Dharani v Canaan Developers Limited & 2 others; County Government of Nairobi & 2 others (Interested Parties) (Environment & Land Case E042 of 2023) [2023] KEELC 19881 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19881 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E042 OF 2023

JO MBOYA, J

SEPTEMBER 21, 2023

BETWEEN

RAHIM DHARANI ..... APPLICANT

AND

CANAAN DEVELOPERS LIMITED ..... 1ST RESPONDENT

CAANAN INFRATECH LLP ..... 2ND RESPONDENT

MANAGEMENT AUTHORITY ..... 3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY

DIRECTOR GENERAL NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... INTERESTED PARTY

CHAIRMAN, NATIONAL ENVIRONMENTAL COMPLAINTS COMMITTEE ..... INTERESTED PARTY

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 2nd August 2023; the Applicant herein has approached the Honorable court seeking for the following reliefs;

    i. .....Spent.

    ii. Leave be granted to the Applicant to prosecute their Application dated the 2nd August 2023; during (sic) the High Court Vacation.

iii. Pending the hearing and determination of this Application inter-partes, the Honorable court be pleased to issue Injunctive orders restraining the 1st and 2nd Respondents by themselves, its agents, servant, or any person acting on their behalf from proceeding with the development and/or construction on Land Reference Number 205/76 (original No. 205/1615); pending the Application and receipt of all Development Permissions and Licenses;

iv. Pending the hearing and determination of the main suit, the Honorable Court be pleased to issue Injunctive orders restraining the 1st and 2nd Respondents by themselves, its agents, servant, or any person acting on their behalf from proceeding with the development and/or construction on Land Reference Number 205/76 (original No. 205/1615);

v. The officer commanding Kileleshwa Police Station or any other Police station that is nearer to the suit Property do assist in compliance of the orders.

vi. Any other further or other relief the Court may deem appropriate.

vii. The costs of this Application be provided for.

2. The instant Application is premised and anchored on the grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of the Plaintiff/Applicant sworn on even date.

3. Upon being served with the pleadings and in particular the subject Application, the 1st and 2nd Defendants/Respondents filed a Notice of Appointment of advocate and thereafter a Notice of Preliminary objection dated the 9th August 2023, wherein the said Respondents' contested the Jurisdiction of the court on the basis of the various provisions of the *Physical and Land Use Planning Act*, 2019; and the *Environment Management and Coordination Act*, 1999, respectively.

4. Other than the 1st and 2nd Respondents, the rest of the Respondents and the Interested Parties, neither entered appearance nor filed any Responses to the subject Application.

5. Be that as it may, the instant Application came up for hearing on the 10th August 2023, whereupon same was canvassed and ventilated vide oral submissions by and on behalf of the Applicant on one hand; and the 1st and 2nd Respondents on the other hand.

Submissions By The Paties:

a. Applicant's Submissions:

6. The Applicant herein raised and canvassed three salient issues for consideration by the Honourable Court. Firstly, Learned counsel for the Applicant has submitted that the Defendant/Respondents herein have since commenced and/or started the construction of a massive project on L.R No. 205/75 (Original No. 205/1615) albeit without procuring and/or obtaining the requisite Environment Impact Assessment License, change of user approval from the County Government of Nairobi and other incidental approvals required under the law before commencement of a project like the one in question/ under reference.

7. Furthermore, Learned counsel for the Applicant has contended that the commencement of the impugned project without the requisite Environment Impact Assessment License contravenes the provisions of Section 58 of *EMCA* 1999; and hence the impugned construction is not only illegal but unlawful.

8. Secondly, Learned counsel for the Applicant has submitted that the impugned project, which has been commenced by and on behalf of the 1st and 2nd Respondent is bound to subject the Environment to serious and substantial degradation; which will compromise the Applicants right to Clean and Healthy environment as entrenched in Article 42 of the *Constitution* 2010.

9. Thirdly, Learned counsel for the Applicant has contended that prior to and before the commencement of the impugned project, same wrote to the various state agencies, inter-alia National Environment Management Authority (NEMA) and Nairobi City County Government, to ascertain whether any licenses and approvals had been procured by and or issued in favor of the 1st and 2nd Respondents; but there was no positive response or otherwise.

10. Additionally, Learned counsel has contended that the only reaction that was received from the Nairobi City County Government was to the effect that the 1st and 2nd Respondents had applied for change of user, but no such approval had been issued. In any event, counsel added that Nairobi City County Government thereafter attached a copy of the application for change of user in her response to the Applicant's inquiry.

11. Insofar as the 1st and 2nd Respondents have neither procured nor obtained the requisite approvals, Learned counsel for the Applicant has submitted that same has therefore established and proved the requisite basis to warrant the grant of a conservatory order and in particular, to stop the impugned project.

b. 1st And 2nd Respondents' Submissions:

12. Learned counsel for the 1st and 2nd Respondents adopted and reiterated that the Notice of preliminary objection dated the 9th August 2023; and thereafter raised, ventilated and canvass two pertinent issues, touching on and/or concerning the question of Jurisdiction.

13. First and foremost, Learned counsel for the 1st and 2nd Respondents has submitted that the issues and/or complaints which have been raised by the Applicant herein ought to have been raised, ventilated and canvassed before the National Complaints Committee, which is established pursuant to the *EMCA*, 1999, the National Environment Tribunal and The County Physical Liaison Committee, the latter which is established pursuant to the *Physical and Land Use Planning Act*, 2019.

14. In addition, Learned counsel has contended that insofar as there exists appropriate statutory bodies, authorized and mandated to deal with the complaints being raised, this court ought not to assume jurisdiction in respect of the subject matter.

15. Secondly, Learned counsel for the Respondents has submitted that the provisions of Article 159 (2) (c) of the *Constitution* , 2010 has underscored the importance of alternative dispute resolution mechanism, before approaching the conventional courts of law.

16. Based on the foregoing provisions, Learned counsel for the 1st and 2nd Respondents has submitted that the instant suit and by extension the subject application offends the Doctrine of Exhaustion.

17. Consequently and in the premises, Learned counsel has contended that even on the basis of the Doctrine of Exhaustion, the suit beforehand ought to be struck out for being premature, misconceived and hence legally untenable.

18. Lastly, Learned counsel for the 1st and 2nd Respondents has invited the court to find and hold that Jurisdiction is so central and fundamental and hence where a court is divested of jurisdiction, then the court ought to down his/her tools at the earliest.

19. In support of the foregoing submissions, Learned counsel for the 1st and 2nd Respondents has cited and relied on the decision in the case of *Owners of Motor Vessel Lilian S versus Caltex Oil (Kenya) Limited* (1989)eKLR.

Issues For Determination:

20. Having appraised, reviewed and considered the subject Application and the Notice of Preliminary objection filed by the 1st and 2nd Respondents; and upon consideration of the oral submissions canvassed on behalf of the respective Parties, the following issues do arise and are thus worthy of determination.

    i. Whether the Honorable court is seized and/or possessed of the requisite Jurisdiction to entertain the subject suit or otherwise.

    ii. Whether the instant suit is defeated by the Doctrine of Exhaustion.

    iii. Whether the Applicant herein has established and/or demonstrated the requisite ingredients to warrant the issuance of the Conservatory/ Injunctive orders sought or otherwise.

Analysis And Determination

Issue Number 1

Whether the Honorable court is seized and/or possessed of the requisite Jurisdiction to entertain the subject suit or otherwise.

21. Learned counsel for the 1st and 2nd Respondents has contended that this court is devoid and/or divested of the requisite jurisdiction to entertain and/or adjudicate upon the subject dispute and by extension the instant application seeking, inter-alia, issuance of conservatory orders.

22. Given the significance and legal implication of Jurisdiction to any proceedings being taken before a court of law, it is thus imperative to ascertain and/or discern whether or not this court is seized of the requisite jurisdiction, before venturing to interrogate the merits or otherwise of the issues ventilated before the court.

23. In any event, it is not lost on this court that the Jurisdiction of a court must be clearly provided for and donated by the *Constitution* or the Constitutive Act, or both; and where the court has not been clothed with the requisite jurisdiction, the court cannot arrogate unto himself or herself Jurisdiction by way of craft, innovation or such other endeavors, not known to law.

24. To this end, it is appropriate to adopt, restate and reiterate the succinct exposition of the law by the Supreme Court in the case of *S K Macharia versus Kenya Commercial Bank Ltd & Another* (2012)eKLR, where the court at paragraph 68 of the decision stated and held thus;

    (68) A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides

for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution* . Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

25. Furthermore, I am alive to the position that where a court is divested of jurisdiction, any proceedings and orders made in the absence of such Jurisdiction become annulity and thus void ab initio; for all intents and purposes.

26. In this respect, the enunciation of the law by the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service* [2019] eKLR, are succinct and apt.

27. For coherence, the court stated and observed as hereunder;

    1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

    2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

28. Having made the foregoing remarks, nay, observations, it is now appropriate to return to the dispute beforehand and to ascertain whether the issues canvassed by the Applicant fall within the Jurisdiction of this court or otherwise.

29. At the center of the complaint by the Applicant is the issue whether or not the 1st and 2nd Respondents, who are the proponents of the impugned project, have procured and obtained the Environment Impact Assessment License (EIA) from National Environment Management Authority; the change of user approval from the Planning Authority, namely, the City County Government of Nairobi or such other necessary approvals.

30. It is instructive to note that despite the complaints by and on behalf of the Applicant that no such licenses and/or approvals have been procured and obtained by the 1st and 2nd Respondents, the named Respondents failed to avail and/or tender before the court any such license and/or approval at all.

31. Notably, if the 1st and 2nd Respondents had procured and obtained the necessary license and approvals from NEMA or the Planning Authority, in compliance with the provisions of *EMCA*, 1999 and the *Physical and Land Use Planning Act*, 2019, respectively, then nothing would have been easier than the named Respondents availing and showing unto the court the licenses and approvals, if any.

32. Importantly, it is appropriate to underscore that such licenses and/or approvals, if any, were issued and/or granted would be under the custody of the 1st and 2nd Respondents and thus same would assume the

Responsibility to tender the licenses/approvals to court, in the event of a dispute arising concerning whether or not, such license or approval were ever issued.

33. Pertinently, where certain facts and/or information are peculiarly within the knowledge of a particular person or organization, then the burden of proving such peculiar/ special facts is cast upon such a person. Instructively, the provisions of Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya are Explicit.

34. For ease of reference, the provisions of Section 112 of the *Evidence Act*, are reproduced as hereunder;

> 12. Proof of special knowledge in civil proceedings.
>
> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

35. Before answering the question as pertains to jurisdiction, I beg to point out that if it was shown to the court that NEMA or the Planning Authority, namely, the County Government of Nairobi had made decisions pertaining to the impugned project and thereby issued the requisite licenses and approvals; then the Applicant herein would have been constrained to mount her complaints before the statutory bodies created under the respective statutes.

36. Pertinently, if NEMA has issued the Environment Impact Assessment License, in compliance with Section 58 of the *EMCA*, 1999, (which is not the case), then the Applicant herein would have a right of recourse by invoking the provisions of Section 129 of the *EMCA*, 1999, which donates jurisdiction to the National Environment Tribunal.

37. Additionally, if the Planning Authority, namely, the City County Government of Nairobi through the concerned Chief Executive Member, had granted the Development approval; then the Applicant would have been called upon to raise her complaints with the County Physical Planning Liaison Committee and not otherwise.

38. However, in respect of the subject matter, I have pointed out that no license or Development approvals were availed and/or shown unto the court and in the absence of such license/approval, the Applicant herein would not have any basis to approach the statutory bodies created under the *EMCA*, 1999 and the *Physical Land Use Planning Act*, 2019, in the manner adverted to by Learned counsel for the 1st and 2nd Respondents.

39. Conversely, the Applicant herein would thus be within his/her rights to approach the Environment and Land Court with a view to vindicating and protecting his Right to a Clean and Healthy Environment, in pursuance of the provisions of Article 42 as read together with Article 70 of the *Constitution* 2010.

40. Consequently and in this regard, I come to the conclusion that this Honorable court is seized and/or vested with the requisite Jurisdiction to entertain and adjudicate upon the dispute beforehand for as long as the license and development approvals have not been issued.

41. Nevertheless and before departing from this particular issue, I beg to underscore and point out that I am alive to the ratio decidendi of the Court of Appeal in the case of *Kibos Distillers Ltd & 5 Others vs Benson Ambuti Adega & Others* (2020)eKLR and *Eaton Towers Kenya Limited v Kasing'a & 5 others* (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR) (28 April 2022) (Judgment); where the Court of Appeal firmly held that the decisions of NEMA and the Planning Authority ought to be challenged before the requisite statutory bodies provided for under the relevant statutes.

42. Notably, I affirm and stand by the ratio decidendi in the foresaid decisions. However, it must be stated that in respect of the instant matter no decisions, license and/or development approvals have been placed and/or shown to the court to trigger the import and tenor of inter-alia Section 129 of the *EMCA*, 1999; which essentially, provides for the Jurisdiction of the National Environment Tribunal

43. Consequently and in a nutshell, I find and hold that the Preliminary objection disputing and contesting the Jurisdiction of this Honourable court is bereft/ devoid of merits; and hence same is dismissed.

Issue Number 2

Whether the instant suit is defeated by the Doctrine of Exhaustion.

44. The second point that was raised and canvassed by Learned counsel for the 1st and 2nd Respondents touched on and/or concerned the Doctrine of Exhaustion.

45. Firstly, it is important to underscore that the Doctrine of Exhaustion is a sound doctrine, calculated to enable the specialized bodies and tribunals, if any, to have the first bite on designated matters, issues and/or disputes.

46. Significantly, the Doctrine of Exhaustion also operates to postpone assumption of Jurisdiction by courts of law and thus anchors the principle of deference, which is exercised by the court to allow established Statutory dispute mechanism to function and actualize their mandate in accordance with the creative/ relevant statute.

47. Be that as it may, it is important to observe that the Doctrine of Exhaustion can only arise and/or be invoked where same is appropriate, available and efficient for purposes of addressing and/or dealing with the dispute in question. For good measure, it cannot be invoked and applied where same would not be efficient and/or efficacious.

48. However, in respect of the instant case, the Doctrine of Exhaustion would only be invoked and applied, if the statutory bodies created and established under the *EMCA*, 1999 and the *Physical and Land Use Planning Act*, 2019; had made decisions which however, is not the case.

49. To the extent that no decisions have hitherto been made by the designated bodies, the Applicant herein could not be called upon to subject himself to the doctrine of exhaustion. Indeed, there would be no other established mechanism to vindicate his Rights to Clean and Healthy Environment; other than to approach the Environment and Land Court pursuant to Section 3(3) of the *EMCA*, 1999; as read together with Section 13(2) and (3) of the *Environment and Land Court Act*, 2011.

50. Premised on the foregoing, I come to the conclusion that the Doctrine of Exhaustion, which is a sound Doctrine and which in any event, has been affirmed in various decisions including, *Geoffrey Muthinja vs Samuel Munga Henry & Others* (2015)eKLR; *Bethwel Allan Omondi Okal vs Telkom (K) Ltd* (2017)eKLR and *Albert Chaurembo Mumba vs Maurice Munyao & 148 Others* (2019)eKLR, respectively; is not applicable to the dispute beforehand and in any event at this juncture.

51. Consequently, and taking into account the foregoing observations, I am not persuaded that there exists any appropriate statutory dispute Resolution body that could have been approached by the Applicant herein, in the absence of any decision having been made in accordance with the law.

52. Simply put and for the avoidance of Doubt, the Applicant herein was within his right to activate and actualize the provision of Articles 42 and 70 of the *Constitution* , 2010, by approaching the

Environment and Land Court by dint of the inter-alia, the Provisions of Section 3(3) of the *EMCA*, 1999.

Issue Number 3

Whether the Applicant herein has established and/or demonstrated the requisite ingredients to warrant the issuance of the Conservatory Injunctive Orders sought or otherwise.

53. The Applicant's primary concern and/or contention is to the effect that the 1st and 2nd Respondents have commenced and/or started the construction of a massive building project on the suit property, albeit without first procuring and/or obtaining the requisite EIA License from NEMA and the development approval, including change of user, from the Planning Authority, being the Nairobi City County Government.

54. Secondly, the Applicant contends that the nature and magnitude of the development project, being carried out and under taken by and on behalf of the 1st and 2nd Respondents , is such that same will impact on the environment and furthermore, occasion serious Environmental degradation.

55. Thirdly, I also hear the Applicant to be stating that without mitigation of the likely adverse effects and Negative consequences of the impugned project, his Rights to Clean and Healthy Environment by dint of Article 42 of the *Constitution* 2010, would be breached, violated and/or infringed upon.

56. Lastly, I also hear the Applicant to be contending that the impugned development project, which is substantial and huge in magnitude; is being commenced and operationalized, albeit without due compliance with the provisions of Section 58 of the *EMCA*, 1999; which Provisions of the Law are peremptory.

57. Clearly and in my mind, the Applicant has demonstrated and/or proved unto the court that same has a prima facie case, pertaining to and/or concerning breach, violation and/or infringement of his Fundamental freedoms and in particular; the Right to Clean and Healthy Environment.

58. No doubt, the impugned construction will have adverse and negative impacts on not only the Applicant herein, but also the neighboring community; and thus the usual necessity that any negative/ adverse effects, be discerned in advanced and appropriate mitigative measures be provided for and/or undertaken.

59. In my humble view, such adverse effects and the attendant mitigating measures, could only have been captured and enumerated in the EIA study report, if any, had been undertaken. Unfortunately, none has been availed and/or shown to the court.

60. In short, I beg to point out that the Applicant herein has on a prima facie basis, persuaded me that same is entitled to the grant of a conservatory order, the failure of which would indeed expose the Applicant to the threatened violation of his Right to Clean and Healthy Environment, as entrenched in Article 42 of the *Constitution* 2010.

61. Finally and without any hesitation, whatsoever, I come to the conclusion that the Applicant has met the requisite threshold to warrant the intervention by the court and essentially to issue the orders sought.

62. To amplify the forgoing observation and in particular, the necessity to grant the conservatory orders sought, I reiterate the succinct exposition of the law as enunciated in the case of *Board of Management of Uhuru Secondary School versus City County Director of Education & 2 others* [2015] eKLR, where it was stated thus;

25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of *Centre for Rights Education and Awareness and 7 Others –v- The Attorney General* [HCCP No. 16 of 2011]:

> "[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner's application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution* ".

26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M. Ibrahim J (as he then was) in the case of *Muslims for Human Rights [MUHURI] & Others –v- Attorney General & Others* CP No. 7 of 2011, who whilst agreeing with Musinga J's statement in *Centre for Rights Education and Awareness [CREAW] and 7 Others –v- The Attorney General* (Supra) stated as follows:-

> "I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success" (emphasis).

27. Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in *Jimaldin Adan Ahmed & 10 Others –v- Ali Ibrahim Roba and 2 Others* [2015] eKLR and *Micro Small Enterprises Association of Kenya (Mombasa Branch) –v- Mombasa County Government* [2014] eKLR respectively.

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see *Patrick Musimba –v- The National Land Commission & 4 Others* HCCP 613 of 2014 (No. 1) [2015] eKLR and also *Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme* [2011] eKLR.

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of *Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others* CP No. 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see *Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others* CP No. 11 of 2012 as well as *Suleiman –v- Amboseli Resort Ltd* [2004] 2 KLR 589.

63. In view of the foregoing, my answer to issue number three (3) is in the affirmative. Simply put and for the sake of coherence; the Applicant has demonstrated a basis for the grant of conservatory/injunctive orders pending the hearing and determination of the instant suit or subject to proof that the requisite Licenses and necessary approvals, have indeed been issued in favor of the impugned project.

Final Disposition;

64. From the foregoing discussion/ discourse; and the attendant analysis, it is evident that the Application by and on behalf of the Applicant is meritorious and thus for granting, with view to meeting the Constitutional imperative of Sustainable Development, which ipso facto denotes balancing the Economic Rights against Environmental concerns.

65. Consequently and in view of the foregoing, the Application dated the 2nd August 2023; be and is hereby allowed in terms of prayers (iv) and (v) thereof. However, the costs of the application shall abide the outcome of the suit.

66. Nevertheless, it is important to make it clear that in the event that the 1st and 2nd Respondents procure and obtain the requisite EIA License in accordance with Section 58 of the *EMCA*, 1999 and the Development approval from Nairobi City County Government, which is the designated Planning Authority; then the Jurisdiction of this court to deal with this matter in the first instant would cease.

67. Barring the foregoing, the orders of the court are as proclaimed in paragraph 65 herein before.

68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Mr. Rashid Ngaira for the Applicant

Mr. Mosota and Mr. Kipyegon for the 1st and 2nd Respondents

Mr. Migele for the 1st Interested Party