



**Kirimi & another v Kenafri Industries Ltd & 4 others (Petition 5 of 2017) [2022] KEELC 2568 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2568 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION 5 OF 2017**

**JO MBOYA, J  
JUNE 27, 2022**

**BETWEEN**

**KENNETH KIRIMI ..... 1<sup>ST</sup> PETITIONER**

**KIPTOO JOHN ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENAFRIC INDUSTRIES LTD ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3<sup>RD</sup>  
RESPONDENT**

**KENAFRIC PROPERTIES LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**KENAFRIC MANUFACTURING CO LTD ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction and Background**

1. Vide a Petition dated 16<sup>th</sup> March 2017 and amended on 14<sup>th</sup> January 2022, supported by the Affidavit of the 1<sup>st</sup> Petitioner, the Petitioners herein approached the court seeking for Judgement to be entered against the Respondents on the following prayers:
  - a. A Declaration that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents contravened the Rights of the Residents and violated Articles 42 and (sic) 249 of *the Constitution*, 2010 and is therefore null and void.
  - b. An Order restraining the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to stop or discontinue any act or omission that is harmful to the Environment.
  - c. An Order for the Court to visit the Site and Assess the Status of the Developments.



- d. An order compelling the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to stop any work in the Factory until this matter is heard and determined.
  - e. An order compelling the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to Demolish any Structures that are on the Sewer Line and remove the Dumped Soil on the Sewer line.
  - f. An Order Compelling the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to remove the illegal Gate Blocking the Public access road to Ruaka River.
  - g. Costs of this Petition.
  - h. An Order Compelling the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to bring down the Perimeter wall on the Riverbank.
  - i. Or such other Orders as this Honourable Court shall deem just.
2. The subject Petition is premised on the grounds contained in the body thereof and same is supported by two sets of affidavits, namely, the supporting affidavit sworn by Kenneth Kirimi on the 16<sup>th</sup> March 2017 and the Supplementary affidavit sworn by same on the 2<sup>nd</sup> May 2017.
  3. Upon being served with the Petition herein, as well as the amended Petition, the Respondents herein duly entered appearance on various dates and thereafter filed their Responses.
  4. For clarity, the 1<sup>st</sup> Respondent filed a Notice of Appointment on the 31<sup>st</sup> March 2017 and thereafter filed a Replying affidavit on the 12<sup>th</sup> April 2017, followed by a Further affidavit on the 5<sup>th</sup> July 2017 as well as the one dated the 15<sup>th</sup> May 2018.
  5. In respect of the 2<sup>nd</sup> Respondent, same filed a Notice of Appointment on the 24<sup>th</sup> March 2017 and Grounds of opposition on even date. However, the Grounds of opposition filed by and/or on behalf of the 2<sup>nd</sup> Respondent herein were in respect of the Application dated the 16<sup>th</sup> March 2017 and not the Petition.
  6. On her part, the 3<sup>rd</sup> Respondent filed a Notice of Appointment of advocate on the 9<sup>th</sup> May 2017 and thereafter filed two sets of Replying affidavits, the first one which was sworn on the 13<sup>th</sup> June 2017 by Njoki Mukiri while the later affidavit was sworn on the 8<sup>th</sup> August 2018, by Christopher Muteti.
  7. Following the joinder of the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein, ( same were initially joined as Interested Parties) same proceeded to and filed a Replying affidavit sworn by one Lorna Solopian sworn on the 9<sup>th</sup> September 2019.
  8. The foregoing Documents and/or Pleadings, reflects the totality of the affidavits which were filed by and/or on behalf of the Parties herein.

**Deposition by the parties”:**

**Petitioners” case:**

9. Vide the Supporting Affidavit sworn on the 16<sup>th</sup> March 2017 and the Supplementary affidavit sworn on the 2<sup>nd</sup> May 2018, the 1<sup>st</sup> Petitioner herein (hereinafter referred to as the deponent) has averred that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have blocked and/or otherwise restricted access to Ruaka River by erecting a perimeter wall fence, which encroaches onto the Riparian reserve, contrary to and in contravention of the provisions of Environment Management and Coordination Act, 1999.



10. Further, the deponent has also averred that other than the erection of the offensive perimeter wall, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have also erected a steel/ Metallic gate, which blocks and/or restricts the public road of access to river Ruaka and by so doing the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have also placed guards, to manes Gate so as to wade off usage of the road of access and to access the river.
11. On the other hand, it has also been deposed that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent have also fenced the Public sewer line, which is now enclosed within their land, such that the sewer line cannot now be accessed and used by the general public.
12. Other than the foregoing, the deponent has also averred that the said Respondents have similarly dumped a heap of soil on the sewer line and as a result of the actions by the said Respondents, there is a threat to Clean and Healthy Environment.
13. Besides, it has also been averred that the said Respondents have also been dumping and burning factory waste in the neighborhood of river Ruaka and as a result of the said action, the river is now exposed to contamination and pollution.
14. Based on the foregoing, the deponent has averred that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have therefore blocked the river bank and encroached onto the riparian land, which actions are contended to be not only illegal but also prejudicial to the general members of the public.
15. Further, the deponent has averred that as a result of the offensive actions and/or activities by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, the Petitioners right to Clean and Healthy Environment in line with Articles 42, 69 and 70 of *the Constitution* of Kenya 2010, have been breached, violated and/or infringed upon.
16. At any rate, the deponent has further averred that the manner in which the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have fenced off the river bank and the main sewer line is also contrary to and in violation of the County by-laws and the Environmental Regulations, under the EMCA ACT, 1999 and the *Water Act*, 2016.
17. As concerns the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the deponent has averred that though same are aware and/or knowledgeable of the offensive activities by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent, same have kept a blind eye and hence the offensive activities, including the erection of the perimeter wall which encroaches onto the riparian reserve as well as the steel gate, have remained in situ, without any corrective action being taken.
18. In view of the foregoing, the deponent has therefore contended that the impugned actions and/or activities, which are complained against, constitutes a threat to the life and livelihood of not only the Petitioners, but also the general membership and the neighborhood who depend on the River for clean water and the eco-system thereat.
19. In a nutshell, the deponent has therefore contended that the orders sought ought to issue and/or be issued against the Respondents jointly and or severally.

**Response by the 1<sup>st</sup> respondent:**

20. Vide Replying Affidavit sworn on the 12<sup>th</sup> April 2017, Further affidavit sworn on the 5<sup>th</sup> July 2017 and 15<sup>th</sup> May 2018, respectively, one Mikul N. Shah, has averred that same is a Director of the 1<sup>st</sup> Respondent and that by virtue of his portfolio as such, same is conversant with and/or knowledgeable of the facts of this matter.
21. Further, the deponent has averred that on or about the 16<sup>th</sup> February, 2017 the Petitioners herein wrote to and in favor of the 1<sup>st</sup> Respondent, wherein same contended that the 1<sup>st</sup> Respondent had built and/or erected an offensive Perimeter wall and encroached onto the Riparian reserve, along Ruaka River.



22. Besides, the deponent has averred that upon receipt of the letter under reference, the 1<sup>st</sup> Respondent was constrained to and indeed responded thereto vide letter dated the 22<sup>nd</sup> February 2017.
23. Other than the foregoing, the deponent has averred that after responding to the Petitioners letter dated the 16<sup>th</sup> February 2017, same was served with the subject Petition and in respect of which the Petitioners alleged that the 1<sup>st</sup> Respondents had fenced the public sewer line within her premises and had similarly dumped a heap of soil on the sewer line.
24. Besides, the deponent has further averred that contrary to the allegations by the Petitioners, the 1<sup>st</sup> Respondent has neither constructed a structure on the sewer line nor dumped any heap of soil on the said sewer line or at all.
25. In any event, the deponent has averred that all the waste and effluent from the 1<sup>st</sup> Respondent are disposed of and/or discharged in accordance with the law and that the manner of discharge thereof has been the subject of inspection by the relevant authorities, who have certified and confirmed that the disposal that is being carried out is in accordance with the law.
26. Further the deponent has averred that even though the 1<sup>st</sup> Respondent is in the manufacturing business, the 1<sup>st</sup> Respondent has acted responsibly towards all their stakeholders and more particularly, towards the community living in the neighborhood of the 1<sup>st</sup> Respondent's manufacturing industry.
27. It has further been averred that the 1<sup>st</sup> Respondent does not conduct activities that are harmful or may be harmful to the Environment and by extension the residents in the neighborhood of the 1<sup>st</sup> Respondent's industry.
28. At any rate, the deponent has averred that the 1<sup>st</sup> Respondent, which is a going concern will suffer irreparably, if the Honourable court was to proceed and decree closure of the 1<sup>st</sup> Respondent's industry, based on the claim of violation and/or infringement of the Petitioners' right to Clean and Healthy Environment.
29. Further, the deponent has averred that the 1<sup>st</sup> Respondents employees, totaling 963, will be subjected to unemployment and hence same would be exposed to suffer, alongside so many other people who depend directly and indirectly on the 1<sup>st</sup> Respondent's industry and operations.
30. Other than the foregoing, the deponent has also averred that there is no action and/or activity that has been undertaken by the 1<sup>st</sup> Respondent, which has blocked and/or barred the Petitioners and by extension the community from accessing and benefiting from the river bank and/or the riparian land.
31. Owing to the foregoing, the deponent has also averred that the 1<sup>st</sup> Respondent herein carries out her activities on a separate and distinct L.R No. 209/13646, which does not adjoin and/or avert river Ruaka.
32. Further, the deponent has also averred that the parcel of land on which the 1<sup>st</sup> Respondent industry is located is well delineated and defined vide a Deed plan, which is clear and confirms that the parcel of land on which the 1<sup>st</sup> Respondent's industry is located does not adjoin river Ruaka.
33. At any rate, the deponent has averred that even the affidavit by one Njoki Mukiri on behalf of the 3<sup>rd</sup> Respondent alludes to a different company, namely, Kenafric Shoe Industry, to be the one that has encroached onto the Riparian reserve and not the 1<sup>st</sup> Respondent herein.
34. Based on the foregoing, the deponent has therefore averred that the 1<sup>st</sup> Respondent is a stranger to the allegations that same has fenced off the public sewer line, erected a steel gate which blocks access to river ruaka and also erected a wall fence, which has encroached onto the Riparian reserve.



35. In short, the deponent has implored the court to find and hold that the allegations by the Petitioners' are therefore misconceived and mistaken.

**Response by the 2<sup>nd</sup> respondent:**

36. It was pointed out elsewhere herein before that the 2<sup>nd</sup> Respondent herein only filed Grounds of opposition which were directed against the Notice of Motion Application dated 16<sup>th</sup> March 2017. However, no response was filed as pertains to the subject Petition.

**Response by the 3<sup>rd</sup> respondent:**

37. On her behalf, the 3<sup>rd</sup> Respondent responded to the Petition vide two Replying affidavits, the first of which was sworn by Njoki Mukiri, sworn on the 13<sup>th</sup> June 2017, whereby the deponent has averred that the right to Clean and Healthy Environment is primary to all Men and that the said rights are inherent as can be discerned from inter-alia, the provisions of Articles 42 of *the Constitution* 2010.
38. Further, the deponent has averred that upon the 3<sup>rd</sup> Respondent being served with the subject petition and the incidental papers, same was authorized and/or instructed to visit the scene of the alleged blockage of the Feeder road, dumping on the sewer line and encroachment onto the riparian reserve.
39. Besides, the deponent has averred that pursuant to the instructions to visit the site in question, same was accompanied by another officer, namely, Regina K. Ondiko, with whom the deponent proceeded to the premises of a company known as Kenafric Shoe Industry.
40. It has been averred by the deponent that upon arrival at the premises of the said Kenafric Shoe Industry, in the company of her colleague, namely, Regina K Ondiko, same were received by one Mr. Jared Otieno, who introduced himself as the head of security, health and environment.
41. Nevertheless, the deponent has proceeded to and averred that the said Jared Otieno thereafter engaged in some consultation with someone within the said company and after a short consultation, the said Jared Otieno informed her and her colleagues that the matter was already in court and hence M/s Kenafric Shoe Industry was not keen to engage with the deponent and her colleague.
42. The deponent has further averred that thereafter the said Jared Otieno, advised herself and her colleague to move out of the premises and in particular same were escorted out of the premises.
43. It has further been averred that as a result of the actions of the officers of Kenafric Shoe Industry, the deponent and one Regina K. Ondiko were denied the opportunity to access the site, which was/is the subject of the complaint by the Petitioners.
44. Based on the foregoing, the deponent has further averred that the actions and/or omissions by Kenafric Shoe Industries and/or their officers, denied same and their colleague the right to perform the Statutory duty and/or mandate.
45. Nevertheless, the deponent has also averred that contrary to the averment by the Petitioners, it is not true that the 3<sup>rd</sup> Respondent has abdicated from the execution and/or performance of her Statutory mandate.
46. Be that as it may, the deponent has averred that upon checking through the 3<sup>rd</sup> Respondent's records, same discovered that no Environment Impact Assessment License had been issued by the 3<sup>rd</sup> Respondent in respect of the alleged perimeter wall, which has encroached onto the riparian land as well as for the erection of the offensive gate that has blocked access to river ruaka or at all.



47. The other Replying affidavit has been sworn by one Christopher Muteti, on the 8<sup>th</sup> August 2018, and same has averred that upon receipt of instructions from the 3<sup>rd</sup> Respondent, same proceeded to and carried out inspection on Kenafric Manufacturing Company Ltd and not Kenafric Confectionary since the former is the one that borders River Rui-Rwaka.
48. On the other hand, the deponent has further averred that on the 2<sup>nd</sup> June 2018 himself and one Samuel Ng'ang'a went back to Kenafric Industries to establish the location of the company installations in regard to River Rui-Rwaka and accessibility of the Rui-Rwaka River from the companies premises.
49. It has be averred that upon the visitation, ( details in terms of the preceding paragraph), same established that the company is located within a mixed development area, characterized by industrial establishments and high-density residential apartments. Besides, it has been averred that there exists a Road bordering the company premises and a boundary wall to the east of Kenafric Manufacturing that leads to Rui-Rwaka River.
50. Other than the foregoing, the Deponent has also averred that at the time of the inspection, same found and confirmed that access to Rui-Rwaka River was hindered by a Metallic gate built across the Access road.
51. Besides, it has also been averred that access through the road, to the river was being controlled by agents, employees and/or guards of Kenafric Manufacturing, who kept the key of the gate.
52. Other than the fact that the access road to the River was blocked by the metallic gate, the deponent also averred that the road was similarly characterized by over grown bushes, which made it impossible to access same or even passing through same.
53. Further, the deponent has also averred that during the inspection, it also transpired that boundary wall erected by Kenafric Manufacturing has encroached on the riparian reserve of the Rui-Rwaka River at a distance of less than six (6) meters from the river and this was observed from Northern boundaries across the river.
54. Other than the foregoing, the deponent has =further stated that the masonry boundary wall is indeed built on the Riparian area of Rui-Rwaka river at a distance of less than 6 meters and thus same has encroach onto the riparian reserve, contrary to and in contravention of the provisions of Section 42 of the Environment Management & Coordination Act, 1999 as well as the provisions of Water Quality Regulations, 2006.
55. Besides, the deponent has also averred that same confirmed and/or authenticated that no Environmental Impact Assessment had been issued by the 3<sup>rd</sup> Respondent to authorized the erection of the offensive boundary/perimeter wall, which has encroached onto the riparian reserve.
56. At any rate, the deponent has also averred that the offensive boundary wall poses a threat to the integrity and potential significant impact on the quantity and quality of the river and same ought to be removed and the Riparian reserve be conserve.
57. Other than the foregoing, the deponent has averred that his team was unable to establish whether the Road of access which had been blocked vide the metallic gate was a public Road or otherwise. In this regard, the deponent has averred that further investigations would thus be necessary to establish and/or authenticate the status of the Road of access in question.
58. As concerns Discharge of sewage and other effluents, the deponent avers that the company is connected to sewer line and that there was also a Pre-treatment Plant within the company and in this regard, the deponent was not able to discern any discharge by the company to the River.



#### **4<sup>th</sup> and 5<sup>th</sup> respondents' case:**

59. On behalf of the 4<sup>th</sup> and 5<sup>th</sup> Respondents, a Replying affidavit was sworn by one Lorna Solopian and in respect of which, same has averred that the 4<sup>th</sup> Respondent herein erected the perimeter wall in question for purposes of security and aesthetic value and that in any event, the said wall was erected and/or constructed long before the enactment of the Environmental management and Coordination Act, 1999.
60. Further, the deponent has averred that given that the perimeter was constructed and/or erected prior to the enactment of the EMCA, 1999, it was not possible and/or feasible for the 4<sup>th</sup> Respondent to procure and obtain any approval from a non-existent body or at all.
61. In any event, the deponent has averred that the 4<sup>th</sup> Respondent has maintained the perimeter wall over the years and that on or about the year 2016, the perimeter wall in question required repairs and in this regard, same sought for and obtained approval and consent for such repairs from the 2<sup>nd</sup> Respondent herein, namely, Nairobi City County.
62. Further the deponent has averred that the repairs which were to be carried out and/or undertaken in respect of the perimeter wall, would not have required any approval and/or license from the 3<sup>rd</sup> Respondent herein.
63. On the other hand, it has also been averred that over the years, the 4<sup>th</sup> respondent has undertaken compliance measures on the premises, as and when called upon and that such compliance measures have always been authorized and/or sanctioned by the 2<sup>nd</sup> Respondent herein.
64. Further, the deponent has averred that other than the fact that the boundary wall complained of, was built and/or erected before the enactment of the EMCA Act, the 4<sup>th</sup> Respondent herein has not carried out any further developments on the said wall and neither has the 4<sup>th</sup> respondent carried out any reconstruction thereon to require any EIA License.
65. It has also been averred that the 4<sup>th</sup> Respondent has also never carried out any excavations and/or drilling or tunneling, in such a manner so as to disturb the River.
66. Other than the foregoing, the deponent on behalf of the 4<sup>th</sup> Respondent has also averred that following the lodgment of the subject Petition, same engaged and/or retained qualified surveyors with a view to undertaking survey works and to delineate the boundaries of the 4<sup>th</sup> Respondent and in particular the boundary wall vis a vis the Riparian reserve.
67. In this regard, the deponent has averred that the nominated surveyor proceeded to and indeed conducted the requisite survey and thereafter same prepared Survey Reports, showing the position of the Boundary wall versus the Riparian reserve.
68. On the other hand, the deponent has also averred that the 1<sup>st</sup> Respondent herein does not occupy and/or own the premises that border Rui-Rwaka River or at all.
69. Be that as it may, the deponent has proceeded to and averred that having been shown the survey map, denoting the 4<sup>th</sup> Respondent property, it is apparent that there is no public sewer line which lies within the 4<sup>th</sup> Respondents property and in any event, the 4<sup>th</sup> Respondent has not granted any right of access to any one to access the sewer line through her property.



70. On the other hand, the deponent has proceeded to and averred, contrary to the averment in the preceding paragraph that there exists a sewer line passing through her property. For clarity, it is imperative to reproduce the averment herein verbatim;

Paragraph 19;

That there exists a sewer line passing through her Property and the interested party can allow access to the Nairobi city water and sewerage company limited such access as reasonably expected of an holder of right of Easement. However, an Easement holder cannot have exclusive access to private property.

71. Finally, the deponent has averred that the issues raised vide the Petition herein ought to have been ventilated and/or addressed before the National Environment Tribunal and not otherwise. In this regard, the deponent has averred that the Petitioners did not exhaust the alternative dispute resolution mechanism, prior to and or before accessing the jurisdiction of the court.
72. Based on the foregoing, the deponent on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Respondent has therefore contended that this Honourable court is divested of jurisdiction to entertain and/or adjudicate upon the subject matter in line with the Provisions of the EMCA Act, 1999 and the Physical Planning and Land Use Act, 2019.

### **Submissions by the parties:**

#### **(a): Submissions by the petitioners:**

73. The subject Petition came up for mention on the 17<sup>th</sup> January 2022 for purposes of discerning whether the Parties had filed the requisite pleadings, responses and documents, necessary for the hearing and determination of the Petition.
74. For clarity, when the matter came up it transpired that the 4<sup>th</sup> and 5<sup>th</sup> Respondent had not filed their Responses to the amended Petition and in this regard, liberty was granted to and in favor of the 4<sup>th</sup> and 5<sup>th</sup> Respondents to file such Responses, albeit within 14 days.
75. Subsequently, the Petition herein came upon on the 24<sup>th</sup> February 2022 whereupon directions were given in respect of the manner of the hearing and disposal of same. For clarity, it was directed that the Amended Petition be canvassed and disposed of by way of affidavit evidence and written submissions.
76. On the other hand, the Parties herein were thereafter directed to file and exchange written submissions in respect of the Amended Petition.
77. Finally, when the matter came up for mention on the 26<sup>th</sup> May 2022, the Parties confirmed that same had filed and exchanged their written submissions and premised on the foregoing assurance, the court proceeded to and set down the matter for Judgment.
78. Be that as it may, it is important to point out that the submissions that were filed by and/or on behalf of the Parties herein are on record and same have been duly considered and taken into account.
79. Briefly, the Petitioners' submitted that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have constructed and/or erected a perimeter wall, which has encroached onto the Riparian reserve of Rui-Rwaka River and to the extent that the said perimeter wall has encroached onto the riparian reserve same constitutes a threat to the Petitioners' right to Clean and Healthy Environment.
80. Secondly, the Petitioners' have also submitted that other than the perimeter wall which has encroached onto the riparian reserve, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' have also erected and maintained a metallic/



steel gate across the Road of access leading to the Rui-Rwaka river and that the gate is being manned by guards and/or employees of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, in a manner so as to bar and/ or prohibit public access to the river.

81. Thirdly, the Petitioners' have submitted that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent have also fenced the public sewer lines within their property and as a result of same, the sewer line is thus not capable of being accessed and/or used by the public, including the Petitioners and the residents of the neighborhood.
82. Owing to the foregoing, the Petitioners' have submitted that the offensive actions and/or activities, which are complained against, have breached and/or violated their right to clean and healthy environment as underscored vide the Provisions of Articles 42 of [the Constitution](#), 2010.
83. On the other hand, the Petitioners' have further submitted that the offensive activities by and/or at the instance of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have also denied and/or deprived same, as well as the general members of the public, living in the neighborhood from accessing, using and benefiting from the clean water at the Rui-Rwaka River, which is a shared and/or common resource and thus ought to be used Equitable and Sustainably by all.
84. At any rate, the Petitioners' have further submitted that the offensive actions and/or activities by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents also constitute a threat to the anthropocentric value of the Marine Eco-system obtaining along and/or within the precincts of river Rui-Rwaka.
85. Based on the foregoing, the Petitioners' have therefore implored the court to find and hold that the impugned activities by and/or on behalf of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are indeed illegal, unlawful and otherwise a breach to the Petitioners' Constitutional rights under Articles 42 of [the Constitution](#) 2010.
86. On the other hand, the Petitioners' have also submitted that despite being mandated under the law to protect and preserve the right to Clean and Healthy Environment, by ensuring compliance with the various provisions of the law, the 2<sup>nd</sup> Respondent has abandoned and/or abdicated her statutory mandate and thus allowed the offensive activities by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to flourish.
87. In support of the foregoing submissions, the Petitioners have relied on the decision in the case of *Twiga Construction Company Ltd versus Director of Physical Planning & 3 Others and Mutarataru Enterprises Ltd versus Kenya Airports Authority* (2017)eKLR.

**(b):Submissions by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents':**

88. On their part, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have submitted that the premises in question neither belong to nor are same occupied by the 1<sup>st</sup> Respondent. In this regard, it is the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' submissions that the 1<sup>st</sup> Respondent has therefore being mis-joined into the subject proceedings.
89. Secondly, it has also been submitted that the impugned Perimeter wall has not encroached onto the Riparian reserve and that in particular, the impugned perimeter wall has left out the 6 meters, which comprises of and/or constitutes the riparian reserve.
90. Thirdly, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' have also submitted that the impugned wall was indeed constructed long before the enactment of the EMCA Act, 1999 and the establishment of NEMA and therefore it was not necessary to seek for and/or procure any approval, including Environmental Impact Assessment License from the 3<sup>rd</sup> Respondent, either in the manner contended, or at all.



91. Fourthly, the said Respondents' have submitted that over the years, same have carried out and/or undertaken various repairs on the perimeter wall and that during the various occasions, same have procured and obtained the requisite approval from the 2<sup>nd</sup> Respondent, namely, the Nairobi city county.
92. Fifthly, the said Respondents' have further submitted that during the period after the construction of the perimeter wall, same have not carried out and/or undertaken any other reconstruction thereon which would have required the approval and/or license by the 3<sup>rd</sup> Respondent, namely, National Environment Management Authority.
93. Besides, the said Respondents' have submitted that the Metallic/ Steel gate that is complained of, has been erected on a private access road from within the premises of the 4<sup>th</sup> and 5<sup>th</sup> Respondent and not otherwise.
94. Finally, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' have submitted that the issues raised by the Petitioners herein, inter-alia, the erection of the perimeter wall on (sic) riparian reserve, erection of the metallic gate across the Public access road and thus barring access to Rui-Rwaka River, the fencing of the public sewer line within the premises of the 4<sup>th</sup> and 5<sup>th</sup> Respondents' as well as the threat to Clean and Healthy Environment, ought to have been placed before the National Environmental Tribunal, as well as the County Physical Planning liaison Committee, in accordance with the EMCA 1999 and the Physical Planning and Land Use Act, 2019, respectively.
95. In the premises, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have therefore contended that this court is divested and hence bereft of Jurisdiction to entertain and/or adjudicate upon the subject Petition.
96. Premised on the foregoing, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have therefore implored the Honourable court to strike out and/or otherwise dismiss the Petition.

**(c) :Submissions by the 3<sup>rd</sup> respondent**

97. On her part, the 3<sup>rd</sup> Respondent has submitted that the right to Clean and Healthy Environment is primary and paramount to all mankind and that same has been underpinned by the provisions of Article 42 of *the Constitution* 2010.
98. In this regard, the 3<sup>rd</sup> Respondent has therefore contended that the Petitioners' as well as the members of the community, residents within the neighborhood of the premises in question are therefore entitled to partake of and enjoy a clean and healthy environment.
99. Secondly, the 3<sup>rd</sup> Respondent has submitted that after the filing and service of the subject Petition, same commissioned her Inspectors to visit the locus in quo and to authenticate the veracity of the Complaints and allegations, alluded to at the foot of the Petition.
100. It has been further submitted that upon the inspection of the locus in quo, by her Inspectors, it was established and/or proven that indeed the offensive perimeter wall has encroached onto the Riparian reserve contrary to and in violation of the provisions of Section 42 of the EMCA Act, 1999, as read together with Regulation 6 of the Water Quality Regulations, 2006.
101. On the other hand, the 3<sup>rd</sup> Respondent has submitted that other than the fact that the impugned perimeter fence/wall has eaten into and encroached onto the riparian reserve, the said wall, as well as the Metallic gate blocking the access road to the Rui-Rwaka River, were also constructed without the requisite approval, authorization and/or sanction of the 3<sup>rd</sup> Respondent.



102. In the premises, the 3<sup>rd</sup> Respondent has contended that the offensive metallic gate and wall were therefore illegally constructed and/or erected and hence same pose a threat to the Petitioner's Right to Clean and Healthy Environment.
103. Other than the foregoing, the 3<sup>rd</sup> Respondent has further submitted that the offensive wall and the metallic gate were also constructed without undertaking Environmental Impact Assessment Study, which would have involved public participation and hence no Environmental Impact License was ever procured or at all.
104. Finally, the 3<sup>rd</sup> Respondent has submitted that the impugned perimeter wall, the metallic gate that blocks access to Rui-Rwaka River and the offensive activities complained of pose a great threat not only to the Environment, but also to the community living and/or residing in the neighborhood of the premises in question.
105. Based on the foregoing, the 3<sup>rd</sup> Respondent has submitted that the offensive wall and the metallic gate, both of which constitute a threat to the right to clean and healthy Environment and which were erected without regard to the provisions of Sections 42 and 58 of the EMCA Act, 1999, ought to be removed and/or pulled down.
106. In support of her submissions, the 3<sup>rd</sup> Respondent has relied on the decision in the case of *National Environment Authority Another v Gerick Kenya Ltd* (2016)eKLR.

#### **Issues for determination:**

107. Having reviewed the amended Petition dated the 14<sup>th</sup> January 2022, the affidavits in support thereof and the Responses filed by the Respondents and having similarly considered the written submissions by the Parties, the following issues do arise and are thus germane for determination;
  1. Whether this Court is seized and/or possessed of the requisite Jurisdiction to entertain and adjudicate upon the issues raised vide the subject Petition.
  2. Whether the Petitioners have proved the claims espoused vide the Amended Petition.
  3. Whether the Reliefs sought at the foot of the Amended Petition ought to be granted.

#### **Analysis and determination**

##### **Issue number 1**

Whether this Court is seized and/or possessed of the requisite Jurisdiction to entertain and adjudicate upon the issues raised vide the subject Petition.

108. The 4<sup>th</sup> and 5<sup>th</sup> Respondents' herein, have raised an issue that the Honourable court herein is not seized and possessed of the requisite jurisdiction to entertain and adjudicate the subject Petition on the face of the provisions of Section 57 and 58 of the Physical planning Act, now repealed, Section 61 (3) and (4) of the *Physical Planning and Land Use Act*, 2019 as well as Section 129 of the *EMCA Act, 1999* (2015).
109. According to the 4<sup>th</sup> and 5<sup>th</sup> Respondents, the issue pertaining to the construction of the perimeter wall and the offensive metallic gate, which is said to have blocked the Public access road to Rui-Rwaka River, are issues that ought to have been dealt with in accordance of the provisions of the Physical Planning Act, now repealed, or the Physical Planning and Land Use Act, 2019.
110. Other than the foregoing, the 4<sup>th</sup> and 5<sup>th</sup> Respondents have also contended that the issue that the offensive perimeter wall and similarly, the erection of the metallic gate that blocks (sic) the road of



access to the river are issues that ought to have been placed before the National Environment Tribunal, pursuant to and in line with Section 129 of the *EMCA Act*, 1999.

111. To my mind, the provisions of the *Physical Planning Act*, now repealed and the provisions of Section 61 (3) and (4) of the *Physical Planning and Land Use Act*, 2019 only come into play where an approval has been given and/or denied by the relevant planning authority and thus the aggrieved Party is obligated to challenge the Decision of the Planning authority, in line with the established provisions of the Act.
112. However, in respect of the subject matter, there was no allegation that the 2<sup>nd</sup> Respondent herein issued to and/or granted unto the 4<sup>th</sup> and 5<sup>th</sup> Respondents any approval and/or authority to undertake the construction of the offensive wall and the erection of the metallic gate across the Road of access leading to Rui-Rwaka River.
113. At any rate, even the 4<sup>th</sup> and 5<sup>th</sup> Respondents, have not placed before the Court any Evidence of Permission, License and/or Authority that was issued unto same for purposes of the construction of the offensive perimeter wall and the Metallic gate across the Public Road of access, which would have provoked the invocation and reliance on the Provisions of the *Physical Planning Act*, now repealed or the provisions of Section 61 of the current *Physical Planning and Land Use Act*, 2019.
114. To my mind, in the absence of any Approval, License and/or Developmental permit by the concerned planning authority, read Nairobi City County, the Petitioners herein would not fall with the description of an aggrieved person, to warrant the invocation of the provisions of the Physical Planning Act now repealed.
115. Certainly, without any approval, license or developmental permit as envisaged under the Physical Planning Act, now repealed or the Physical Planning and Land Use Act, 2019, no recourse can be made to the Liaison committee or at all.
116. On the other hand, the 4<sup>th</sup> and 5<sup>th</sup> Respondents' have also contended that the Dispute herein ought to have been mounted before the National and Environment Tribunal, prior to and before the Petitioners herein could approach this Honourable Court by way of an appeal.
117. First and foremost, it is imperative to note and observe that National Environment Tribunal, which is established pursuant to the provisions of 125 of the EMCA Act, 1999, only handles appeals arising from the decisions of NEMA and same does not have original mandate and/or jurisdiction to deal with a matter to which no decision has hitherto been made by NEMA.
118. To be able to appreciate and understand the scope, extent and tenor of the Jurisdiction of National Environment Tribunal, it is imperative to reproduce the provisions of Section 129 of *EMCA Act*, which provides as hereunder;

‘129. Appeals to the Tribunal:

- (1) Any person who is aggrieved by—
  - (a) the grant of a licence or permit or a refusal to grant a license or permit, or the transfer of a license or permit, under this Act or its regulations;
  - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
  - (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.’

119. My reading of the foregoing provision and which is fortified by the sub-heading, denotes that National Environment tribunal only has appellate mandate over decisions of NEMA and not otherwise.
120. Consequently, in a situation, where it is conceded and admitted that NEMA did not make any decision and/or issue an Environmental Impact Assessment License, as was the case herein, then it is not possible to contend that the Petitioners herein ought to have lodged their complaint with the tribunal.
121. In my humble view, the contention by the 4<sup>th</sup> and 5<sup>th</sup> Respondents that the dispute at the foot of the Petition herein, which revolves around the erection of the perimeter wall which encroaches onto the riparian reserve and for which no EIA license was given ought to have been mounted before the tribunal, is premised on misapprehension and misconception of the Jurisdiction of the tribunal.
122. Be that as it may, I wish to point out that the scope and extent of the Jurisdiction of the Tribunal has hitherto attracted judicial pronouncement and in this regard, I adopt and endorse the decision of the Court in the case of *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* [2020] eKLR, where the court stated as hereunder;

“It will be seen from the provisions of EMCA, which I have set out above, that the jurisdiction of the Tribunal is to hear appeals from decisions of NEMA. NEMA is established by Section 7 of EMCA, and its mandate, as provided by Section 9 of EMCA, 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. Part of this mandate is to grant Environmental Impact Assessment (EIA) licences, for under Section 58 of EMCA, no person should proceed with a project before first obtaining an EIA licence. NEMA can of course grant or decline to issue an EIA licence. It may be that a person is aggrieved by this decision, and the reason that NET was created, was to provide an avenue for a person who wishes to challenge the decision of NEMA. This is done in the form of an appeal against the decision of NEMA. The Tribunal can confirm, set aside, or vary such decision.

If a person is aggrieved by a decision of the Tribunal, the statute provides that he can pursue a final appeal to the High Court, which provision must now be read to mean the Environment and Land Court. Under Section 129(1) of the *Environmental Management and Co-ordination Act*, the National Environment Tribunal (NET) is empowered to hear and determine appeals arising from persons aggrieved by decisions of National Environmental Management Authority (NEMA), such as the issuance of a license.”

123. Notwithstanding the foregoing, I am also alive to the provisions of Section 3(3) of *EMCA Act, 1999*, (2015), which underscores the extent and scope of the jurisdiction of this court as pertains to matters concerning violation, infringement or threat to the right to a clean and healthy environment.
124. For coherence, it is appropriate to reproduce the provisions of Section 3(3) of *EMCA Act, 1999* (2015), which provides as hereunder;

‘(3) 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.’

125. Notwithstanding the foregoing provisions, it is not lost on me that the scope and extent of jurisdiction to entertain issues pertaining to a right to clean and healthy environment as well as planning, has also been dealt with and/or addressed vide the provisions of Section 13(3) of the [Environment and Land Court Act](#), 2011.
126. For completeness, the provisions of Section 13(3) [Environment and Land Court Act](#), 2011 (supra) are reproduced as hereunder;
  - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of [the Constitution](#).
127. Based on the foregoing, it is now appropriate to state and underline that the issues raised at the foot of the amended Petition by and/or on behalf of the Petitioners herein squarely fall for determination before this Honourable court and not otherwise as contended by the counsel for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
128. Suffice it to state, that if any of the bodies enumerated and/or established under the provisions of the [Physical Planning Act](#), now repealed, [Physical Planning and Land Use Act](#), 2019 and the [EMCA Act](#), had made an initial decision in respect of the matter complained off, then the aggrieved party would have been constrained to exhaust the established administrative/statutory Dispute resolution mechanism established under the said Acts.
129. However, in respect of the subject matter, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents or better still the 4<sup>th</sup> and 5<sup>th</sup> Respondents, acted on their own and their actions have threatened the right to clean and healthy environment and in this regard, I am not prepared to forsake the Jurisdiction that squarely belongs to me.
130. Before coming to an end in respect to this issue, it is worthy and appropriate to take cognizance of the holding of the Supreme Court of Kenya vide decision in the case of [Samuel K Macharia versus Kenya](#)



Commercial Bank Ltd & Another (2012)eKLR, where the Supreme Court observed at paragraph 68 as hereunder;

(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

131. In a nutshell, it is my finding and holding that this Honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject matter.

## **Issue number 2**

### **Whether the Petitioners have proved the claims espoused vide the Amended Petition.**

132. The gravamen of the Petitioners complaint is four-fold; first and foremost, the Petitioners have complained that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent jointly and/or severally erected a perimeter wall along the river bank Rui-Rwaka river, in such a manner that the wall has encroached onto the riparian reserve, contrary to and in violation of the Provisions of Section 42 of the EMCA Act, 1999 as read together with the Water Quality Regulations, 2006.
133. Secondly, the Petitioners have also complained that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent have also erected a Metallic gate across a public access road, which is meant to access Rui-Rwaka River and that by doing so same have therefore restricted and blocked access to the said river.
134. Thirdly, the Petitioners have also complained that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent have also fenced the Public sewer line within their properties and thereby denied and/or deprived the public of access to and use of the said sewer line.
135. Fourthly, it was the Petitioners complaint that other than fencing the public sewer line with their premises, in line with the preceding paragraph, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, jointly and/or severally, have also deposited heaps/mounds of soil on the said sewer lines, which actions are likely to provoke Environmental degradation.
136. Having made the foregoing complaints, it was incumbent upon the Petitioners to tender and/or give evidence towards proving their foregoing Complaints.
137. Nevertheless, other than the Evidence that was tendered by the Petitioners vide the various affidavits as well as the photographic evidence attached thereto, the 3<sup>rd</sup> Respondent herein filed an affidavit, through one of their officers, namely, Christopher Muteti and which affidavit was detailed, elaborate



and instructive on the nature of activities that had been carried out and/or undertaken at the locus in quo.

138. Without rehashing the averments contained in the Replying affidavit by the said deponent, whose details were captured elsewhere herein before, it is worthy to recall and underscore that indeed the Complaints by the Petitioners were substantially proven and/or corroborated.
139. At any rate, it also imperative to note that as concerns the Complaint that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, either jointly and/or severally had fenced the public sewer line within their own premises, the affidavit of one Lorna Solopian, at paragraph 19 thereof was instructive and/or pertinent.
140. For clarity (sic) it is appropriate to reproduce the said paragraph and same is reproduced as hereunder;  
Paragraph 19;  
That there exists a sewer passing through her property, the interested party can allow access to the Nairobi city water and sewerage company limited such access as reasonably expected of an holder of right of Easement. However, an Easement holder cannot have exclusive access to private property.
141. Other than paragraph 19 of the affidavit of Lorna Solopian, which has been reproduced herein before, the said deponent also annexed to the affidavit herein two sets of survey Reports, both of which proceed to confirm two things, namely
- i. The perimeter wall erected and or constructed by the 4<sup>th</sup> Respondent has variously encroached onto the riparian reserved and in fact it has been conceded that there are points where the said wall is too close to the River source and therefore reflecting that the 6 meter riparian reserve was not observed.
  - ii. The access road which has been blocked by the metallic gate, is indeed public access gate.
142. It is worthy to point out that there is no ownership rights as far as evidence tendered before the court is concerned.
143. Put differently, the court is enjoined to consider the totality of the evidence adduced in court and to calibrate on same to see whether the issues in dispute have been proven. For clarity, proof can even be discerned from an admission or concession by the adverse party.
144. In respect of the subject matter, the Respondents vide their Replying affidavits and in particular, the affidavit by Christopher Muteti sworn on the 8<sup>th</sup> august 2018 and the Replying affidavit of Lorna Solopian sworn on the 9<sup>th</sup> September 2019, have by coincidence corroborated and reaffirmed the complaints by the Petitioners.
145. Based on the foregoing, I return a verdict that the Petitioners have indeed proved and or established the complaints and claims at the foot of the amended Petition. Nevertheless, it is imperative to underscore the observation that the burden of proof, namely, of proving the claims vide the Petition laid on the shoulders of the Petitioners and not otherwise.
146. To buttress the foregoing position, I can do no better than to restate the holding of the Supreme Court vide the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the Supreme Court held as hereunder;

[49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person



who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule other shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.

147. Notwithstanding the foregoing, there is yet another issue that requires to be addressed and/or otherwise mentioned. For clarity, the issue herein relates to the acknowledgement by the 4<sup>th</sup> and 5<sup>th</sup> Respondents that the impugned perimeter wall, which has since been established and confirmed to encroach upon the riparian reserve, was erected and/or constructed without the requisite license and/or approval by the National Environment Management Authority.
148. Be that as it may, the affidavit of Lorna Solopian, indicates that the impugned wall was indeed constructed long before the enactment of the EMCA Act, 1999 and by extension before the establishment of National Environmental Management Authority.
149. Nevertheless, despite the contention that the impugned wall was constructed before the enactment of the EMCA Act, 1999, whose import and tenor was to show that no approval and/or license from NEMA was necessary, however, the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein, did not place any evidence before the court to show when the impugned wall was erected and/or constructed.
150. In my humble view, it was incumbent upon the 4<sup>th</sup> and 5<sup>th</sup> respondents to show when, in terms of time, the impugned wall was constructed and in this regard, it behooves the 4<sup>th</sup> and 5<sup>th</sup> Respondents to even annex the approved building plans, if any, was ever obtained from the relevant authority existing at the material point in time.
151. To my mind, even before the enactment of the EMCA Act, 1999, no building and/or construction, of whatsoever nature, could be undertaken and/or carried out without the requisite approval, permit and/or license issued and/ or granted by the appropriate Planning Authority.
152. Suffice it to say, the long and short of the averments by and/or on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Respondents was that the impugned wall, which has been authenticated to have encroached to riparian reserve, was actually erected without undertaking the Environmental Impact Assessment Study and thus without the issuance of Environmental Impact Assessment License.
153. Consequently, the summation discernable from the foregoing is that the impugned wall was carried out and/or undertaken contrary to and in contravention of Section 42 of the EMCA Act, 1999, which prohibits the undertaking of such kind of developments, within a defined dimension of a Water body, in this case, Rui-Rwaka River.
154. Without belaboring the point, it is my conclusion that the Amended Petition has been proven and/or established to the requisite threshold and the proof herein, has been aided by the various concessions,



admissions and confirmation obtaining vide the Responses filed on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

### Issue number 3

#### Whether the reliefs sought at the foot of the amended petition ought to be granted.

155. Having found and held that the Petitioners herein have proved and/or established the assertions contained at the foot of the amended Petition, it therefore appropriate to ascertain whether the Petitioners herein are entitled to the various reliefs alluded to at the foot of the Amended Petition.
156. Consequently, what remains to be addressed is that what reliefs ought to be granted and in this respect, it is my considered view that the Petitioners herein would be entitled to the following;
- a. A declaration be and is hereby granted that the 4<sup>th</sup> and 5<sup>th</sup> Respondents contravened the rights of the residents and violated Articles 42 and (sic) 69 of *the Constitution*, 2010.
  - b. An order be and is hereby granted restraining the 4<sup>th</sup> and 5<sup>th</sup> Respondents to stop or discontinue any act or omission that is harmful to the Environment.
  - c. An order be and is hereby granted compelling the 4<sup>th</sup> and 5<sup>th</sup> Respondents to demolish any structures that are on the sewer line and remove the dumped soil on the sewer line.
  - d. An order be and is hereby granted compelling the 4<sup>th</sup> and 5<sup>th</sup> Respondents to remove the illegal gate blocking the public access road to Ruaka River.
157. Notwithstanding the foregoing, it is important to observe that the issues that have been raised at the foot of the amended Petition herein are issues that ought to have been dealt with by the Nairobi City County Government, Nairobi metropolitan Services and National Management Authority and same ought not to have been left to the public-spirited Petitioners to attend to.
158. Certainly, what becomes apparent is that the public body, authority and/or state agents that are obligated to perform and/or execute certain mandates have gone to slumber and as a result of the slumber, the right to clean and healthy environment that mankind has fought for, starting with Stockholm Convention 1972, all the way to Rio De Jenneiro Declaration 1992 and resting with *the Constitution* 2010, are now being threatened and/or violated with abandoned.
159. Suffice it to point out that some of the issues that the court has had to deal with would long have been dealt with by the 3<sup>rd</sup> Respondent, if her officers and Inspectors were alive to and cognizant of the provisions of Section 117 of the *EMCA Act*, 1999.
160. For convenience, the provisions of Section 117 of the EMCA Act, 1999, provides as hereunder;
17. Appointment of Environmental Inspectors:
- (1) The Director-General shall, by Gazette Notice, appoint duly qualified persons whether public officer or otherwise, whether by name or by title of office, to be environmental inspectors of the Authority for such jurisdiction units as shall be specified in the Gazette Notice appointing them.
  - (2) An environmental inspector shall—
    - (a) monitor compliance with the environmental standards established under this Act;
    - (b) monitor the activities of other sector-specific environmental inspectorates;



- (c) monitor the pattern of use of environmental resources;
  - (d) conduct environmental audits; and
  - (e) perform such other functions as may be required under this Act or under the Gazette Notice appointing him.
- (3) An environmental inspector may, in the performance of his duties under this Act or any regulations made thereunder, at all reasonable times and without a warrant—
- (a) enter any land, premises, vessel, motor vehicle or ox-drawn trailer and make examinations and enquiries to determine whether the provisions of this Act are being complied with;
  - (b) require the production of, inspect, examine and copy licences, registers, records and other documents relating to this Act or any other law relating to the environment and the management of natural resources;”
161. To my mind, time is ripe for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and their officers to wake up and take their statutory mandate seriously and in particular, to endeavor to and internalize the provisions of Articles 10,42 and 232 of *the Constitution* of Kenya 2010, which underscore the values and principles of governance, Right to Clean Enviroment, as well as principles of public service.

**Final disposition:**

162. Having reviewed and appraised the issues that were outlined for determination in respect of the subject matter and having duly considered same, it is now opportune to make the final orders.
163. In the premises, the court finds and hold that the Petitioners have proved their case to the required standards and consequently, Amended Petition be and is hereby allowed.
164. In the premises, the court proceeds to and hereby decree as hereunder;
- a. A Declaration be and is hereby granted that the 4<sup>th</sup> and 5<sup>th</sup> Respondents contravened the rights of the residents and violated Articles 42 and 69 of *the Constitution*, 2010.
  - b. An order be and is hereby granted restraining the 4<sup>th</sup> and 5<sup>th</sup> Respondents to stop or discontinue any act or omission that is harmful to the Environment.
  - c. An order be and is hereby granted compelling the 4<sup>th</sup> and 5<sup>th</sup> Respondents to demolish the offensive wall which has encroached onto the Riparian reserve and any structures that are on the sewer line as well as remove the dumped soil on the sewer line.
  - d. An order be and is hereby granted compelling the 4<sup>th</sup> and 5<sup>th</sup> Respondents to remove the illegal gate blocking the public access road to Ruaka River.
  - e. The Implementation, execution and compliance with the orders enumerated herein before, shall be carried out and/or undertaken with 60 days from the date hereof.
  - f. In default by the 4<sup>th</sup> and 5<sup>th</sup> Respondents, jointly and/or severally to comply with the implementation within the stipulated timeline, the Director General of National Environment Management Authority together with the Nairobi Metropolitan Services, shall undertake the demolition, removal of the offensive perimeter wall and the metallic gate, whole of which have caused the hindrance and access to Rui-Rwaka River and the costs of such removal and/or demolition shall be surcharged upon the 4<sup>th</sup> and 5<sup>th</sup> Respondent.



- g. Upon compliance with the foregoing orders, a Restoration Order be and is hereby issued and the 4<sup>th</sup> and the 5<sup>th</sup> Respondents are hereby directed to restore the impugned area to its status ante and ensure that the Riparian reserve is free of encroachment and devoid of pollution and/or threat of pollution, in any manner whatsoever and howsoever.
- h. A structural interdict/continuing Mandamus be and is hereby issued against the 3<sup>rd</sup> Respondent and same shall be required to undertake continuous inspection and/or supervision of the 4<sup>th</sup> and 5<sup>th</sup> Respondents and to ensure that the Restoration order is duly complied with and adhered with and that the 3<sup>rd</sup> Respondent shall file with the court bi-annual reports denoting status of compliance for a period of 3 years henceforth.
- i. Where the 3<sup>rd</sup> Respondent shall discern any breach and/or violation of the orders herein or any threats to the right to clean and healthy environment, same shall undertake and execute appropriate enforcement measures in accordance with the Provisions of Environment Management Coordination Act, 1999 (2015).
- j. The 4<sup>th</sup> and 5<sup>th</sup> Respondent shall bear the costs of the Petition.

165. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2022.**

**OGUTTU MBOYA,**

**JUDGE**

In the Presence of;

Kevin Court Assistant

Mr. Omangi Gichana h/b for Mr. Kelvin Mogeni for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

N/A for the Petitioners.

