



Sheria na Watu v Nairobi City County & 4 others (Environment & Land Petition E023 of 2023) [2023] KEELC 21994 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E023 OF 2023**

EK WABWOTO, J

NOVEMBER 23, 2023

**IN THE MATTER OF ARTICLES 1, 2,10,19,20,22,23(3),
60,62,67,177,196 & 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10(1)(A), (B), (C) AND
2(A), 60, 67,196(1)(A) AND (B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 3(F), 8, 8(A), 88, 91, 102(A) AND
115 OOF THE COUNTY GOVERNMENT ACT NO. 27 OF 2012**

AND

**IN THE MATTER OF THE PRINCIPLE OF PUBLIC PARTICIPATION
IN COUNTY PLANNING IN THE USE OF TITLES OVER PUBLIC
PROPERTIES FOR URBAN RENEWAL PROJECTS AS A SIMPLE
NON-COLLATERAL DEPOSIT WITH FINANCIAL INSTITUTIONS**

BETWEEN

SHERIA NA WATU PETITIONER

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

COUNTY ASSEMBLY OF NAIROBI 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

FELIX OLUOCH OTIENO 4TH RESPONDENT

PATRICK MAINA MWANGI 5TH RESPONDENT



Nairobi County’s action of depositing the title deed for public land containing urban renewal projects as collateral with a financial Institution was unconstitutional and contrary to the law.

The decision underscored the role of the National Land Commission in management of public land. The High Court when faced with the question whether the Nairobi City County’s action of depositing the title deed for public land containing urban renewal projects as collateral with a financial Institution was unconstitutional and contrary to the law answered in the affirmative. Such a decision needed to be approved by the National Land Commission.

Reported by John Ribia

Land Law – public land – management of public land – role of the National Land Commission vis-à-vis role of County Governments in management of public land – where a county government’s executive committee decided to use the titles of public land as security with financial institution to finance an urban renewal project - whether the Nairobi County’s action of depositing the title deed for public land containing urban renewal projects as collateral with a financial Institution was unconstitutional and contrary to the law - whether such a decision required an approval from the National Land Commission - Constitution of Kenya, 2010 articles 1(2),10(2)(a), 62(1), (2), and 196(2); National Land Commission Act (Cap 281) section 5(2), and 18.

Brief facts

On April 18, 2023, the 1st respondent through the County Executive Committee resolved that Nairobi City County Government title deeds for the Urban Renewal Projects sites including Pangani Estate Project site be deposited with financial institutions to act as simple non-collateral deposits in order to enable the joint venture development partners to raise funds for implementation of the projects.

The petitioner argued that the actions of the 2nd respondent in approving the resolution by the 1st respondent without public participation was meant to confirm a commercial benefit to developers such as the 4th and 5th respondents against the 38 collective interests of the petitioners as well as the millions of Nairobi residents to whom the property meant to house the proposed site belonged to.

It was also argued that the 3rd respondent who by law was vested with powers to manage public land did not authorize the 1st and 2nd respondents to deposit the subject titles of public land with financial institutions to secure funding for the developers.

The 1st and 2nd respondents and the interested party put forth a position that the National Land Commission (NLC) had availed the Land for the Pangani Renewal Project and was continually availing other lands as Urban Renewal Project unfolds in phases. It was also their case that the 1st respondent would only use the Pangani Project title as a simple non-collateral deposit in obtaining funding and as such, there was no risk of the 1st respondent losing the property or any other property should the developers default on payment of the facilities, the titles having not been charged with any financial institutions.

Issues

- i. Whether the Nairobi County’s action of depositing the title deed for public land containing urban renewal projects as collateral with a financial Institution was unconstitutional and contrary to the law.
- ii. Whether such a decision required an approval from the National Land Commission.

Held

1. Article 62(2) of the Constitution provided that public land shall vest in and be held by a County Government in trust for the people resident in the County and shall be administered on their behalf by the National Land Commission. Further, article 62(3) provided that certain classifications of Public land shall be administered on their behalf by the NLC.
2. Then the National Land Commission Act conferred power upon the National Land Commission to administer and manage public land that was vested in the County Government. The National Land



Commission Act further required the National Land Commission to undertake certain functions for effective management of land. Section 18 of the National Land Commission Act also provided for the establishment and functions of County Land Management Boards and the boards shall *inter alia* perform any other functions assigned to it by the Commission or by any other written law.

3. While it was the 1st respondent's case that National Land Commission was engaged prior to the adoption of the impugned judgment resolution, no evidence was presented to the court on whether or not the National Land Commission had consented and or approved the 1st respondent's action of depositing the title for the Pangani Urban Renewal Project and other titles with the Financial Institutions. In respect to the provisions of article 67(2) and 67(2)(a) of the Constitution, it was evident that the consent and or approval of the National Land Commission was required prior to the adoption of the said resolution by the 2nd respondent and subsequently depositing the said titles to the financial Institutions. The interpretation of the terms "manage" and "administer" as used in the Constitution and applied in the National Land Commission Act was evident that National Land Commission approval had to be obtained.
4. Section 8(d) of the National Land Commission Act also required the Commission when administering and managing public land to ensure that the land was used for specific purpose and subject to such conditions, covenants, encumbrances or reservations as may be specified. The impugned resolution could not have been sound unless the approval of National Land Commission was obtained. There was no evidence of such approval and or consent. There was a violation of articles 62(2) and 67(2)(a) and (h) of the Constitution.
5. The 1st respondent's action of depositing the title deed for the said land as collateral with a financial Institution was unconstitutional and contrary to the law. For the avoidance of doubt, there was no fault with the ongoing project as fashioned save for the impugned resolution dated April 18, 2023 that required the depositing of title deeds held by the 1st respondent as collateral to various financial institution without the approval of the National Land Commission.

Petition partly allowed.

Orders

Each party was to bear its own costs.

Citations

Cases

Kenya

1. *Gakuru, Robert N & others v Governor Kiambu County & others* Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated); [2014] eKLR - (Applied)
2. *In the Matter of the National Land Commission* Advisory Opinions Application 2 of 2014; [2015] KESC 3 (KLR) - (Applied)
3. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* ? 743 of 2006; [2007] KEHC 3680 (KLR) - (Applied)
4. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] KECA 381 (KLR) - (Applied)
5. *Mui Coal Basin Local Community & 15 others v Permanent Secretary, Ministry of Energy & 17 others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 1(2); 10(2)(a); 62(1); 62(2); 196(2) - (Interpreted)
2. County Governments Act (cap 265) sections 3(f); 8(e); 87(a); 87(b); 102(a); 115- (Interpreted)
3. National Land Commission Act (cap 281) sections 5(2); 18 - (Interpreted)



4. Physical Land Use Planning Act (cap 303) section 36 - (Interpreted)

Advocates

Mr. Mwangi Kangu h/b for *Mr. Mutunga* for the petitioner

Ms. Irene Odhiambo for the 1st respondent

Mr. Bake for the 2nd respondent

Ms. Wanini for the 3rd respondent.

Mr. Mulako h/b for *Mr. Diro* for the interested party

JUDGMENT

1. The petition in the petition dated May 10, 2023 seeks for the following reliefs:

- (i) A declaration be and is hereby issued that the resolution by the 1st respondent contained in its letter dated April 18, 2023, Ref. NCC/CS/PAA/297 and approved by the 2nd respondent on 19th April, 2023 to have the developers of the Urban Renewal Projects including the Pangani Urban Renewal Project to deposit Title Deed for the said land as collateral with Financial Institutions violates articles 1(2) 10(2)(a), 196(2) of the Constitution as well as sections 3(f) 8(e) 87(a) and(b), 102(a) and 115 of the County Governments Act, 2012 and therefore unconstitutional, unlawful, null and void for want of public participation.
- (ii). A declaration and is hereby issued that the resolution by the 1st respondent contained in its letter dated April 18, 2023, Ref NCC/CS/PAA/297 and approved by the 2nd respondent on April 19, 2023 to have the developers of the Urban Renewal Projects including the Pangani Urban Renewal Project to deposit Title Deed for the said land as collateral with a Financial Institutions violates article 67(2) for want of sanction, authority and/or consent by the 3rd respondent.
- (iii) An order of certiorari does issue calling, removing and delivering up to this court and quashing or removing the resolution by the 1st respondent contained in its letter dated April 18, 2023, Ref NCC/CS/PAA/297 and approved by the 2nd respondent to have the developers of the Urban Renewal Projects including the Pangani Urban Renewal Project to deposit Title Deed for the said land as collateral with Financial Institutions.
- (iv) Costs of the Petition be provided for.

2. The subject petition is premised on the various grounds alluded to and or enumerated in the body thereof and the same is supported by the affidavit sworn by Augustine Omondi on May 10, 2023.

3. Upon being served with the petition, the 1st respondent filed a replying affidavit sworn by Patrick Analo Akiraga sworn on July 6, 2023 in opposition to the petition. The 2nd respondent filed a replying affidavit sworn by Edward Gichana, the Clerk of Nairobi City County Assembly on the July 3, 2023. The 3rd respondent filed grounds of opposition dated August 24, 2023 in opposition to the petition while the interested party relied on affidavit sworn by David Kipchumba Sirma on July 3, 2023.

4. Pursuant to the directions issued by the court, the petition was canvassed by way of affidavit evidence, oral and written submissions filed by the parties.



The Petitioner's case and submissions

5. The petitioner's case as presented in the petition and the supporting affidavit sworn by Augustine Omondi is that; In February 2023, the 1st respondent through its website www.nairobi.go.ke/tenders advertised for various tenders requesting interested parties to submit bids for proposals for the design, financing, building and sale of housing in different parts of Nairobi through Joint Venture Agreements as particularized hereunder:
 - a) Tender No: NCC/URH&BS/RFP/231/2022-2023 in Embakasi Estate.
 - b) Tender No: NCC/URH&BS/RFP/229/2022-2023 in Bondeni Estate.
 - c) Tender No: NCC/URH&BS/RFP/225/2022-2023 in Bahati Estate.
 - d) Tender No: NCC/URH&BS/RFP/230/2022-2023 in Ziwani Estate.
 - e) Tender No: NCC/URH&BS/RFP/232/2022-2023 in Kariobangi Estate.
6. On 18 April 2023, the 1st respondent through the County Executive Committee resolved that Nairobi City County Government title deeds for the Urban Renewal Projects sites including Pangani Estate Project site be deposited with Financial Institutions to act as simple non-collateral deposits in order to enable the Joint Venture development partners raise funds for implementation of the projects.
7. Consequently, *vide* a letter dated April 18, 2023, Ref. NCC/CS/PAA/297, the 1st respondent through the Ag. County Secretary sought the 2nd respondent's approval of the said resolution and without hesitation, the said motion was introduced on the floor of the 2nd respondent by Peter Imwatok Jateso, the Majority Leader on April 19, 2023 during the Assembly's session wherein the 2nd respondent rubber-stamped the decision of the 1st respondent to have the developer of the Pangani Urban Renewal Project to deposit Title Deed for the said land as collateral with a Financial Institution.
8. It was also averred that the resolution by the 1st respondent and the subsequent approval by the 2nd Respondent is illegal, irregular, unlawful and unconstitutional as the same was passed without any form of public participation whatsoever contrary to article 10(2)(a) and 196(1)(b) of the *Constitution*.
9. The petitioner further averred that the properties earmarked for Urban Renewal Projects including the Pangani Urban Renewal Project are public properties within the meaning of article 62(1) of the *Constitution* and which the 1st respondent holds in trust for the residents of Nairobi and falls within the administrative mandate of the 3rd respondent as enshrined under article 62(2) of the *Constitution*.
10. It was contended that prior to approval of the said resolution by the 2nd respondent, no authorization was obtained from the 3rd respondent to offer the Title of the intended Pangani Urban Renewal Project as collateral, for the benefit of the developers, who are private entities.
11. It was further contended that being public land and the said project falling squarely within the mandate of the 1st respondent involving County Planning, the 2nd respondent was under constitutional and statutory obligation under articles 10(2)(a) and 196 of the *Constitution* as well as sections 3(f), 8(e) 102(a) and 115 of the *County Governments Act* to, as a matter of necessity, facilitate public participation before any decision and/or policy is made or implemented over the subject property.
12. The petitioner further averred that the hastily act by the 2nd respondent to approve the impugned resolution by the 1st respondent in less than twenty-four (24) hours after its formulation was meant to curtail, suppress, militate and deny the residents of Nairobi of any opportunity to engage in any form



- of public participation, whether qualitative and/or quantitative in a critical policy decision affecting the utilization of public property reposed in the 1st respondent which holds it in trust for them.
13. As a result, neither the petitioner nor any resident of Nairobi was ever granted an opportunity to express their views in any manner as contemplated under section 91 of the [Country Governments Act](#), to wit, information communication technology platforms, town hall meetings and notice boards. Consequently, the residents of Nairobi County were completely locked out of the decision-making process culminating in the impugned resolution by the 1st respondent as approved by the 2nd respondent.
 14. It was the petitioner's case that the net effect of the actions by the 1st and 2nd respondents violated the principles of Nairobi citizen's participation particularly the timely access to information, data, documents and other information relating to the resolution made by the 1st respondent and approved by the 2nd respondent for implementation and/or benefit of the developers including the 4th and 5th respondents to the collective detriment of the petitioner as well as millions of Nairobi residents.
 15. In approving the impugned resolution, the 2nd respondent violated section 87(2) of the [Country Governments Act](#) by denying the Petitioners as well as residents of Nairobi County the right to reasonable access to the process of formulating and implementing approval of development projects within Nairobi City County.
 16. The actions of the 2nd respondent in approving the resolution by the 1st respondent without public participation are meant to confer a commercial benefit to the developers such as the 4th and 5th respondents, against the collective interest of the petitioner as well as the millions of Nairobi residents, to whom the property meant to house the proposed site belong.
 17. Further to conferring such commercial benefit, the residents of Nairobi risk losing the subject properties to Financial Institutions should the developer(s) default on its and/or their financial obligations in servicing the financial facilities secured through the deposit of the Title Deed for the subject property with the requisite financial institution.
 18. According to the petitioner, the impugned resolution and the subsequent approval by the 2nd respondent, even though it appears specific to the Pangani Project site has opened a leeway and Pandora and in so doing the 2nd respondent delivered a blank cheque to the 1st respondent to enter into consortiums with developers in like projects as outlined under paragraph 18 wherein public assets would be used as collaterals to the detriment of the residents of Nairobi City County.
 19. In approving the impugned resolution, the 2nd respondent abrogated its oversight responsibility over the County Executive Committee as enshrined under article 185(3) of the [Constitution](#) thereby putting the collective interests of the residents of Nairobi County over the subject property in great jeopardy.
 20. The petitioner also filed written submissions dated August 1, 2023 where the petitioner submitted on the following two issues; whether the resolution complained of by the petitioner violates the Constitution and other Statutory provisions of the law for want of Public Participation and whether the orders sought should be granted.
 21. It was submitted that that public participation is now an integral requirement in all decisions made by public bodies whether at the National or County Government level so long as those decisions affect members of public. This requirement is so fundamental that the framers of the [Constitution](#) of Kenya, 2010 had to anchor it under article 10(2)(a) of the Constitution and that the 1st and 2nd respondents fall squarely within the authorities envisaged herein above and cannot therefore exempt



themselves from complying with the said article of the Constitution in their decision making and policy implementation.

22. It was also submitted that the 1st and 2nd respondents and precisely the 1st respondent did not carry out public participation to the standard that is envisaged by law. The petitioner is aggrieved by the actions of the 1st and 2nd respondents in that vide a letter dated April 18, 2023 (Ref NCC/CS/PAA/297), the 1st respondent sought for the approval of the 2nd respondent with respect to a resolution to deposit title deeds for the estates earmarked for urban renewal projects with financial institutions as simple non-collateral deposits to enable developers obtain funding for the said project without public participation. The 2nd respondent hurriedly approved the said resolution on the 19th April 2023, a move that was deliberately taken to lock out public participation by the residents of Nairobi City County who are directly impacted by the said resolution. It is worth noting that the 3rd respondent who by law is vested with powers to manage public land did not authorize the 1st and 2nd respondents to deposit the subject titles of public land with financial institutions to secure funding for the developers.
23. It was also submitted that the 1st respondent has attempted to convince this Honourable court that there was public participation as required by law. It alleges that the impugned resolution was arrived at pursuant to a Gazette Notice dated August 28, 2018 produced in its evidence which purportedly invited residents of Nairobi City County and stakeholders to participate. It has also attached at page 14-46 a Sectoral committee on planning and housing. At page 48-55, it has annexed a register of attendees. At page 57 it has annexed a Notice that it posted on its website purportedly inviting members of the public and other stake holders to give views on the Urban Renewal Project, which is the basis of the instant petition. Interestingly, the said public participation for the 13 affected areas was fixed the same date which is May 25, 2023.
24. It was argued that the objectives of the said invitation posted on its website are the following:
 - (i) To share progress information on the County affordable housing project.
 - (ii) To enhance beneficiaries' ownership on the County's affordable housing project.
 - (iii) Prepare the public on the commencement of the construction works by the contractors.
25. It is the petitioner's submission that a look at the objectives of the invitation posted on the 1st respondent's website does not list deposition of Title deeds to the 13 affected estates as one of the subjects to which members of the public are being invited to give views upon. It was an invitation to update them on the progress so far made with regards to the urban renewal project rather than take their views. This in itself does not amount to public participation. Reliance was made to the case of *Robert N Gakuru and others v Governor Kiambu County & A others* (2014) eKLR, while addressing the question of what public participation entails, Odunga J as he then was held thus:

“In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for purposes of fulfillment of the constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assembly ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous,”



26. It was further submitted that the notice did not say anything about depositing Title deeds to the subject properties with financial institutions as simple non-collateral assets for funding. The said Title deeds are in respect of public land which the 1st respondent holds in trust for the residents of Nairobi City County in general. Therefore, for whatever reasons, the 1st and 2nd respondents are enjoined by law to seek the views of members of the said estates and stake holders in general thus they cannot seek to hide behind a gazette notice issued on 18th August, 2018 or any other subsequent report which does not reflect the views of the public with regard to the subject in issue.
27. The petitioner further submitted that the move by the 1st and 2nd respondents to code Title deeds to public property as collateral to secure funding for private developers is very serious and ought to have been subjected to public participation. Similarly, the authority of the 3rd respondent ought to have been procured since the subject titles are in respect of public land. The 1st respondent in particular alleges that there was public participation. It has produced in its evidence an attendance list of purported members of the public for a meeting dated 29th January 2019. However, the heading of the said attendance sheet reads

“Public Participation Exercise at Nairobi City County Assembly Charter Hall Held on Tuesday January 29, 2019”.

28. It was submitted that such a list does not amount to public participation for the reasons that the heading clearly does not refer to Depositing of Title Deeds to the subject estates with financial institutions as Simple non-collateral to enable developers get funding for the project. Secondly, there are no minutes of what was discussed in that meeting. Thirdly, the list comprises of only 92 attendees which cannot be said to be a proportionate representation of the thousands if not hundreds of thousands of the residents of Nairobi City County with regard to public participation as envisaged under the law.
29. It was therefore the petitioner's submission that the resolution by the 1st respondent in its letter dated April 18, 2023 and approval by the 2nd respondent on the April 19, 2023 is illegal, unconstitutional for noncompliance with the dictates of the constitution and legislation with regard to public participation.
30. It was also submitted that the orders sought in the petition be granted as prayed and reliance was placed to the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR.
31. During the highlighting of the parties written submissions, learned counsel Mr. Mutunga appeared for the petitioner and reiterated that the impugned resolution was approved without the input of the Nairobi residents and further relied on the affidavit and written submissions filed in support of the Petition.

The case of the 1st respondent and its submissions

32. The 1st respondent filed a replying affidavit sworn by Patrick Analo Akiraga the Ag. County Secretary and Head of County Public Service on July 6, 2023 and written submissions dated September 14, 2023. It was the 1st respondent's case that from in 2016, the 1st respondent initiated the redevelopment of eight (8) residential estates in Nairobi as the first phase of the Urban Renewal Programme. These were Pangani, Jevanjee/Bachelors Quarters, New Ngara, Old Ngara, Ngong Road Phase 1, Ngong Road Phase 2 and two green fields in Uhuru and Suna Road. At the inception phase of the Renewal Programme, the 1st respondent issued a Public Notice of Intention to Plan vide Gazette Notice No 9511 of August 28, 2018, inviting the general public and all stakeholders to participate in the Plan. Subsequently, in 2018, the Urban Housing Renewal and Regeneration Policy (hereinafter "the Urban



Renewal Policy" was formulated to guide the implementation of the affordable housing and urban renewal projects. The Policy was approved by the 2nd respondent in March, 2019.

33. It was averred that prior to the adoption of the Urban Renewal Policy, the 1st respondent called for an open public participation forum on the policy document on January 29, 2019 at Charter-Hall, City Hall and reviewed written memoranda that had been forwarded to the Office of the Clerk by the said date. The Pangani and Jevanjee/Bachelors estates redevelopment projects were launched in June, 2020 being the first phase of the Urban Renewal Programme; the 1st respondent has since embarked on the second phase of urban renewal that targets the redevelopment of Woodley, Bahati, Maringo, Jericho, Lumumba, Ziwani, Embakasi, Kariobangi North and Bondeni estates, among others. The 1st respondent published the Public Participation Notice on its website, inviting interest members of the public and other stakeholders to attend meetings, as scheduled, on May 25, 2023 and submit written memoranda by May 25, 2023 with regard to this second phase. The Urban Renewal Projects have adopted a Joint Venture (JV) developers are tasked with raising the project funds WITHOUT charging the concerned properties or in any way dealing with the said properties in a manner that may lead to the 1st respondent losing its land.
34. It was averred that further to the averments in paragraph 4 above and in response to paragraphs 3 to 5 of the supporting affidavit sworn by Augustine Omondi. the Resolution reached by the 1st respondent on April 18, 2023 was strictly regarding the depositing of the Pangani Estate Urban Renewal Project title and other project titles with financial institutions as simple non-collateral deposits and that the said Resolution was reached for reason that the Financier in question, KCB Bank Kenya Limited, has access to government-backed funding, specifically meant for the Affordable Housing Projects and therefore the Pangani Project stands to benefit greatly from favorable pricing of the said funding.
35. It was further averred that the financing arrangement was on the condition that the title for the Pangani Renewal Project, being Title No Nairobi/Block 40/474 be held by the Financier as a simple non-collateral deposit, contrary to the Petitioner's misconceived allegations.
36. It was contended that the 1st respondent undertook numerous public consultation activities from the Plan preparation phase of the Urban Renewal Project, received grievances from different quotas and adequately responded to the same prior to the implementation of the Project. The public participation activities included; 10 Awareness & Sensitization Workshops, including a preliminary workshop for County Assembly Planning Committee members & Area MCAs, a meeting with Ward Administrators & Estate Officers and six Local Area Stakeholder Workshops; Estate Consultations, focused Group Discussions with Gikomba Wholesale Traders, Burma Market Traders, Kaloleni Residents Association and Matopeni Slum Residents, technical Consultative Meetings with the Governor, Deputy Governor and CEC Members, PS- Housing, CEC Member - Urban Renewal, Housing and Building Services, World Bank, Project Implementation Team (National and County Government), UN- Habitat and Kura:
 - (a) Household and Market Surveys;
 - (b) Publication of Notice of Intention to Plan on 2 local dailies and Kenya gazette;
 - (c) Nine Situational Analysis/Draft Plan Validation Workshops including eight Local Area;
 - (d) Stakeholder Workshops and one for the County Assembly Planning Committee Members & Area MCAs; and
 - (e) Eight Final Plan Validation Workshops.



37. It was further contended that the 1st respondent bears the mandate for city planning and development, including housing, as provided for under Part 2, Clause 8(d) of the Fourth Schedule to the *Constitution*, Part XI of the *County Governments Act, 2012* and section 36 of the *Physical Land Use Planning Act 2019*, among other statutes. In exercise of its planning and development mandate, the 1st respondent initiated the Urban Renewal Programme in collaboration with the Ministry of Lands, Public Works, Housing and Urban Development.
38. It was averred that the National Land Commission (NLC), the 3rd Respondent herein, has availed the land for the Pangani Renewal Project and is continually availing other lands as the Urban Renewal Project unfolds in phases. Additionally, the 3rd respondent, being a key player in the Project, has specific roles assigned to it and will be large part of the Project Area. As such, the Petitioner's allegations thereto are misconceived.
39. It was further averred that the petitioner's claim that the Urban Renewal Programme is against the interests of Nairobi City County residents is misplaced for reasons that the Urban Renewal Policy is very categorical that former residents relocated from the affected estates will be given priority in allocation of the redeveloped units. Additionally, the Policy also seeks to prioritize low and middle-income households in Nairobi in the units allocation.
40. It was also the 1st respondent's case that the 1st respondent will only use the Pangani Project title as a simple non-collateral deposit in obtaining funding and as such, there is no risk of the 1st respondent losing the said property, or any other property, should the developers default on repayment of the facilities, the said title(s) having not been charged with any financial institutions.
41. It was also the 1st respondent's case that the 1st respondent has consistently acted within the law in all aspects of the Urban Renewal Projects, and has keenly given ear to and considered, all along, the views and suggestions of the interested members of the public together with all the concerned stakeholders, all in a bid to provide decent and affordable housing to the City residents as mandated by law.
42. It was contended that the Pangani Urban Renewal Project is already about fifty-five percent (55%) complete and as such any further delays on the Project completion only expose the development to adverse weather effects which may have a net effect of further delaying the Project and possibly increasing the costs thereto, to the detriment of the 1st Respondent and of the many City residents who have already made substantial payments towards the purchase of units.
43. In its written submissions dated September 14, 2023, the 1st respondent submitted on the following issues:
- (i) Was the Public Participation in respect of the 1st respondent's Urban Housing Renewal and Regeneration Project as awhile?
 - (ii) Was there Public Participation prior to the formulation and approval of the 1st respondent's resolution dated April 18, 2023?
 - (iii) Whether the impugned resolution if implemented is for the benefit of private individuals and risks the loss of public property to the detriment of the residents of the Nairobi City County?
 - (iv) Whether the impugned resolution was approved without the National Land Commission's Consent contrary to article 67(2) of the *Constitution*.
44. On the issue of Public Participation of the project, it was submitted that the 1st Respondent bears the mandate for city planning and development, including housing, as provided for under Part 2, Clause 8(d) of the Fourth Schedule to the *Constitution*, Part XI of the *County Governments Act, 2012* and



- Section 36 of the Physical Land Use Planning Act 2019, among other statutes. In exercise of its planning and development mandate, the 1st respondent initiated the Urban Renewal Project in collaboration with the Ministry of Lands, Public Works, Housing and Urban Development in 2016.
45. At the inception phase of the Urban Renewal Project, the 1st respondent issued a Public Notice of Intention to Plan vide Gazette Notice No 9511 of August 28, 2018, inviting the general public and all stakeholders to participate in the Plan.
46. This invitation was in line with section 115 (1) of the County Governments Act, No 17 of 2012 which provides that: -
- “ 115. Public participation in the county planning processes shall be mandatory and
- (1) be facilitated through: -
- (a) mechanisms provided for in Part VIII of this Act; and
- (b) provisions to the public of clear and unambiguous information on any matter under consideration in the planning process including:
- (i) clear strategic environmental assessments;
- (ii) clear environmental impact assessment reports;
- (iii) expected development outcomes; and
- (iv) development options and their cost implications.”
47. In fulfilling the requirements under section 115(1) of the Act, the 1st respondent engaged all the relevant stakeholders as described in paragraph 8 of its replying affidavit and thereafter prepared a comprehensive report dated 19th September, 2019 on the Urban Renewal Plan, covering all the issues under consideration in the planning process. The Report highlights, in detail, the nature of public engagement including the manner in which grievances raised by key stakeholders were addressed.
48. In 2018, the Urban Housing Renewal and Regeneration Policy was formulated to guide the implementation of the affordable housing and urban renewal projects. The Policy was approved by the 2nd respondent in March, 2019. Prior to the adoption of the Urban Renewal Policy, the 1st respondent called for an open public participation forum on the policy document on January 29, 2019 at Charter-Hall, City Hall and reviewed written memoranda that had been forwarded to the Office of the Clerk by the said date.
49. It was further submitted that section 87 of the act lists principles that ought to guide public participation within counties, subsection (a) provides for timely access to information, data, documents, and other information relevant or related to policy formulation and implementation. This is the basis upon which the respondent invited members of the public for a public participation forum on the policy document including the submission of written memoranda on the same.
50. It was also submitted that the 1st respondent conducted 10 awareness and sensitization workshops; Estate Consultation; focused Group Discussions with Gikomba Wholesale Traders; Gikomba Retail Traders; Kwa Gacucu Traders, Kamukunji Jua Kali Trades, Burma Market Traders, Kaloleni Residents Association and Matopeni Slum residents, Technical Consultation meeting with the Governor, Deputy Governor and CFC Members, PS – Housing, CFC Member Urban Renewal, Housing and Building Service, World Bank, Project Implementation Team (National and County government) UN – Habitat and Kura and Household and Market Surveys among others.



51. Reliance was also placed in the cases of *Robert N Gakuru & others v Governor, Kiambu County & 3 others* [2014] eKLR, *Mui Coal Basin Local Community & 15 others v Permanent Secretary, Ministry of Energy & 17 others* [2015] eKLR and *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR.
52. It was also submitted that the entire Policy Document having been subjected to public participation, the financing strategies laid out in the said document were subjected to thorough scrutiny and on approval of the Policy Document, there was certainly no need for another round of public participating if the 1st respondent decided to embark on commercial borrowing and seek the 2nd respondent's approval as was the case herein.
53. Further to this, all the joint venture agreements entered into between the 1st respondent and its development partners tasks the developers with raising the project funds without charging the concerned properties or in any way dealing with the said properties in a manner that may lead to the 1st respondent losing its land.
54. It was further submitted that contrary to the petitioner's misconceived allegations, the Urban Renewal Project was birthed first, in response to the 1st respondent's mandate to progressively realize the right to accessible and adequate housing, as provided for under article 43(1)(b) of the *Constitution*. Nairobi City County's affordable housing demand far outstrips the current population. This situation has resulted into an overcrowded city with many informal settlements which lack basic infrastructure and basic social amenities.
55. It was argued that a successful renewal and redevelopment of the Nairobi City County's old and decayed estates comes with better planning and provision of the missing basic infrastructure such as access to roads, and better and cleaner environments. Beyond this, affordable and proper housing restores the dignity of millions of Nairobi residents who have been condemned to overcrowded informal settlements.
56. The 1st respondent also submitted that as to whether there is a real risk of losing public property into the hands of financial institutions, it is necessary to first understand that a simple non-collateral deposit is a form of money borrowing that falls under the category of unsecured loans. The loan does not require or rather charge the collateral as form of security.
57. It was also submitted that the 1st respondent has engaged the nlc, the 3rd respondent herein, right from the inception of the Urban Renewal Project idea. The 3rd respondent has been a key stakeholder throughout the process and has already availed some of the lands relevant to the Renewal Project. It was further submitted that the NLC has been involved through the policy making process and is aware of the financing options available to the 1st respondent as detailed in the Policy.
58. During the highlighting of the submissions filed by the parties, learned counsel Ms Odhiambo while holding brief for Mr Bake made oral submissions on behalf of the 1st respondent and urged the court to dismiss the petition.

The case of the 2nd respondent and its submissions

59. The 2nd respondent's case was based on their replying affidavit sworn by Mr. Edward Gichana, the Clerk of Nairobi City County Assembly on 3rd July, 2023 and the oral and written submissions made on their behalf. The written submissions were dated September 8, 2023.
60. It was the 2nd respondent's case that on November 22, 2016 the County Government entered into a Joint Venture Agreement with a consortium of companies Sovereign Group Limited being the



lead consortium member, Lee Construction United and Tecnofin Kenya Limited herein after jointly referred to as Development Partners.

61. The objective of the Joint Venture was to facilitate urban renewal and Improvement and addition of and by upgrading of the old estates belonging to the 1st respondent.
62. The general populace were engaged and they had a buy in on the proposed project an act that is signified by their willful delivery up of possession to pave way for the construction of affordable housing.
63. The decision of the 1st respondent to enter into the said Joint Venture was based on the right to accessible, adequate and affordable housing and reasonable standards of sanitation expressly provided for in article 43(1)(b) of the [Constitution](#) and to the fact that affordable housing is a social pillar of vision 2030 which recognized investment in housing through partnership and it being an Agenda for the previous government,
64. The Development Partners incorporated a Special Purpose Vehicle (SPV) through which it would undertake the Urban Renewal and Redevelopment project and were expected to raise debt capital to meet the costs of constructing the project.
65. The ownership of the sub leases in respect of the Housing and Commercial units developed would then vest in the name of the SPV until such a time as their sale price value is paid in full to the SPV by a third-party purchaser when the sub lease shall be transferred to the third-party purchaser to hold for the remainder of the term of 98 years less such a period as shall be determined by the lease of the property by the 1st respondent to the SPV.
66. On April 18, 2023, the 1st respondent through the County Executive Committee resolved that Nairobi City County Government Title Deeds for the Urban Renewal Projects sites including Pangani Estate project site be deposited with financial Institutions to act as simple non collateral deposits in order to enable the Joint Venture development partners raise funds for completion of the projects.
67. The said resolution was premised on clause 10.3.2 of the Joint Venture Agreement which expressly required the Development Partner to obtain the 1st respondent herein the Contracting Authority's approval before entering into any agreement whereby the Development Partner will incur indebtedness.
68. It was also the 2nd respondent's case that the approval referred to herein above was to be given within fifteen (15) working days. Further, for the 1st respondent sought the approval of the 2nd respondent by dint of article 1(2) of the [Constitution of Kenya 2010](#) as read together with section 8 of the [County Government Act](#) and article 185 of the [Constitution of Kenya 2010](#).
69. The 2nd respondent herein received a letter Ref. NCC/CS/PAA/297 dated April 18, 2023 from the Ag County Secretary, the said letter was a request by the County Executive for the approval of the executive's resolution made on April 18, 2023.
70. Taking cognizance of the timelines provided for in the joint Venture Agreement, and noting that the residents of Nairobi at large had participated and embraced the project it was incumbent on their elected leaders to exercise its functions through the Assembly by dint of section 8 of the [County Governments Act 2012](#).
71. In addition, 1st respondent through its executive committee members having passed the resolution, acted within the law in seeking the 2nd respondent's approval of its the resolution dated April 18, 2023 that the Nairobi City County Government Title Deed for the Pangani Estate Urban Renewal Project



- site to be deposited with the financial institutions requesting as a simple non collateral deposit to facilitate the joint venture development partner to raise the financing of the project.
72. The decision of the Assembly to pass the resolution was based on the fact that it supported the Nairobi City County Government's bid to provide decent and affordable housing to the city residents in implementing the Urban Renewal projects and the fact that Joint Venture Agreement Clause 12.3(c) imposes an obligation on the 1st respondent herein shall not unreasonably withhold consent for restructuring and rescheduling of the debt due.
73. It was contended that all actions taken by the 2nd respondents were solely for the benefit of the Residents of Nairobi who are represented by the Members of the 2nd respondent herein and the same were done within the timelines stated in the contract.
74. It was argued that the County Government conducted public participation on the inception of the project which facilitated the execution of a memorandum of understanding between the 1st respondent herein and the Pangani Welfare Resident Association and the occupants residing on the property as required by clause 12.1 (c) of the Joint Venture Agreement.
75. Further, it was only after public participation that the parties executed the Memorandum of Understanding, Joint Deed of Undertaking and Implementation Plan by the 1st respondent and the Development Partners paid to the existing tenants relocation rent to enable them move to alternative premises during the construction for a period of two years from the commencement of the project and any extensions granted therein. An obligation Imposed on parties by clause 12.2(1) of the Joint Venture Agreement.
76. It was also averred that the project is currently 75% complete and that if the orders sought are issued, it will delay the completion of the project.
77. In its written submissions, the 2nd respondent submitted on the following issues:
- (i) Whether Public Participation was carried out in accordance to the law?
 - (ii) Whether Petitioners are entitled to the orders sought?
78. It was submitted that Public Participation was indeed undertaken within the reasonable threshold by engaging the residents of Pangani who were convinced to give up possession to pave way for not only the ground breaking but equally the laying of foundation stone and subsequent construction which stands at nearly 85% completion.
79. The 2nd respondent urged the court to hold that there was sufficient public Participation and reliance was made to the case of Mui Coal Basin (*Supra*).
80. In respect to the reliefs sought, it was submitted that the balance of convenience and public interest heavily weighs on not granting the said orders as the project seeks to provide low cost housing to the residents of Nairobi. The court was urged to dismiss the petition.
81. Learned counsel Mr Kokebe made oral submissions on behalf of the 2nd respondent in opposition to the petition.

The case of the 3rd Respondent

82. The 3rd respondent filed grounds of opposition to the petition raising the following objections:
- (i) That the petition does not raise any reasonable cause of action against the 3rd respondent.



- (ii) That no evidence has been adduced by the petitioner to demonstrate how the 3rd respondent has either by its actions or omissions infringed on or threatened to infringe on its constitutional rights and freedoms or statutory rights given in the statutory provisions under which the petition is brought.
 - (iii) That it has not been shown that the 3rd respondent has an identifiable legal interest or duty in these proceedings.
 - (iv) That the prayers sought cannot be enforced by or against the 3rd respondent as they do not form any part of its mandate.
 - (v) That the petition is frivolous, vexatious and is otherwise intended to embarrass and harass the 3rd respondent.
83. During the plenary hearing of the petition learned counsel Ms. Wanini associated herself with the submissions made by the respondents and interested party and urged the court to dismiss the petition.

The case of the 4th and 5th Respondents

84. No response nor any pleadings were filed on behalf of the 4th and 5th respondents and neither did they take part in these proceedings despite having been served.

The case of the interested party

85. The interested party having been joined to this petition filed a replying affidavit sworn by David Kipchumba Sirma sworn on July 3, 2023 and written submissions dated September 6, 2023.
86. Learned counsel Mr Diro and Ms Gathoni appeared for the interested party.
87. In these proceedings, it was the interested party's case that prior to the commencement of the project, the Interested party sought to obtain a facility from KCB (hereinafter the 'Financier') for Kenya Shillings One Billion (1,000,000,000.00) being construction loan and a further USD 6,375,725.36 being a letter of credit payable at banks Kes. Base rate and 2% per annum respectively, as the shareholder sources, the pre-sales and the initial facility were not sufficient to finance the entirety of the project.
88. Consequently, the Financier imposed various conditions upon both the applicant and the 1st respondent to enable release of the initial deposit and the subsequent draw downs, which conditions have since been successfully met.
89. Upon receipt of the initial deposit and drawdowns, the interested party proceeded to execute the project, which project is estimated to be at 75% completion;
90. It was averred that the process leading to the execution of the joint venture agreement and the development of the Project Land is disputed and which dispute is before this Court for determination.
91. It was further averred that as the developer, the Intended Interested Party is obligated to perform his obligations in the contract and guarantee the warranties and conditions thereto.
92. In their written submissions, the interested party submitted on the following issues:
- (i) Whether there was Public Participation with regard to the impugned resolution of the Nairobi City County government which was approved by the Nairobi City County Assembly.
 - (ii) Whether the orders sought ought to be granted?
 - (iii) The costs of the petition.



93. On Public Participation, it was argued that Public participation is one of the objects of the CGA and should be carried out as required under article 196 of the Constitution. County Assemblies, therefore, have a constitutional obligation to facilitate public participation on policy formulation, legislative process and any other decision affecting residents of the county including approving the borrowing by the county government in accordance with article 212 of the Constitution as provided under section 8 of the County Government Act.
94. It was also argued that section 20 of the County Government Act further provides for the method in which such approval shall be made, and sets out that any question proposed for decision by the County assembly shall be determined by a majority of the members of the county assembly present and voting.
95. Whereas citizen participation in county governments is provided for in part VII of the CGA, the applicable principles of public participation in section 87 is described as
- “reasonable access as the process of approval of development proposals, projects and budgets...”
96. Section 91 of the CGA prescribes the manner through which the objective of public participation in the County Government affairs can be achieved as below:
91. Establishment of modalities and platforms for citizen participation. The county government shall facilitate the establishment of structures for citizen participation including:
- (a) information communication technology-based platforms
 - (b) town hall meetings
 - (c) budget preparation and validation for a;
 - (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;
 - (e) development project sites,
 - (f) avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate or
 - (g) establishment of citizen fora at county and decentralized units.
97. Section 115 of the County Government Act further provides for public participation in county planning processes as being mandatory and including the provision of information to the public including development options and their cost implications.
98. It was also submitted that the 1st and 2nd respondent has since discharged this obligation in respect to its legal mandate and the modalities. In its response to the petition vide the replying affidavit of Patrick Analo dated July 6, 2023, the 1st respondent annexed a Gazette Notice dated August 28, 2018 and a Sectoral Committee Report enclosing notices and attendance sheets with regard to the public participation meetings held by the 1st respondent. Indeed, it gave the public a reasonable opportunity to participate.
99. It was argued that the manner in which public participation is carried out depends on the matter at hand and that in the instant case, there was no doubt that the public were invited vide the Gazette Notice to give their views on the proposed development which public consultation was carried out at the Nairobi County Assembly Charter Hall and the attendance sheet attached by the 1st respondent.



100. In respect to the orders sought, it was submitted that the petition has not disclosed any violation of the Constitution in the question of public participation. Under article 1 of the Constitution, the sovereign power lies in the hands of the people and can be directly or indirectly exercised through their democratically elected representatives.
101. In the instant case, the impugned resolution was taken by 1st respondent and approved by the 2nd respondent who are the representatives of the people after directly engaging with them (the people) of Nairobi City County which, the 1st and 2nd respondents did not exceed their power under the Constitution or under the County Governments Act.
102. The court was urged to dismiss the petition.

Analysis and determination

103. Upon considering the petition, affidavits filed, written and oral submissions made by the parties, this court is of the view that the salient issue for determination herein is whether the impugned resolution was made contrary to the Constitution and other statutory Provisions.
104. On April 19, 2023, the 2nd respondent adopted the impugned resolution which states as follows:

“Subject: Financing of Urban Renewal Projects

WHEREAS, Paragraph 8(d) of the second part of the fourth schedule to the Constitution of Kenya bestows County Governments with the mandate of county planning and development which includes provision of housing;

Whereas, the Nairobi City County Government in its bid to provide decent and affordable housing to the city residents is implementing Urban Renewal projects under a joint venture arrangement with development partners;

and Whereas, under the joint venture arrangement, the Nairobi City County Government and Private Developers formed a Special Purpose Vehicle (SPV) to implement the projects where the County Government holds the majority shares of ninety-nine (99) while the private developers holds one (1) share,

Noting, that under the joint venture arrangement, the Nairobi City County Government is expected to provide land for the projects while the developers are to raise funds and implement the projects;

Further Noting, that in order to raise the required funds, financial institutions have required the private developers to provide collateral in order to provide the finances;

Recognising, that at its sitting held on April 18, 2023, the County Executive Committee resolved that Nairobi City County Government Title Deeds for the Urban Renewal project sites be deposited with Financial Institutions to act as simple non-collateral deposits in order to enable the joint venture development partners to raise finances necessary to implement the Urban Renewal projects;

Acknowledging, that vide a letter Ref NCC/CS/PAA/297 dated April 18, 2023 by the Ag. County Secretary, the County Executive requests this County Assembly to approve the aforementioned resolution of April 18, 2023 with respect to the Pangani Estate project site;

Now Therefore, taking into account the significance of the Urban Renewal Project to the residents of Nairobi City County, the resolution of the County Executive of April 18, 2023 and the subsequent request to the Assembly and the conditions set out for the implementing



of the joint venture, and pursuant to Section 8 of the [County Governments Act, 2012](#), this County Assembly Resolves to Approve the resolution of the County Executive of April 18, 2023, that Nairobi City County Government Title Deed for the Pangani Estate Urban Renewal Project site be deposited with the requesting financial institution, as simple non-collateral deposit, to facilitate the Joint Venture Development partner to raise the financing of the project."

105. The Petitioner argued that the actions of the 2nd respondent in approving the resolution by the 1st respondent without Public Participation was meant to confirm a commercial benefit to developers such as the 4th and 5th respondents against the 38 collective interest of the petitioner as well as the millions of Nairobi Residents to whom the property meant to house the proposed site belongs.
106. It was also argued that the 3rd respondent who by law is vested with powers to manage public land did not authorize the 1st and 2nd respondents to deposit the subject titles of Public Land with Financial Institutions to secure funding for the developers.
107. In responding to the aforementioned issues, the 1st, 2nd respondents and the interested party put forth a position that the National Land Commission (NLC) has availed the Land for the Pangani Renewal Project and is continually availing other lands as Urban Renewal Project unfolds in phases. It was also their case that the 1st respondent will only use the Pangani Project title as a simple non-collateral deposit in obtaining funding and as such, there is no risk of the 1st respondent losing the said property or any other property should the developers default on payment of facilities the said titles having not been charged with any financial institutions.
108. Article 62(2) of the [Constitution](#) provides that Public land shall vest in and be held by a County Government in trust for the people resident in the County and shall be administered on their behalf by the National Land Commission.
109. Further, article 62(3) of the [Constitution](#) provides that certain classifications of Public land shall be administered on their behalf by the NLC.
110. Section 5(2) of the [NLC Act](#) Apart from the functions listed under article 67(2) of the [Constitution](#), section 5(2) of the Act assigns other tasks to the NLC, in the following terms:
 - “(a) on behalf of, and with the consent of the National and County Governments, alienate public land;
 - (b) monitor the registration of all rights and interests in land;
 - (c) develop and maintain an effective land information management system at National and County levels; and
 - (d) manage and administer all unregistered trust land and unregistered community land on behalf of the County Government.”
111. It is evident that the National Land Commission has been given powers in respect to any dealings of Public Land. The Supreme Court in the matter of the [National Land Commission](#) [2015] eKLR stated:

“... the requirement of consent to such a transaction, from the National or County government is certainly a check and balance relationship between the two state organs. The



NLC’s function of monitoring the registration of all rights and interests in land is another mechanism of checking the powers of the body responsible for registration.”

112. Then the *National Land Commission Act* confers power upon the National Land Commission to administer and manage public land that is vested in County Government. The National Land Commission Act further requires National Land Commission to undertake certain functions for effective management of land.
113. Section 18 of the *National Land Commission Act* also provides for the establishment and functions of County Land Management Boards and the boards shall inter alia perform any other functions assigned to it by the Commission or by any other written law.
114. In the instant case, while it was the 1st respondent’s case that National Land Commission was engaged prior to the adoption of the impugned judgment resolution, no evidence was presented to this court on whether or not the National Land Commission had consented and or approved the 1st respondent’s action of depositing the title for the Pangani Urban Renewal Project and other titles with the Financial Institutions. In respect to the provisions of article 67(2) and 67(2)(a) of the *Constitution*, it is evident that the Consent and or approval of the National Land Commission was required prior to the adoption of the said resolution by the 2nd respondent and subsequently depositing the said titles to the financial Institutions. The Interpretation of the terms “manage” and “administer” as used in the Constitution and applied in the *National Land Commission Act* is evident that National Land Commission approval had to be obtained herein.
115. Section 8(d) of the National Land Court Act also requires the Commission in administering and managing public land to ensure that the land is used for specific purpose and subject to such conditions, covenants, encumbrances or reservations as may be specified.
116. The impugned resolution could not have been sound unless the approval of National Land Commission was obtained. There was no evidence of such approval and or consent herein. Looking at the totality of petitioner’s case, this court is persuaded that there was a violation of articles 62(2) and 67(2)(a) and (h) of the *Constitution*.
117. Having held that the resolution was undertaken contrary to the Constitution and the applicable statutes, it is the finding of this court that the 1st respondent’s action of depositing the title deed for the said land as collateral with a financial Institution is unconstitutional and contrary to the law. The petition therefore partly succeeds. For the avoidance of doubt this court wishes to clarify that there is no fault with the ongoing project as currently fashioned save for the impugned resolution dated April 18, 2023 that required the depositing of title deeds held by the 1st respondent as collateral to various financial institution without the approval of the National Land Commission.
118. On the issue of costs, its trite law that the court has discretion as to whether costs are payable by one party to another. Having regard to all the relevant circumstances in the instant petition and considering its partial, it would only be fair, if each of the parties herein bear their own costs.

Disposition

119. In the end, the petition dated May 10, 2023 partially succeeds in the following terms :
 - (i) A declaration is hereby issued that the resolution by the 1st respondent contained in its letter dated April 18, 2023 RefNCC/CS/PAA/297 and approved by the 2nd respondent on April 19, 2023 to have the developers of the Urban Renewal Project including Pangani Urban Project to



deposit title deed for the said land as collateral with a financial Institution was unconstitutional and contrary to the law.

- (ii) An order of *certiorari* does issue calling, removing and delivery upto this court and quashing the resolution by the 1st respondent contained in its letter dated April 18, 2023, Ref. NCCC/CS/297 and approved by the 2nd respondent to have the developers of the Urban Renewal Project including the Pangani Urban Renewal Project to deposit title deed for the said land as collateral with financial Institutions.
- (iii) Each party to bear own costs of the petition.

Judgment accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Mwangi Kangu holding brief for Mr. Mutunga for the Petitioner

Ms. Irene Odhiambo for the 1st Respondent and also holding brief for Mr. Bake for the 2nd Respondent.

Ms. Wanini for the 3rd Respondent.

No appearance for the 4th and 5th Respondents.

Mr. Mulako holding brief for Mr. Diro for the Interested Party.

E.K. WABWOTO

JUDGE

