Gathu v County Government of Nairobi & 6 others (Environment & Land Petition 23 of 2017) [2022] KEELC 15027 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15027 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 23 OF 2017

MD MWANGI, J

NOVEMBER 24, 2022

BETWEEN

DANIEL M. MWANGI GATHU ..... PETITIONER

AND

COUNTY GOVERNMENT OF NAIROBI ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD RESPONDENT

LOISE NYAGUTHII MURIITHI ..... 4TH RESPONDENT

PAUL MUHORO MURIITHI ..... 5TH RESPONDENT

COMMITTEE EXECUTIVE MEMBER OF PHYSICAL PLANNING COUNTY GOVERNMENT OF NAIROBI ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

JUDGMENT

Background

1. The Petitioner in this case, Daniel M. Mwangi Gathu is the registered owner of House No. K20/H erected on L.R. No. 209/6989/64 situated within what is collectively called Jamhuri Housing Estate within the Nairobi County and popularly known as 'Jamhuri Estate'.

2. Jamhuri Estate was the first of the several residential estates developed by the defunct City Council of Nairobi in the early years of Kenya independence, for sale to city residents. As the minutes of 11th August 1967 of the Social Services and Housing Committee of the defunct City Council of Nairobi show, in Jamhuri Estate, the housing units were to be grouped and situated in landscaped settings with

the aim of giving maximum amenities to the owners of the properties whilst at the same time keeping service costs to the minimum. The government of Kenya granted the City Council of Nairobi a 99 years lease being grant of lease L.R. No. 209/6989 measuring approximately 9.30 ha from January 1968 for that purpose.

3. The special conditions in the lease explicitly provided that 'no buildings were to be erected on the land neither additions nor external alterations were to be made to any buildings, otherwise than in conformity with the plans and specifications previously approved in writing by the Commissioner of lands.'

4. The City Council of Nairobi subsequently surveyed the land and created 2 types of residential units with adjoining community areas (open spaces and road reserves) as follows: -

    i. 156- three bedroom attached homes in 24 blocks – on 3.2 ha.

    ii. 72 flats in 8 blocks – 0.97 ha

    iii. Landscaped open space- 2.98 ha

    iv. Road reserves – foot paths and parking areas – 2.23 ha

5. A survey plan was developed in 1968 denoting the subdivision of the property that yielded sub-plots each with a new registration number. The open spaces included in the survey pan were denoted as L.R.209/6989/R clearly indicating that they were reserve areas. The letter 'R' at the end indicated that the specific parcel was reserved.

6. The Petitioner's parcel of land is L.R. No. 209/6989/64.

7. The survey pan for Jamhuri Estate in its entirety was completed and duly registered in accordance with the provisions of the *Survey Act*, Cap 299 Laws of Kenya, and deed pans issued. Since then, Jamhuri Estate has not been resurveyed again.

8. The open spaces and road reserves were to be held in trust by the City Council of Nairobi for and on behalf of the residents of Jamhuri Estate. They were therefore not available for alienation to any other persons or for any other purposes.

9. I pose at this point to retrospect at the 'good old days' before all hell broke loose in the 'City in the Sun' and our motherland Kenya resulting in the proliferation of informal settlements, inadequate infrastructural services, congestion, environmental degradation, unplanned urban settlements, pressure on agricultural land and numerous conflicts and disputes. (The report of the Land Commission of Inquiry into the illegal and irregular allocation of land – 2004).

10. The Petitioner explains that in the late 1990s, things took a dramatic turn when the City Council of Nairobi which was supposedly the trustee of the road reserves and open spaces, purported to unlawfully and whimsically allot the open spaces in the estate and proceeded to issue irregular ownership documents to 3rd parties without any reference to the residents of Jamhuri Estate.

11. The shepherd who was supposed to tend the flock turned against the sheep, 'eating the fat ones and using their wool to make clothes for himself and his wives'.

12. The defunct City Council of Nairobi christened the irregularly allocated plots 'infills'.

13. The residents of Jamhuri estate through their Estate Association, in a bid to protect and preserve their estate, filed a case against the City Council of Nairobi and obtained an injunction against the City Council and the 'allottees of the infills' awaiting the final determination of the suit. The case was

Nairobi HCCC 1390 of 1998 - *Emma Murai & others v Nairobi City Council*. As at the time of filing this petition, that case was yet to be determined. It has since been determined and I will be discussing the judgement and its implications on the petition by the Petitioner herein later in this judgement.

14. The court in the aforementioned suit (Nairobi HCCC 1390 of 1998 - *Emma Murai & others v Nairobi City Council*), on 12th July 2000 issued an interim injunction against the Nairobi City Council (the predecessor in title to the Nairobi City County government) barring it and the allottees of plots/ and or purchasers from allottees described in the map/drawing as Jamhuri Estate phase 1 infills and marked as J1 to J53 and also playing fields, public open spaces, and parkings from proceeding with the allotments, and allottees or any person purportedly deriving interest/benefit from them proceeding with the development of the said plots/open spaces until the final determination of the suit or until further orders of the court.

15. The Petitioner avers that the city council of Nairobi in flagrant breach of the aforesaid order of the court, undeterred went ahead to prepare and procured for registration leases for the infills including a lease dated 14th may 2010 for a plot No. 159 next to the Petitioners Parcel No. L.R. No. 209/6989/64 in favour of an entity known as Resurge investment limited which lease was registered in the lands office as IR No. 139632. Resurge Investment Ltd subsequently transferred the said lease to the 4th & 5th Respondents herein on 2nd October 2013.

16. The lease was created on plot No. 159 which was eventually registered in the Lands Office as L.R. No. 209/6989/159 with the full knowledge that it was hitherto reserved as public land.

17. The Petitioner avers that his home located on L.R No. 209/6989/64 and other residential units constituting Jamhuri Estate as originally developed are the 'dominant tenements' entitled to the continued benefit and enjoyment of easements accruing from the subservient tenements which were reserved for common public use. The reserved spaces were denoted as L.R. No. 209/6989/R signifying that they were no longer available for alienation.

18. The Petitioner insists that L.R. No. 209/6989/159 therefore does not therefore in reality exist; he calls it a legal aberration. The interest therefore purportedly transferred to the 5th & 6th Respondent was irregular, null and void in law.

19. By way of a letter dated 14th May 2015 issued by the Nairobi City County Government, the 4th & 5th Respondents obtained an approval to construct a two (2) storey building on the impugned plot L.R. No. 209/6989/159. They however, proceeded to construct a seven (7) storey block of flats next to the Petitioner's maisonette on L.R. No. 209/6989/64.

20. In the course of construction and after the completion, the 4th & 5th Respondents blatantly trampled on the Petitioner's right to property under article 40 of the *Constitution*. The Petitioner has at paragraph 23 (a-k) of his petition particularized the actions by the Respondents constituting the violations.

21. Consequently, the said actions by the 4th and 5th Respondents with the acquiescence of the 1st Respondent, Nairobi City County Government, have caused the Petitioner's house to diminish in value and denied him the right to quiet enjoyment of his property. As a result, the house in which the Petitioner had been living with his family for over twenty (20) years became inhabitable due to the risks and intrusions highlighted above forcing him to abandon it and seek residence elsewhere.

22. Although the Petitioner remains the registered owner of the plot L.R. No. 209/6989/64, he is incapacitated because he has been unable to dispose it off yet he cannot at the same time live in it.

23. The block of flats constructed by the 4th and 5th Respondents was done in such a cavalier way that some of its windows and doors when open intrude into the Petitioner's space. Clothes hanged out to dry

by the tenants in the flat drip water into the Petitioner's compound. Others, including undergarments fall off into the compound totally violating his space.

24. The Petitioner is categorical that the 4th & 5th Respondents were able to put up the block through the help and constant aid of the 1st & 6th Respondents.

25. The accuses the 2nd & 3rd Respondents (National Land Commission and the National Environment Management Authority respectively) of failing to take action to stop the violations despite his complaints. He particularly points at the 3rd Respondent, National Environment Management Authority (NEMA) for ignoring valid complaints regarding the illegal and irregular construction undertaken by the 4th & 5th Respondents.

26. The Petitioner has particularized the complaint against each of the Respondents at paragraph 32 (a) – (h) of his petition.

27. The Petitioner prays for various reliefs as follows:

    a. A declaration that the creation and allocation of all the sub-leases and in particular L.R. No. 209/6989/159 from the reserve land number LR/209/6989/R is unlawful, unprocedural, unfair and unjust thus null and void.

    b. A declaration that the creation of the sub-leases and in particular L.R. No. 209/6989/159 by the 1st Respondent amounts to deprivation of the petitioners right of use together with other original owners of L.R. No. 209/6989/R.

    c. A declaration that the purported creation of new sub-leases on LR No. 209/6989/R in particular L.R. No. 29/6989/159 violates the Petitioner's right under Article 40 of the *constitution*.

    d. A declaration that failure by the council to disclose to the Petitioner its intention to create sub-lease L.R No 209/6989/159 from the reserve land LR No. 209/6989/R violates the Petitioner's right to information, notice and participation which is in violation of Article 47 of the *Constitution*.

    e. A declaration that since LR No 209/6989/R had already been alienated as reserve land for use and enjoyment by all adjoining leases and in particular L.R. No 209/6989/64, it was not possible to alienate LR No 209/6989/R for any other purpose.

    f. A mandatory injunction to compel the respondents to bring down and/or demolish the illegal seven storey building erected on the reserve land and restoration of the land to its original condition.

    g. General damages for diminution of value to the Petitioner's residential unit erected on 209/9689/64

    h. The respondents be ordered to compensate the Petitioner in the sum of kshs 14,000,000/-

    i. A declaration that all the reserve land within Jamhuri Estate comprised in LR No. 209/6989/R is public utility land vesting in the National Land Commission to hold in trust for the Petitioner.

    j. A declaration that any alteration of the original development to introduce new construction is unlawful and diminution of the environment.

k. An order revoking any building permit, approval of consent issue by third respondent for construction over LR No. 209/6989/159.

l. An order perpetually barring the third respondent from issuing any building permit, approval or consent to the fourth and fifth respondent for construction over L.R. No. 209/6989/159

m. A declaration that any approval of building plan by the first respondent over LR No. 209/6989/159 is unlawful.

n. An order quashing any building plan approved by the first respondent over LR No 209/6989/159

o. An order revoking allotment of LR No 209/6989/159 to Resurge Investments Limited and the subsequent transfer to the fourth and fifth respondents.

Response by the Respondents

28. The 1st, 3rd and 6th Respondents replied to the petition by way of replying affidavits. The 2nd Respondent on its part filed grounds of opposition. The 4th and 5th Respondents despite service by way of substituted service did not file any response. Neither the 7th Respondent. Respond to the Petition.

Response by the 1st and 6th Respondents.

29. The Replying Affidavit filed on behalf of the 1st & 6th Respondent was sworn by one Albwao Erick Odhiambo, Director of Legal Affairs of the 1st Respondent on 17th March 2017.

30. In the said affidavit, the deponent deposes that the 1st Respondent is the only authority statutorily mandated by the *Physical Planning Act* cap 286 (now repealed) to approve any development and/or construction within the Nairobi City County.

31. The Jamhuri Estate where the Petitioner resides, falls within zone 4 of the Nairobi Urban Planning zoning map which allows multi dwelling units/flats.

32. The deponent zeros in to the Jamhuri Estate and particularly deposes that: -

a. Block L.R. No. 209/6989 was the property of Nairobi City County, before it was developed into what is now known as Jamhuri Estate Phase 1.

b. In 1968, the predecessor in title to the Nairobi City County developed 156 (three bedroom) maisonettes in 24 blocks- on 3.2 ha and 72 flats in 8 blocks in an area of 0.7 ha.

c. The property known as LR No 209/6989/R was not developed due to lack of funds. This was however, still the property of the 1st Respondent.

33. The Affidavit was filed when this matter was before the High Court. The petition was subsequently transferred to this court. The issues of jurisdiction raised in the affidavit have therefore been overtaken by events. This court is properly seized of this matter.

Response by the 2nd Respondent.

34. The 2nd Respondent is the National Land Commission. Its response was by way of grounds of opposition dated 26th October 2021. In a nutshell the 2nd Respondent avers that it has been wrongfully joined in the petition as the Petitioner has not demonstrated any violation(s) committed by it.

Response by the 3rd Respondent.

35. The replying affidavit filed on behalf of NEMA is sworn by one David Ongare, the Director compliance and Enforcement, on 27th February 2017.

36. The deponent describes NEMA as the Principal instrument of the Government of Kenya in the implementation of all policies relating to the environment. Further that it is entrusted by the *Constitution* and the Laws of Kenya to safeguard the right to a clean and healthy environment in Kenya.

37. The deponent affirms that NEMA received an Environment Impact Assessment (EIA) project report from the 4th & 5th Respondents with respect to the subject project on 15th July 2015. It was for construction of a proposed two(2) apartments and one(1) caretaker's unit being two(2) storey with the ground floor being the vehicle parking area.

38. The deponent further states that he received complaints from Jamhuri Estate Residents Welfare Association informing him of injunctive orders barring any developments on the 4th and 5th Respondents' Land. He as a result declined to process an EIA licence and communicated the same to the 4th and 5th Respondents. He has attached a copy of the letter communicating his decision to the 4th & 5th Respondents marked "DO2(a)"

39. The deponent is categorical that NEMA had not at the time issued an EIA licence or approval licensing the construction of the alleged high-rise structure on the property known as L.R. No. 209/6989/159. Todate, NEMA has not issued the license; meaning that the 4th and 5th Respondents under the supervision of the 1st Respondent proceeded without an EIA licence or approval licensing from NEMA. He recommends that the same should be stopped forthwith. He supports the Petitioner's bid to stop the illegal construction and restore the land to its original position on the basis of the precautionary principle. The affidavit was sworn on 27th February 2017. The circumstances have since changed significantly. The unlicensed building has since been completed.

40. The deponent pointed out that the situation was exacerbated by the fact that the approval issued by the Nairobi City County was only for two(2) apartments and not multi-storied apartments. He urges action to deal with the impunity exhibited by the project proponents.

41. The deponent insists that NEMA did not superintend the alleged construction neither did it condone it or ignore complaints as alleged by the Petitioner. NEMA only became aware that the project proponents had proceeded with the project of putting up a multi-storied building after it was served with this petition by the Petitioner herein.

Evidence adduced in support of the Petition

42. The Petition proceeded to full hearing with the Petitioner testifying orally as a witness in his case in accordance with the directions of the court.

43. The Petitioner adopted his affidavit in support of the petition sworn on the 15th September 2016 together with the annextures thereof as his evidence in chief. The affidavit, I must say explains in great details the Petitioner's case. The Petitioner additionally produced the judgment in ELC Petition No 23 of 2017 which was the case filed by residents of Jamhuri Estate. None of the Respondents presented a witness.

44. Earlier on in the year 2019, the Deputy Registrar of this court had visited the site and made a site visit report dated 8th August 2019. The report forms part of the evidence in this case.

45. The Petitioner called two(2) other witnesses in support of his case. One was the valuer who valued the Petitioner's house on plot L.R. No 209/6989/64. The other witness was the son of the Petitioner who provided the electronic evidence in form of a compact disk showing the extent of damage and interference with the Petitioner's home. The video was played in court.

Court's direction

46. The court at the close of the case directed the parties to file written submissions. However, none of the parties filed any submissions; including the Petitioner despite extension of the time on two occasions to comply.

Issues for determination.

47. Upon considering the Petition and the supporting affidavit and statement, the responses by the Respondents and the evidence adduced herein, the court is of the opinion that the issues for determination in this matter are:-

    a. What is the significance of the judgment in ELC 1312 of 1998 (consolidated with HCCC 1390 of 1998) to the petition herein and the prayers sought by the Petitioner?

    b. Whether the Petitioner is entitled to the relief(s) sought and against which Respondent(s).

    c. Who should bear the costs of the Petition.

Analysis and determination.

A. What is the significance of the judgment in ELC 1312 of 1998 (consolidated with HCCC 1390 of 1998) to the petition herein and the prayers sought by the Petitioner?

48. The Petitioner in his petition made reference to HCCC 1390 of 1998. Apparently this case being a land case was transferred to the Environment & Land Court. Subsequently it was consolidated with an earlier case No. ELC 1312 of 1998. Judgment was delivered by Lady Justice Bor on 6th December 2018.

49. I have perused the said Judgment. It touches on a wide range of issues that the Petitioner has raised in his petition.

50. I am alive to the decision in the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Another* (2020) eKLR, where the court cautioned that: -

> "Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit does not sanitize the suit to make it a fresh suit."

51. The court of Appeal in the case of the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR defined the elements that constitute '*res judicata*' as follows: -

    a. The suit or issue was directly and substantially in issue in the former suit.

    b. That former suit was between the same parties or parties under whom they or any of them claim.

    c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.

52. The purpose of the doctrine as the Court of Appeal elaborated is to ensure finality in litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.

53. The foundations of *res judicata* therefore rest in public interest for 'swift, sure and certain justice'.

54. I am happy that the Petitioner brought to the attention of this court the Judgment of my sister Judge Lady Justice Bor. It is a clear demonstration of honesty and honour that must be commended.

55. Sure enough, the Petitioner is aware that a big number of the issues in his petition were also in issue in the case HCCC 1390 as consolidated with ELC 1312 of 1998. The court that determined the issues was competent and rendered a final determination after a full hearing.

56. In the Petition before me, the Petitioner sued in his individual capacity as the owner of the parcel of land known as L.R. No. 209/6989/64 as well as a resident of Jamhuri estate.

57. The suit HCCC 1390 of 1998 (*Emma Murai & others v Nairobi City Council*) according to the Petitioner was filed by the Jamhuri Estate Association through its officials (off course on behalf of the residents). The suit was challenging the capricious actions of the City Council of Nairobi (the predecessor in title to the Nairobi City County Government) of interfering with the original plan and design of Jamhuri Estate by irregularly creating additional plots on reserved public spaces.

58. Though I have not had the opportunity to read the pleadings in the said case, the judgment is quite telling on the issues that were before the court.

59. At paragraph 6 of the said Judgment, the gracious Lady Judge while analyzing the pleadings and evidence stated that, "the Defendants' (officials of Jamhuri Estate Association) accused the City Council of Nairobi of breaching its 'implied contract' by issuing letters of allotment to 3rd parties over the subdivided plots created from the initial spaces which were designated as J1 to J 53". They were apprehensive that the City Council intended to subdivide all the open spaces in Jamhuri Estate and allocate it to 3rd parties to the detriment of the residents of the estate of Jamhuri Estate. Their case was the City Council was estopped from subdividing and allocating the open spaces in the estate which were meant for public utility and intended for common use of all the residents of the estate. They argued that the allotments to the Plaintiffs (3rd parties) were therefore illegal.

60. The Plaintiffs sought orders for nullification of the subdivisions and allotment letters irregularly and illegally issued by the City Council and the cancellation of the title documents issued in respect of the 'subdivisons'.

61. The court after hearing the evidence presented before it made a determination on all the issues. As far as those issues are concerned therefore, this court is barred by the doctrine of res judicata from making any finding. I would in essence be 'sitting on appeal or review' of the determination by a judge of equal status.

62. When the Plaintiff became aware of the Judgment in the previous suit, he should have moved to amend his petition.

63. The court has nevertheless identified those issues and will isolate them accordingly and strictly restrict itself to the issue of the Petitioner's claim for compensation for diminution of the value of his

residential house on L.R. No. 209/9689/64 as a result of the construction of the seven(7) storey building on the neighbouring plot L.R No 209/6989/159 by the 4th & 5th Respondents and the prayer for revocation and barring NEMA from issuing any approval over L.R No 209/6989/159

64. What this means is that the Petitioner's prayers (a), (b), (c), (d), (e), (f),(i), (j), (l), (m), (n) & (o) will not be considered having already been determined in the above referred case.

65. By way of explanation on prayer (f) and for emphasis purpose only; the Petitioner sought an order of mandatory injunction to compel the Respondents to demolish and or bring down the seven (7) storey building erected on the reserved land and restore the land to its original conditions. The Petitioner's basis for this prayer as framed in his petition was that the said building is on a reserve land. The issue whether the said plot on which the building is erected was reserve land that was illegally allocated or not was an issue that was directly and substantially in issue in the suit HCCC 1390/1998 (consolidated with ELC 1312 of 1998).

66. In the Petition, the Petitioner had alleged that the seven (7) storey building was constructed contrary to the building plans approved by the City Council of Nairobi. Had that been the basis of the prayer for the mandatory injunction, the court would not have had any difficulty allowing it. As has been aptly stated in numerous decisions by courts, a party is bound by his pleadings.

67. In the case of the *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* (2014) eKLR the court reiterated the principle that parties in litigation are bound by their pleadings. The court in the case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3 where the court quoted an article by Sir Jacob entitled, "the present importance of pleadings" published in 1960 where the author had stated that,

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of the might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" in the same sense that points other than those specific may be raised without notice."

68. The supreme court of Nigeria on the other hand in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that,

> " In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."

69. In the case of *Raila Odinga & Another v IEBC & 2 others* (2017) eKLR the Supreme Court of Kenya pronounced the essence of pleadings and stated that,

> " It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

70. The same reasoning applies too to the prayers in regard to the building plans. The basis of the Petitioner's prayers is the allegation that the plot upon which the building was to be erected was illegally allocated to the 4th & 5th Respondents through Resurge Investment Limited who transferred it to the 4th & 5th Respondents.

B. Whether the Petitioner is entitled to the prayers sought against the 3rd Respondent

71. Prayers (k) and (l) were sought against the 3rd Respondent, NEMA. As I had already pointed out earlier, the 3rd Respondent had filed a replying a replying affidavit vehemently denying the allegation that it issued an EIA licence or approval to the 4th & 5th Respondent for the construction over L.R. No 209/6989/159. The Petitioner didd not file any further affidavit to contradict the avements in the replying affidavit of the 3rd Respondent.

72. In his evidence, the Petitioner did not produce any evidence to prove that NEMA had issued any EIA licence or approval to the 4th & 5th Respondent.

73. It is a well-established principle of the law of evidence that he who alleges, proves. The *Halsbury's Law of England*, 4th Edition, Volume 17, at paragraph 13 & 14 discusses the "burden of proof" in the following words:

> " The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case."

74. The issue was emphasized in the case of *Eastern Produce (k) Ltd v Christopher Atiado Osiro* (2006), where the court held that:-

> " It is trite law that the onus of proof is on he who alleges."

75. The Petitioner has not discharged that burden of proof in respect of the allegations against NEMA.

76. Secondly, NEMA has a statutory mandate to issue licenses and or approvals of the nature under consideration in this matter but after due consideration of all the issues contemplated in the statute. How then would the court perpetually bar NEMA from performing its statutory obligations?

77. The statute creating NEMA, *Environment Management and Co-ordination Act* (EMCA) has provided has provided the mechanisms to address grievances by any person not satisfied with the exercise of NEMA's Statutory duty i.e. the issuance or failure to issue the licence as the case may be.

78. This court declines the invitation to perpetually bar a statutory body from exercising its mandate.

79. Before I move to the next issue, I need to pose a question triggered by the affidavit of the Director Compliance and Enforcement of NEMA.

80. Is NEMA a toothless bulldog that is all bark and no bite?

81. That affidavit sworn by David Ong'are, the Director Compliance and Enforcement of NEMA has brought to question the capacity of NEMA to enforce compliance of laws and policies to safeguard the right to a clean and healthy environment.

82. In the said affidavit, the Director of compliance & enforcement, describes NEMA as the Principal Instrument of the Government in the implementation of all policies relating to the environment and is entrusted by the Constitution and the Laws of Kenya to safeguard the right to a clean environment:

83. In the affidavit, the Director of Compliance and Enforcement deposes that NEMA has never issued an EIA licence or approval licensing the construction of the alleged high-rise structure on the property known as L.R. 209/6989/159 at Jamhuri Estate and that construction of the same ought to be stopped forthwith.

84. I pose at that juncture to wonder; who else ought to stop the construction that is proceeding without an EIA licence if not NEMA? That is the basis of my question; is NEMA a toothless bulldog that is all bark and no bite?

85. The Director of Compliance and enforcement has correctly noted that NEMA is the principal instrument of the government to safeguard the right to a clean and healthy environment. I agree with the Director. My reading of the law tells me that NEMA has the necessary statutory mandate under *EMCA* to enforce compliance against any person.

86. NEMA needs to take the lead in safeguarding environmental rights and executing its statutory mandate. It must not shy away from taking appropriate legal action against violaters irrespective of their status be they natural persons or corporations, including the government agencies and County Governments.

87. A multi-sectoral approach is called for between the various agencies in the licensing and approval of project and constructions. How could the County Government of Nairobi have issued an approval without confirming whether NEMA had licensed the project?

88. Or is it a case of too many cooks spoiling the broth?

89. Parliament needs to interrogate the laws and policies governing the approval and authorization of projects and construction of buildings as well as the effectiveness of the various agencies concerned with the implementation and enforcement of those laws and policies. The country has witnessed an increase in the number of high-rise buildings collapsing and killing innocent Kenyans.

90. It is time to take action. The usual rhetoric and empty threats to take stern action and leave no stones unturned has now become just too familiar. Parliament must get to the root cause of this problem.

91. The unfortunate situation disclosed by the sequence of events in this case points to institutional failure and a clear lack of co-ordinated multi-sectoral approach. Those are some of the urgent issues that Parliament must address.

92. The orders sought therefore cannot be granted for lack of proof.

C. Whether the Petitioner is entitled to compensation for diminution in value and destruction of his property on L.R. No. 209/6989/64

93. The Petitioner graphically testified how in the course of the construction of the 4th and 5th Respondents high-rise building, his home was blatantly violated. His roofing tiles and rafters were damaged by falling rocks and debris from the storey building. Without seeking the Petitioners authority and or consent, the 4th and 5th Respondent masons chopped off part of his house's roof such that the seven(7) storey building now lies wholly wall to wall with the Petitioner's house.

94. During the construction, the 4th and 5th Respondents acted recklessly and without regard to the Petitioner's rights to privacy and property. They failed to take reasonable care to avoid act or omissions that could reasonably be foreseen as likely to injure their neighbour, the Petitioner herein. They did not bother to provide screening around the construction area to prevent debris, cement and dust from blowing into the Petitioner's compound. At one point during the construction, a huge rock fell off from one of the floors of the high-rise building tearing a gaping hole through the Petitioner's roof right through the ceiling into his son's bedroom and onto the bed on the first floor of the house. Fortunately, the son was not in the room at the moment.

95. The high-rise building has blocked natural light into the Petitioner's house. When it rains water from the balconies of the high-rise building drips directly into the Petitioner's compound.

96. In the course of the construction and due to the constant banging with mattocks, the walls and foundations of the Petitioner's house were shaken and became unstable.

97. Finally, the privacy of the Petitioner and his family has been completely violated. The occupants of the high-rise building have an unobstructed view of the Petitioner's home.

98. As I had mentioned earlier on, the Deputy Registrar of this court had visited the scene and filed a report with pictures showing the situation on the ground.

99. The construction by the 4th and 5th Respondent was authorized by the County Government of Nairobi, whose Director of Legal affairs correctly described as the only body statutorily mandated by the *Physical Planning Act*, Cap 286 of the Laws of Kenya (now repealed) to approve any development and or construction within Nairobi City County.

100. In granting the approvals for such developments and constructions one of the core and foremost consideration must be the rights of the immediate neighbours. The county Government must ensure that the approved construction does not infringe on the rights of other property owner-rights such as the right to access their own properties, right to natural and right to privacy. Besides approving, the County government has an obligation to supervise the construction to the very end to ensure that it complies with what was approved.

101. I do find that the Petitioner has proved his case of violation of his property rights by the 1st, 4th & 5th Respondents. The actions by the 4th and 5th Respondents were carried out with the acquiescence of the 1st Respondent, Nairobi City County Government.

102. The valuer elaborated in his testimony and in his report the justification for the compensation of Kshs. 14,000,000/-

103. I therefore award the Petitioner the sum of Kshs 14,000,000/- as against the 1st, 4th & 5th Respondents jointly and severally being the compensation for the damage and diminution of value of the Petitioner's house.

104. I find no basis for the prayer for 'general damages for diminution of value' to the Petitioner's residential unit erected on 209/9689/64. Having awarded the Petitioner compensation for the actual loss of value and damage to his home, the prayer for general damages for diminution of value is superfluous.

105. The court itself is as bound by the pleadings of the parties as the parties themselves.

Conclusion

106. The upshot is that the Petitioner's case is allowed as against the 1st, 4th and 5th Respondents only. The Petitioner is awarded compensation of Kshs 14,000,000/- being the compensation for the damage and diminution of value of the Petitioner's house. The figure of Kshs.14,000,000/- shall attract interest at court rates from the date of this judgment until payment in full.

107. The court further awards costs of the petition to the Petitioner as against the 1st, 4th & 5th Respondents jointly and severally.

108. The case against the 2nd, 3rd & 7th Respondents is disallowed but with no orders as to costs considering that the Petitioner's case was of the nature of public interest litigation.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kiiru for the Petitioner

N/A for the Respondents

Court Assistant: Hilda/Yvette

M.D. MWANGI

JUDGE