In the premises the Petitioner has not met the conditions prescribed under Article 47(2) of the Constitution as read with Section 4(3)(d) of the *Fair Administrative Action Act 2015*.

153. It was contended that the 3rd Respondent in collusion with the 4th Respondent, by deliberately establishing the said school outside the parameters set out by the Act, and further, the 1st and 2nd Respondents ignoring these provisions together with the *Basic Education Act* amounts to a breach of the Petitioner’s rights under Article 27(1) and 2) and 28 of the Constitution of which the former provides that all persons are equal under the law.

154. In expounding its case the Petitioner asserted that the 2nd Respondent ought to have put into consideration the likelihood of future conflicts emanating from the proximity of the 3rd Respondent, school to its distillery and should not have authorised the establishment of the school. The 3rd Respondent was accused of continuing to operate a school within the premises contrary to Section 78 of the *Basic Education Act*, in collusion with the 4th Respondent who is hell-bent on ousting the Petitioner out of business and to equally economically sabotage it.

Further, under Section 50 of the **Basic Education Act** it is provided that no person shall maintain a private school unless it is registered and at subsection (2) it is clear that no private school shall be registered if the school premises or any part of it is unsuitable for being a school.

155. In this case the 3rd Respondent has set out the steps taken by itself in establishing the subject school. None of the documents it has exhibited has been impugned by the petitioner. The said Section 78 of the **Basic Education Act** states as follows:-

(1) A person shall not engage in the promotion, management, or teaching of basic education unless such person is accredited and registered in accordance with the provisions of this Act.

(2) A person may not use any premises or facilities to provide education and training through face to face, open distant or electronic learning or any other mode of delivery unless the institution has undergone quality review and approved in accordance with this Act.

(3) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or a term of imprisonment not exceeding three years or to both.

156. From the material placed before me in this petition, I am unable to make a definite finding as regards the non-compliance with section 78 of the **Basic Education Act** and how it, per se, violates the petitioner's rights.

157. The petitioner however alleges that these and among other actions have condemned the it to untold agony and anxiety over the magnitude and the effects of the anticipated conflicts arising from the mixed users in the area. The Petitioner contends that these conflicts may eventually culminate in its distillery being closed, thus leading to pecuniary losses, loss of employment and source of livelihood for all its employees. Due to this uncertainty, the Petitioner can neither make any further investments to expand its plant and that these actions by the 4th Respondents jointly with others culminated in a well-calculated scheme to economically sabotage it in blatant threat to and consequent violation of Article 43 of the Constitution which provides for the Economic and Social Rights of every person.

158. The Petitioner contends that by their conduct, the two parties continue to threaten its rights under Article 40 of the Constitution to the extent that, owing to the alleged claims of pollution, the 3rd Respondent is likely to come before this Court in a very near future, or in its usual mannerism collude with other Government institutions alleging that the rights of its students as provided by Article 53 of the Constitution as read together with Article 43(1)(f) of the Constitution are being violated by the Petitioner. This will undoubtedly lead to the closure of the Petitioner's distillery.

159. As held hereinabove, the provisions of the Section 12(1)(c) of the **Alcoholic Drinks Control Act** relied upon by the petitioner in support of its case are of no assistance to the petitioner since its operations do not fall within the ambit of that provision. Secondly, the allegations made by the petitioner are rather remote. They may or may not take place. While the possibility of the 3rd and 4th Respondents lodging complainants cannot be ruled out and the said Respondents have the right to lodge any complaint against the petitioner however frivolous, there is no certainty that that will be the position and whether such complaints have any chances of succeeding.

160. In my view a case has not arisen where the petitioner's operations is threatened with stoppage. In other words, the issue of the stoppage of the petitioner's operations cannot under the circumstances of this case be said to be justiciable. I find support for this proposition in the decision of **Onguto, J in Wanjiru Gikonyo & 2 others vs. National Assembly of Kenya & 4 Others [2016] eKLR** where the Learned Judge held that:

“The citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favour in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness. By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see Black’s Law Dictionary 9th Ed,p 943-944. In other words, courts should only decide matters that require to be decided. Thus in *Ashwander –v- Tennessee Valley Authority [1936] 297 U.S 288*, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination...”

161. The Learned Judge continued to pronounce himself thus:

“The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either...”

162. Similarly, in **Okiya Omtatah Okiiti vs. Communication Authority of Kenya & 8 Others [2018] eKLR** it was noted that:

108. Article 22 (1) of the Constitution grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened...What is the test to apply when a court is confronted with alleged threats of violations aforesaid? In our view, each case must be looked at in its unique circumstances, and a court ought to differentiate between academic, theoretical claims and paranoid fears (of the one part) with real threat of constitutional violations (of the other). In that regard, *Lenaola J. in Commission for the Implementation of the Constitution vs The National Assembly & 2 Others [2013] eKLR* differentiated between hypothetical issues framed for

determination in that case and the power of the High Court to intervene before an Act of Parliament has actually been enacted and in circumstances such as are before us where the impugned Act has been enacted and has come into force. He stated in that regard that:

“ ■■■■■ where the basic structure or design and architecture of our Constitution are under threat, this Court can genuinely intervene and protect the Constitution.”

116. We agree with the Learned Judge and would only add that clear and unambiguous threats such as to the design and architecture of the Constitution are what a party seeking relief must prove before the High Court can intervene.”

163. The same view was adopted by **Mumbi Ngugi, J** in **Abdalla Rhova Hiribae & 3 Others vs. Attorney General & 7 Others [2013] eKLR** where she held that:

"It is now well established that a party alleging violation of a constitutional right must demonstrate, with a reasonable degree of precision, what provisions of the Constitution have been violated, as well as the manner in which they have been violated. See Anarita Karimi Njeru –v- Republic (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012. This is important not just to allow the respondents to know the case that they have to answer, but to enable the court to make a clear determination on the alleged violations."

164. It is my view and I hold that the issue of the establishment of the 3rd Respondent's school being a step towards the crippling of the operations of the petitioner is rather speculative at this stage. It cannot be said that it is the natural sequel to the establishment of the said school in order for this court to find that by establishing its school, the 3rd Respondent intends to bring to a halt the operations of the petitioner.

165. Based on my findings hereinabove, it is no longer necessary for me to deal with the other issues which were raised by the 3rd and 4th Respondents in their submissions in opposition to the petition herein.

166. Suffice it to say that this petition has no merit. Consequently, the same fails and is hereby dismissed with costs to the 3rd and 4th Respondents.

167. It is so ordered.

Read, signed and delivered in open Court at Machakos this 29th day of April, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Geoffrey