Anami & 2 others (Suing as Officials of Rhapta Road Residents Association) v County Executive Committee Member(CECM) Built Environment and Urban Planning, Nairobi City County & 20 others (Environment and Planning Petition E030 of 2024) [2025] KEELC 128 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 128 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING PETITION E030 OF 2024

OA ANGOTE, J

JANUARY 23, 2025

IN THE MATTER OF ARTICLES 10,23,42, 60(1), 66, 70 AND 183 OF THE CONSTITUTION, THE FOURTH SCHEDULE PART 2 SECTION 8 OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

UNDER ARTICLES 10, 42, 60(1), 66, 70 AND 183 OF THE CONSTITUTION OF KENYA AND THE FOURTH SCHEDULE PART 2 SECTION 8 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 5, 6, 102, 103, 104, 105, 106, 107, 112 AND 113 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF REGULATIONS 4, 5(4), 15, 16(1), 27(2) AND 28 OF THE PHYSICAL AND LAND USE PLANNING (BUILDING) REGULATIONS

BETWEEN

CLAIRE KUBOCHI ANAMI (CHAIRMAN) ..... 1ST PETITIONER

ALEX TITO MWANGI MUIRURI (SECRETARY) ..... 2ND PETITIONER

KAVIT MEDIRATTA (TREASURER) ..... 3RD PETITIONER

SUING AS OFFICIALS OF RHAPTA ROAD RESIDENTS ASSOCIATION

AND

COUNTY EXECUTIVE COMMITTEE MEMBER(CECM) BUILT ENVIRONMENT AND URBAN PLANNING, NAIROBI CITY COUNTY ..... 1ST RESPONDENT

THE NAIROBI CITY COUNTY ..... 2ND RESPONDENT

DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

MAWA DEVELOPMENT COMPANY LTD ..... 6TH RESPONDENT

WIMAX HOMES LIMITED ..... 7TH RESPONDENT

SHIMONI RESORTS LIMITED ..... 8TH RESPONDENT

HALE END PROPERTIES LIMITED ..... 9TH RESPONDENT

KANTI NARAN MANJI PATEL, NITABEN KANTI PATEL, UMESH KALYAN NAVAN PATEL AND NARENDA KALYAN PATEL ..... 10TH RESPONDENT

KANJI KUNVENJI PATEL, SAPNA MAVIN KERAI ..... 11TH RESPONDENT

HOLLOWAY LIMITED ..... 12TH RESPONDENT

SKY VALLEY VENTURES KENYA CO LTD ..... 13TH RESPONDENT

PATTERSON INVESTMENTS LIMITED ..... 14TH RESPONDENT

RHAPTA ROAD PLAZA LIMITED ..... 15TH RESPONDENT

CENTRAL LINK PROPERTY CO. LTD ..... 16TH RESPONDENT

GAUFF INGENIEURE GMBH AND COMPANY ..... 17TH RESPONDENT

LOVI VENTURES KENYA COMPANY LTD ..... 18TH RESPONDENT

PUNITA JAYANT ACHARYA AND JAYANT RAJNIKANT ACHARYA ..... 19TH RESPONDENT

MEDINA PALM DEVELOPMENT LTD ..... 20TH RESPONDENT

NANCY WANGARI AVERDUNG AND FOLKER AVERDUNG .... 21ST RESPONDENT

JUDGMENT

Introduction

1. Vide a Petition dated 12th August, 2024, the Petitioners seek the following reliefs against the Respondents, jointly and severally;

    a. A permanent conservatory order restraining the Respondents their respective agents, servants and or employees and officers, contractors, consultants and all persons acting under their

respective authority and permission from undertaking any or any further demolition, excavation, construction, development, building and or other construction activities with respect to the respective properties listed herein under as follows:

Item No	Land Reference Number	Registered Owner and Developer	Approval unlawfully granted
1.	Title No Nairobi Block 3/63(formerly L.R No 1870/IV/26)	6th Respondent, Mawa Development Company Limited and 7th Respondent, the Developer, Wimax Homes Limited	19 Floors of 187 Units
2.	Title No Nairobi Block 4/109	7th Respondent, Wimax Homes Limited	
3.	Title No Nairobi Block 3/85(formerly L.R No 1870/IV/71	8th Respondent, Shimoni Resorts Limited and 9th Respondent, Hale End Properties Limited	20 floors of 419 units.
4.	Title No Nairobi Block 3/119(formerly L.R No 1870/IV/113)	10th Respondents, Kanti Naran Manji Patel, Nitaben Kanti Patel, Umesh Kalyan Navan Patel, and Narendra Kalvan Patel	18 Floors of 187 units
5.	Title No Nairobi Block 3/177(formerly L.R No 1870/IV/183)	11th Respondent, Kanji Kuvenji Patel, Sapna Mavin Kerai and Holloway Limited, 12th Respondent and 13th Respondent, the Developer Sky Valley Ventures Kenya Co Ltd.	17 floors of 136 units
6.	L.R No 1870/v/266	14th Respondent, Patterson Investments Limited	4 Basements, ground plus 19 floors

7.	Title No Nairobi Block 4/113 (formerly L.R No 1870/VI/335)	15th Respondent, Rhapta Road Plaza Limited and the Developer, 16th Respondent, Central Link Property Co Ltd	18 floors of 216 units
8.	Title No Nairobi Block 4/85 (formerly L.R 1870/v1/193)	17th Respondent, Gauff Ingenieure GMBH and Company and the Developer, Lovi Ventures Kenya Company Limited, 18th Respondent	19 floors of 420 units.
9.	Nairobi/Block 4/174(formerly L.R No 1870/V1/38)	19TH Respondent, Punita Jayant Acharya, and Jayant Rajnikant Acharya; and the Developer, Medina Palm Development Limited, 20th Respondent.	22 floors of 252 units
10.	Title No Nairobi Block 3/111(formerly L.R No 1870/IV/77)	21st Respondent, Nancy Wangari Averdung and Folker Averdung.	15 floors

b. A declaration be granted to the effect that the approvals for development permissions granted by the 1st and 2nd Respondents with respect to the properties registered in the respective names of the 6th to 21st Respondents listed in Order (a) above, are unlawful, irregular, null and void and of no effect.

c. A declaration be granted to the effect that the approvals for development permissions granted by the 1st and 2nd Respondent with respect to the properties registered in the names of the 6th to 21st Respondents listed in Order (a) above, were granted in violation of the zoning provisions set by the 2nd Respondent and therefore, the approvals for development permissions are unconstitutional and further unlawful for being in violation of the *Physical and Land Use Planning Act*, the obligations of the 2nd Respondent under the *County Governments Act*, the *Urban Areas and Cities Act* and all the Regulations laid down in the said statutes.

d. A declaration be granted to the effect that the 2nd Respondent do, within such period of time set by the Honourable Court, enforce and or compel the 6th to 21st Respondents to comply with the zoning and other requirements under the Nairobi Integrated Urban Development

Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022; and in default of compliance thereof, the 2nd Respondent be directed to enforce compliance through demolition of all the properties partially constructed by the 6th to 21st Respondents respectively at the cost and expense of the 6th to 21st Respondents as per their respective affected properties listed in Order (i) above.

e. A declaration be granted to the effect that the Environmental Impact Assessment (EIA) Licenses granted by the 3rd and 4th Respondents in favour of the 6th to 21st Respondents with respect to the properties listed in Order (a) above, are irregular, unlawful, null and void and of no effect.

f. A mandatory injunction be granted directing the 1st, 2nd, 3rd and 4th Respondents, their agents, and or officers, to forthwith Gazette the Petitioners' Development Zone 4 in the Kenya Gazette and to henceforth comply with the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022 when granting development permissions to any developer in the Rhapta Road area within the Nairobi City County.

g. A mandatory injunction be granted directing the 1st,2nd,3rd and 4th Respondents, their agents, servants, and or employees and or officers, to forthwith issue restoration orders directed at the 6th to 21st Respondents, as the case may be, to restore all properties registered in their respective names as listed in Order (a) above; to the former ordinary state with flora and fauna before the development permissions were granted, and before the demolition, construction and or other building activities were undertaken following grant of permissions by the 1st, 2nd , 3rd and 4th Respondents.

h. General Damages.

i. Exemplary Damages against the 2nd and 4th Respondents jointly and severally.

j. Costs of the Petition.

k. Such further orders as the Court may deem just and expedient be issued.

The Petitioners' case

2. According to the Petition and the Verifying Affidavit sworn by Alex Tito Mwangi Muiruri, the Secretary of the Rhapta Road Residents Association, it is the Petitioners' case that on or about 2004, the predecessor to Nairobi City County, Nairobi City Council, issued a Development Policy which informed the approvals for development named "A Guide of Nairobi City Development Ordinances and Zones" and that under the 2004 policy, Zone 4 was restricted for development purposes to 'residential (apartments allowed were only) four storeys max' on at least 0.05Ha (approx. 0.125 acres).

3. The Secretary of the Rhapta Road Residents Association, deposed that sometime in or about December 2014, the 1st and 2nd Respondents published "The Project on Integrated Urban Development Master Plan for the City of Nairobi in the Republic of Kenya" which is also known as the "Nairobi Integrated Urban Development Master Plan" (NIUPLAN).

4. The Petitioners' Secretary deponed that the NIUPLAN, as approved in the year 2016, is the last approved plan in the County of Nairobi; that the area where they reside and their properties are located are classified under Zone 4 and planned to include the following areas: Upper Spring Valley, Kileleshwa, Kilimani, Thompson, Woodley, etc and that the density and levels permitted for construction under the NIUPLAN were up-to four (4) storeys/floors.

5. The Petitioners contend that vide the Gazette Notice No. 5392 published on 1st August 2014, and pursuant to the NIUPLAN, the 3rd and 4th Respondents issued a Strategic Environmental Assessment (SEA) and made recommendations for the implementation of the NIUPLAN and inter alia, provided that the capacity of the 2nd and 4th Respondents be increased to enable the 4th Respondent deal with current and future environmental issues.

6. It was deposed that the 3rd and 4th Respondents recommended for the development of policies to reduce the use of petroleum products by promoting public transport in the nine (9) transport corridors and there be an update of the building code to include onsite water treatment facilities, reuse of recycled water and rain water harvesting.

7. Further that, it was deposed, it was recommended by the 3rd and 4th Respondents that there be an adequate design for storm water drainage, there be an implementation of the action plans in the Integrated Solid Waste Master Plan to manage existing columns of solid waste, and an expansion program be conducted in phases to ensure commensurate integration of new facilities with the existing services and population growth.

8. It is the Petitioners' position that the road, water, sewerage, traffic, garbage collection facilities and all related infrastructure in place in the area around Rhapta and in larger parts of the Nairobi City County have not been improved in any material manner since 2016 when the NIUPLAN was approved by the Nairobi County Assembly.

9. Further, it was deposed, the 1st and 2nd Respondents prepared and issued a proposed Development Control Policy which rezoned the Nairobi City County; that their properties and area of residence were reclassified from Zone 4 in the NIUPLAN to Zone 4B named "Muthangari" located between Waiyaki Way, Riverside Drive, Ring Road Westlands and Mahiga Mairu Avenue.

10. The Petitioners' Secretary stated that the said Nairobi City County Development Control Policy, 2022 was not approved and therefore, remains a proposal; that the aforesaid policy has not been taken through public participation as required under Article 10 of *the Constitution*; that by virtue of the proposed policy 2022, the permitted developments in Zone 4B where the Petitioners' properties and residents are situated is restricted to ground coverage of not more than 35% of land (without sewer connection) and ground cover of up to 75% (with sewer connection), and a height of up to 16 floors or levels.

11. He opines that in the aforesaid proposed Development Control Policy 2022, the 1st and 2nd Respondents accepted, reported and or noted, inter alia, that there was unplanned and uncoordinated urban growth, inadequate infrastructure, deterioration of the urban environment and increasing poverty.

12. It was deposed that the policy further provided that due to lack of an updated policy, the County has processed applications for development using discretion, practice, precedence, planning justifications advanced by the developers, architects and engineers; and that the Nairobi City County was divided into 20 zones prescribing guidelines to those aspects of the development ordinances that every property developer in the City requires in setting up any form of development.

13. It was deposed that the policy further noted that only 40% of those with connection in the Nairobi City County received continuous water supply from the water supply company; that residents and businesses in Nairobi City County produces approximately 876,000 tonnes of waste per year and currently, there is a 60-70% coverage rate with about 54% of waste generated being collected, and that

the 2nd Respondent published the proposed development control guidelines and zonal maps as annex 2 to the Policy.

14. It is the Petitioners' case that despite the dire need for infrastructural improvements to cope with the increase in population, no improvement in the road infrastructure has taken place along Rhapta Road since the year 2000 which was before NIUPLAN was published; that there has been no improvement in the sewer capacity in the Nairobi City County, in the capacity for the garbage to be collected by the 2nd Respondent within Rhapta Road, in service delivery on garbage collection, in the public facilities for recreation, rest and walk ways, defecation, leisure and sports within the Rhapta Road locality adjacent to the Petitioner's properties and resident's homes.

15. According to the Petitioners, no additional water or other storage facilities have been availed, constructed or provided for by the 2nd Respondent in any significant way, and that there are no parking facilities available within Rhapta Road locality and all parking facilities were meant for low density residential homes and no commercial parking areas exist within the vicinity.

16. The Petitioners assert that there continues to be experienced chronic water shortage in Nairobi City County and water supply subsists for only once a week on Sunday 10:00 am to Monday 11 :00 am as revised in April 2024 by Nairobi Water and Sewerage Company Limited under Equitable Water Distribution Programme; that there are no recreational facilities in Rhapta Road areas since the year 1963 and that the nearest public primary school existing in the Rhapta Road locality remain the same.

17. The schools within the area, it was deposed, include, Bohra Primary School, Westlands Primary School, St Mary's School, Waridi School, Parklands Baptist and Consolata School and that the street lighting available within the locality of Rhapta Road is not sufficient to meet the security, visibility and ambience of the area and therefore, the same requires vast improvements before the high-density approvals are granted by the 1st and 2nd Respondents.

18. According to the Petitioners, the pedestrian footpaths available within the Rhapta Road locality are very narrow and are directly adjacent to the tarmacked roads making it unsafe for pedestrians to use them. Further, it was deposed, there are no noticeable footpaths along St. Michael's Road, Mahiga Mairu Road and the main Rhapta Road.

19. It is the Petitioners' position that the approved developments will interfere with natural lighting and despite the proposed developments occupying beacon to beacon of the respective plots, the Respondents have ignored the need for respecting the 35% ground cover (non-sewer connected) and 75% ground cover (sewer connected) thereby undermining the environmental rights of all adjacent properties.

20. For example, it was deposed, the excavation of Title No. Nairobi Block 4/113 (formerly LR. No. 1870/VI/335) registered in the names of the 15th Respondent, with the 16th Respondent as the developer, is beacon-to-beacon.

21. The Petitioners urge that despite the existence of a clear zoning of the Muthangari area, Kilimani Division as Zone 4, the 1st and 2nd Respondents have granted development approvals which flagrantly breach the zoning restrictions already set out by the 1st and 22nd Respondents under the NIUPLAN 2016 and the Development Control Policy 2022 including:

Item No	Land Reference Number	Registered Owner and Developer	Date of Approval	Approval unlawfully granted
1.	Title No Nairobi Block 3/63(formerly L.R No 1870/IV/26)	6th Respondent, Mawa Development Company Limited and 7th Respondent, the Developer, Wimax Homes Limited	15th February 2024	19 Floors of 323 Units
2.	Title No Nairobi Block 4/109	7th Respondent, Wimax Homes Limited	Unknown	18 floors of 187 units. Proposed project exceeds the permitted ground cover of 35%.
3.	Title No Nairobi Block 3/85(formerly L.R No 1870/IV/71	8th Respondent, Shimoni Resorts Limited and 9th Respondent, Hale End Properties Limited	30th November 2023	20 floors
4.	Title No Nairobi Block 3/119(formerly L.R No 1870/ IV/113)	10th Respondents, Kanti Naran Manji Patel, Nitaben Kanti Patel, Umesh Kalyan Navan Patel, and Narendra Kalvan Patel	20th July 2023	19 Floors of 420 units. Proposed project exceeds the permitted ground cover of 35%.
5.	Title No Nairobi Block 3/177(formerly L.R No 1870/ IV/183)	11th Respondent, Kanji Kuvenji Patel, Sapna Mavin Kerai and Holloway Limited, 12th Respondent and 13th Respondent, the Developer Sky Valley Ventures Kenya Co Ltd.	30th November 2023	17 floors
6.	L.R No 1870/v/266	14th Respondent, Patterson Investments Limited	Unknown	4 Basements, ground plus 19 floors

7.	Title No Nairobi Block 4/113 (formerly L.R No 1870/ VI/335)	15th Respondent, Rhapta Road Plaza Limited and the Developer, 16th Respondent, Central Link Property Co Ltd	Unknown	18 floors of 216 units. Excavation undertaken was beacon to beacon, breaching the 75% ground coverage ratio under the zoning rules.
8.	Title No Nairobi Block 4/85 (formerly L.R 1870/ v1/193)	17th Respondent, Gauff Ingenieure GMBH and Company and the Developer, Lovi Ventures Kenya Company Limited, 18th Respondent	30th August 2023	19 floors of 420 units. Proposed project exceeds the permitted ground cover of 35%.
9.	Nairobi/ Block 4/174(formerly L.R No 1870/V1/38)	19TH Respondent, Punita Jayant Acharya, and Jayant Rajnikant Acharya; and the Developer, Medina Palm Development Limited, 20th Respondent.	Unknown	22 floors of 252 units
10.	Title No Nairobi Block 3/111(formerly L.R No 1870/IV/77)	21st Respondent, Nancy Wangari Averdung and Folker Averdung.	13th October 2023	15 floors of 210 units. Proposed project exceeds the permitted ground cover of 35%.

22. The Petitioners state that the approvals granted by the 1st and 2nd Respondents as well as the 3rd and 4th Respondents constitute a serious breach of the Petitioners' constitutional rights and further constitutes a serious breach of the 1st to 4th Respondents' respective constitutional and statutory duties; that the processing of grant of the approvals and Environmental Impact Assessment (EIA) Licenses is being undertaken unlawfully by the 1st to 4th Respondents and further that at the behest of the 6th to 21st Respondents, and without any compliance with the known zoning requirements and with regular breaches of other requirements of planning and other environmental laws.

23. It was asserted by the Petitioner's Secretary that by granting the approvals of the developments within the Rhapta Road area, the 1st to 4th Respondents have violated the planned zoning provisions within zone 4 as per the NIUPLAN 2016 and zone 4B as per the Development Control Policy 2022, and that

by deliberately misrepresenting the zoning classifications, the 1st to 4th Respondents have breached the provisions with respect to the transparency and good governance as protected under Article 10 of *the Constitution*.

24. He asserts that by granting the approvals herein, without first improving the facilities and infrastructure as required in NIUPLAN 2016, with respect to expansion of sewer, water, road and other facilities, the 1st to 4th Respondents have breached their obligations under Article 42 of *the Constitution* and have failed to preserve the environment and character of Rhapta Road area and thereby undermined the lives of the residents and damaged the flora and fauna of the area generally.

25. It was deponed that the 4th Respondent abdicated its statutory duties under Section 69 of the EMCA and in violating the *Physical and Land Use Planning Act* (PLUPA) requirements for proper planning permissions; that the 1st and 2nd Respondents have abdicated their responsibilities under Sections 5, 46, 56 and 61 (1) of the *Physical and land Use Planning Act* (PLUPA).

26. It was stated that by admitting in the Development Control Policy 2022 that permissions have been granted haphazardly and based on discretion and without any parameters, the 1st and 2nd Respondents have admitted that the 2nd Respondent has for long periods abdicated its obligations under Article 183 of *the Constitution* of Kenya and the Fourth Schedule Part 2 Section 8 of *the Constitution*.

27. Further still, it was deposed, by granting approvals haphazardly, the 1st and 2nd Respondents have abdicated their responsibilities under Sections 103, 104, 105 and 107 of the *County Governments Act*, and that by permitting and or failing to supervise the 2nd and 4th Respondents and or oversee the implementation of the NIUPLAN 2016 and the Development Control policy, 2022, the Ministry responsible for the Environment and Natural Resources and further the Ministry of Lands and Physical Planning have abdicated their respective roles and duties under Articles 42 and 60 of *the Constitution*, including Article 187 and Sections 20 and 21 of the Fourth Schedule to *the Constitution* thereof, and further under Sections 26 and 27 of the *Physical and Land Use Planning Act*.

28. Similarly, it was stated, by deliberately seeking to violate the character, ambience, good condition, serenity, clean and healthy environment of the Petitioners and the residents of Rhapta Road area, as well as property owners therein, the Respondents herein have by their acts or omissions sought to disinherit the future generations of the safe and good environment that was bequeathed to them by their ancestors.

29. According to the Petitioners, they have written several correspondence to the Respondents on the aforesaid issues; that in a letter dated 13th December, 2023, the Petitioners, through the firm of Oraro & Co Advocates, sought to know the zoning classification by the 1st and 2nd Respondents with respect to the development permissions granted by the 1st and 2nd Respondents to the 6th to 21st Respondents.

30. According to the Petitioners, in a letter dated 19th February 2024, the 1st and 2nd Respondents falsely represented to the Petitioners' advocates that the Petitioners' properties and the properties within the area of occupation and location of their properties was in the zone classified as Zone 3 yet the 1st and 2nd Respondents knew all too well that based on the NIUPLAN 2016 and even the unapproved Development Control 2022, the Petitioners' properties and locality of their properties were situated within Zone 4 and 4B respectively.

31. It was deposed that in a letter dated 4th January 2024, the 3rd and 4th Respondents promised to look into the concerns of the Petitioners but thereafter, they proceeded to grant the development permissions sought by the 6th to 21st Respondents.

32. It was contended by the Petitioners that in a letter dated 18th September 2023, the firm of JN & P Law LLP acting for one of the residents of Rhapta Road area also objected to an approval by the 3rd and 4th Respondents, of a development with respect to Title No. Nairobi Block 4/113 (formerly LR. No. 1870/Vl/335) in favour of the 15th Respondent but the 4th Respondent still proceeded to grant the license to the said 15th Respondent.

33. It was argued by the Petitioners that by a letter dated 8th February 2024, the 1st and 2nd Respondents wrote to the Petitioners justifying their decision to approve various developments in favour of the 6th to 21st Respondents.

34. The Petitioners stated that the aforesaid letter was a justification of the unlawful approvals and in another demand letter dated 18th March 2024, the Petitioners' Advocates on record, Macharia-Mwangi & Njeru Advocates, demanded that the permitted developments be halted and that the approvals be stopped by the Respondents. The demand letter was also addressed to the 6th to 21st Respondents.

35. The Petitioners contended that their demands have not been met thus necessitating the proceedings herein by way of a constitutional petition; that having been the one who promulgated the NIUPLAN 2016 and the unapproved Development Control Policy, 2022, the Petitioners have a legitimate expectation that the 1st and 2nd Respondents would not approve development permissions that do not adhere with the zoning and other provisions of the NIUPLAN 2016 and the unapproved Development Control Policy, 2022.

36. According to the Petitioners, the 6th to 21st Respondents have purported to hold public participation meetings but in all the meetings, the Respondents' applications for development permissions have failed and or neglected to meet the requirements of Article 10 of *the Constitution* by failing and or deliberately failing to explain and or respond to the Petitioners' numerous enquiries.

37. The Petitioners state that unless the Respondents are restrained by way of conservatory and other orders, the unlawful developments shall proceed to completion thereby changing the character of the Rhapta Road area and damaging the environment and unless this court intervenes and stops any further developments, the ongoing developments shall be completed, the result of which is that the rights of the Petitioners, their properties and the residents' rights to a clean and healthy environment shall be violated causing them irreparable loss and damage.

38. It was contended that unless the proposed developments are stopped and the development permissions cancelled, the Petitioners and their residents' properties shall be severely devalued; that the ongoing developments shall injure the cross generational rights to a clean and healthy environment of the residents of Rhapta Road area and that the ongoing approvals and developments within Rhapta Road area in Nairobi further undermine their rights to enjoy sustainable development and integrated planned land use which is guaranteed under Articles 42 and 60(1) of *the Constitution*.

39. The ongoing development, it was deposed, and further permissions for developments shall completely undermine the character, nature, flora and fauna of Rhapta Road area thereby causing the Rhapta Road area to mirror and or resemble the developments that have already taken place unlawfully within the greater Kilimani and Pipeline Areas which are currently either concrete jungles and/or almost irredeemably congested, with poor supply of water, recurrent traffic congestion and unattractive for comfortable living.

40. It is their case that unless the developments being undertaken and others being proposed and undergoing the approval process, are stopped and cancelled altogether, the Respondents shall continue to abdicate their respective statutory and constitutional duties and obligations, under the *Physical*

and Land Use Planning Act, the Environmental Management and Coordination Act (EMCA), the *County Governments Act*, the *Urban Areas and Cities Act* and *the Constitution*, to the great and serious detriment of the residents of Rhapta Road area and to the great degradation of the living standards of the residents of Rhapta Road and its immediate environs

41. They asserted that based on the current state of poor planning and development permissions within Nairobi City County, neither the 2nd or 4th Respondents nor the National Government are committed to proper planning and maintenance of a clean and healthy environment and that in view of the circumstances of the case herein, including the overlapping issues of zoning and duties of the 2nd Respondent as a County Government under the *County Governments Act*.

42. The Petitioners stated that considering the constitutional issues raised herein, including the need to compel the 2nd and 4th Respondents to comply with their respective statutory and constitutional duties, they did not require to engage the Physical and Land Use Liaison Committee of the 2nd Respondent or the National Environment Tribunal under the EMCA Act, prior to lodging the proceedings herein and that they are directly and seriously affected by the violations committed by the Respondents hence they have the necessary locus standi to lodge the proceedings herein.

43. The Petitioners also relied on the affidavit sworn by Mr. John Koyier Barreh, an experienced urban planner, dated 10th August 2024. In his affidavit, Mr. Barreh deponed that the Petitioners' properties and the area of Rhapta Road are located in Kileleshwa Ward, which were placed in Zone 4 of the 2004 Guide of Nairobi City Development Ordinances and Zones; that as per the 2004 guide, planned developments in Zone 4 were limited to "residential (Apartments allowed on sewer only)- Four Storeys Max (Five floors) and that this guide remained in place until 2016 when another plan was promulgated by the 2nd Respondent.

44. He deponed that the Nairobi Integrated Urban Development Master Plan (NIUPLAN was approved in 2016; that contrary to the proposal in the NIUPLAN, there has been no further plans prepared by the 1st to 4th Respondents as required under Section 46 of the *Physical and Land Use Planning Act*, specifically the Local Development Plans; that on 1st August 2014, the 3rd and 4th Respondents published a follow up Strategic Environmental Assessment in Kenya Gazette No. 5393 and that the 3rd and 4th Respondents failed to publish and promulgate regulations on the implementation of the NIUPLAN.

45. Additionally, it was deposed, the now defunct Nairobi Metropolitan Services purported to publish a Nairobi City Development Control Policy dated December 2021 and that the policy has however not been subjected to a broad city-wide public participation and has never been approved by the Nairobi City County Assembly.

46. Mr. Barreh asserted that the 1st to 4th Respondents have approved several development permissions, granted several changes of user and approved building plans contrary to the permitted zoning of the area in the NIUPLAN of four storeys. He stated that this amounts to a breach of the obligations of the 1st to 4th Respondents under the NIUPLAN, PLUPA, EMCA, the *County Governments Act*, the *Urban Areas and Cities Act* and *the Constitution*.

The 2nd Respondent's response

47. The 2nd Respondent, through its Acting County Secretary, Godfrey Akumali, filed a Replying Affidavit on 15th October 2024. He deponed that this court's jurisdiction to determine the Petition has been prematurely invoked and that the 2nd Respondent is statutorily mandated under Section 56

of the *Physical and Land Use Planning Act*, to among others, consider and approve all development applications and grant all development permissions.

48. It was deposed by the 2nd Respondent's Acting County Secretary that pursuant to Rule 1 to 11 of the Third Schedule of the PLUPA, aspects of development include change of use; extension of user; extension of lease; sub-division scheme and amalgamation proposals; building plans; processing of easements and wayleaves; setting up of education institutions, base transmission stations, petrol stations, lodges, campsites, power generation plants, factories, advertisement and others as the county executive committee may prescribe from time to time.

49. It is the 2nd Respondent's case that as per Section 57 of PLUPA, developers are obligated to carry out developments after the issuance and grant of a development permission.

50. It was his deposition that contrary to the Petitioners' allegations, the developments approved by the 2nd Respondent were subjected to the necessary scrutiny and consultations.

51. He detailed that the 6th -21st Respondents respectively put up newspaper advertisements and onsite public notices inviting members of the public to submit their comments or objections; made the requisite payments and were issued with change of user approvals after compliance with the statutory procedures set out in Section 58(1), (7) and (8) and Section 60 of PLUPA.

52. It was deposed by the 2nd Respondent, through its Acting County Secretary, that the projects by the 6th - 21st Respondents do not contravene or change the nature of the area and align with the existing character and zoning regulations and that the 2nd Respondent does not have a County Physical and Land Use Development Plan as the current zoning policy is under review at the County Assembly.

53. In the absence of a policy, it was averred, the County technical committee composed of experts is duly mandated to approve the proposed projects ensuring they meet all legal and technical standards, and that the Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones (City Council of Nairobi, 2004) has been rendered outdated with the exponential growth of the city.

54. According to the 2nd Respondent's Acting Secretary, the NIUPLAN referenced by the Petitioners is a broad spatial framework to guide urban planning within Nairobi County for the period 2014-2030 and the existing law/policy for zoning in Nairobi.

55. Further, he stated, there is the Nairobi City County Development Policy, December, 2021 which provides parameters upon which the development applications will be evaluated and approved; that this policy recognized the NIUPLAN and the fact that development control guidelines were last reviewed in 2006 and were to last till 2016 and that it is apparent that the 2004 ordinance and the NIUPLAN 2014, have been superseded by events unforeseen at the time of their culmination and do not account for the dynamic and evolving nature of urban and environmental planning.

56. In any event, it was averred, considering that the projects by the Respondents have undergone public participation and the concerns of the Petitioners addressed within the existing legal and policy framework, the proposed projects are not invalid on account of the outdated development ordinances and zones (city council of Nairobi, 2004) provided they continue to comply with the conditions set forth in the EIA licenses and other relevant regulations.

57. Mr. Akumali urged that the proposed developments by the 6th -21st Respondents are consistent with the 2nd Respondent's vision and the wide national vision for urban development and planning which encourages high density residential buildings to optimize land use and address housing shortages; that the approvals were based on a thorough evaluation process that included EIA, technical reviews and public participation, and that the 2nd Respondent regularly monitors the approved developments to

ensure compliance with all the relevant laws and regulations during construction and operational phases.

58. He opined that the facts upon which the Petition is founded are unsupported by evidence and that Alex Tito Mwangi cannot prove the technical information that is the basis of his averments while they, in granting approvals rely on among others documents, planning briefs prepared by registered city planners.

59. It was deponed that the Petitioners have not identified, demonstrated any denial, violation, infringement or a right of fundamental freedom in the bill of rights and that the Petitioners have not particularized, substantiated and demonstrated the nature of injury caused to them or the public in respect of which it seeks relief and no case has been made to warrant the grant of any of the orders sought.

60. The 2nd Respondent filed a Further Replying Affidavit on the 22nd October 2024.The Affidavit was sworn by Patrick Analo Akivaga, the Chief Officer, Urban Development and Planning of the 2nd Respondent, who deposed that, who deponed that as advised by Counsel, this Court's jurisdiction has been prematurely invoked, and that without prejudice to the foregoing, the orders sought in the Petition are unwarranted.

61. Mr. Akivaga deponed that plans for the development of Nairobi date back to the colonial era and include the first plan of Nairobi City of 1898: Uganda Railway General Plan of 1901; Plan for Settler Capital of 1927: Master Plan for a Colonial Capital in 1948: Nairobi Metropolitan Growth Strategy 1973; and Nairobi Integrated Urban Development Master Plan (NIUPLAN) of 2014.

62. As regards zoning, he noted that the systems that have been in place include the preliminary land use zoning system designated for the 1948 master plan; the revised zoning system of 1968: the Upper hill rezoning plan of 1993; and the Nairobi City Development Ordinances and Zones, 2004.

63. It was deponed that pursuant to Article 184(1) and Clause 8 part 2 of the Fourth schedule of *the Constitution* and Section 56 of the PLUPA and Part V of the Urban and Cities Act, the 2nd Respondent has a legal mandate to among other things consider and approve all development applications and grant all development permissions and that Chapter 5 of the Kenya Vision 2030 and the National Urban Development Policy envisages the development of Nairobi as Metropolitan Centre taking into account the drastic population growth from 2, 577,000 in 2004 to 5, 541,000/= in 2024.

64. The Chief Officer, Urban Development and Planning of the 2nd Respondent, reiterated that the City County Ordinances, 2004 and NIUPLAN, 2014 having been superseded by events, the 2nd Respondent's Urban Planning and Technical Committee currently processes and approves applications using discretion, practice, precedence and planning justifications and the approvals granted in respect of the properties the subject of this Petition were lawful and regular.

65. It was averred that the 2nd Respondent's Urban Planning and Technical Committee is composed of experts drawn from other professional bodies such as the Kenya Alliance of Residents Association; the Architectural Association of Kenya; Engineers and Physical Planners, and that the 6th -21st Respondents followed the requisite procedures in obtaining change of user approvals and development permissions as set out in the Affidavit of Godfrey Akumali.

66. The Chief Officer, Urban Development and Planning of the 2nd Respondent, opined that public participation was undertaken and the Petitioners' concerns were addressed within the statutory frameworks and that the projects are not invalid on account of the outdated Ordinances provided they continue to comply with the conditions set out in the EIA license and that in inviting the

Court to intervene in the manner it has, the Petitioners are asking the Court to delve into an area of policy administration and urban development and planning, which by law is the preserve of the 2nd Respondent.

The 4th Respondent's response

67. In response to the Petition, the 4th Respondent's Senior Principal Environmental Compliance Officer, Veronicah Kimutai swore a Replying Affidavit on behalf of the 3rd and 4th Respondents. She deponed that the 4th Respondent is a statutory corporate body established under section 7 of the Environment Management and Coordination Act, (hereinafter EMCA), and whose core objective is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

68. According to Ms. Kimutai, in order to achieve the above-mentioned core objective, the Authority in consultation with lead agencies and relevant stakeholders, has prescribed rules and guidelines to enable it, receive, review and approve Environment Impact Assessments as per the provisions of section 58 of EMCA and the relevant regulations.

69. She stated that pursuant to the prescribed rules and guidelines, it is a requirement that a proponent of any project specified in the Second Schedule to EMCA undertakes an environmental impact assessment and submits a report to the Authority, prior to being issued with an Environmental Impact Assessment (EIA) license by the Authority, and that indeed the 6th to 21st Respondents lawfully obtained Environmental Impact Assessment Licenses as follows:

    a. Wimax Homes Limited - NEMA/EIA/SR/3123 issued on 8th March 2024 & NEMA/EIA/SR/3259 dated 29th August 2024.

    b. Central Link Property Company Limited-NEMA/EIA/PSL/29263 dated 9th November 2023.

    c. Lovi Ventures Kenya Co Ltd- NEMA/EIA/PSL/31222 dated 3rd August 2024.

    d. Patterson Investment Limited - NEMA/EIA/PSL/16179 dated 5th January 2022.

    e. Sky Valley Ventures Kenya Co Ltd- NEMA/EIA/PSL/32393 dated 21" May 2024; and

    f. Nancy Wangari Averdung and Folker Averdung: NEMA/EIA /PSL/33041 dated 18th June 2024.

70. It was Ms. Kimutai's deposition that pursuant to Regulations 11 and 13 of the EMCA(Impact Assessment and Audit Regulations), the Authority requires and it received from the relevant proponents of the project falling under high risk, the Terms of Reference (TORs) for Environmental Impact Assessment on various dates, to be conducted by licensed EIA Experts and which TORs were duly approved by the 3rd and 4th Respondents, and that where necessary, EIA Project reports were submitted for projects falling under medium risk projects.

71. The 4th Respondent's Senior Principal Environmental Compliance Officer stated that upon approval of the Terms of Reference for the study reports, the team of experts undertook the Environmental Impact Assessment and submitted the EIA study report to the Authority in the prescribed format and information for the proposed project on various dates.

72. In relation to the current Petition, she noted that the 6th to 21st Respondents made applications for EIA licenses from the 3rd and 4th Respondents to construct the projects listed in the Petitioners' Petition which were classified as either medium risk or High Risk Projects as provided under the Environmental

(Impact Assessment and Audit) Regulations, which requires submission of an environmental project report or environmental impact assessment study report with all the requisite statutory provisions followed to the letter.

73. She averred that as required under Regulation 20(1) of EIA Regulations, the Authority proceeded to contact the relevant lead agencies requesting for their views/ comments which would assist the Authority to make an informed decision in reviewing the submitted EIA project reports and/ or study reports, and that where the project(s) required EIA Study Reports, the Authority wrote to the Government Printers where it submitted a public notice to be published in the Kenya Gazette and whose publication costs would be borne by the proponent(s) of the project as per EIA Regulations on EIA study reports.

74. The 4th Respondent's Senior Principal Environmental Compliance Officer noted that the proponents of the affected projects proceeded to place the notices which appeared in two local dailies with nationwide circulation, and also placed a radio announcement which was aired as per the statutory requirements.

75. She deponed that during the information disclosure and public participation period, the Authority received comments from the various government agencies and that they did not cite any objections, and where they did, they were addressed in relation to the project implementation as well as the safety for management of construction sites and welfare of workers.

76. Ms. Kimutai contended that the Authority also received some complaints, objections and concerns from the Rhapta Road Residents Associations on various dates citing issues around the zonation, traffic impacts, inadequacy of the sewerage infrastructure, water shortages, power outages, deep excavations, noise, dust pollution, insecurity, visual intrusion and public consultations.

77. According to the 4th Respondent's Senior Principal Environmental Compliance Officer, where the issues raised were substantive, the Authority issued the concerned proponents with a letter to address the concerns from the public as well as provide other details as per the technical review outcome, and that site inspection visits were conducted by the Authority on all the sites on various dates to assess the suitability and inform decision making.

78. She stated that the Authority continued receiving numerous objections and complaints from the Rhapta Road Residents and their advocates which revolved around the public consultation and the ESIA process, including the manner in which the consultations were planned and conducted and that the proponents responded to the issues raised and a technical review was undertaken that established the technical adequacy of the response, baseline environmental information and the environmental management plans for the potential impacts of the project that were mitigatable.

79. It was asserted that upon comprehensive review of all the reports relating to the various projects, the projects were, on varying dates, recommended for approval and issuance of an EIA license with mandatory compliance conditions to institute the appropriate environmental and social safeguards.

80. Some of the key considerations and decision-making principles in the technical review, it was deposed, included compatibility/ conformity to planning framework and institutional recognition; that the annexed to the EIA study and/ or project reports were change of user approvals by the Nairobi City County Government as the proposed project sites were in mixed development areas; development approvals with conditions to guide the development in conformity with the *Physical and Land Use Planning Act* and duly approved Architectural drawings.

81. Another key consideration, it was deposed by the 4th Respondent's Senior Principal Environmental Compliance Officer, was an ecosystem approach in the project design to determine if there were any

sensitive ecological areas near any of the proposed project; that the EIA considered the project sites to ensure that they posed no risk to any ecologically sensitive areas, risk assessment consideration, pursuant to which a geotechnical survey was undertaken to inform the suitability of the proposed sites' geological formation to support the building structures, and that where necessary, a statement of deep excavation methodology was also done by the project structural engineer to assess the impacts of the excavation vibrations to the surrounding building structural integrity.

82. It was stated that an analysis of alternatives was done with extensive analysis being considered including the technology, material or design for each of the projects and that the EIA process for each of the projects provided reasonable opportunity for the interested parties to submit their comments as per the provisions of EMCA, and the EIA Regulations 2003 and full disclosure of project information was done and project affected persons' submitted comments on the proposed project.

83. It was the averment of the 4th Respondent's Senior Principal Environmental Compliance Officer that the EIA study reports and project reports elaborately identified the potential impacts of the projects, analyzed alternatives and proposed mitigation measures, and that following the hierarchy to mitigate impacts, the identified impacts were found mitigatable with best available technologies and good practice of environmental management.

84. She stated that overall, the EIA Project reports and EIA study report relating to the impugned projects having undergone the prescribed due processes, the proposed projects were approved and licenses issued to the 6th to 21st Respondents as highlighted above; that post the EIA licensing, the various letters by the Rhapta Residents Association were reviewed and various responses made, and that the issues raised were all fully addressed and the license conditions were found to be adequate in mitigating any risks.

85. The 4th Respondent's Senior Principal Environmental Compliance Officer She noted that the 3rd and 4th Respondents reviewed the EIA Project reports and EIA Study Reports to ensure that they complied with the requirements of the Environmental Management and Coordination Act, and the Environmental (Impact Assessment and Audit) Regulations, 2003.

86. It was her deposition that they found that the 6th -21st Respondents conducted meaningful public participation in accordance with the *Environmental Management and Co-ordination Act* and the Regulations, as evinced by the questionnaires and/or minutes of the public participation meetings that were conducted by the 6th -21st Respondents and attached meetings that were conducted by the 6th to 21st Respondents which are attached to the EIA reports that were submitted.

87. According to the deponent, from a perusal of the minutes, the 6th -21st Respondents provided adequate notice to the residents of Rhapta Road Residents Association and other stakeholders about the public meetings through radio announcements, newspaper adverts, public notices and direct invitations.

88. It was deponed that during the public participation process, the residents of Rhapta Road Residents Association were given the opportunity to submit their comments and/or objections regarding the proposed projects and that the EIA licenses were issued subject to strict conditions to ensure ongoing compliance with environmental laws and to mitigate any potential negative impacts during the construction and operational phases of the project.

89. She urged that the 3rd and 4th Respondents monitor and enforce compliance with the conditions of the EIA license through regular inspections and audits of the project sites during and after construction of projects; that through co-ordination and supervision of the relevant agencies, they will continuously undertake compliance monitoring of the Environmental and Social safeguards instituted through the

Environmental management plan in the EIA project reports and/ or study reports and the EIA license conditions to ensure sustainable development of the projects and sound environmental management.

90. It is the 4th Respondent's case that continuous stakeholder engagement and grievance redress mechanisms are some of the safeguard measures that have been put in place to address emerging issues and unforeseen impacts of the project.

91. It was deposed that these safeguards are an avenue for any concerned party to register their complaint or concern for appropriate resolution action and that the 6th to 21st Respondents have complied with all the conditions of the EIA licenses and have been implementing the recommended mitigation measures to minimize environmental impact.

92. According to the 4th Respondent's Senior Principal Environmental Compliance Officer, that the 3rd and 4th Respondents' decision to issue the EIA licenses was based on the technical merits of the proposed projects and the adequacy of the proposed mitigation measures to address any potential environmental impacts and that the 6th-21st Respondents' projects are in line with the principles of sustainable development and environmental conservation as outlined in the Environmental Management and Coordination Act.

93. The 4th Respondent's Senior Principal Environmental Compliance Officer finally asserted that the 6th -21st Respondents have implemented all recommended mitigation measures and complied with the conditions of the EIA License to minimize environmental impacts; that the 4th Respondent continues to monitor the project to ensure ongoing compliance with environmental laws and that the Petitioners allegations of irregularities in the issuance of the EIA Licenses are unsubstantiated and lack any factual basis and support.

The 7th Respondent's Replying Affidavit

94. In a Replying Affidavit sworn by Hu Bin, the Director of the 7th Respondent, he deponed that the 7th Respondent is duly registered with the National Construction Authority and holds a valid Contractor Annual Practicing Certificate for 2024.

95. He asserted that the 7th Respondent is the registered proprietor as lessee of the properties title numbers Nairobi/Block 4/109 and Nairobi Block 3/63 and that the 7th Respondent has complied with all the relevant laws and duly obtained all the necessary permits before commencing the developments. Further, it was deposed, the approvals and permits issued to the 7th Respondent were issued in accordance with the law and mandate of the 2nd Respondent.

96. The Director of the 7th Respondent stated that the parcels of land were initially under residential use and the 7th Respondent put up a site notice on the respective properties at the gate requesting for any members of the public with any comments or objections to forward them to the 1st Respondent, and that the 7th Respondent also placed a public notice on the Standard newspaper dated 31st March 2023 and 13th January 2024 inviting public comments and opinion of the proposed development.

97. Hu Bin deposed that on 3rd April 2023 and 25th January 2024, the 7th Respondent applied to the 2nd Respondent for development permission and change of use from single dwelling to multi-dwelling units (apartments). The 2nd Respondent, being satisfied that the application followed all the laws and rules in force, issued approvals dated 13th April 2023 and 15th February 2024.

98. It was deposed that the 7th Respondent also submitted its building plans and floor plans for the project and the same were duly approved by the 2nd Respondent vide approvals dated 3rd August 2023, 29th

November 2023, and 28th March 2024. The deponent asserted that the 7th Respondent has not made any changes or alterations to the said building plans.

99. Further, Hu Bin deposed that the 7th Respondent engaged a qualified NEMA consultant to undertake the process of environmental impact assessment; that a notice was thereafter placed on two local newspapers of national circulation and announcements were made on radio, inviting comments with respect to both properties.

100. The 4th Respondent, it was submitted, subsequently issued the terms of reference for the EIA report vide a letter dated 17th October 2023 and 15th April 2024; that the 7th Respondent also invited the public to various public participation fora on various dated which were attended by over 50 people and that the 7th Respondent then submitted an Environmental Impact Assessment Study Report (EIA Report) to the 3rd and 4th Respondents outlining the impact of the said project on the environment and the surrounding area.

101. The Director of the 7th Respondent opined that the 3rd Respondent put notices on the Kenya Gazette Notices Number 17163 of 15th December 2023 and 8420 of 5th July 2024 inviting the public to issue their comments on the proposed development and that the 3rd and 4th Respondents, upon conducting their independent investigations and assessments, and upon evaluating the comments received from the public, concluded that the projects would not be of any negative consequence to the environment.

102. The 3rd Respondent therefore, it was deposed, issued a license number approving the project on Block 4/109. The 7th Respondent is still awaiting the NEMA approval for Title No. Nairobi Block 3/63 and is yet to commence the project.

103. The 7th Respondent's Director asserted that the Petitioners have not singled out any statutory provision that the 7th Respondent failed to comply with before commencing the developments. Moreover, he deposed, in the 7th Respondent's applications to the 2nd- 4th Respondents and during the public participation fora, the 7th Respondent explained that it has put in place measures to ensure that the project does not infringe on the rights of the people living in the area.

104. In its report, the 7th Respondent's stated, it showed it has put in place measures to ensure that the projects do not interfere with the physical and biological environment including the topography and the ecosystem of the area where the project is undertaken; that during and after the construction there shall be no interference or obstruction of the access roads including Rhapta Road, and that where the project is located, the sewerage system is well installed and that the same shall not hog or otherwise interfere with the public sewer line serving the area.

105. It was deposed that the report also shows that the water from the main supply network is supplemented with borehole water and which boreholes are to be drilled as per the specifications by the 4th Respondent; and a proper surface drainage maintained to ensure effective storm water drainage into the public drainage system.

106. The deponent stated that he was aware that the area within which the development is situated comprises of several mixed-use properties including several properties of similar nature to the one in development by the 7th Respondent.

107. Hu Bin averred that the stoppage of works in the development has tremendous and irreparable negative effects on the 7th Respondent, in particular out of the development costs of the project on Nairobi/ Block 3/63, which is Kshs. 1,350,408,632 and that of Block 4/109 which is Kshs. 675,333,775.25, the 7th Respondent has expended a total of Kshs. 638,289,642/ towards the two projects including land

costs, stamp duty, acquisition of approvals and permits, recruitment of workers and wages as well as excavation and construction costs.

108. It is the deposition of the Director of the 7th Respondent that the 7th Respondent continues to accrue losses in terms of administrative expenses such as rent and utility charges at the rate of Kshs. 250,000 per month for Block 3/63 and Kshs. 250,000 per month for Block 4/109 and that it also continues to incur losses in terms of wages paid to the employees at the rate of Kshs. 1,071,100 for the two projects.

109. It was deponed that the 7th Respondent had also carried out deep excavations on the properties and that it is standard practice that such work should be expedited to mitigate the risk of landslide and degradation of the risk of slope failure. Should the same not be mitigated, it was deposed, the 7th Respondent risks losing the use of its land due to landslide and slope failure.

110. Hu Bin deponed that the Petitioners have not complied with the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019, including referring the dispute to the National Environmental Tribunal and the County Liaison Committee first before invoking this court's jurisdiction.

111. He deponed that the Petitioners have not disputed that the 7th Respondent complied with the law and obtained all requisite approvals. Rather, he proffered, the Petitioners' contention is that the 2nd and 4th Respondents did not comply with the NIUPLAN, which, he asserts is neither a policy nor a law, but just a guide, which does not limit the powers conferred upon the 2nd and 4th Respondents by statute.

112. The 7th Defendant's Director deponed that the petitioners have not shown the ways the neighboring properties or how their individual properties will be affected by the developments; that the Petitioners have not demonstrated which properties they own as the list of members of the association attached does not include their properties or what interest they have in with the association and that it will be very unfair for the court to issue detrimental orders against litigants who have not demonstrated what interest they have on the property as against the 7th Respondent who has clearly demonstrated its proprietary interest.

The 9th Respondent's response

113. Through a Replying Affidavit sworn by Li Bo, the Managing Director of the 9th Respondent, Hale End Properties Limited, he deposed that the development proposed by the 9th Respondent fully complies with the law and due process in accordance with PLUPA and EMCA have been followed, in securing the attendant regulatory clearance and approval for the proposed development. The Managing Director of the 9th Respondent stated that the Petitioners have not faulted any flaw or impropriety on the 9th Respondent's part, warranting challenge by way of a constitutional petition.

114. Li Bo deponed that the grievances raised by the Petitioners, in challenging the propriety of the change of use and planning approvals in respect of Plot No. Nairobi/ Block 3/85, are by law required at first instance to be lodged before the Nairobi City County Physical and Land Use Liaison Committee, pursuant to Section 78 (a) *Physical and Land Use Planning Act* and Section 9(2) of the *Fair Administrative Action Act*, 2015.

115. Further, it was deposed, this court's jurisdiction ought to have been deferred pursuant to Articles 27(1), 47, 50(2), 162 and 169(1)(d)& (2) of *the Constitution* as read with Section 9 of the Fair Administrative Actions Act.

116. He asserted that bringing this matter at first instance before this court, deprived the litigants herein available appellate opportunities should they be displeased, by eliminating one tier of dispute resolution mechanisms, in violation of Article 25(1) of *the Constitution* of Kenya.

117. Li Bo asserted that the 1st Respondent in its Replying Affidavit dated 15th October 2024 confirmed that the development permit issued to the 9th Respondent was subject to requisite statutory regulations and procedures and that the permit was lawfully procured and fully compliant with Sections 58(10, (7) and (8) as well as Section 60 of PLUPA.

118. He contended that the supposed failure and neglect by the state through the 1st and 2nd Respondents to promote infrastructural development, changes or improvements would at least find a cause of action against the state, but not against the 9th Respondent's property rights as sought herein.

119. To the extent that the Petition seeks to challenge the process and propriety of the environmental impact assessments and consequent approvals in respect of the proposed development on Plot No, Nairobi Block 3/85, the 9th Respondent's Director asserted, the issues at first instance are required to be lodged before the National Environment Tribunal.

120. Mr. Li Bo, the Managing Director of the 9th Respondent, stated that the Petition evinces a gross misapprehension of the country's planning law as the law does contemplate submission of a proposed development that may ultimately contemplate a change in the purpose and/or level of land use or even the general character of the area, and the law lawfully prescribes defined regulatory processes through which such developments would be considered and approved.

121. He argued that the Petitioners are unlawfully usurping and irregularly arrogating themselves the exclusive legal mandate of the lawful planning authority to superintend approvals for proposed developments by imposing an undue fetter and introducing considerations unknown to law, and in contravention of Section 58 of EMCA and Section 72(1) of PLUPA 2019.

122. Further still, Mr. Li Bo deposed, that without prejudice to the want of proper invocation of the court's jurisdiction at first instance, the Petitioners have irregularly failed/ neglected to seek exemption or leave before prosecution of this petition, contrary to the exemption principles.

The 10th Respondent's response

123. The 10th Respondents responded to the Petition vide a Replying Affidavit dated 22nd October 2024 and sworn by Kanti Naran Manji Patel, one of the 10th Respondents, and the Director of the developer, KNP Investments Limited.

124. He deponed that from his understanding, the Petitioners' case is that the 10th Respondents have proceeded to unlawfully develop a high rise building without adherence to the Nairobi Integrated Urban Development Master Plan (NIUPLAN), and that he was aware that the implementation of any such policies is the mandate of the county government, and not the party seeking approvals for construction of the property.

125. He asserted that all the necessary approvals were lawfully obtained prior to commencement of the construction from all the relevant regulatory bodies with due and proper procedures as required under the law. He averred that the property known as LR 1870/IV/113 was acquired by the 10th Respondent for purposes of development of residential apartments.

126. Mr. Kanti Naran Manji Patel, one of the 10th Respondents, deposed that upon conducting thorough due diligence, the developer discovered that the property was originally designated for single-dwelling

use; that the 10th Respondent, aiming to construct multi-dwelling units placed a public notice in the local newspaper seeking to change the use of the property and that there being no objections to the change of user notice, the 10th Respondent proceeded to apply for both change of user and development approval for which they received an invoice totaling Kshs. 10,000,000/- pending approval.

127. The deponent added that the County Government duly reviewed the application and granted the change of user from single dwelling to multi-dwelling apartments as evidence by the approval dated 20th July 2023. Following this, it was deposed, they engaged qualified and registered construction consultants to prepare the necessary architectural and structural drawings required for the development, and that they submitted an application for development approval, which the County Government of Nairobi issued on 30th November 2023, upon the 10th Respondents paying the statutory fees and deliberations.

128. Furthermore, it was deposed, in compliance with EMCA, the developer applied for an EIA license; that an assessment was conducted, resulting in a report dated November 2023, and that having satisfactorily fulfilled the requirements for an EIA and adhered to the recommendations in the report, the developers were granted a license on 17th January 2024.

129. Mr. Kanti Naran Manji Patel deponed that the Petition is a nonstarter, premature, frivolous and abuse of the court process, because this court has no jurisdiction to entertain this matter; that there are proper mechanisms in place to raise any such complaints with respect to approvals which mechanisms have not been exhausted by the Petitioner and that seeking redress from this Honourable Court is not the appropriate avenue;

The 11th and 12th Respondent's response

130. The 11th and 12th Respondents filed a Replying Affidavit sworn on 22nd October 2024 by the 12th Respondent's Director, Hasmita Patel, who deponed that at the time of filing the Petition, the 11th and 12th Respondents were neither the legal nor the beneficial owners of the property known as Nairobi/ Block 3/177 (Formerly LR no. 1870/IV/183.

131. Hasmita Patel averred that by an agreement for sale dated 16th June 2023, the 12th Respondent transferred the property to Goldentimes Investment Company limited which assigned its rights and obligations under the agreement to Sky Valley Kenya Company Limited, and that upon the successful transfer of the property to Sky Valley Ventures Kenya Company Limited as at 1st February 2024, the interest of the 12th Respondent in the said property was extinguished.

132. It was averred that the 12th Respondent acquired the property from the 11th Respondents sometime in 2019; that contrary to the averments by the Petitioners, the planning report was not filed in the names of the 11th and 12th Respondents; that the notification for approval of application of change of user was issued to Kanti Patel Naran Manji and not the 11th and 12th Respondents and that the EIA report for the property was filed by Sky Ventures Limited and not the 11th and 12th Respondents.

133. Additionally, it was deposed, the application for change of user dated September 2023, approval of change of user and incomplete search, attached to the Petitioners' bundle do not evidence ownership of the property to the 11th and 12th Respondents. She claimed that the application was made before the property was transferred to its current owner. She asserted that the 11th and 12th Respondents have attached an official search disproving their alleged ownership of the suit property.

134. On the basis that the Petitioners have not disclosed any reasonable cause of action against the 11th and 12th Respondents, the deponent sought that the 11th and 12th Respondents be struck out from these proceedings.

The 13th Respondent's Replying Affidavit

135. Through a Replying Affidavit dated 30th August 2024 and sworn by Yiwen Sun, a director of the 13th Respondent, the 13th Respondent sought that this Petition be struck out.

136. Yiwen Sun averred that the 13th Respondent currently employs 60 Kenyans who are directly employed in various projects and developments across the country; that the 13th Respondent is also duly registered with the National Construction Authority and holds a valid Contractor Annual Practicing Certificate for 2024 and that the 13th Respondent is the registered proprietor of the property title number Nairobi/ Block 3/177 for a term of 50 years from 1st January 1993.

137. It was deposed that the 13th Respondent complied with all the relevant laws and duly obtained all necessary permits before commencing the development; that the Petitioners have not singled out any statutory provision that the 13th Respondent failed to comply with before commencing the development and that on 22nd September 2023, the then owner of the property, Holloway Limited, applied to the 2nd Respondent for change of user from single dwelling unit to residential (apartments/ flats) cum offices.

138. He asserted that the 13th Respondent also submitted its building plans and floor plans for the project and the same were duly approved by the 2nd Respondent and that the 13th Respondent has not made any changes or alterations to the said building plans and the same are as captured in the approved building plans.

139. Additionally, he stated that the 13th Respondent submitted an EIA Report to the 3rd and 4th Respondents outlining the impact of the said project on the environment and the surrounding area; that the 13th Respondent invited the public to various public participation fora on various dates, which were attended by over 50 people and that the 3rd Respondent put notices in the Kenya Gazette Notice Number 4070 of 5th April 2024 as well as an advertisement in the Star Newspaper of 5th April 2024 inviting the public to issue their comments on the proposed development.

140. It was deponed that the 3rd and 4th Respondents, upon conducting their own independent assessment and evaluating the comments received from the public, arrived at the conclusion that the project would not have any negative consequence to the environment and accordingly issued a license number EIA/ NEMA/SR/3172 approving the project.

141. Yiwen asserted that the 13th Respondent carried out a traffic impact assessment in January 2024, which was approved by the Kenya Urban Roads Authority, confirming that the project would not have any negative impact on the roads and the traffic around the area.

142. Yiwen Sun asserted that during the public participation fora, the 13th Respondent explained the measures it had put in place to ensure that the project does not infringe on the rights of the people living around the area, particularly measures to ensure that the project did not interfere with the physical and biological environment of the area where the project is undertaken, and that there shall be no interference or obstruction of the access roads, including Church Road and Rhapta Road.

143. It was deponed that the sewerage system is well installed and that the same shall not hog or interfere with the public sewer line serving the areas; that water from the main supply network is supplemented

with borehole water, drilled as per the specifications of the 4th Defendant; that a proper surface drainage is maintained to ensure effective storm water drainage into the public drainage system and that the 13th Respondent does not encroach on the riparian reserve which borders the area, among many other mitigation measures.

144. The deponent asserted that the area in which the development is comprised of several mixed-use properties, of similar nature to the one in development by the 13th Respondent; that the stoppage of works in the development has tremendous and irreparable negative effects on the 13th Respondent including expensing Kshs. 30,936,796 out of the development costs of Kshs 611,648,073 and an additional amount of 100,000,000 being the costs of purchasing the land and that the 13th Respondent continues to accrue losses in the sum of Kshs. 265,038 per week.

145. Yiwen Sun averred that the Petitioners have not complied with the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019 including referring the dispute to the National Environment Tribunal and the County Liaison Committee first, before invoking this court's jurisdiction.

The 14th Respondent's Replying Affidavit

146. In a Replying Affidavit dated 2nd December 2024 and sworn by Olav Kala, an employee of M/S Patterson Investments limited, the 14th Respondent averred that the 14th Respondent is the lawful and duly registered proprietor of the property comprised in LR No. 1870/V/266 which is located on Rhapta Road, Westlands.

147. It was deponed that although the 14th Respondent has yet to commence its development over its property, it has as entitled by law, duly obtained development permission over the same and that in the process of obtaining development permission, the 14th Respondent duly paid for the same and complies with the *Physical and Land Use Planning Act*.

148. The 14th Respondent's employee, Olav Kala, deponed that the 14th Respondent advertised its intention to apply for a change of use from single residential to services apartments, ancillary services and management offices vide radio advertisements (Kameme FM) and via print media through the People Daily and Daily Nation, all of 13th September 2019.

149. Olav Kala deponed that the 14th Respondent's development plans were interrupted by the Covid-19 pandemic but sometime in September 2021, the 14th Respondent applied for a construction permit and was issued with an invoice for a total sum of KShs. 10,464,320 which was duly paid on 21st September 2021 and approval finally granted on 5th August 2022.

150. Furthermore, it was deposed, the 14th Respondent applied for an EIA License and in so doing, invited members of the community and the public to visit the site and offer feedback at a public stakeholder's forum hosted by the 14th Respondent on 30th October 2021.

151. The deponent asserted that the public stakeholder's forum was attended by the 14th Respondent's immediate neighbours, members of the local administration and other interested parties, and that upon completion of the EIA exercise and submissions of the findings and reports to NEMA, the 14th Respondent was issued with an EIA License on 5th January 2022. He asserted that there is no lawful basis upon which the orders sought in the Petition against the 14th Respondent may be issued.

The 16th Respondent's response

152. The 16th Respondent opposed the Petition through a Replying Affidavit dated 30th August 2024 and sworn by Ke Huang, a Director of the 16th Respondent. He asserted that the 16th Respondent is the registered proprietor as lessee of the property title number Nairobi/ Block 4/113 and that on 12th July 2018, the then owner of the property applied to the 2nd Respondent for change of use from residential to a residential (apartments/flats) cum offices, which approval was granted on 16th May 2018.

153. It was deponed that on 20th July 2023, the 16th Respondent applied to the 2nd Respondent for development permission regarding a development that the 16th Respondent intended to carry out on its property; that the 2nd Respondent later issued an approval on 3rd August 2023, being satisfied that the application was in compliance with all the laws and rules in force; and that the 16th Respondent also submitted its building plans and floor plans for the project and the same were duly approved by the 2nd Respondent.

154. Further still, it was deposed, the 16th Respondent submitted an EIA Report to the 3rd and 4th Respondents outlining the impact of the said project on the environment and the surrounding area and that it invited the public to various public participation for and advertised the project through public media and newspapers and also obtained feedback by way of questionnaires.

155. It was deposed that the 16th Respondent paid all applicable fees to the 4th Respondent and the project was advertised in the Kenya Gazette, inviting the public to issue their comments on the proposed development. The 3rd Respondent, being satisfied that the project would not have any negative consequence to the environment, it was deposed, it issued a license approving the project.

156. It was deposed that during the public participation meetings, the 16th Respondent communicated the measures it had put in place to ensure that the project does not infringe in any way on the rights of the people living around the area, including measures to prevent interference with the physical and biological environment of the project area, the access roads, including Church Road and Rhapta Road, the public sewer serving the area, supplementing the water from the main supply network with borehole water and maintaining a proper surface drainage to ensure effective storm water drainage into the public drainage system.

157. Ke Huang deponed that out of the development costs of the project of Kshs. 2.4 billion as well as the Kshs. 200 million being costs of purchasing the land, the 16th Respondent has since expended Kshs. 297,987,940 towards the project, and that the 16th Respondent continues to accrue losses in terms of administrative expenses such as rent and utility charges, costs of idle labour and equipment at the rate of Ksh. 6,939,130.

158. The 16th Defendant's Director asserted that the petitioners have not complied with the doctrine of the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019.

The 18th Respondent's response

159. The 18th Respondent opposed the Petitioner through a Replying Affidavit sworn by its Director, Xiulan Chen, dated 30th August 2024, who deponed that the 18th Respondent is the registered proprietor of the property title number Nairobi/ Block 4/85; that the 18th Respondent applied to the 2nd Respondent for development permission and change of user from offices to commercial cum

residential and that being satisfied that the application was in compliance with all laws, issued approvals on 30th August 2024.

160. It was deposed that the 18th Respondent submitted an EIA Report to the 3rd and 4th Respondents outlining the impact of the said project on the environment and the surrounding area; that the 18th Respondent invited the public to various public participation fora on various dates which were attended by over 50 people; that upon payment of applicable fees to the 4th Respondent, the 3rd Respondent put notices in the Kenya Gazette Number 16937 of 8th December 2023 as well as advertisements in the Standard Newspaper on 27th September 2023, 12th October 2023 and 27th October 2023 inviting the public to issue their comments on the proposed development.

161. It was deposed that after the 3rd Respondent issued a license approving the project, the 18th Respondent also carried out a traffic impact assessment in November 2023 which was approved by the Kenya Urban Roads Authority and further obtained a Certificate of Compliance from the National Construction Authority before commencing the development.

162. It was additionally asserted that the 18th Respondent, during the public participation meetings, explained the measures it would put in place to ensure the project does not infringe on the rights of people living in the area, including, inter alia, the physical and biological environment of the project area, the access roads including Church Road and Rhapta Road, the sewerage system and water from the main supply network which would be supplemented with borehole water.

163. The 18th Respondent additionally asserted that it had expended Kshs. 450,000,000 out of the development costs of the project of Kshs. 2,810,000,000; that the 18th Respondent continues to accrue losses at the rate of Kshs. 5,000,000 per week in terms of administrative expenses and that it is now threatened by a myriad of potential litigation by its employees, suppliers, and lenders for breach of contract; and the more than 1000 employees and workers at the development are at the verge of losing their source of livelihood.

164. It was further deponed that the Petitioners had not complied with the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019 including referring the dispute to the National Environment Tribunal and the County Liaison Committee first before invoking this court's jurisdiction.

The 20th Respondent's response

165. Wang Cheng, the 20th Respondent's Director, deposed through a Replying Affidavit sworn on 29th August 2024, that it is the registered proprietor as lessee of the property Title Number Nairobi/ Block 4/174 and that on 7th August 2023 and 23rd September 2023, the 20th Respondent applied to the 2nd Respondent for development permission and change of user form single residential dwelling to multi dwelling units (apartments) cum commercial.

166. It was deponed that the 20th Respondent paid all the requisite fees in connection with the said application and being satisfied that the said application complied with all laws, the 2nd Respondent issued approvals dated 13th October 2023 and 31st August 2023.

167. It was further deponed that the 20th Respondent submitted an EIA Report to the 3rd and 4th Respondents; that the 20th Respondent invited the public to public participation fora, which were attended by over 50 people; that upon payment of all applicable fees to the 4th Respondent, the 3rd Respondent put notices in the Kenya Gazette inviting comments from the public on the proposed development and that the 3rd Respondent thereafter issued it with a license.

168. Wang Cheng additionally averred that the 20th Respondents explained comprehensively the measures it had put in place to ensure the project does not infringe on the rights of persons living around the area; that the area within which the development is situated comprises of several mixed use properties of similar nature to the one in development by the 20th Respondent; and that the 2nd Respondent has the exclusive mandate regarding development control and the permits issued to the 20th Respondents were issued in accordance with the law.

169. The deponent asserted that the stoppage of works in the development has tremendous and irreparable negative effects on the 20th Respondent; that it has expended Kshs. 104,220,014 out of the development costs of the project which is Kshs 1,200,000,000 exclusive of Kshs. 270,000,000 being the cost of purchasing the land.

The 21st Respondent's Replying Affidavits

170. Through Replying Affidavits sworn on 27th September 2024 and 12th November 2024, Nancy Wangari Averdung deposed that she is one of the registered proprietors of Title Number Land Reference Number 1870/IV/77; that on 19th September 2023, she and her husband Folker Averdung made an application to the 2nd Respondent for the change of use of their property from a single dwelling unit to multi dwelling units and that upon the fulfillment of all the obligations on their part, including providing the requisite documentation and paying the requisite fees, the 2nd Respondent granted the Approval for change of use on 13th October 2023.

171. Ms. Nancy Wangari Averdung stated that they also submitted the building plans and floor plans for the development and the said building plans and floor plans were approved by the 2nd Respondent; that they also submitted an Environmental Impact Assessment Report to the 3rd and 4th Respondents as is required by law to obtain the license required for implementation of the project, and that on 18th June 2024, the 3rd and 4th Respondents issued to them License NEMA/EIA/PSL/33041.

172. The 21st Respondent asserted that they complied with all the relevant laws and regulation and that due process and procedure was followed in obtaining the approvals and licenses.

The Petitioner's Further Affidavit

173. The Petitioners filed a Further Affidavit sworn on 12th November 2024 by Mr. John Koyier Barreh, who deponed that the 1st and 2nd Respondents, through the defunct, Nairobi Metropolitan Services, purported to publish a Nairobi City Development Control Policy dated December 2021 which has never been approved by the Nairobi City County Assembly.

174. He contended that in the proposed Land Use Policy 2023 under clause 4.2. (2), the 1st and 2nd Respondents, inter alia, proposes to implement the Physical Planning Legislation and regulations to facilitate proper urban planning, and prepare local physical and land use development plans for all the sub counties.

175. It is deponed that the 1st and 2nd Respondents have conceded that the Nairobi County does not have a County Physical and Land Use Development Plan and the County Technical Committee has processed applications using discretion, practice, precedence and planning justifications advanced by developers, architects and engineers.

176. He opines that if the 1st and 2nd Respondents are left to utilize their discretion, the ongoing developments and further permissions for developments shall completely undermine the character, nature, flora and fauna of Rhapta Road area thereby causing the Rhapta Road area to mirror and or

resemble the developments that have already taken place unlawfully within the greater Kilimani and Pipeline Areas which are currently either concrete jungles and/or almost irredeemably congested.

177. It is apparent, he asserts that the 2nd Respondent needs to be stopped and forced to adhere to the policies set out and if they are left on its own, Rhapta Road will be turned into a concrete jungle and unbearable 'heat is land' contrary to the principals of Article 42 of *the Constitution* of Kenya.

178 Mr. Barreh deposed that that the Office of the Auditor General conducted a performance audit report on the provision of sewerage in major towns in Kenya, with the case study being Nairobi City, and that in his conclusion, he found that the already developed infrastructure has been inadequately maintained further contributing to inadequacy of the sewerage system.

179. He states that many residents in the area complain that the sewerage system in the area is inadequate and often bursts with overflowing raw sewerage; that for instance, administrators of St. Mary's School which is located in Rhapta Road have severally complained about the negative impact of the 6th and 21st Respondents' developments in the area and that when he visited the school, there was pungent smell around the school.

180. He averred that it is evident that 6th to 21st Respondents' developments will undermine the Petitioners' right to a clean and safe environment; that in September 2016, there was a site inspection visit to Ruai Treatment Plant and a report was prepared by the water and sanitation committee, and that the 1st to 5th Respondents have greatly failed the Residents of Nairobi and in particular the Petitioners by failing to prepare a further Local Physical and Land Use Development Plan, and hence the haphazard developments in the City County.

181. Further, it was deposed, the 1st and 2nd Respondent have failed to follow the NIUPLAN 2014 to 2030, hence there was no implementation of proposed better water supply, sewer expansion and solid waste management processes and plans and failure to have publish and promulgate regulations on the implementation of the NIUPLAN in the Nairobi City County.

182. It was his contention that contrary to the 1st and 2nd Respondents averments, having perused all EIA Reports, the aforementioned 6th to 21st Respondents' experts have identified the serious capacity shortcomings ranging from water supply, parking, sewer system, garbage collection (solid waste) and traffic management; that these approvals amount to a breach of the obligations of the 1st to 4th Respondents under the NIUPLAN and indeed the *Physical and Land Use Planning Act* (PLUPA), the Environmental Management and Coordination Act, the *County Governments Act* and *Urban Areas and Cities Act* and *the Constitution*.

183. He deponed that in view of the foregoing, they prepared a further report to support the Petition titled "Impacts on the Rhapta area from high density developments breaching zoning policy & environmental and social impact assessment requirements for sub-zone 4b based on the NIUPLAN: 2014 – 2030" and that in the said further report, their recommendations are as follows:

a. NIUPLAN 2014 - 2030, approved by the Nairobi County Assembly has to be implemented pursuant to PLUPA No. 13 of 2019 and any other material planning statute.

b. The CECM has to urgently formulate through participatory process the mandatory enabling physical and land use development plans, subject plans, structure plans, local physical & land use development plans and attendant development control guidelines to facilitate implementation that has to be documented on an integrated GIS platform that is functional and accessible to all stakeholders and I or ratepayers and investors in Nairobi City. No discretionary, precedence and or haphazard planning decision-making that is counter-

productive to sustainable city development that are forestalled by articles 60 & 66 other related constitutional requirements stipulated by articles 42, 47, 69 & 70 among others should be implemented.

c. The SEA framework on the NIUPLAN that was approved by NEMA in 2014, and the NCCG, granted a 24-months period to put in place functional implementation trajectory has to be re- invigorated and undertaken with active participation of all stakeholders as envisaged by Article 69 of *constitution of Kenya, 2010*. Further, the NCCG and NEMA have to continuously build their internal capacity and those of the city's various communities or resident for proper and progressive development control, active participation in EIA full studies and informed participatory decision making in development planning and environmental management.

d. All approved developments that have breached zoning policy & EIA licensing statutory requirements under the stipulations of PLUPA No. 13 of 2019 and the EMCA, 1999, Revised, 2012 & 2015 have to be removed or demolished in total and the properties to revert to their original status until they obtain statutory development approvals that comply with the obtaining legislation, policies, and requirements.

e. For the petitioners to document conclusive impacts from the 12 No. samples sent to Polucon Services Laboratory, may the Honourable ELC allow for at least 14 days from 5/11 /2024, for the laboratory test results to be officially communicated and enable the undersigned expert two days to prepare their final scope of impacts based on the said findings to guide all parties.

184. Vide a Supplementary Affidavit filed on the 2nd December, 2024, the Petitioners, through John Koyier Barrer deponed that he received the test results of the 12 samples sent to Polucon Services Laboratory on the 16th November, 2024 and a corrected sample of one of the tests on the 22nd November, 2024; that he has prepared an addendum report where he has analyzed the sample results listing the detailed the impacts of the 6th -12th Respondents' developments on the environments around Rhapta Road in Nairobi.

Hearing and Evidence

185. The Petitioners adduced the testimony of one witness, John Koyier Barreh (PW1), a registered Urban Planner and a lead EIA expert. PW1 stated that he had experience in planning from 1988, when he joined the Nairobi City Council.

186. He informed the court that in his first Affidavit, Volume he spoke about the Development Policies in the city. He referred to the Guide of 2004 and the policies preceding it. He testified that the City is divided into around 24 zones; that the policy of 2006 updated the 2004 policy, which amended Zones 3,4 and 5; and that Rhapta Road fell in Zone 4(b) in the 2004 Policy at page 141.

187. PW1 testified that the restricted levels were four storeys in Kileleshwa; that the ratio was 0.75 for sewered properties while the unsewered is 0.25; and that the 2004 policy was reviewed in July 2006 due to the pressure of developments in the area.

188. He stated that there were also the NMS Development Control Guidelines for 2021 which was to support the Nairobi Integrated Urban Development Master Plan 2014-2030, the County Spatial Plan for the Nairobi Council; that it shows the Zoning of Rhapta Road to be Zone 4B, including Muthangari Area and Riverdrive; that it shows a plot ratio of 1,200% for Rhapta Road area; that the proposed levels is 16 storeys, and that 75% is the area of the land to be covered by the building, up from 35% and the minimum size of the plot is 0.0.5Ha.

189. PW1 asserted that this is a proposed policy which is subject to stakeholders' participation, and that the policy cannot be implemented as it has not been subjected to stakeholder engagement, including the Rhapta Road plot owners.

190. He also stated that that the NIUPLAN is a broad master plan to guide sustainable development of the city, replacing the one that had applied between 1973-2000; that the Plan is a regulatory tool, and it did not change the 2004 guidelines, and the 2006 policy is the one to be used for Zones 2, 3, 4 and 5.

191. PW1 testified they took samples comprising raw sewer effluent and soil samples and submitted them for analysis in an accredited NEMA laboratory and that the results show the types of impacts that would accrue.

192. With regards to the claim by the 2nd Respondent that they use discretion, PW 1 asserted that planning must be predicated on plans and policies thereto. He testified that under Rule 2, Schedule 3 of the PLUPA, the County Government is required to be bound by plans and policies; that Rule 17 also prescribes that in processing the application, they need to look at the size of the land, conforming with land use, and that Rule 5 also provides the factors to be considered while changing the use of land.

193. PW1 asserted that the approvals must adhere to the Master Plan, and the 2004 and 2006 Policies.

194. In cross-examination, PW1 asserted that if a plan is not in place, they ought to use the existing plan until a further plan is prepared to take care of the demographics; that he did not engage other bodies such as NEMA, the Nairobi County Government and the NCA, while preparing his reports, and that he used secondary data from these institutions.

195. He stated that the 2021 and 2023 policies were proposals, which must be presented to stakeholders for public participation.

196. DW1, Patrick Analo Akivanga, asserted that he is the Chief Officer in charge of Urban Development and Planning at the Nairobi County Government. DW1 gave a history of the plans in Nairobi, starting from the 1927 Plan which set up zones including Westlands, Parklands, Karen etc.

197. This was followed by the 1948 Plan and the 1973 Metropolitan Growth Strategy, which gave rise to 20 zones. DW1 stated that these plans were then followed by the 2014 Masterplan, which recognized the rapid urbanization of the city and population flight. The Master Plan, according to DW1, recommended for investment in infrastructure, including the four by-passes and water reticulation and that it also suggested that we go vertical because the city was sprawling.

198. DW1 asserted that they have continued to implement the NIUPLAN; that the Nairobi County Development Policy, 2021, which is still pending at the Assembly, and that they previously had the 2004 and 2006 policies which restricted it to four zones.

199. He asserted that the Draft Policy recommended increases of levels in the disputed area to 16 levels; that height is a function of several factors, including the size of lands and that if land is three times bigger than the minimum area, you can do higher levels to attain the density including provision of traffic, storm water, flexible access into the property, lighting etc.

200. These approvals, he stated, are undertaken by the Urban Planning Technical Committee, which has representatives including the Architectural Association, Engineers Institute, Kenya Civil Aviation Authority, the Kenya Alliance of Residents Association, and the Kenya Institute of Planners.

201. He asserted that the Nairobi Liaison Committee has not received any application seeking to revoke the approvals in this case; that the County Government approvals are subject to the approvals from

other entities, and that they have a Planning and Compliance Committee which monitors compliance with the approvals.

202. He stated that while the County has attempted to develop a Local Physical and Land Use Development Plan, this would not provide height restrictions and that height restrictions are provided for in the Development County Policy.

Submissions

203. Counsel for the Petitioner, through its Submissions dated 18th November 2024, submitted that during preparation of the Nairobi Integrated Urban Development Master Plan also called the "NIUPLAN 2016", it was noted that "all of Nairobi, Dar es Salaam and Addis Ababa suffer from lack of land use plans to guide investments and physical development of the city".

204. Counsel asserts that the Petitioners are a Residents' Association consisting of residents who live and have property along Rhapta Road in Nairobi in Muthangari Sub-location; that the previous zoning in "A Guide of Nairobi City Development Ordinances and Zones" of 2004, Rhapta Road was placed in Kileleshwa under Zone 4, in which there was permission for construction for "Residential Apartments allowed on sewer only, Four Storeys Max, and that under the NIUPLAN, it was noted that the development activities did not seem to follow the revised regulation much, as there were incidents of high-rise buildings of more than five floors and land use mixture in residential areas.

205. It was submitted that under the NIUPLAN, Kileleshwa is still located under Zone 4 where the 2004 Guide permitted the construction of buildings up to four storeys maximum.

206. The Petitioner's Counsel submitted that the averments by the 1st, 2nd, 7th, 9th, 13th, 16th, 18th and 20th Respondents that the Petitioners have not complied with the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* and the National Environment Tribunal are erroneous.

207. He asserts that the 1st to 4th Respondents have violated their obligations under various laws and *the Constitution*, and it is only this court that can intervene to restore order and ensure that the 1st to 4th Respondents enforce planning laws.

208. Counsel stated that the Petitioners have raised constitutional issues in their Petition, including the need to compel the 2nd and 4th Respondents to comply with their respective statutory and constitutional duties.

209. It was submitted that the Petitioners did not require to engage the Physical and Land Use Liaison Committee of the 2nd Respondent or the National Environment Tribunal prior to lodging the proceedings herein and that the issues raised in the Petition are multi-faceted as they deal with an overarching breach of the mandated granted to the 2nd and 4th Respondents to plan the City of Nairobi and or manage the environment and that they deal with deliberate dereliction of duty by the said Constitutional and Statutory bodies.

210. The Petitioners' Counsel submitted that the Petitioners are not just challenging the unlawful approvals of the developers, but are also seeking a significant policy change, and compulsion against the 1st to 4th Respondents, and are urging for protection of intergenerational constitutional and environmental rights.

211. It is Counsel submitted that the 1st and 2nd Respondents admitted that they have not promulgated any county plan, which is a neglect of their Constitutional mandate and that under Section 111 of the

County Governments Act, the 2nd Respondent is mandated to put in place a Land Use Plan, a Zoning Plan, Building Plan and recreational areas and public facilities plan.

212. Counsel submitted that Sections 36,37,38, 39, 40 and 41 of PLUPA provide a comprehensive procedure of the preparation of a County Physical and Land Use Development Plan; that the NIUPLAN is equated to the County Physical and Land Use Development Plan and that the 1st and 2nd Respondents have never taken the further step of preparing the Local Physical and Land Use Development Plan, as defined under Section 2 of PLUPA.

213. It was submitted that the oversight in failing to cascade the NIUPLAN to Rhapta Road is deliberate and is meant to leave a gaping hole to be filled by 'discretion and justification'; that this was admitted by Patrick Mbogo and Godfrey Akumali in their Affidavits when they asserted that in the absence of the County Physical and Land Use Development Plan, the technical committee has processed applications using discretion, practice, precedence and planning justifications advanced by developers, architects and engineers and that the nonchalant approach by the 1st and 2nd Respondents to the obligation to plan the City amounts to a serious dereliction of duties and the court ought to sanction them. Counsel relied on the case of Multiple Hauliers E.A. Limited vs Attorney General & 10 Others (2013) eKLR.

214. Counsel submitted that there has been breach of duty by the Nairobi City County to grant lawful approvals; that the Petitioners have adduced overwhelming evidence to show that despite being fully aware that the zoning restrictions for Rhapta Road had been breached, the Nairobi City County continued to grant approvals against the permitted zoning restriction of 4 floors; that the 6th to 21st Respondents have asserted that they were not duly approved to undertake the developments by the 1st and 2nd Respondents; and that despite the 1st and 2nd Respondents admitting under oath that they were not using any specific plan to grant approvals and despite admitting that they based approvals based purely on discretion, they still insist that the Petition herein has no basis.

215. With respect to degradation of the environment by the Nairobi City County and NEMA, the Petitioners' Counsel submitted that the Petitioners have adduced evidence to show that the City of Nairobi has no capacity to handle the increased sewer and solid waste as captured in the Auditor General Report in April 2018.

216. It was submitted that John Koyier Barreh's report dated 3rd August 2024 shows that none of the EIAs went through sufficient public participation and identified that the infrastructure and social services available on Rhapta Road was not sufficient to cope with the thousands of apartments that were being proposed.

217. Counsel relied on the case of Dendy vs University of Witwatersrand, Johannesburg & Others – [2006] 1 LRC 291, where the court held that the primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. He submitted that it is proper and just that any partially built structures and buildings be demolished.

218. Counsel for the 2nd Respondent submitted that the planning and development of Nairobi dates back to the colonial era and that the city has developed on a British colonial blueprint where spatial organization and segregation was based on social stratification and that there have been many plans formulated for the planning and development of Nairobi.

219. Counsel asserts that Chapter Five of the Kenya Vision 20230 Blueprint and the National Urban Development Policy (NUDP) 2016 envisage the development of Nairobi as a metropolitan center considering the drastic population growth from 2.5 million in 2004 to 5.5 million people in 2024. This population growth, it was deposed, has necessitated both horizontal and vertical expansion of living space.

220. It was Counsel's submission that the Nairobi City Development Ordinances and Zones of 2004 is no longer tenable for the planning and development of Nairobi given the drastic population growth and that the development approvals and permissions being granted by the 2nd respondent appreciate the current reality of present day Nairobi and the need to develop a metropolis that serves the housing needs and demands of the people.

221. It was submitted that the County Assembly is currently reviewing the zoning policy for the 2nd Respondent; and that the 2nd Respondent's Urban Planning Technical Committee currently processes and approves applications using the NIUPLAN of 2014, discretion, practice, precedence and planning justifications advanced by developers, architects, city planners, engineers and other expert professionals in the field of urban planning and development.

222. Counsel asserted that under Section 57 of the *Physical and Land Use Planning Act*, the 6th to 21st Respondents could only carry out development after the issuance and grant of a development permission; that the approvals for change of user and subsequent development permissions granted by the 2nd Respondent were made in strict compliance with the relevant planning laws, regulations and policies governing urban planning and that the 6th to 21st Respondents followed lawful process to obtain the change of user and development approvals.

223. It was submitted that as the Respondents' projects have undergone public participation, the Petitioners' concerns have been addressed within the existing legal and policy framework, and are not invalid on account of the outdated Development Ordinances and Zones 2004, provided they continue to comply with the conditions set forth in the EIA Licenses and other relevant regulations.

224. It was Counsel's further submission that the impugned applications were not granted by the 2nd Respondent in isolation, but rather in consultation with and upon the review of the relevant government authorities and agencies, as provided for under Section 60 of PLUPA, and that the 2nd Respondent's Urban Planning Technical Committee is composed of experts that are duly mandated to approve any proposed development, ensuring that the projects meet the legal and technical standards.

225. These include representation, it was submitted, from the Kenya Alliance of residents Association, the Architectural Association of Kenya, Engineers, and Physical Planners.

226. Conversely, Counsel submits that during cross-examination, John Koyier Barreh who prepared an Expert Report for the Petitioners confirmed that the report was prepared without seeking the opinion of other multisectoral agencies and relevant authorities. Counsel urged that this court should consider the expert evidence with a pinch of salt as it seeks to counter nine other EIA reports which confirmed the suitability and sustainability of the impugned developments.

227. Counsel also urged the court to take cognizance of the fact that until May 2016, Mr. Koyier was the Director of Urban Planning at the 2nd Respondents and that the urban planning and process of development of approvals was being carried out well up until his departure from the 2nd Respondent. They relied on the case of Sakwa & 2 Others vs National Housing Corporation & 4 others [2022] KEELC 14930 (KLR) on expert evidence and witnesses.

228. Counsel deponed that in the event the 2nd Respondent was to strictly apply the outdated zoning policy without consideration of the current realities, it would fall short of the principles of sustainable urban development and may result in unjust outcomes that do not reflect the needs and contexts of present-day society.

229. 2nd Respondent's Counsel challenged the jurisdiction of this court to entertain this Petition in the first instance. They assert that the main grievance in the Petition revolves around the decision by the 1st and 2nd Respondents to approve the applications for change of user and development permissions by the 6th to 21st Respondents.

230. Counsel submitted that this court must examine the doctrine of exhaustion which requires a party to exhaust any alternative dispute resolution mechanism provided by statute before resorting to the courts, and the doctrine of constitutional avoidance, which frowns upon the practice of bringing ordinary disputes to the constitutional court.

231. Counsel relied on the cases of Sikalieh (Chairman) Suing on Behalf of Karen Langata District Association vs Nairobi County Government & 3 others [20222] KEELC 15120 (KLR), the Court of Appeal case of Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR as well as the case of Owners of Motor Vessel 'Lillian S' vs Caltex Oil (K) Limited [1989] KLR 1.

232. According to Counsel, the Affidavit sworn by John Koyier Barreh on 10th August 2024 is not properly before this court, as this suit is dated 12th August 2024; that before that date, the Petition did not exist; that even in his affidavit, Mr. Barreh makes reference to the Affidavit of Alex Tito Mwangi sworn on 12th August 2024; and that it is either Mr. Barreh on oath referred to a non-existent affidavit or an unsworn affidavit and the impugned affidavit should therefore be struck out.

233. Counsel relied on the Supreme Court's finding in Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli, Elijah Mbogo & Independent Electoral and Boundaries Commission [2018] KESC 58 (KLR), where the court found that an affidavit that was not signed, commissioned or dated was defective.

234. Counsel submitted that NIUPLAN does not set a limit with regards to the number of maximum number of floors but proposed that developments should be considered based on the following factors: population growth trends, legal, policy and institutional framework, that land is inelastic, land market value, advances construction technology, provision of infrastructure, internal urbanization trends and urban dynamics. They relied on the case of Millenium Gardens Management Limited v Metricon Home Nairobi Company Limited Nairobi City County Government & 2 others (Interested Parties) [2024] KEELC 6040 (KLR).

235. It was Counsel's further submission that the Petition has not met the threshold of a Constitutional Petition as set out in the case of Anarita Karimi Njeru vs Republic [1979] eKLR. They assert that while the Petition has stated the obligations of the 1st to 5th Respondents, the manner in which these obligations have been abdicated have not been factually particularized.

236. That to the contrary, the Affidavits sworn by Godfrey Akumali and Patrick Analo Akivanga demonstrate that the 2nd Respondent carried out its duties as required by law; that none of the reliefs sought in the Petition have referred to any of the substantive Articles of *the Constitution*; and that the Petitioners want this court to find the 2nd Respondent in breach of what the Petitioners refer to as an unapproved Development Control Policy 2022.

237. Counsel relied on the case of Portside Freight Terminals Limited & 2 Others vs Okoiti & 10 others [2024] KECA 169(KLR), where the Court of Appeal held that breach of a policy direction does not amount to a constitutional violation to warrant redress in a constitutional court.

238. They also invited the court to consider the decision of the Court of Appeal in Mumo Matemu vs Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenya Section of the International Commission of Jurists

& Kenya Human Rights Commission [2013] KECA 445 (KLR) on the threshold of constitutional petitions.

239. Counsel for the 7th, 13th, 16th, 18th, and 20th Respondents submitted that this court lacks the jurisdiction to hear and determine the Petition. This is because the Applicants have failed to exhaust the dispute resolution mechanisms stipulated in the law. They assert that under Section 76 of the *Physical and Land Use Planning Act*, the County Physical and Land Use Planning Liaison Committee is established with jurisdiction to hear disputes regarding change of use, non-compliance with zoning policies as well as any disputes regarding the environmental impacts of any developments approved by the county or any county executive committee member.

240. It was submitted that on the other hand, Section 125 of the Environment Management & Coordination Act established the National Environmental Tribunal with jurisdiction to hear appeals arising from the grant of license or permits under the act.

241. They relied on the cases of Kibos Distiller's Limited & 4 Others vs Benson Ambuti & 3 Others [2020] eKLR, Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR, William Odhimabo Ramogi & 3 Others vs Attorney General & 4 Others: Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR and Speaker of the National Assembly vs James Njenga Karume [1992] eKLR. Counsel asserted that the Petitioners have not demonstrated the exceptional circumstances that would warrant the intervention of this court.

242. It was counsels' submissions that the Petitioners have not met the burden of proving that the developments by the Respondents violate *the Constitution*; that the Petitioners have only particularized alleged breaches of *the Constitution* by the 1st, 2nd and 4th Respondents and have not listed any breach of *the Constitution* by the other Respondents or any injury threatened or occasioned by the Respondents; and that the Petitioners dispute is to the extent that the 1st and 2nd Respondents issued approvals for change of use of various properties owned by the respondents, which approvals were contrary to the provisions of the Nairobi City Development Ordinances and Zones 2004, NIUPLAN and the Nairobi City County Development Control Policy 2022.

243. According to Counsel, the Petitioners have failed to demonstrate how their right to a clean and healthy environment has been violated, as the Petition is premised on speculation and aspersions.

244. Furthermore, Counsel asserted that the Petitioners have failed to tender any evidence to prove that its members have any proprietary interests in the Rhapta Road area, or that its members own any land, buildings or are residents within the area where the Respondents' developments are situated.

245. Counsel submitted that the Petitioners have not adduced any evidence to prove that the Respondents' construction will create health hazards as alleged. They stated that the Respondents, on their part, have tendered evidence to show that before the approvals were issued for the change of user, the respondents carried out public participation and duly took into consideration all the views raised at the public participation for.

246. It was submitted that the Respondents undertook an Environmental Impact Assessment Study and presented a report setting out mitigation measures to be undertaken in view of the feedback received from the public participation; and that the 4th Respondent having been satisfied with the mitigation measures, issued the Respondents with an Environmental Impact Assessment License which set out all the necessary conditions to be met by the Respondents before and during construction.

247. Counsel submitted that the Zoning Policy relied upon by the Petitioners has since been superseded by several factors including the population growth and the need to provide affordable and adequate

housing to Kenyans, and that by having duly obtained an EIA license and having addressed all the concerns raised from the public participation, the projects cannot be held to be invalid on account of the zoning policies.

248. Counsel for the 10th Respondent submitted that contrary to the claim by the Petitioners, the 10th Respondents are not the registered proprietors of Nairobi/Block 3/119, and that their inclusion in this suit arises from a factual misapprehension, amounting to misjoinder.

249. It was submitted that NIUPLAN does not reflect the current legal framework governing urban development in Nairobi; that the Nairobi City Development Ordinance and Zones 2021 was brought forth to accommodate high-rise buildings in response to the growing population and urbanization demands faced by the city and the new ordinance presents a modern, progressive approach to urban planning, allowing developments that align with the city's needs.

250. With respect to whether the Petitioner is entitled to the relief sought, Counsel submitted that the Respondents followed proper laid out procedure in obtaining the development approvals and NEMA licenses from the 1st to 4th Respondents, and cannot be faulted for developing their property in furtherance of their right to property.

Analysis and Determination

251. Upon consideration of the Petition, Replying Affidavits filed by the Respondents, the evidence adduced and the submissions filed by the parties to this Petition, the following issues arise for determination:

a. Whether this court has jurisdiction to hear and determine this suit.

b. Whether the Petitioners have locus standi to file this suit.

c. Whether the Petition meets the specificity test.

d. Whether the development approvals were granted in breach of the zoning guidelines and policies.

e. Whether the EIA Licenses granted by the 3rd and 4th Respondents in favour of the 6th to 21st Respondents were lawfully issued.

252. This Petition concerns the various developments by the 6th to 21st Respondents, and the approvals for development permissions granted by the 1st and 2nd Respondents and the Environmental Impact Assessment (EIA) Licenses granted by the 3rd and 4th Respondents for the said developments.

253. The impugned developments are situated on the following suit properties:

i. Title No Nairobi Block 3/63 (formerly L.R No 1870/IV/26).

ii. Title No Nairobi Block 4/109

iii. Title No Nairobi Block 3/85 (formerly L.R No 1870/IV/71).

iv. Title No Nairobi Block 3/119 (formerly L.R No 1870/IV/113)

v. Title No Nairobi Block 3/177 (formerly L.R No 1870/IV/183).

vi. L.R No 1870/v/266 in Rhapta Road in Westlands

vii. Title No Nairobi Block 4/113 (formerly L.R No 1870/VI/335).

viii. Title No Nairobi Block 4/85 (formerly L.R 1870/v1/193).

ix. Nairobi/Block 4/174(formerly L.R No 1870/V1/38).

x. Title No Nairobi Block 3/111(formerly L.R No. 1870/IV/77).

254. The Petitioners assert that the development permissions and EIA licenses granted by the 1st to 4th Respondents with respect to the above properties are unlawful, illegal, null and void, as they have been granted contrary to the zoning regulations and are in violation of the *Physical and Land Use Planning Act*, the obligations of the 2nd Respondent under the *County Governments Act*, the *Urban Areas and Cities Act*, the Environment Management and Coordination Act (EMCA) and *the Constitution*.

255. The Petitioners state that the approvals granted by the 1st and 2nd Respondents, as well as by the 3rd and 4th Respondents, constitute a serious breach of their constitutional rights and further constitutes a serious breach of the 1st to 4th Respondents' respective constitutional and statutory duties.

256. Moreover, they assert, by granting the approvals herein, without first improving the facilities and infrastructure as required in NIUPLAN 2016, with respect to expansion of sewer, water, road and other facilities, the 1st to 4th Respondents have breached their obligations under Article 42 of *the Constitution*; and have failed to preserve the environment and character of Rhapta Road area and thereby undermined the lives of the residents and damaged the flora and fauna of the area generally.

257. The Respondents, on their part, assert that the development permissions issued by the 1st and 2nd Respondents to the 6th to 21st Respondents were done lawfully; that the applications were subjected to the necessary scrutiny and consultations and that the 6th – 21st Respondents were respectively issued with change of user approvals, building plan approvals and EIA licenses after compliance with the statutory procedures.

258. It is also claimed that the Petitioners have not listed any breach of *the Constitution* by the 6th to 21st Respondents or any injury threatened or occasioned by the Respondents, and that their claim is against the actions of the 1st to 4th Respondents.

259. The 2nd Respondent asserted that the City County Ordinances, 2004 and NIUPLAN, 2014 having been superseded by events, the 2nd Respondent's Urban Planning and Technical Committee currently processes and approves applications using discretion, practice, precedence and planning justifications and the approvals granted in respect of the properties the subject of this Petition were lawful and regular.

Whether this Court has Jurisdiction

260. The Respondents herein have asserted that this court lacks the jurisdiction to hear and determine this Petition because the Petitioners have not complied with the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019 (PLUPA) and the Environment Management and Coordination Act. They contend that this court's jurisdiction has been prematurely invoked.

261. The Respondent asserted that pursuant to Sections 61 (3) & (4) as read with Section 78(a) of the *Physical and Land Use Planning Act* 2019, the grievances raised by the Petitioners, in challenging the propriety of the change of use and planning approvals, are required at first instance to be lodged before the Nairobi City County Physical and Land Use Liaison Committee.

262. Section 61(3) and (4) of the *Physical and Land Use Planning Act* prescribe that:

> "(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
>
> (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court."

263. Section 78 of the Act provides the functions of the County Physical and Land Use Planning Liaison Committee to include hearing and determining complaints and claims made in respect to applications submitted to the planning authority in the county; hearing appeals against decisions made by the planning authority with respect to physical and land use development plans in the county; advising the County Executive Committee Member on broad physical and land use planning policies, strategies, and standards; and hearing appeals with respect to enforcement notices.

264. To the extent that the Petition challenges the lawfulness of the Environmental Impact Assessment licenses issued to the 6th to 21st Respondents, the Respondents claim that pursuant to Section 129(1) & (2) and 130 *Environmental Management and Co-Ordination Act* 1999, (EMCA) the Petitioners' challenge ought to have been lodged before the National Environment Tribunal.

265. Section 129(1) and (2) of EMCA provides as follows:

> (1) Any person who is aggrieved by-
>
> (a) the grant of a license or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
>
> (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
>
> (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
>
> (d) the amount of money required to paid as a fee under this Act or its regulations;
>
> (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
>
> (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose."

266. Section 130(1) of the EMCA states that any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.

267. As held in the case of Owners of Motor Vessel "Lillian S." vs Caltex Oil (K) Limited [1989] KLR 1, jurisdiction is everything without which a court has no power to make one more step.

268. The Respondents have claimed that the Petitioners failed to exhaust the doctrine of exhaustion, and have not established any grounds for exemption thereunder. The doctrine of exhaustion prescribes that a party ought to exhaust a dispute resolution mechanism as prescribed under statute, before seeking redress before a court of law.

269. The Court of Appeal in Geoffrey Muthinja and Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR addressed itself to the rationale of this doctrine as follows;

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

270. A five-judge bench in the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR, held as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

271. The Respondents have asserted that this Petition contravenes Article 159(1) of *the Constitution*, which recognizes the authority vested in Tribunals and Article 159(2)(c) of *the Constitution* which provides for Alternative Dispute Resolution Mechanisms. They also rely on Section 9(2) of the Fair Administrative Actions Act.

272. The principle of exhaustion has been upheld by several courts. For instance, in Secretary, County Public Service Board & Another vs Hulbhai Gedi Abdille [2017] eKLR, the Court of Appeal held as follows:-

> " Time and again, it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

273. Similarly, the Court of Appeal in in Kibos Distillers Limited & 4 Others vs Benson Ambuti Adega & 3 Others [2020] eKLR, held as follows, with respect to the jurisdiction of the ELC vis a vis that of the National Environment Tribunal:

> "... I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.
>
> A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body. In addition, section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all- encompassing provision that confers at first instance jurisdiction upon the Tribunal... It was never the intention of *the Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court."

274. The doctrine of exhaustion is however not absolute and courts have found that a party may be exempted from exhausting administrative dispute resolution mechanisms before filing a suit. The court in William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR pronounced the following exemptions to the doctrine of exhaustion:

> "As observed above, the first principle is that the High Court (read ELC) may, in exceptional circumstances consider and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting the Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
>
> In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion... This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

275. The Supreme Court has established that a case by case and nuanced approach ought to be adopted in evaluating whether a matter is to be exempted from the doctrine of exhaustion. In the case of Benson Ambuti Adega & 2 Others vs Kibos Distillers Limited & 5 Others [2020] eKLR the Court stated:

> " 51. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court "in the interests of justice." It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.
>
> 52. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...
>
> 54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected.
>
> 55. The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance."

276. More recently in Nicholus vs Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) [2023] KESC 113 (KLR), the Supreme Court held that a court must adopt a nuanced approach:

> " Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party..."

277. In the same case, the court held as follows:

> (107) Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).
>
> (108) It was therefore sufficient that the appellant alleged that a right in *the Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of *the Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why Section 3 of EMCA provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment."

278. This court is guided accordingly. Turning to the facts of this case, the Petitioners have challenged the issuance of approvals and licenses by the 2nd and 4th Respondents in respect of the impugned developments by the 6th to 21st Respondents. They assert that if these developments are allowed to go on, the Petitioners' rights to a clean and healthy environment will be violated causing them irreparable loss and damage.

279. The Petitioners have further contended that the ongoing developments will injure the cross generational rights to a clean and healthy environment of the residents of Rhapta Road area and that the ongoing approvals and developments within Rhapta Road area in Nairobi further undermine their rights to enjoy a well-planned and sustainable development and integrated planned land use which is guaranteed under Articles 42 and 60(1) of *the Constitution*.

280. Article 42 of *the Constitution* prescribes that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and

future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.

281. Article 69 lists the obligations of the state with respect to the environment, which include, inter alia, ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; establishing systems of environmental impact assessment, environmental audit and monitoring of the environment; and eliminating processes and activities that are likely to endanger the environment.

282. This Petition is also predicated on the 2nd Respondent's constitutional duty to plan Nairobi City County, of which the Petitioners assert that the 1st and 2nd Respondents are in breach, because the approvals granted to the 6th – 21st Respondents breach the zoning restrictions already set out by the 1st and 2nd Respondents under the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and the Development Control Policy 2022.

283. Moreso, the Petitioners deponed, the approvals by the 1st to 4th Respondents are in breach of their duties under Sections 5, 46, 56, 61 (1) and 69 the *Physical and Land Use Planning Act* (PLUPA), the Environmental Management and Coordination Act, the *County Governments Act* and the *Urban Areas and Cities Act* and *the Constitution*.

284. The Petitioners have sought declaratory orders that the approvals for development permissions granted by the 1st and 2nd Respondents with respect to the properties registered in the respective names of the 6th to 21st Respondents are unlawful, irregular, null and void and of no effect; that the development permissions were granted in violation of the zoning provisions set by the 2nd Respondent and therefore, the approvals for development permissions are unconstitutional, and that the 2nd Respondent do, within such period of time set by this Court, enforce and or compel the 6th to 21st Respondents to comply with the zoning and other requirements under the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022.

285. The Petitioners have also sought a mandatory injunction directing the 1st to 4th Respondents to gazette the Petitioners' Development Zone 4 in the Kenya Gazette and to henceforth comply with the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022 when granting development permissions to any developer in the Rhapta Road area within the Nairobi City County.

286. It is then apparent that this Petition is multifaceted and has several dispute resolution fora available to it. It is further clear that it also seeks to redress the alleged violation of the Petitioners' constitutional rights to a clean and healthy environment, as well as the constitutional duty of the 2nd Respondent to plan the Nairobi City County.

287. Not all these issues fall within the jurisdiction of the National Environmental Tribunal, or that of the County Physical Planning and Land Use Liaison Committee.

288. As held by the Supreme Court in Nicholus vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR), *the Constitution* allocates the Petitioners herein the right to file their constitutional Petition before this court. Looking at the orders that the Petitioners have set out, it is evident that the remedies of appealing to the Physical Liaison Committee and NET, respectively, are not efficacious and adequate.

289. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations as is the case in the present dispute. The fact that

licenses may well be a part of the Petition does not in any way oust the jurisdiction of the ELC. That is the same position that obtains in respect of the approvals granted under PLUPA.

290. In addition to the above findings, since the Petitioners' claim is multifaceted, by their own choice, the most appropriate forum for the determination of this Petition is this court, which would then interrogate and determine them based on such facts and law.

291. Just as was held in the Nicholus case (supra) by the Supreme Court, although the claims against the Respondents are intertwined and arise from the same series of events, it is impractical to expect the Petitioners to appeal against the decisions of both the County Physical Liaison Committee and NEMA before two different tribunals.

292. For this reason, this court finds that that this Petition is a candidate for exemption from the doctrine of exhaustion.

Whether the Petitioners have locus standi to file this suit

293. The 7th, 13th, 18th, and 20th Respondents challenged the standing of the Petitioners to institute this suit in their respective Replying Affidavits. They uniformly asserted that the Petitioners have not shown how the neighboring properties or how their individual properties will be affected by the developments and that the Petitioners have not demonstrated which properties they own because the list of members of the Association attached does not include their properties or what interest they have in with the Association.

294. Under *the Constitution*, the locus standi to assert the right to a clean and healthy environment is broad. This right may be asserted by any person, without having to establish personal injury on the part of the claimant.

295. This is provided for under Article 70 of *the Constitution*, which proclaims that any person that alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

296. Article 70(3) of *the Constitution* expressly provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury. This is also provided for under Section 3(3) of the Environmental Management and Coordination Act which provides as follows:

> "If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—
>
> (a) prevent, stop or discontinue any act or omission deleterious to the environment;
>
> (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
>
> (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing."

297. In any event, Alex Tito Mwangi, in his Affidavit dated 12th August 2024, has presented the Petitioner's Certificate of Registration as a society dated 20th February 2024; a letter from the Office of the Attorney General dated 1st August 2024, which indicates the officials of the Petitioners as well as a letter from the Assistant Chief, Muthangari Sub-location, to the Registrar of Societies dated 1st February, 2024, in which he confirmed that the Association members are residents in his area of jurisdiction.

298. This evidence establishes that the Petitioners are residents within the area of the Respondents' developments, and have locus standi to file the Petition. Even if they were not residents within the area where the locus quo is, they would still have the requisite locus standi pursuant to the provisions of Article 70 of *the Constitution* alluded to above.

Whether the Petition satisfies the specificity test

299. The 2nd,7th, 13th, 16th, 18th, and 20th Respondents assert that the Petition has failed the specificity test established by the authority of Anarita Karimi Njeru vs Republic (No.1) (1979) 1 KLR 154. The test in that case was stated thus:

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

300. In the same vein, the Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR stated as follows:

> " Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

301. The Petitioners have averred that this suit is based on the right to a clean and healthy environment under Article 42 of *the Constitution*, as well as on the constitutional duty of the 1st and 2nd Respondents under Article 183 of *the Constitution* of Kenya and the Fourth Schedule Part 2 Section 8 of *the Constitution* to plan the County.

302. The Petition also challenges the issuance of regulatory approvals and licenses by the 1st to 4th Respondents, which they assert was in breach of zoning regulations and statutory law.

303. The Petitioners additionally claim that by deliberately misrepresenting the zoning classifications, the 1st to 4th Respondents have breached the provisions with respect to transparency and good governance as protected under Article 10 of *the Constitution*.

304. The Petitioners have further alleged that the Respondents' applications for development permissions have failed and or neglected to meet the requirements of Article 10 of *the Constitution* by deliberately failing to explain and or respond to the Petitioners' numerous enquiries during the public participation meetings.

305. The 2nd Respondent has sought to rely on the case of Portside Freight Terminals Limited & 2 others vs Okoiti & 10 Others [2024] KECA 169(KLR), where the Court of Appeal held that breach of a policy direction does not amount to a constitutional violation to warrant redress in a constitutional court.

306. However, this matter is multifaceted, and while it may concern the alleged breach of a policy direction, it also has to do with the alleged violation of constitutional rights, and specifically Article 10, 42 and 69 of *the Constitution*. The Petition therefore satisfies the specificity test.

Whether the 10th Respondents are rightly enjoined to this Petition

307. The 10th Respondents have opposed their joinder to this suit as they assert that they are not the owners of LR No. 1870/IV/113, as claimed by the Petitioners. They assert that the property is registered to KNP properties, which is a separate entity from the 10th Respondents.

308. The 10th Respondent are listed as Kanti Naran Manji Patel, Nitaben Kanti Patel, Umesh Kalyan Navan Patel, and Narenda Kalyan Patel. The Petitioners' secretary has, on his part, annexed a copy of KNP Properties' director's details. These directors are Kanti Naran Manji Patel, Nitaben Kanti Patel, and Lina Arunkumar Kantaria.

309. The law relating to corporate personality was laid down in the case of Salomon Co. Ltd vs Salomon [1897] AC 78 where Lord Macnaghten affirmed the separation between the corporation and its members thus;

> " The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act."

310. The corporate veil may however be lifted, such as in the instance of fraud, to allow a creditor to attach the personal assets of a corporation's shareholders or directors in certain circumstances or where it is just and fair for the interests of justice.

311. Upon perusal of the annexures, this court found that in the EIA Report, the four persons enjoined this suit as the 10th Respondents, are listed as the owners of the suit property. These are Kanti Naran Manji Patel, Nitaben Kanti Patel, Umesh Kalyan Navan Patel, and Narenda Kalyan Patel.

312. Noting that Kanti Naran Manji Patel and Nitaben Kanti Patel are directors of KNP Properties, which would be the proper party to this suit, this court finds that the joinder of the said Respondents was proper, in view of their relationship with the company and the submitted EAI Report.

Whether the development approvals were granted in breach of the zoning guidelines and policies

313. Having dealt with the preliminary issues, this court will now consider the substantive prayers, starting with the allegation that the 2nd Respondent, in granting the 6th to 21st Respondents development approvals, did so illegally and unlawfully, and in breach of zoning guidelines and the relevant laws.

The prayers that the Petitioners are seeking under this head is framed as follows:

a. A declaration be granted to the effect that the approvals for development permissions granted by the 1st and 2nd Respondent with respect to the properties registered in the names of the 6th to 21st Respondents listed above, were granted in violation of the zoning provisions set by the 2nd Respondent and therefore, the approvals for development permissions are unconstitutional and further unlawful for being in violation of the *Physical and Land Use Planning Act*, the obligations of the 2nd Respondent under the *County Governments Act*, the *Urban Areas and Cities Act* and all the Regulations laid down in the said statutes.

b. A declaration be granted to the effect that the 2nd Respondent do, within such period of time set by the Honourable Court, enforce and or compel the 6th to 21st Respondents to comply with the zoning and other requirements under the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022; and in default of compliance thereof, the 2nd Respondent be directed to enforce compliance through demolition of all the properties partially constructed by the 6th to 21st Respondents respectively at the cost and expense of the 6th to 21st Respondents as per their respective affected properties listed in Order (i) above.

314. It is not disputed that the Petitioners reside within an electoral Ward known as "Kileleshwa." This assertion was made by the area sub chief by way of a letter. The court has confirmed after the research it undertook that "Kileleshwa" Ward, or sub location, is made up of several estates, which include: Chiromo, Groganville, Kileleshwa, Muthangari and Riverside.

315. The County Governments in Kenya play a critical role in development policymaking under the *Urban Areas and Cities Act*. The Act provides a framework for governance and development planning for urban areas and cities.

316. County governments are responsible for spearheading development policies that integrate urban areas and cities into the broader county development agenda. This includes developing County Integrated Development Plans (CIDPs) and ensuring they align with urban planning frameworks which address specific local needs like housing, infrastructure, and services.

317. These integrated plans are essential for coordinated and sustainable urban development Section 38 requires counties to prepare Integrated City or Urban Development Plans. The plan should address assessment of the current social, cultural, economic, and environmental situation, amongst others. This comprehensive approach ensures that development policies are well-planned and effectively implemented.

318. The *Physical and Land Use Planning Act*, 2019 provide a legal framework for the preparation, approval, and implementation of physical and land use plans by county governments. The Act emphasizes sustainable development and orderly land use. The Local Physical and Land Use Development Plans (section 45) must be consistent with an Integrated City or Urban Development Plan contemplated under the *Urban Areas and Cities Act*.

319. Section 46 of the PLUPA provides that the purpose of the local plan is for zoning, urban renewal, or redevelopment, guiding and coordinating the development of infrastructure, and regulating the land use and land development.

320. The contents of a Local Physical and Land Use Development Plans, as per the 2nd Schedule, include: population, housing and infrastructure analysis; transportation and communication analysis; water and sewerage networks, roads network; education; recreation areas among others.

321. "A Guide of Nairobi City Development Ordinances and Zones, 2004, was developed by the Department of City Planning of the now defunct City Council of Nairobi, in 2004 (the 2004 Guidelines). The 2004 Guidelines divided the City into 20 zones, placing Kileleshwa, Riverside Drive, Spring Valley, Kilimani, Thompson and Woodly in Zone 4. The allowed type of development was residential (Apartments allowed on sewer only)- Four storeys max.

322. The Guide of Nairobi City Development Ordinances and Zones, 2004 does not pass the test of a Local Physical and Land Use Development Plan contemplated under section 46 of the PLUPA. It does not have the parameters provided under schedule 2 of the Act, which includes population, housing and infrastructure analysis; transportation and communication analysis; water and sewerage networks, roads network; education; recreation areas among others.

323. According to the Petitioners' witness, PW1, who worked with the then Nairobi City in the Directorate of City Planning from 1988 until 2016, the 2004 Guide became outdated, and was replaced by another 'policy' in 2006. However, neither him nor the Respondents placed before the court the '2006 'policy' that replaced the 2004 Guide. However, it was his evidence that that the policy of 2006 updated the 2004 policy, which amended Zones 3,4 and 5.

324. The Nairobi Integrated Urban Development Master Plan [NIUPLAN], 2016, which is a broad spatial framework to guide urban planning and development within the Nairobi City County for the period 2014-2030, the Master Plan, was adopted by the County Assembly on 5th July 2016.

325. The 2016 Master Plan [NIUPLAN] succeeded the Nairobi Metropolitan Growth Strategy 1973. The 2016 Master Plan references the 2004 Nairobi City Development Ordinances and Zones. It indicates at pages 3-43 as follows:

> "The last zoning review was carried out in 2004 and resulted in subdividing 20 zones into smaller zones and prescribed ground coverage ratios (GC) and plot ratios (PR), and definition of the minimum plot size for each zone. This revision allowed developers a maximum of four floors for apartments in Westlands, Parklands, Woodley, Kilimani, and Kileleshwa. However, the situation in those areas and the current development activities did not seem to follow the revised Regulation much. These can be observed in incidents of high-rise building of more than five floors and land use mixture in residential areas. Actual Regulation may seem to be more ad-hoc than the adopted scheme. Maps indicating the standing Regulations were planned for public reference, but have not been realized. Thus, the zoning itself lacks discipline and strength to control the day-to-day development activities appropriately."

326. The NIUPLAN 2016 also indicated that the Nairobi City County had undertaken two studies on Land Use and Policy Plan for Zones 3,4, 5, 6, 13 and 20B in 2012, but these revisions were not yet authorized as they were awaiting the outcome of the NIUPLAN.

327. The Master Plan also noted at page 6-53 the urgency and need to have a Local Physical Development Plan (LPDP) because during the drafting of the Plan, the County Government faced high pressure from developers to ease existing regulation and approve their plans, especially in Zones 3, 4 and 5 areas.

328. NIUPLAN 2016 estimated that the maximum capacity of NCC is approximately 5 million people. It recommends at pages 6-19 that the Development Ordinance 2004 should be revised to change land use i.e to convert some non-residential land use to residential use, and the plot ration should be changed to a higher value to promote higher population density to accommodate future population.

329. A reading of the NIUPLAN 2016 therefore indicates that it did not intent to replace the 2004 Nairobi City Development Ordinances and Zones. Rather, it is a blueprint, which is to guide the development in Nairobi until 2030. The Master Plan only echoed the provisions of the 2004 Guidelines, juxtaposing the same with failures to comply with the indicated levels as well as the realities of increased population urbanization in Nairobi City.

330. The recommendation in the NIUPLAN for the revision of the 2004 Guidelines to convert some non-residential land use to residential use, and the plot ration to be changed to a higher value to promote the population density and accommodate the growing population gave rise to the Nairobi City County Development Control Policy, first published in 2021.

331. The Nairobi City County Development Control Policy provides that it seeks to revise the development control guidelines for effective urban management; to sustainably guide and control development in Nairobi City for ten years; and to facilitate private sector investment within the city aimed at transforming Nairobi into a modern City with a high quality of life for all residents.

332. Although generated by the executive arm of the 2nd Respondent, the Nairobi City County Development Control Policy, 2021 has not been approved by the County Assembly as required under the County Government Act.

333. This is despite the fact that it was received by the office of the speaker of the County Assembly 0n 21st January, 2022. Essentially, the policy is a draft. Can the 2021 policy be used as a guide by the 2nd Respondent, pending its approval or rejection by the County Assembly of Nairobi? Put it differently, can the court rely on an unproved policy to arrive at its decision?

334. Courts primarily base their decisions on enacted laws and officially approved policies. However, in certain circumstances, courts may consider draft policies as interpretative aids, especially when there is a legislative or policy vacuum. This approach ensures that judicial decisions align with the evolving legal and policy landscape, even if specific policies have not been formally enacted.

335. Further, draft policies may provide guidance where no formal law or policy exists, ensuring courts do not leave critical issues unaddressed. Policy documents, even when not fully formalized, could reflect government intentions, which courts may take into account to interpret administrative actions.

336. Draft policies may also outline a government's intended approach, helping courts understand the policy trajectory and avoid decisions contrary to pending reforms. Discretion exercised by public officials should align with the policy intent, even where the framework is under development.

337. In some cases, reverting to a draft policy ensures justice is served, especially when ignoring it would result in unfairness or inconsistency. Courts may also use draft policies to align decisions with societal or professional standards, especially in dynamic areas such as technology, health, or environmental law.

338. In the case of, Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others [2017] eKLR, the Court of Appeal stated as follows in relation to a draft policy:

> " While the National Land Commission is already operational, the land use policy envisioned under (b) above is yet to be passed. The same is still at the drafting stage with the latest draft having been published in 2016; titled 'Land Use Policy.' While not binding on this Court, the same may provide some insight and guidance..."

339. The 2nd Respondent has never enacted a policy on development control. Indeed, the outdated "2004 Guidelines" which I was informed were amended by the 2nd Respondent were prepared by the Planning Department and do not amount to a policy document contemplated under the PLUPA or the repealed Physical Planning Act.

340. While looking at the relevancy of the 2004 Guidelines and the 2021 policy document, this court held in Millennium Gardens Management Limited vs Metricon Home Nairobi Company Limited; Nairobi City County Government & 2 Others (Interested Parties) [2024] KEELC 6040 (KLR) as follows:

> " 214. It is abundantly clear from the foregoing that the 2004 Zoning Guidelines in question have long been superseded by events that were unforeseen at the time of their formulation. These guidelines, once relevant, fail to account for the dynamic and evolving nature of urban and environmental planning, a phenomenon recognized by the NIUPLAN and Nairobi City County Development Control Policy, 2021.
>
> 215. The Court recognizes that the application of these outdated guidelines (2004) without consideration of the current realities and the operative Master Plan (2014-2030) and Nairobi City County Development Control Policy, 2021 may result in unjust outcomes that do not reflect the needs and contexts of contemporary society.
>
> 216. Nonetheless, it is clear from the foregoing excerpts that the 1st Interested Party has at all times been alive to the conflict between the 2004 Zoning Guidelines in place and the Nairobi Integrated Urban Development Plan, and Nairobi City County Development Control Policy, 2021 which identified the need for review of the zoning policy."

341. That being so, the closest and most relevant document that should guide the 2nd Respondent while approving development plans in Nairobi is the unapproved Nairobi City County Development Control Policy, 2021 (2022/2023). Indeed, this position has been admitted by the Petitioners impliedly, considering the way some of the prayers have been framed.

342. The Petitioners' witness, PW1, informed the court that under the 2021 (2022/2023) Nairobi City County Development Control Policy, which is still under consideration as discussed above, the subject area was renamed Muthangari, and marked as Zone 4B. According to the said Nairobi City County Development Control Policy, developments in that area are limited to a maximum of 16 levels, on a minimum land area size of 0.05 Ha.

343. It was deponed by the Petitioners' secretary that by granting the approvals of the developments within the Rhapta Road area, the 1st to 4th Respondents have violated the planned zoning provisions within zone 4 as per the NIUPLAN 2016 and zone 4B as per Nairobi City County Development Control Policy 2022, and that by deliberately misrepresenting the zoning classifications, the 1st to 4th

Respondents have breached the provisions with respect to the transparency and good governance as protected under Article 10 of *the Constitution*.

344. According to the Petitioners, in a letter dated 19th February 2024, the 1st and 2nd Respondents falsely represented to the Petitioners' advocates that the 6th – 21st Respondents' properties and the properties within the area of occupation and location of their properties was in the zone classified as Zone 3 yet the 1st and 2nd Respondents knew all too well that based on the NIUPLAN 2016 and even the unapproved Development Control Policy 2022, the Petitioners' properties and locality of their properties were situated within Zone 4 and 4B respectively.

345. The Petitioners assert that the 2nd Respondent has issued development permissions to the 6th – 21st Respondent, contrary to zoning guidelines and the same are therefore unlawful. The 1st and 2nd Respondents however assert with the development policy under review, the Technical Committee currently processes and approves application using discretion, practice, precedence and planning justifications advanced by developers, architects, city planners, engineers and other experts.

346. Under Section 4(1) of the *Fair Administrative Action Act*, every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. It is notable that the Development Control Policy was developed by the 2nd Respondent and first published in 2021.

347. While the Policy remains in abeyance, pending public participation and approval by the County Assembly, the 2nd Respondent cannot issue approvals that exceed the prospective limit indicated in the Policy, as this would be contrary to the legitimate expectation created by the publication of the Draft Policy in 2021.

348. The uapproved Nairobi City County Development Control Policy is a clear, unambiguous, and lawful communication by the County Government of Nairobi on the zonal guidelines and restrictions, and until the contents therein change, the 2nd Respondent is bound by it.

349. The subject matter herein is not the Petitioners' properties, but the 6th – 21st Respondents' developments. Other than the title numbers, the 6th – 21st Respondents' properties have been described in the Petition as properties located within the "Rhapta Road area." The exact location of the ten (10) properties has not been given.

350. It is not clear to this court if "Rhapta Road area" where the ten (10) suit properties are situated is confined to an area known as 'Muthangari' or traverses other estates within the larger Kileleshwa Ward (electoral area) which, according to my research, includes the following estates: Chiromo, Groganville, Kileleshwa, Muthangari and Riverside. In his Affidavit, the 2nd Respondent's Chief Officer deposed that the "impugned developments by the 6th to 21st Respondents are situated along Rhapta Road, in the Westlands area of Nairobi County Government."

351. I raise this issue because the correspondence before me seems to suggest that while the 2nd Respondent stated that the suit properties fall within zone 3, the Petitioners' position is that the suit properties are within zone 4B. The zone (s) in which the properties are located is critical considering that the allowable heights in zons 3A, 3B, 3C and 4B under the 2022 policy are different.

352. According to the schedule annexed to the 2021 policy, zone 3A is the Westlands CBD area and zone 3B is Westlands Museum Hill area. Zone 3C is Riverside and includes areas between Chiromo Road, Kalobot Drive, State House Road, Arboretum edges, Ring Road Kileleshwa and Rhapta Road. Zone 4B is categorized as Muthangari and includes areas between Waiyaki Way, Riverside Drive, Ring Road Westlands and Mahiga Mairu Avenue.

353. Zone 3B, (Riverside) which includes Rhapta Road, provides for a height level of 20 while zone 4B (Muthangari) provides a height level of 16. The question of whether all the ten (10) suit properties, which are described in the Petition as being within the 'Rhapta Road area', in my view, should have been better described by the Petitioners using a qualified surveyor.

354. I say so because while "Rhapta Road" seems to be categorized under zone 3C (Riverside), the Petitioners' witness, who is not a surveyor, stated that all the ten (10) suit properties are in Muthangari. This distinction is critical considering that the approvals that were granted to the 6th – 21st Respondents ranged between 15 to 22 levels, most of which are permissible under zone 3C and not 4B, with the exception of two developments where permission granted was for 22 and 15 floors.

355. The issue of the location of the suit properties is further complicated by the fact that some of the suit properties, as per the EIA Study Reports, are indicated to be in Westlands sub county (Ward), which is distinct from Kileleshwa sub county (Ward), where Muthangari (zone 4B) is situated.

356. For example, the EIA Study Report for Title number Nairobi/Block 3/85 shows the property is located along "Mkoko Close in Westlands area of Westlands sub-county. However, the google map shows "Mkoko Close' is in between Waiyaki way and Riverside Drive, which, according to the Policy, falls within 'Muthangari' (zone 4B).

357. The EIA Study Report for Title number Nairobi/Block 3/177 shows the property is located off "Church Road in Westlands." The google map shows "Church Road" is between "Rhapta Road" and "Waiyaki Way," which, according to the classification in the unapproved policy is in "Muthangari," zone 4B.

358. The EIA Study Report for L.R No. 1870/V/266 shows the property is located at the junction of Rhapta Road and East Church Road." The google map shows "East Church Road" is between "Rhapta Road" and "Nairobi River," which, according to the unapproved policy, is in "Muthangari," zone 4B.

359. The EIA Study Report for Title Nairobi Block 4/174 shows the property is located along "Sports Road in Westlands," which, according to the google map is between Wayaki Way and Rhapta Road. This area also falls within the Muthangari zone 4B

360. The EIA Study Report for L.R No. 1870/IV/77 shows the property is located along "Terrace Close," off "Rhapta Road within Westlands sub-county. According to the google map, "Terrace Close" is in between Wayaki Way and Riverside Drive, which is in 'Muthangari, zone 4B.'

361. The above sampled parcels of land all fall within zone 4B. Considering that all the suit properties are in the same locality, the court agrees with the Petitioners that all the suit properties are within Zone 4B, otherwise known as "Muthangari" located between Waiyaki Way, Riverside Drive, Ring Road Westlands and Mahiga Mairu Avenue.

362. It is the finding of this court that the allowable height of the 6th – 21st Respondents' development cannot exceed 16 levels, with a maximun ground coverage of 75% as provided for in the 2021 unapproved Nairobi City County Development Control Policy.

Whether the EIA Licenses granted by the 3rd and 4th Respondents in favour of the 6th to 21st Respondents were lawfully issued

363. The Petitioners have contended that the EIA Licenses granted by the 3rd and 4th Respondents were issued unlawfully as they were not in compliance with the zoning requirements.

364. Section 58 of EMCA prescribes that any person, being a proponent of a project, shall before commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to the Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

365. The law further provides that the proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any license by the Authority.

366. The Environmental Impact Assessment studies and reports required under the Act are to be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority.

367. Rule 16 of the Environmental (Impact Assessment and Audit) Regulations, 2003 state that the environmental impact assessment study prepared shall take into account environmental, social, cultural, economic, and legal considerations, and shall— (a)identify the anticipated environmental impacts of the project and the scale of the impacts; (b)identify and analyze alternatives to the proposed project; (c)propose mitigation measures to be taken during and after the implementation of the project; and (d)develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance, which shall include the cost of mitigation measures and the time frame of implementing the measures.

368. Rule 17 (2) provides for public participation during the process of conducting an environmental impact assessment study.

369. Ms. Veronica Kimutai, for the 4th Respondent, NEMA, deponed that the 6th to 21st Respondents made applications for licenses; that the 4th Respondent thereupon evaluated the said applications, including contacting the relevant lead agencies/ committees in accordance with EMCA, requesting for their views/ comments which would assist the Authority to make an informed decision in reviewing the submitted EIA project reports and/ or study reports.

370. It was deposed that where the project(s) required EIA Study Reports, the Authority wrote to the Government Printers where it submitted a public notice to be published in the Kenya Gazette and whose publication costs would be borne by the proponent(s) of the project as per EIA Regulations on EIA study reports.

371. She stated that pursuant to the requirements for information disclosure and public participation as stipulated under Section 59 of EMCA and Regulation 21 of EIA Regulations, on various dates, the Authority wrote to the proponents of the projects that required EIA study, where it shared with them public notices to be delivered to a suitable print media office and the Government Printers, with a condition that once the relevant notices appeared in the Kenya Gazette and print media, and the announcements over the radio, the particular proponent was to furnish the Authority with copies of the same and a space order for the radio announcement.

372. She noted that the proponents of the affected projects proceeded to place the notices which appeared in two local dailies with nationwide circulation, and also placed a radio announcement and that during the information disclosure and public participation period, the Authority received comments from the various government agencies stating any concerns that they had in relation to the proposed development projects.

373. Ms. Kimutai contended that the Authority also received some complaints, objections and concerns by the Rhapta Road Residents Associations on various dates citing issues around the zonation, traffic impacts, inadequacy of the sewerage infrastructure, water shortages, power outages, deep excavations, noise, dust pollution, insecurity, visual intrusion and public consultations.

374. According to the 2nd Respondent, where the issues raised were substantive, the Authority issued the concerned proponents with a letter to address the concerns from the public as well as provide other details as per the technical review outcome, and that site inspection visits were conducted by the Authority on all the sites on various dates to assess the suitability and inform decision making.

375. She stated that the Authority continued receiving numerous objections and complaints from the Rhapta Road Residents and their advocates, which revolved around public consultation and the ESIA process, including the manner in which the consultations were planned and conducted and that the proponents responded to the issues raised and a technical review was undertaken that established the technical adequacy of the responses, baseline environmental information and the environmental management plans for the potential impacts of the project that were mitigatable.

376. It was asserted that upon comprehensive review of all the reports relating to the various projects, the projects were, on varying dates, recommended for approval and issuance of an EIA license with mandatory compliance conditions to institute the appropriate environmental and social safeguards.

377. I have gone through the voluminous EAI Study reports which were prepared by the 6th – 21st Respondents' EIA experts, amongst other documents. With respect to Title No Nairobi Block 3/63(formerly L.R No 1870/IV/26), the 7th Respondent published a public notice on the suit property's gate on 15th January 2024, inviting comments and objections on the proposed change of use from single dwelling to multi-dwelling units. A similar notice was published in the Standard Newspaper on 31st March 2023.

378. On 15th April 2024, NEMA approved the Terms of Reference for the EIA for the proposed residential apartments on LR No. Nairobi/Block 3/63 along Michael's road off Church Road. On 8th July 2024, NEMA published a notice to the public to submit comments on the EIA report with respect to LR No. Nairobi Block No. 3/63, in two newspapers with national circulation.

379. Three public meetings were held on 20th April 2024, 11th May 2024 and 8th June 2024, where more than 50 people attended each meeting. Several issues were raised in the meetings, including compliance of the project with the zoning regulations; mitigation of traffic from trucks during construction, sinking of a borehole given acute water shortage, and noise pollution and parking.

380. In the EIA Study Report for LR No. Nairobi/Block 3/63, the environmental and social impacts were noted to include soil disturbance, changes in land use, changes in hydrology/ impended drainage/ deep excavations, air pollution, noise pollution and water quality and sewerage infrastructure, among others.

381. Several measures were adopted to mitigate these impacts. It was also noted that the foreseeable negative impacts of the project include constraints/pressure to the existing infrastructure i.e water, foul and wastewater disposal, power, increased water run off resulting from the roof catchments and as a result of decreased recharge areas and the impact of the soil.

382. The proposed mitigation measures for increased water demand were avoidance of wastage of water, roof catchments and rainwater harvesting systems to enhance collection and storage of run-off and sensitization of all stakeholder on means and needs to converse water resource.

383. On sewage and effluent, it was proposed that the internal and external sewerage system be made of hard, strong, durable, smooth and non-corrodible materials and that the design of the sewerage system should consider the estimate discharges from individual sources and cumulative discharges from entire project during peak volumes.

384. On solid wastes, it was proposed that the proponent should work hand in hand with private refuse handlers, NEMA and the Nairobi City County Government to facilitate sound waste management as per the prevailing regulatory provisions; that the wastes should be properly segregated to encourage recycling of some useful waste materials and to train or educate the involved stakeholders/tenants on the importance and means of waste management and handling during the occupation phase.

385. On noise pollution, the proposed mitigation measures were for the construction works to be carried out specifically between 8am and 5pm; use of machine cut stones that require no chisel dressing, which can be a major source of noise; to sensitize construction vehicle drivers and machinery operators to switch of engines of vehicles and machinery when not in use; machines to be maintained regularly to reduce noise resulting from friction; generators and heavy duty equipment to be insulated or placed in enclosures to minimize ambient noise levels and excavation machines to use the hydraulic system that generates low noise, among others.

386. In respect of Title No Nairobi Block 4/109, the 7th Respondent placed a notice on the gate of the suit property on 30th March 2023 notifying the public on the proposed change of use from residential to commercial cum residential (shops & apartments) development, and invited comments and objections.

387. On 17th October 2023, NEMA approved the terms of reference for the EIA for the proposed development on Nairobi Block 4/109 along Mvuli Road in Westlands. On 26th September 3rd October, December 13th and 14th 2023, NEMA published notices to the public to submit comments on the EIA report with respect to LR No. Nairobi Block 4/109 in newspapers with national circulation.

388. The 7th Respondent held three public participation meetings on 13th October 2023, 27th October 2023 and 18th November 2023, which were preceded by invitations to the public through public notices and advertisements in newspapers with national circulation.

389. The following issues were raised during the meetings: that the project should have proper drainage system; that the developer should work with Athi Water to improve infrastructure and connect with high speed water and sewer along Waiyaki way; that there is currently no gazette document on zoning; that the area was previously zoned as Zone 4, and that the water table had gone down and the current aquifer, at 350 m down, has a lot of fluoride concentration.

390. One resident wanted to know whether the county government had improved on the current water, sewer and power infrastructure to warrant these new developments. Hon. Sonia, Chair of the Rhapta Road Residents Association also tabled a memorandum of objection to the proposed development signed by members of the Association and copied to various government and private entities.

391. The objection was pegged on the current laws and regulations, strain on the existing infrastructure like roads, sewer, water supply, storm water drains, power supply, security, social and environmental impacts of the project.

392. In the EIA study Report for the proposed development on LR No. Nairobi/ Block 4/109, various impacts were identified and the corresponding mitigation measures indicated thereon. The identified negative impacts include constraints to the existing water, wastewater disposal, power, surface drains,

roads; impact to oil, increased noise and vibrations; air pollution and other hazards associated with construction.

393. On water supply, the proponent indicated that it would liaise with Nairobi Water and Sewerage company to connect to high speed water along Waiyaki way. The proponent also undertook to drill a borehole. It also undertook to avoid wastage of the water by providing roof catchments with rainwater harvesting systems to enhance collection and storage of the would be run-off.

394. With respect to waste management, the developer proposed mitigation measures, including designing the sewerage system to consider the estimate discharges from individual sources and cumulative discharge of the entire project even during peak volumes and seeking approval from Nairobi City Water and Sewerage Company before connecting to the existing public mains and monitoring quality of waste water to ensure compliance with the Environmental Management and Coordination (Water Quality) Regulations 2006.

395. The proponent also proposed to designate an area for temporarily holding waste materials during construction phase; segregation of wastes at the source for ease of handling and disposal; appointment of a NEMA licensed waste transporter to transport solid waste from proposed site during construction and occupation phases and regular inspection and maintenance of the drainage and sewer systems to avoid blockage. The developer committed in the course of public participation meetings to replant on the 6m setbacks facing Mvuli road with flowers and trees.

396. With respect to Title No Nairobi Block 3/85(formerly L.R No 1870/IV/71), the 9th Respondent obtained an EIA study report in which the anticipated negative impacts associated with the proposed project was soil erosion, air pollution, noise and excessive vibrations, solid waste, liquid waste, water demand, energy demand, traffic congestion, storm water drainage etc.

397. The proposed mitigation measures included drilling a borehole to supplement the existing water supply subject to the acquisition of an authorization permit from WRA, rainwater harvesting to supplement existing water supply; proponent to prepare Waste Management Plan for the entire project cycles; segregation of non-hazardous waste into organic and non - organic fractions before final disposal and extension of the connection of the proposed development to the sewer system upon acquisition of connection permit from NCWSC.

398. The proponent further proposed to construct internal reticulation system which can consistently handle the loads even during peak volumes ; construct service lane within property adjacent to Mkoko Close to ensure smooth flow of traffic in and out of site and to prepare Traffic Management Plan to ensure smooth flow of traffic during construction phase and construct drainage channels within the site covered with gratings to avoid the occurrence of accidents and entry of dirt and construct gently sloping drains to convey water at non-erosive speed.

399. The EIA report indicated that the 9th Respondent sought for information and comments from the public through public stakeholder meetings, administration of questionnaires, one-on-one interviews and filed surveys and observations. Prior to the public meeting, appropriate notices were sent out at least one week prior to the public meeting. They asserted that the issues raised and foreseen concerns had been adequately addressed in the report.

400. As for LR No. 1870/IV/113, on 9th June 2023, a notice was published in the newspaper on the change of use of the said property from single dwelling unit to multi dwelling units (serviced apartments). The public was invited to forward comments and objections.

401. In the EIA report for LR Nairobi Block 3/119, it was noted that the potential environmental impacts include water pollution, water balance/hydrology and surface flow, and increased air pollution and noise pollution.

402. Mitigation measures were duly proposed including to encourage water reuse during the entire project cycle for sustainability; that there should be enough water storage facilities in the project areas; that with respect to sewage and effluent; there shall be proper installation, operation and maintenance of sewer; that there shall be proper decommission of waste water and there shall be incorporation of absorption pits during landscaping to allow for water percolation.

403. It was further proposed with respect to solid waste, that waste generation be minimized during construction phase through reuse and recycling of produced waste, reuse and recycle of construction debris and other material should be encouraged and that waste should only be transported by licensed waste transporters and dumping of unusable materials done at the recommended and licensed dumping sites, among others.

404. In the EIA report, it was indicated that questionnaires and interviews were used, and that the majority of those interviewed indicated that they had no objections to the project as long as the works would be confined to the designated area and all negative impacts mitigated.

405. With respect to Title No Nairobi Block 3/177 (formerly L.R No 1870/IV/183), following publication of invitations in newspapers with national circulation, three public participation meetings were held on 3rd February 2024, 2nd March 2024 and 23rd March 2024.

406. The following issues were raised: that the drawings that had been circulated had not indicated the flood line given that the project is next to a riparian reserve; that the project plans should indicate service provisions like traffic management and should also include a site plan and that the zoning policy document the developer had based the proposed project on to be availed.

407. Ms. Claire Anami tabled a memorandum of objection to the proposed development purportedly signed by Rhapta Road residents. The objections were based on the current laws and regulations, development control policy, zoning, strain on the existing infrastructure like roads, sewer, water supply, storm-water drains, power supply, security, social and environmental impacts of the project, biodiversity loss and public participation.

408. In the meeting held on 2nd March 2024, attended by 55 people, the traffic engineer reported that following a traffic count conducted in January 2024, at the Church Road/ Rhapta Road intersection, it was found that this particular development would have minimal impacts on the level of service (LOS) at the intersection. It was also reported that there was a plan to sink a borehole on site.

409. The proponent also provided that dust proof nets shall be installed while the trucks ferrying the materials shall be covered; on sanitation, mobile toilets will be provided with tissues and on storm-water, the developer to provide adequate drainage system that will channel storm water into the nearby river.

410. On noise, the working hours is to be restricted in line with NEMA licensing conditions, from 0800hrs to 1700hrs on Monday to Friday and on Saturdays from 0800hrs to 1300hrs and that there shall be no blasting during excavation.

411. On insecurity, it was reported, the developer intends to maintain a log-in and log-out register to monitor those attending to the site, provide security guards, CCTV cameras, security lights and other security apparatus during excavation.

412. NEMA thereafter published a notice in the Kenya Gazette and two newspaper with national circulation on 5th April 2024 on the impacts and mitigation measures proposed for this development and invited the public to submit oral or written comments within 30 days. NEMA then issued an EIA license to the project on 21st May 2024 on several conditions, including that the proponent shall design and implement a concise traffic management plan during the entire project cycle and that the proponent shall ensure air pollution control measures are put in place to mitigate against dust during the construction phase.

413. The 4th Respondent further stated in the license that the proponent shall ensure that all wastewater is disposed of as per the standards set out in the Environmental Management and Coordination (Water Quality) Regulations 2006.

414. The proponent was advised to ensure that the development adhered to zoning specifications issued for the development of such a project within the jurisdiction of the Nairobi City County Government with emphasis on the approved land use of the area, and to put in place a comprehensive water harvesting and storage scheme to augment the Nairobi City Water and Sewerage Company supply.

415. The 13th Respondent additionally obtained from the Water Resources Authority, a riparian reserve marking/ pegging through a letter dated 4th October 2024. The authority asserted that ten meters on the left bank of Nairobi river was marked as riparian reserve as provided under the *Water Act* 2016 and the Physical Planning and Land Use Regulations 2021, from downstream to upstream.

416. The 14th Respondent published a notice of change of user of L.R No 1870/v/266 from single residential to serviced apartments, ancillary services and management offices in a newspaper with national circulation on 10th September 2019 and 13th September 2019. The notices invited objections and comments on the proposed change of user.

417. The 14th Respondent invited the public to a public stakeholder forum on 30th October 2021 at the project site. NEMA issued the 14th Respondent a license on 5th January 2022 on several conditions, including that the proponent ensures that the proponent shall design and implement a concise traffic management plan during the entire project cycle; that the proponent shall ensure air pollution control measures are put in place to mitigate against dust during the construction phase and the proponent to ensure that the development adhered to zoning specifications issued for the development of such a project within the jurisdiction of the Nairobi City County Government with emphasis on the approved land use of the area.

418. The developer was also required to obtain authorization to drill a borehole from the Water Resources Authority and a NEMA EIA license before drilling and abstracting water; to ensure that rain water harvesting facilities are provided to supplement surface and ground water and the proponent to ensure that all solid waste is handled in accordance with the Environmental Management and Coordination (Waste Management) Regulations 2006.

419. In respect to Title No Nairobi Block 4/113 (formerly L.R No 1870/VI/335), the 16th Respondent obtained an EIA report on the project, which identified negative environmental impacts during the construction phase, operation phase and decommissioning phase of the project.

420. These include unsustainable construction and use of building materials, destruction of existing vegetation, noise pollution and vibration, air quality degradation, soil erosion and water logging, surface and ground water quality degradation, increased water demand, increased insecurity and increased traffic.

421. To mitigate destruction of existing vegetation, it was proposed that a thorough site assessment and planning should be carried out such that planning of the building layout and construction activities avoid disturbing existing vegetation as much as possible, transplanting valuable trees to a different location on the site or to another suitable location before construction begins and incorporating a comprehensive landscaping plan that includes native and adaptive plants after construction is complete.

422. As to solid waste generation, the proposed mitigation measures were to recycle or reuse all construction waste materials that would otherwise be disposed of as waste, consider use of recycled or refurbished construction materials, and to dispose waste responsibly by using NEMA licensed waste handlers.

423. Mitigation measures for increased water use are installing water meters were applicable, installing water-saving devices in the appropriate places (flow regulators, water flow sensors, self-closing taps, low-flush taps), regularly maintain plumbing fixtures and piping in order to avoid losses and replacing defective seals and repair damage to water pipes.

424. NEMA published notices in the Kenya Gazette inviting submission of comments from the public on the EIA for the residential development located on Plot L.R. No. Nairobi/ Block 4/113 along Rhapta Road as well as in two newspapers with national circulation. The 16th Respondent annexed evidence to show that they paid for airtime with KBC on 30th August 2024 for announcement of the project on KBC's Radio Taifa and English Service.

425. Following the said public notices, three stakeholder meetings were held on 22nd, 28th and 29th Saturday 2023. Questionnaires were also used to collect feedback on the proposed project. Some of the feedback was that the 18 storey building is not suitable on Rhapta Road, which should only have three storey buildings, and that the project may cause negative impacts of dust, noise, traffic and vibration. NEMA issued to the 16th Respondent an EIA license dated 9th November 2023, on various conditions.

426. With regards to Title No. Nairobi Block 4/85 (formerly L.R 1870/v1/193), NEMA approved the Terms of Reference for the proposed residential apartments on the property on 27th September 2023, as shared by the 18th Respondent. Preceded by public notices inviting stakeholders, the 18th Respondent held three stakeholder meetings on 11th October 2023, 26th October 2023 and 11th November 2023.

427. The issues raised by the members of the public were that the developer should consider repairing the road after construction on the areas damaged by the construction trucks; mitigation of the issue of water shortage; that the 18 storey apartment will block light to the neighborhood properties; there will be increased traffic and the zoning applicable in the area allowing the height of the proposed project.

428. The Chair of the Rhapta Road Residents also submitted a memorandum of objection to the proposed project, pegged on the current laws and regulations, strain on the existing infrastructure like roads, sewer, water supply, storm-water drains, power supply, security, and social and environmental impacts of the project.

429. In response, the developer indicated that it would apply for water connection in the water mains. A representative from Nairobi Water also committed to work with the Athi Water and the developer to improve the water infrastructure and connect with the water mains along Waiyaki Express Way.

430. Furthermore, it was indicated that a borehole would be sunk; that the storm water would be collected from upper ground floor and channeled to the storm water drains along the Lantana Road and that zoning was a mandate of the County Government.

431. He also shared with the public a traffic impact assessment report which had been done which revealed that with or without the project, the two critical junctions in the area would operate at level A, the best level of service.

432. Petronilla from the Westlands Association asserted that the Sessional Paper gazetted in February 2022, which was currently undergoing public participation, is the one currently guiding the City County in approving the developments in the area.

433. NEMA published notices in the Kenya Gazette and two newspapers of national circulation inviting the public to give comments or objections to the proposed project. NEMA issued an EIA license on 8th March 2024 with various general conditions, construction conditions, operational conditions, notification commissions and decommissioning conditions.

434. In respect of Nairobi/Block 4/174(formerly L.R No 1870/V1/38), public participation meeting was held on 26th August 2023. Questionnaires were also utilized to collect views from the public. Residents raised the following issues: parking; loss of vegetation; privacy issues due to highrise compared to current housing design; sewer line is very small to accommodate the increased population; small road network would not be able to accommodate increased density; noise and air pollution and insecurity.

435. The response to these issues was that while the area is served by the Nairobi Water and Sewerage Company, the developer would have more underground water storage tanks and would impress water conservation methods such as insulating tanks, to save on both energy and water loss, and that rain water harvesting tanks will be used to increase water stock and to curb stormwater from flowing all over the place.

436. It was stated that there will be a stand-by generator in case of power outage; that there will be a traffic management plan onsite and that 3 meter allowance will be left between the gate and boundary wall to allow clients to get in and out with ease.

437. An EIA license was issued to the 20th Respondent on 9th November 2023, subject to several general conditions, construction conditions, operational conditions, notification conditions and decommissioning conditions.

438. As to the 21st Respondent's Property, Title No Nairobi Block 3/111(formerly L.R No 1870/IV/77). The EIA Report identified several adverse environmental impacts including generation of solid and liquid wastes; air pollution, gaseous, dusts and particulates; increased pressure on utilities/services; increase in traffic flows; noise generation and loss of flora and fauna habitats.

439. The proposed mitigation measures include, among others, implementing waste conservation techniques; availing suitable facilities for collection, segregation and safe disposal of wastes, employing waste management plan; using equipment with noise suppressing technologies; enclosing the structures under construction with dust proof nets and clearing vegetation only in construction areas and demarcating area where no clearing will happen.

440. The study report included a chapter on public participation. It was indicated that this was conducted through key informant interviews, public barazas and file surveys, photography and observation. It stated that mixed reviews on the project had been made available by the public, with positive and negative impacts of the project being identified. An EIA license was thereafter issued on 18th June 2023.

441. The purpose of an Environmental Impact Assessment is to identify, assess, and propose measures to minimize, prevent, or compensate for the adverse environmental effects of a project or activity.

Mitigation is a critical component of the EIA process, ensuring that projects are developed in a way that balances economic, social, and environmental considerations.

442. Specifically, the purpose includes: identifying potential mpacts; highlighting the possible negative effects of a project on the environment, such as pollution, habitat destruction, or resource depletion. In summary, the mitigation aspects of an EIA study ensure that potential environmental risks are proactively managed, promoting sustainable project development and protecting natural ecosystems.

443. The 4th Respondent's evidence on the issue of the adequacy of the public participation that was undertaken before the EIA Licenses were issued to the 6th – 21st Respondents was neither challenged nor impeached. Indeed, all the concerns that were raised by the Petitioners in this Petition, and during the public participation process on the adverse effects of the impugned developments were addressed by the Respondents, and the EIA experts.

444. The Petitioners and the 4th Respondents should be more concerned about the implementation of the mitigation measures proposed in the EIA Study Reports. Monitoring of environmental impact assessments is a crucial phase in the EIA process that ensures the implementation of mitigation measures, evaluates the actual environmental impacts, and ensures compliance with regulatory requirements. This phase occurs after the project has been approved and often continues throughout the project lifecycle.

445. The key objectives and aspects of EIA monitoring include: ensuring that the project complies with the conditions of approval and adheres to the environmental management plan (EMP) outlined during the EIA process and assesses whether the proposed mitigation measures are effective in minimizing or preventing the identified environmental impacts.

446. EIA monitoring also identifies unforeseen environmental impacts that might arise during project implementation; provide data and insights to adjust mitigation strategies or operational practices in response to monitoring results, and maintains transparency and accountability by keeping stakeholders informed about the project's environmental performance.

447. On the basis of the documentary evidence adduced by the Respondents, this court is satisfied that the EIA licenses were procedurally and lawfully issued to the 2nd to 6th Respondents. Further, the EIA Study reports adduced addressed all the social, economical and environmental concerns that were raised by the Petitioners.

448. The Petitioners have thereby not established that the issuance of the EIA licenses was done unlawfully, or was in breach of their right to a clean and healthy environment. The said licenses therefore remain valid provided that the Respondents comply with the conditions provided therein.

Appropriate reliefs

449. It is trite that an appropriate relief should be an effective remedy for purposes of enforcing *the constitution*, human rights and the rule of law. In Fose vs Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851 Ackermann, J, writing for the court, stated that:

> "(19) Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the

courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

450. And in Hoffmann vs South African Airways (CCT17/00) [2000] ZACC 17; Ngcobo, J put the position thus:

> "(45)The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source".(emphasis)

451. As was held by the Supreme Court in the case of Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR), Article 23(3) of *the Constitution* empowers this court to fashion appropriate reliefs, so as to redress the violation of a fundamental right.

452. This court has held that the suit properties are within Zone 4B, otherwise known as "Muthangari" as per the 2021 unapproved Nairobi County Development Control Policy. The court has further held that until the County Assembly of Nairobi amends the Policy to state otherwise, the allowable height of all developments within zone 4B is 16 levels, with a maximum ground coverage of 75%.

453. This court has been informed that some of the Respondents had commenced developments on the suit properties based on the approvals that were granted to them by the 2nd and 4th Respondents This court is cognizant of the costs that might have been incurred by the Respondents who had commenced the said constructions and the effect of the demolitions of the same.

454. Considering that the court has found that the developments of the suit properties should not exceed 16 floors, it is the considered view of this court that the said developments should proceed under the conditions stipulated in the approvals granted by the 2nd and 4th Respondents, with the exception that the developments do not exceed the sky line of 16 floors.

455. For these reasons, the Petition dated 12th August, 2024 partially succeeds as follows:

a. A declaration be and is hereby issued that the approvals for development permissions granted by the 1st and 2nd Respondents with respect to the properties registered in the names of the 6th to 20th Respondents, in so far as the number floors is concerned, were granted in violation of the zoning provisions set by the 2nd Respondent.

b. A declaration is hereby issued that the development approvals issued to the 6th to 20th Respondents by the 1st and 2nd Respondents in respect to the suit properties enumerated above are hereby varied limiting the number of floors to 16, subject to the County Assembly of Nairobi's decision while approving the 2021 Nairobi City Development Control Policy.

c. A declaration is hereby granted directing the 1st, 2nd, 3rd and 4th Respondents, their agents, and or officers, to henceforth comply with Nairobi City County Development Control Policy, 2021 when granting development permissions to any developer in the Rhapta Road area

within the Nairobi City County, pending the approval of the said policy by the County Assembly of Nairobi.

d. Considering that the Petition is in the nature of public interest litigation, I decline to grant damages.

e. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF JANUARY, 2025.

O. A. Angote

Judge

In the presence of;

Mr. Makori for 7th, 13th, 16th, 18th and 20th Respondents

Mr. Marete for 14th Respondent

Mr. Allan Kamau for 5th Respondent

Ms Odhiambo for 2nd Respondent

Mr. Mwangi and Ms Njagi for Petitioner

Mr. Luaka Luther for 11th and 12th Respondents

Ms Noor for 10th Respondent

Mr. Lusi for 9th Respondent

Ms Makena for 21st Respondent

Court Assistant - Tracy