



**Patel & 4 others v Osweta & 3 others (Constitutional Petition  
E25 of 2021) [2022] KEELC 13477 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13477 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
CONSTITUTIONAL PETITION E25 OF 2021**

**A OMBWAYO, J  
OCTOBER 12, 2022**

**BETWEEN**

**JAYANTILAL G. PATEL ..... 1<sup>ST</sup> PETITIONER  
NISHIT CHAUHAN ..... 2<sup>ND</sup> PETITIONER  
MOHAN SINGH RUPRA ..... 3<sup>RD</sup> PETITIONER  
HASMUKHRAI GOSAR SHAM ..... 4<sup>TH</sup> PETITIONER  
NEMCHAND B. SHAH ..... 5<sup>TH</sup> PETITIONER**

**AND**

**MAURICE OYIGI OSWETA ..... 1<sup>ST</sup> RESPONDENT  
MARTHA ACHIENG OYUGI ..... 2<sup>ND</sup> RESPONDENT  
COUNTY GOVERNMENT OF KISUMU ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
RESPONDENT**

**JUDGMENT**

**Background**

1. Jayantilel G Patel, Nishit Chauhan, Mohan Singh Rupra, Hasmukhrai Gosar Shah and Nemchand B Shah (hereinafter referred to as petitioners) have come to this court against Maurice Oyugi Osweta, Martha Acheng Oyugi, county government of Kisumu, city manager Kisumu and National Environment Management Authority (hereinafter referred to as the respondents) claiming to be Kenyans of sound minds and registered proprietors and residents of residential houses situated in the area known as Aghakhan Walk Grescent, Milimani Kisumu whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents



are registered owners of Kisumu/Municipality block 10/469 also situated within the Agakhan Walk Crescent Milimani estate Kisumu.

2. The petitioners claim that on or about the August 30, 2021 it came to their knowledge and attention that construction had been initiated by the 1<sup>st</sup> & 2<sup>nd</sup> respondents, whose property, Kisumu/Municipality/Block 10/469, adjoins and/or is directly opposite the petitioners residential properties. Subsequent to the petitioners communicating their concerns to the group a letter dated August 30, 2021 was issued to the 4<sup>th</sup> respondent requesting information in relation to the construction. The 4<sup>th</sup> respondent *vide* letter dated September 13, 2021 requested the 1<sup>st</sup> respondent to submit hard copies of approved building and site plans in respect of the development.
3. *Vide* letter dated September 17, 2021 the 4<sup>th</sup> respondent acknowledged receipt of structural drawings and requested the 1<sup>st</sup> respondent to submit copies of additional documents.
4. Subsequently *vide* enforcement notice dated September 30, 2021 the 4<sup>th</sup> respondent informed the 1<sup>st</sup> respondent that no approval had been granted for the development and that change of user and occupation permit had not been renewed. The 1<sup>st</sup> respondent was directed to halt all construction works within 48 hours failing which the 3<sup>rd</sup> & 4<sup>th</sup> respondents would enter the property and execute the requirements.
5. According to the petitioners, in wanton disregard of the orders contained in the enforcement notice, the construction has continued unabated and that the 3<sup>rd</sup> & 4<sup>th</sup> respondents have been derelict in their duty to enforce the orders contained in the enforcement notice in violation of their constitutional and statutory obligations.
6. The petitioners instructed their advocates to issue notice to the 4<sup>th</sup> respondent, which notice dated February 26, 2021 demanded that action be taken with a view to arresting any further development, to no avail.
7. Additionally, *vide* letter dated October 27, 2021, the petitioners advocates informed the 5<sup>th</sup> respondent that the petitioners had not been involved/consulted or their views sought as stakeholders and residents of Agakhan Walk who would be directly and most adversely affected by the development, prior to the development being initiated. The petitioners requested that, in the event that an environmental impact assessment had been carried out and a licence issued that a copy of the EIA report and licence be furnished.
8. The petitioners advocates did not receive a response from the 3<sup>rd</sup> and 4<sup>th</sup> respondents, however, the 5<sup>th</sup> respondent permitted a copy of the EIA report to be made which the petitioners advocate obtained on the November 4, 2021 and responded to the petitioners advocates letter dated October 27, 2021, on the November 10, 2021.
9. According to the petitioners, upon perusal of the report the petitioners shockingly noted that none of the residents of Agakhan Walk/neighbours of the 1<sup>st</sup> & 2<sup>nd</sup> respondents had been consulted; but the views of a boda boda rider, a truck driver, student and alleged business persons/hotel workers were sought. The petitioners contend that no ID numbers and no names and places of business of the alleged business persons were disclosed on the questionnaires leading the petitioners to conclude that the entire EIA exercise was a mockery of the precept of public participation and a white wash stage managed in a bid to surreptitiously obtain the NEMA approvals.
10. The petitioners later learnt that the 5<sup>th</sup> respondent had approved the construction of a 5 storey hotel on Kisumu/Municipality/Block 10/469, on the June 23, 2021.



11. The petitioners state that they were not accorded the opportunity of giving their views yet they are the persons who stand to be directly and adversely affected by the development.
12. The petitioners further contend that no notice was issued to them, no advertisements were published and no public participation took place prior to approval by the 5<sup>th</sup> respondent being issued.
13. The petitioners further noted from the 4<sup>th</sup> respondent's enforcement notice dated September 30, 2021 that the 1<sup>st</sup> & 2<sup>nd</sup> respondents were erecting structures without development permission, without an approval letter by the 4<sup>th</sup> respondent and without renewal of change of user and occupation permit.
14. The petitioners allege that the respondents have violated articles 10, 47, 69, 179 (c) and (d) & 184 (1) (c) of the Constitution.
15. That they have been denied their rights to fair administrative action that is lawful, reasonable and procedurally fair. They have been denied the opportunity to present their views and make representation. They have not been consulted and involved in relation to the development of the hotel by the 1<sup>st</sup> and 2<sup>nd</sup> respondents prior to issuance of the approvals and licenses for the development.
16. The petitioners state that there is a threat to loss of value of the petitioners properties, disturbance, nuisance, and noise and air pollution. According to the petitioners the loss is valued at Kshs 1, 600,000,000.
17. The petitioners claim that the respondents have violated the petitioner's right to a clean, safe and healthy environment. That the respondents are guilty of violation of the petitioners rights to consultation, public participation, to be involved in decision making process to their rights to fair administrative action, the access to information necessary for them to make an informed decision, the violation of their socio- rights.
18. The petitioners pray for a declaration that the respondents have jointly and severally violated and continue to violate the rights and fundamental freedoms of the petitioners and the residents of the Agakhan Walk Crescent contrary to articles 10, 27, 35, 42, 43, 47, 69 & 184 of the Constitution of Kenya.
19. They pray for a declaration that the petitioners and residents of Agakhan Walk Crescent's rights to a clean and healthy environment have been violated by the respondents and a declaration that the development and construction initiated and being carried out on immovable property, Kisumu/Municipality/Block 10/469 by the 1<sup>st</sup> & 2<sup>nd</sup> respondents is irregular, wrongful, illegal and unconstitutional and null and void
20. Moreover, the petitioners pray for a declaration that the respondents are guilty of failing to comply with, adhere to, enforce and abide by the relevant provisions of the Constitution, the EMCA, Fair Administrative Action Act, Access to Information Act, Urban Areas & Cities Act, County Governments Act, Kisumu County Public Participation Act, Physical and Land Use Planning Act 2019 and regulations, National Construction Authority Act and regional and international treaties and conventions.
21. Furthermore, the petitioners pray for an order of *certiorari* do issue to bring to this court for purposes of quashing the decisions by the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> respondents to issue permits, approvals and licenses in respect of the development and construction being carried out by the 1<sup>st</sup> & 2<sup>nd</sup> respondents on immovable property, Kisumu/Municipality/Block 10/469 issued in blatant breach of the provisions of the Constitution, the EMCA, Fair Administrative Action Act, Access to information Act, the Urban Areas & Cities Act, County Governments Act, Kisumu County Public Participation Act, Physical and



[Land Use Planning Act](#), [National Construction Authority Act](#) and regional and International treaties and conventions.

22. A conservatory order restraining/prohibiting the 1<sup>st</sup> & 2<sup>nd</sup> respondents either by themselves, their agents, employers, servants, workers, contractors or any person/s working under or on their instructions from continuing with the construction and development of a hotel on Kisumu/ Municipality /block 10/49 and from continuing with violations of and/or threats to the safety, well-being and health of the petitioners and the residents of the Agakhan Walk Crescent occasioning interference, nuisance and disturbance to the petitioners and residents of the Agakhan Walk Crescent rights to life, property and a clean and healthy environment protected under article 42 of the [Constitution](#).
23. An order under article 70 (2) (a) & (b) of the [Constitution](#) compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to restore its original state the immovable property Kisumu/Municipality/Block 10/469 which has been polluted, degraded and violated by the illegal and unconstitutional actions of the respondents and an order directing the 1<sup>st</sup> & 2<sup>nd</sup> respondents to cease any further construction of development of the hotel without compliance with the [Constitution](#), the [EMCA](#), the [Fair Administrative Action Act](#), [Access to information Act](#), the Urban Areas & Cities act, [County Governments Act](#) Kisumu County Public Participation act, [Physical and Land use Planning Act](#) and regional and international treaties and conventions.
24. An order for compensation and/or damages against the respondents under article 70 (2) (c) of the [Constitution](#) for violation of the rights of the petitioners and residents of the Agakhan Walk Crescent under articles 42, 43, 69 and 70 of the [Constitution](#).
25. An order for compensation and/or damages against the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> respondents for violating the petitioners and the residents of Agakhan Walk Crescent's rights protected under articles 10, 35 & 47 of the [Constitution](#) as read with section 11 (1) (j) of the [Fair Administrative Action Act](#).
26. General damages for the blatant contravention and breach of the petitioners' fundamental rights and freedoms. Costs of this petition.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents Response**

27. In the replying affidavit, Maurice Oyugi Osweta states that the change of user was obtained in 2014 legally and within the law.
28. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted and obtained approvals of the building plans of a modern guest house procedurally and in full compliance within applicable laws by particular the [Physical and Land use planning Act](#) No 13 of 2019 and the [EMCA](#) No 8 of 1999,
29. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, NEMA approved the project. The respondents alleged that NEMA conducted public participation according to the law. The respondents state that there was an application and notice of relevant change of user but the petitioners chose to come to court rather than participate in public consultation.
30. The 1<sup>st</sup> and 2<sup>nd</sup> respondents allege that the petitioners have not exhausted the appeal procedures with the relevant liaison committee in accordance with sections 61 and 93 of the [Physical and Land use Planning Act](#) 2019 and the National Environment Tribunal in accordance with section 129 (1) of the [EMCA](#). The 1<sup>st</sup> and 2<sup>nd</sup> respondent state that on December 16, 2014 they received from the 3<sup>rd</sup> respondent a certificate of compliance in respect of the change of user.



31. They also received a notification of approval and development permission on the same date. The building plans were paid for on June 3, 2019. The building plans were submitted on May 4, 2020. Notification of approval by the 3<sup>rd</sup> respondent was done on May 3, 2021. On June 23, 2021 they received the NEMA approval and report. On September 8, 2021, they received the certificate of compliance from National Construction Authority (NCA). The gist of the 1<sup>st</sup> and 2<sup>nd</sup> respondents response is that they complied with the procedure.

### **Petitioners' Submissions**

32. The gravamen of the petitioners submissions is that this court has jurisdiction to hear and determine the dispute herein where the petitioners are challenging the action of the respondent as the petitioners are not just challenging the decision of the 3<sup>rd</sup> to 5<sup>th</sup> respondents but seeking relief that relate to environment land use and development and have raised issues of the approval of change of user and violation of the petitioners rights under articles 42 and 70 of the *Constitution* of Kenya 2010. The petitioners are seeking for reliefs that relate to the environment land use and development.

33. The petitioner submit that with the enforcement notice issued by the 3<sup>rd</sup> and 4<sup>th</sup> respondent there was nothing to move with to the liaison committee as well as the National Environmental Management Trustee to petition and clarify violation of the right to a clean and healthy environment when the said committee and trustee have no authority or mandate to determine.

34. According to the petitioners, the reading of section 129 of Environment Management and Coordination Act shows that the issues raised by the petitioner cannot be heard and determined by the National Construction Authority or the County Physical Planning Liaison Committee. In terms of article 165 (3) b as read with article 163 (3) b of the *Constitution* only the High Court and court of equal status possesses and are endowed with the jurisdiction to hear and determine issued relating to violation of constitution rights.

35. On whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent proposed development violates the *Constitution* and statutory provisions for of public participation the petitioner submitted that the main complaint of the petitioners is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents commenced construction on the property Kisumu/ Municipality/block10/469 which they consider to be harmful to the environment without according then the opportunity to be heard to present their views, to concur or object to the proposed development. Simply put they were denied the opportunity to participate and were frustrated in their rights to fair administrative action and a fair hearing. This was done despite the fact that they are the person who stand to be most directly and adversely affected by the development which borders and is in close proximity to their residential houses. They have also challenged the manner in which the approvals and Environmental Impact Assessment licence was issued on the basis that they were not consulted or granted the opportunity to present their views. The Environmental Impact Assessment (summary project report was conducted in support of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' development. it is intituled "proposed hotel development".

36. The petitioners submit that article 10 of the *Constitution* of Kenya obligated the respondents to ensure public participation which included taking the views of the petitioners, who would be directly and most gravely affected by the proposed development before applying for the respective approvals and licenses for the development.

37. To persuade the court the petitioners relied on the decision of The High Court in *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR while referring to the South African decision in *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05)



[2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations.

The petitioners refer to the *Black's Law Dictionary* 10<sup>th</sup> Edition defines 'consultation' as follows:

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and others v President of the Republic of South Africa and others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

In a three-judge bench the High Court in consolidated constitutional petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (formerly Nairobi constitutional petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the court addressed the concept of consultation in the following manner: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (emphasis added).

38. The petitioners referred to chapter 4 which constitutes the consultation and public participation “ of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' environmental impact assessment ( summary project report ) which has questionnaires ( pages 139-147 of the petition) clearly showing that shockingly and in a gross and egregious disregard of their rights none of the petitioners were consulted and the 9 questionnaires contain views from a boda boda rider, truck driver, student, and motorist all of whom are transitory individuals and not residents of the area. The remaining five persons identify themselves as business people, a hotelier and hotel workers with no details of their alleged businesses or their identification numbers.
39. The petitioners submit that the decision by the 3<sup>rd</sup> to 5<sup>th</sup> respondents to proceed to approve and/or issue license to the 1<sup>st</sup> and 2<sup>nd</sup> respondent without sensitization or disseminating relevant infrastructure involving or consulting them to distinguish the finding in the *Benson Adege v Kibos Distillers* case. That it is clear from the reading of the judgment rendered by the court of appeal and Supreme Court



that there is no determination by either court regarding the jurisdiction of the Environment and Land Court with reference to the Constitution.

40. The petitioner refer to section 3 (3) of the Environment Management Coordination Act that permit a person who alleges that his rights to a clean and healthy environment has been or is threatened with violation to approach the Environment and Land court for redress. The petitioner thirdly submitted that the jurisdiction to redress violation of the right to the clean and health environment under article 22 and 23 of the Constitution of Kenya 2010.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions**

41. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that this court lacks jurisdiction to determine the dispute before it. That the petitioners prematurely invoked the jurisdiction of the court for reason that the petition is an abuse of the doctrine of exhaustion. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that the dispute in the petition falls squarely within alternative mechanisms of dispute resolution and neither does it meet the threshold of the exceptions as set out above.
42. The fact relied thereupon particularly paragraphs 61,62,63,64,65,66,68,70,71, and 76 all inclusive, and from which it is apparent that the petitioners are bent upon enforcing statutory provisions of the Environmental Management and Coordination Act camouflaged as a constitutional petition is fatally defective and divests the honorable court of its jurisdiction in the first instance, as the alleged non-compliance with statute, illegalities and irregularities cannot be enforced by dint or under the guise of a constitutional petition.
43. According to the respondents, the petitioners are aggrieved with the decision of the 5<sup>th</sup> respondent to approve the proposed project. The petitioners challenge, very openly and aggressively, the approval granted to the 1<sup>st</sup> and 2<sup>nd</sup> respondent by the 5<sup>th</sup> respondent. The upshot of the petitioners' case is that they are dissatisfied by NEMA's decision to approve the 1<sup>st</sup> and 2<sup>nd</sup> respondents' proposed development.
44. In the circumstances, the petitioners ought to have appealed to the National Environmental Tribunal within 60 days in accordance with section 129 (1) of the Environmental Management and Coordination Act. Instead, the petitioners invoked the jurisdiction of the honorable court prematurely without the exhausting the alternative remedies of dispute resolution provided for by statute.
45. Similarly, the facts relied thereupon particularly paragraphs 60,61,63,66,67,74 and 76 all inclusive, are clear and unambiguous that the petitioners are aggrieved with the decision of the 3<sup>rd</sup> respondent to approve the project without due regard to procedural requirements. In particular, the petitioners are aggrieved that the 4<sup>th</sup> respondent approved the 1<sup>st</sup> and 2<sup>nd</sup> respondent's building and site plans in the absence of renewal of change of user
46. The respondents submit that the petitioners challenge the development permission issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents by the county government of Kisumu, the 3<sup>rd</sup> respondent herein.
47. In the circumstances, a challenge to the decision of the planning authority, ought to lie with the relevant liason committee in accordance with section 61(3) of the Physical and Land Use planning Act 2019. The petitioners herein failed to exhaust the remedy provided for under Physical and Land Use Planning Act 2019. In particular, on November 24, 2021, the 3<sup>rd</sup> respondent advertised the call for comments and objections to the extension of change of user in respect of the property of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, the petitioners filed the instant petition on November 29, 2021, barely five days into the advertisement and during the 14 days window period for aggrieved parties to submit objections. Further, on December 3, 2021, the 3<sup>rd</sup> respondent re-advertised the call for comments and



objections to the extension of change of user in respect of the property of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is manifestly clear that the petitioners have invoked the jurisdiction of the honorable court prematurely.

48. The facts relied thereupon particularly paragraphs 72 and 74 all inclusive, are clear and unambiguous that the petitioners are aggrieved with the inaction of the 4<sup>th</sup> respondent, in particular, the failure to stop the construction subsequent to issuance of the enforcement notice to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
49. The 1<sup>st</sup> and 2<sup>nd</sup> respondent argues that the petition is incompetent and incapable of meeting the threshold of a constitution petition as established in the *locus classicus* case of [Anarita Karimi Njeru v Republic \(No 1\)](#) 1979 1KLR 154
50. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further submitted that it is crystal clear that the instant petition fails the test as a result of which the petition is fatally defective and should be dismissed in limine. The courts have previously ruled that the court cannot breathe life to a petition that is dead on arrival. That the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of the [Constitution](#), the petition provided neither particulars of the alleged complaints, the manner of alleged infringement or the jurisdictional basis of the action before the court. The respondents maintain that such failure to draft the petition with precision has prejudiced the 1<sup>st</sup> and 2<sup>nd</sup> respondents. According to the respondents, this petition provided little or no particulars as to the allegations and the manner of the alleged infringements and as such, there is no any competent petition before this court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further submit that the petitioner have not denied that the respondent committed gross violation of the [Constitution](#) statute law.

### Submissions by 3<sup>rd</sup> and 4<sup>th</sup> Respondent

51. The 3<sup>rd</sup> and 4<sup>th</sup> respondent argue that when the 3<sup>rd</sup> respondent received a complaint she went and wrote to the respondents requesting the respondent to submit building plans approved by the 3<sup>rd</sup> respondent and site plans all drawn by a recognized professional. Moreover the 3<sup>rd</sup> and 4<sup>th</sup> respondents issued an enforcement notice stopping further construction because the respondent did not have the prerequisite documents in compliance with the conditions as red out under part v of the [Physical Planning Act](#). The 3<sup>rd</sup> and 4<sup>th</sup> petitioner submitted that the petition is fatally defective and an abuse of court process.

### Analysis and Determination

52. The 1<sup>st</sup> issue to be addressed by this court is whether the court has jurisdiction to entertain the dispute. The petitioners argue that court has jurisdiction whereas the respondent argue that the court lacks jurisdiction. It is argued that the jurisdiction in this dispute lies into the liaison committee and the National Environment Tribunal and the National Environment Management Authority. The National Environment Tribunal is established under section 125 of [Environment Management and Coordination Act](#) cap 387 Laws of Kenya as read with section 129 of [Environment Management and Coordination Act](#). section 125 of Environment Management and Coordination Act provides for the establishment of the National Environment Tribunal as follows:-

- (1) There is established a tribunal to be known as the National Environment Tribunal which shall consist of the following members—
  - (a) a person nominated by the judicial service commission, who shall be a person qualified for appointment as a judge of the Environment and Land Court of Kenya;
  - (b) an advocate of the High Court of Kenya nominated by the Law Society of Kenya;



- (c) a lawyer with professional qualifications in environmental law appointed by the cabinet secretary; and
  - (d) three persons with demonstrated competence in environmental matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.
- (2) All appointments to the tribunal shall be by name and by gazette notice issued by the cabinet secretary.
  - (3) The members of the tribunal shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.
  - (4) The office of a member of the tribunal shall become vacant—
    - (a) at the expiration of three years from the date of his appointment;
    - (b) if he accepts any office the holding of which, if he were not a member of the tribunal, would make him ineligible for appointment to the office of a member of the tribunal;
    - (c) if he is removed from membership of the tribunal by the cabinet secretary for failure to discharge the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour; and
    - (d) if he resigns the office of member of the tribunal.
  - (5) The members of the tribunal shall, in their first meeting, elect from amongst themselves a chairperson to the tribunal from amongst the persons appointed under paragraphs (a), (b) and (c) of subsection (1) and a vice chairperson to the tribunal from amongst all members.
  - (6) The chairperson and vice-chairperson shall be of opposite gender.
  - (7) In the absence of the chairperson, the vice-chairperson shall serve as the acting chairperson for the duration of the absence of the chairperson and the acting chairperson shall perform such functions and exercise such powers as if that person were the chairperson.
  - (8) In the absence of both the chairperson and the vice-chairperson, the members of the tribunal present may nominate, from among themselves, a person to act as the chairperson, which person shall have the training and qualifications in the field of law and such person, while acting as the chairperson, shall perform such functions and exercise such powers as if that person were the chairperson.
  - (9) The chairperson may designate the vice-chairperson and two other members to constitute a separate sitting of the tribunal.

section 129 of *Environment Management and Coordination Act* provides:-

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 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 be 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.
- (3) Upon any appeal, the tribunal may—
- (a) confirm, set aside or vary the order or decision in question;
  - (b) exercise any of the powers which could have been exercised by the authority in the proceedings in connection with which the appeal is brought; or
  - (c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
  - (d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
  - (e) if satisfied upon application by any party, review any orders made under paragraph (a).
- (4) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection (3)(a).

53. The above provisions do not give the tribunal the power to entertain a dispute revolving on a clean and healthy environment as provided for by the [Constitution](#) and grant a constitutional relief. This petition is Multi-faceted between violation of provision of the [Constitution](#) of Kenya 2010 and failing to follow the procedure laid out in the [Environment Management and Coordination Act](#). The argument that this court has no jurisdiction is grounded on the mis-apprehension of the facts before this court. One other very important issue raised in the dispute is that the petitioner's allegation of lack of public participation and breach of rules of natural justice and breach to right to fair administrative action that is a preserve of this court.
54. The petitioners are challenging the respondent's action for failure to adhere to the constitutional provisions and therefore the court has the prerequisite jurisdiction.
55. The issues raised by the petitioner cannot be determined by the physical planning liaison committee and National Environmental Tribunal. This court appreciates that the issues herein are multi-faceted and the court can't determine issues that should be before the physical planning liaison committee and National Environmental Tribunal.



56. However, section 3(3) of *Environment Management and Coordination Act* cap 387 Laws of Kenya provides for entitlement to a clean and healthy environment thus 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 compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment 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 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.
57. This section envisages that issues based on the right to a clean and healthy environment is a preserve of the Environmental Land Court. My conclusion is that the court has jurisdiction to determine whether the process of issuance of licence to the 1<sup>st</sup> and 2<sup>nd</sup> respondent was in breach to the *Constitution* of Kenya 2010.
58. On whether the issuance of licence to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was in breach of the rights of the petitioner the public participation as enshrined in the *Constitution*. This court observes that article 10 of the *Constitution* of Kenya provides for national values and principles of governances. It provides as follows:-
10. National values and principles of governance
    - (1) The national values and principles of governance in this article bind all state organs, state officers, public officers and all persons whenever any of them—
      - (a) applies or interprets this *Constitution*;
      - (b) enacts, applies or interprets any law; or
      - (c) makes or implements public policy decisions.
    - (2) The national values and principles of governance include—
      - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
      - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
      - (c) good governance, integrity, transparency and accountability; and
      - (d) Sustainable development.
59. Regulation 17 of *Environment (Impact Assessment Audit) regulations 2003* provides that environmental impact assessments study must involve the public. Moreover the; participation of the public must involve the person affected by the project.
60. This court has a duty to guard against going into the merit of decision made by the county government and the National Environmental Management Authority but has a supervisory duty and power to ensure that the *Constitution* of Kenya 2010 and the *County Government Act* and the National



Environment Management Act are complied with to the letter and to ensure that the county government and the National Environmental Management Authority exercise an existing and not imaginary power in making the decision in question.

61. The question is whether the decision meets the constitutional, legality and procedural impropriety test. This court finds that the petitioners being the persons directly affected by the decision to licence the 1<sup>st</sup> and 2<sup>nd</sup> respondent to put up a five Stoney building to house a hotel, ought to have been consulted.
62. The Court of Appeal in Nairobi civil appeal 200 of 2014 *Kiambu County Government & 3 others v Robert N Gakuru & others* [2017] eKLR approved the findings in High Court civil case No 532 of 2013 consolidated with petition Nos 12, 35, 36, 42 & 72 of 2014 and JR Misc Appln No 61 of 2013 where the High Court rejected the contention that ‘the people had elected their representatives in the County Assembly and therefore there was no need for further consultations with them’. The Court of Appeal highlighted the place of public participation in the following manner: -

“The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The *Constitution* in article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation, but does not define or say how it should be implemented. In article 196, it commands County Assemblies to, *inter alia*, facilitate public participation and involvement in the legislative and other business of the assembly and its committees, but again does not say how. The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation.

63. There is no evidence that the petition who are members of the public directly were made aware of the project by National Environmental Management Act in compliance with the regulations 17 of the Environmental (A A& A) regulations 2003 that provide for public participation. Likewise, section 87 of the *County Government Act* 2012 provides for public participation thus:-

87. Principles of citizen participation in counties citizen participation in county governments shall be based upon the following principles—
  - (a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
  - (b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
  - (c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
  - (d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;



- (e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;
- (f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and
- (g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

64. Section 115 of the same Act provides for mandatory public participation thus:-

115. Public participation in county planning

- (1) Public participation in the county planning processes shall be mandatory and be facilitated through—
  - (a) mechanisms provided for in part viii of this Act; and
  - (b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—
    - (i) clear strategic environmental assessments;
    - (ii) clear environmental impact assessment reports;
    - (iii) expected development outcomes; and
    - (iv) development options and their cost implications.
- (2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

65. Public participation is an integral part of any decision making process by all institutions, state organs or organizations in Kenya and therefore failing to observe the same gives the court the power to quash such decisions.

66. This court will not go into the merit of the decision made by the NEMA and the county government as that is the preserve of the National Environmental Tribunal and the physical planning liaison committee, however, the court has the power to quash any process or decision due to the fact that the same is made without adherence to national values set down in the *Constitution* of Kenya 2010 or an Act of parliament. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are required to undertake the process within the law. The upshot of the above is that I do grant reliefs to the petitioner limited to a declaration that the petitioners rights as envisaged under article 10 and 47 of the *Constitution* of Kenya have been violated by being denied the right to participate in the decision to allow the 1<sup>st</sup> and 2<sup>nd</sup> respondents to put up a five storey building to house a hotel and therefore their rights to a clean and healthy environment are being threatened and that the process of approval and licensing the 1<sup>st</sup> and 2<sup>nd</sup> defendant development and construction being carried out on Kisumu/Municipality/Block10/469 is irregular, wrongful and unconstitutional as the same was done without consultation and public participation of the petitioners being persons directly affected.



67. Ultimately , I do find that the petitioners are entitled to a remedy and I do issue an order of *certiorari* quashing the decision by the 3<sup>rd</sup> , 4<sup>th</sup> and 5<sup>th</sup> respondents to issue permits and approvals and licenses in respect of the development and construction being carried out by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on immovable property, Kisumu/Municipality/Block10/469 in blatant breach of the provisions of the Constitution, the EMCA, Fair Administrative Action Act, Access To Information Act, the Urban Areas & Cites Act, County Government Act, Kisumu County Public Participation Act, Physical and Land Use Planning Act, National Construction Authority Act and regional and international treaties and conventions. Cost of this petitioner to the petitioner. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF OCTOBER, 2022.**

**A. O. OMBWAYO**

**JUDGE**

