



Wagitaha Holdings Limited v Haldoor Real Estate Limited & 2 others (Environment and Planning Civil Case E003 of 2023) [2025] KEELC 4405 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING CIVIL CASE E003 OF 2023**

AA OMOLLO, J

JUNE 5, 2025

BETWEEN

WAGITAHA HOLDINGS LIMITED PLAINTIFF

AND

HALDOOR REAL ESTATE LIMITED 1ST DEFENDANT

NEMA 2ND DEFENDANT

**THE DIRECTOR DEV MANAGEMENT, THE NAIROBI COUNTY
GOVERNMENT 3RD DEFENDANT**

JUDGMENT

1. The Plaintiff commenced this suit against the 1st to 3rd Defendants vide a plaint dated 16th August 2023 and amended on 30th December 2024 seeking for the following prayers;
 - a. A permanent injunction restraining the 1st Defendant from continuing with construction works or development of the Property Number Nairobi/ Block 1X4/X2 along Mukunga Road, Pangani Ward, Starehe Sub County —Nairobi City County or other activity and or any activity thereon whatsoever.
 - b. The 1st Defendant be compelled to demolish, deconstruct, disassemble and remove all the offending and or the structures illegally constructed on the Property Number Nairobi/ Block 1X4/X2.
 - c. A mandatory injunction compelling the 2nd and 3rd Defendants to decline withdraw and/or cancel any approvals for any change of user or approval of plans or any ELA licence in respect of the Property Number Nairobi/ Block 1X4/X2 due to lack of proper public participation.
 - d. General damages to the plaintiff for interfering with the plaintiffs right to a safe and peaceful enjoyment of his property.



- e. Special damages for loss of rental income of Kenya Shillings Four Hundred Thousand (Kshs.400000).
 - f. Costs of this suit and interest thereon at court rates till payment in full.
 - g. Any other order that this Court shall deem fit to grant.
2. The Plaintiff asserts ownership of a property known as Nairobi/Block 1X4/X3 adjacent to that of the 1st Defendant, who owns Nairobi/Block 1X4/X2 herein after referred to as “the suit property” and claims the right to exclusive and peaceful possession of it.
 3. The Plaintiff contends that the 1st Defendant has undertaken unauthorized construction activities on the suit property, including demolishing existing houses and conducting extensive excavation works without obtaining the necessary statutory approvals or engaging in public participation. Additionally, the Plaintiff highlights that the 1st Defendant failed to submit a required Environmental Impact Assessment (EIA) Report to the relevant authorities or secure building plans, all of which were necessary for the legality of the works.
 4. The Plaintiff pleaded to have experienced significant disruption due to the 1st Defendant’s actions, including privacy invasions, noise, and the accumulation of construction debris. That a group of 19 local residents, including the Plaintiff, formally objected to the unauthorized works.
 5. Further, the Plaintiff avers that the 1st Defendant’s negligence in carrying out construction has caused damage to utilities like electricity and water pipes, disrupted essential services, and created a health hazard for the Plaintiff and the surrounding community. That the ongoing construction is also alleged to be altering the character of the area, shifting it from a low-density residential zone to one suitable for larger developments, violating the rights of neighboring property owners to quiet enjoyment.
 6. The Plaintiff asserted that it has suffered both financial and non-financial losses due to the 1st Defendant’s actions including lost rental income from a tenant who vacated the property due to the disruption, unsanitary conditions caused by water leakage, and structural damage to a shared boundary wall. In addition, the Plaintiff cites the nuisance created by falling construction debris, environmental concerns, and the burden of engaging in litigation.
 7. That despite demands to cease the unauthorized works, the 1st Defendant has refused to stop, prompting the Plaintiff to seek legal recourse and that there is no other proceedings between the parties regarding the same matter.

1st, 2nd & 3rd Defendants’ Defences:**

8. Each of the Defendants filed amended defences dated 15th January 2025 and 14th January 2025 respectively. The 1st Defendant acknowledges ownership of the property in question but denies having begun any construction works there. He insists that it has always intended to undertake authorized construction on the property, with plans to do so even during the ongoing proceedings.
9. Further, the 1st Defendant denies the allegations in the amended plaint concerning the commencement of construction, asserting that only a geotechnical survey was conducted in preparation for future construction. They also emphasize that all necessary permissions and approvals, including an Environmental Impact Assessment (EIA) license and a certificate of compliance from the National Construction Authority, were obtained legally in accordance with the law thus the suit moot due to the legal approvals already in place.



10. The 3rd Defendant admits that the 1st Defendant applied for and received approval for the proposed construction on the subject property, including a change of use for the land. However, the 3rd Defendant disputes the allegations in relation to the lack of public participation in the approval process and accusations of illegal or harmful practices associated with the development. The 3rd Defendant clarifies that a full environmental impact assessment was carried out, and the necessary permits were granted after proper review. They aver that public participation was also conducted and feedback from the community was incorporated into the project planning, Thus no environmental or legal violations occurred in the process.
11. The 2nd Defendant acknowledges that an Environmental Impact Assessment (EIA) report was initially missing at the start of the construction, but after the suit was filed, a proper site inspection was carried out, and an EIA report was submitted. The 2nd Defendant pleaded that it conducted a thorough review of the proposed project, including a public consultation process, which is a requirement under the Environmental Management and Coordination Act (EMCA).
12. That the EIA report submitted was deemed sufficient, and an EIA license was issued in April 2024. The 2nd Defendant also denies the Plaintiff's claims of suffering damage and insists that proper procedures were followed in issuing the EIA license. The Defendant state that they were unaware of the Plaintiff's intention to sue prior to the legal action being taken.

Evidence adduced:

13. In support of the Plaintiff's case, PW1 Gidraph Mbogo Babu, its director testified and adopted two written statements dated 16th August 2023 and 14th February 2025 respectively as evidence in chief. The witness also produced bundles of documents contained in a list dated 16/8/2023. The documents produced inter alia were; copy of the certificate of lease for Nairobi/Block 1X4/X3, objection notice dated 28th July 2023, photographs showing status of Nairobi/Block 1X4/X2 on and after demolition of houses, photographs showing fallen construction debris, photographs showing alleged damage by the 1st Defendant's construction and photographs of the drenched neighborhood. and 27/1/2025.
14. PW1 stated that he is a neighbor adjacent to the 1st Defendant living in a single dwelling house and the case was brought because the developers demolished the existing house which was a private dwelling and started excavations without the necessary approvals.
15. He testified that there was a meeting of 7/9/2023 called by the Assistant Chief of Pangani to hear complaints of the members of the estate and in the meeting a document was produced and asked to sign but objected. That they only saw the EIA report after their Advocate asked for it. That the 2nd Defendant filed some questionnaires filled by persons named Kendi who the witness identifies as a broker that sells plots along Juja road but does not stay in the estate. That the others, John Chepkoech, Wambua, Sara and Patrick all stay outside the estate.
16. It is the Plaintiff's case that the development spoiled electricity wires, water pipes, sewer lines, broke his roof top tiles, dug so close to the wall leaving his house shaking. In support they produced photographs to show the damage caused. Further, there was noise, dust emitted and at one point he had to pay the City County to drain the clogging water.
17. During cross examination, the witness stated that NEMA did not visit the site and if they did, they did not call anyone in the house/plot. He denied that there was any public participation conducted. He averred that if the developer got any approvals, it was after the meeting with the assistant chief and that the excavations were 5 feet but put back the soil after the complains.



18. He admitted that he had not produced any document to show that the area is designated as low-density single dwelling and or evidence to show burst water pipes but reiterated that no public participation was conducted as he was not contacted being a part of Juja Road Estate home owners.
19. The 1st Defendant called one of its director DW1Khalif Ali, who testified as DW1 in support of its case. He adopted his written statement dated 11.9.2024 as his evidence in chief and produced the documents filed vide the list dated 11/9/2024 and 21/1/2025 respectively as exhibits.
20. DW1 asserted that he had met PW1, his wife, his son and daughter discussing possibility of purchasing their land which is adjacent to the suit parcel but they gave a high quotation. That when the 1st Defendant started building on the suit plot, Pw1 instituted this suit against them which in his view was malicious and aimed at forcing them into buying his parcel.
21. It is the evidence of the 1st Defendant that they had not started construction except what has been done is demolishing the previous structure, and excavations of the natural soil so as to enable them conduct geotechnical survey. Currently, DW1 stated that they have received all the necessary approvals for the developments and urged the court to lift the orders of injunction.
22. During cross examination, DW1 confirmed that they purchased the suit property when it had a house in it. They did not obtain any approvals when demolishing the house and when this suit was being instituted but have since obtained the same. That after the injunction was given, no works were carried out but filled forms after a public participation meeting of September 2023 was held of which the residents had been invited for vide letter dated 24.7.2023.
23. The witness asserts that 12 people signed the spread sheet attached to the minutes of the meeting and has evidence proving service of the feedback of the public participation to the Juja residents. Further, that prior to the meeting, the questionnaires were given to the residents, of which Joan Chepkoech being among those that filled it lives in the estate, Kendi owns a hospital near the estate, Wambua's form does not indicate the house but lives in the estate.
24. The 1st Defendant through DW1 insist that there are mixed developments in the area which are high storeys. That they have received permission for change of user from the 3rd Defendant.
25. Ms Catherine Thaithi testified on behalf of the 2nd Defendant (hereafter referred to as DW2) by stating that she works with it as county director of environment. She adopted her written statement dated 10/9/2024 as evidence in chief and produced documents filed on the same date and further documents in the list filed on 3/2/2025 as Dex 3 & 4.
26. She testified that the 1st Defendant as a developer is required to carry out public participation and that they have categorized projects into low risk and high risk. That the 1st Defendant's project was low-medium risk and so was required to present a comprehensive project report and they were satisfied with a series of questionnaires and meetings conducted.
27. Ms Thaithi explained that the questionnaires allow affected persons to air their views about the project and that once they receive the report, they consider if all the lists have been ticked plus approvals from other lead agencies. The witness continued to state that Juja A was initially single dwelling which forms the reason why the county has to grant the change of use. The 2nd Defendant would also visit the site to confirm if it is in character with its surroundings and in this case, they did two site visits in October 23 and April 2024. The visits confirmed what the expert had submitted.
28. During cross examination, the witness agreed that demolition of a building affects the environment but stated that demolition of the structure was not a degradation of environment but decommissioning.



- She stated that NEMA do not authenticate minutes taken if the meeting is chaired by chief as he/she is a representative of government. She clarified that project affected persons depends on the nature of risk, with low-medium risk persons would be immediate neighbor's and up to 500 metres.
29. John Kibuchi Mwangi gave evidence as DW3 on behalf of the 1st Defendant. He introduced himself as a civil and structural engineer certified by Engineering Board of Kenya and the director of Civil Ltd. He adopted his written statement dated 20.1.2025 as his evidence in chief. He stated that they undertake geotechnical soil testing before construction works commences and that in June 2023, he was contracted by the 1st Defendant to conduct soil testing. That the 1st Defendant was to remove the top soil before the testing.
 30. They moved on site on 4th July 2023 and by that time the 1st Defendant had removed the top soil after demolishing the existing structures that were on the suit property. They had done partial works but were stopped by uniformed police and so they carried out partial testing.
 31. Wilfred Masinde who is the deputy director Planning, compliance and Enforcement, Nairobi City County testified as DW4 on behalf of the 3rd Defendant. He adopted his witness statement dated 21/1/2025 as his evidence in chief and produced as exhibits the documents filed in the list dated 21/1/2025 in favour of the 3rd Defendant's case.
 32. That before issuing change of user, they consider the ownership (title), if the advertisement was put in one of the dailies and notice on site. In addition, they consider the type of proposed development. He confirmed that the 1st Defendant was issued with a change of user and his development plans approved.
 33. During cross examination, DW4 stated that he has held his position from Sept 2022 and conducted evaluation of the application for change of user. However, he didnot annex any evaluation report which he clarified during re-examination that since it's an internal process they do not require reports.
 34. He added that during the evaluation process, he was not aware of any objections raised to the change of user application made on 3rd June 2023. Normally, they communicate back in writing to any objection made but in this case they did not produced any responses to the objection as the objection dated 28th July 2023 came after evaluation of the application which was approved on 5th July 2023.
 35. That the building plans were approved by the Nairobi City County on 30th November,2023 resulting to plan Registration No. PLUPA -BPM-002673-N.

Submissions.

36. The Plaintiff filed submissions dated 2nd April 2025 while the 1st and 2nd Defendants filed submissions dated 11th April 2025 and 17th April 2025 respectively. The 3rd Defendant's submissions are dated 14th May 2025.
37. The Plaintiff submitted that the 1st Defendant demolished a dwelling house on the suit property and carried out excavation works without the necessary approvals from the relevant authorities, including from the 2nd and 3rd Defendants. Despite the Plaintiff's objections, the 2nd Defendant issued an EIA License to the 1st Defendant, and the 3rd Defendant approved a change of user and building plans.
38. The Plaintiff submitted that these approvals were questioned due to procedural irregularities, including lack of proper public participation and misrepresentation in the approval process. That the 1st Defendant's construction was commenced without approvals, violating their right to quiet possession of their property.



39. The Plaintiff argued that the public participation undertaken was superficial, with insufficient notice or transparency as evidence showed that the public meetings were not effectively conducted. Further, that there were discrepancies in the attendance registers and filled questionnaires. It is argued that the 1st Defendant's actions, including conducting soil testing and demolition prior to obtaining necessary approvals, were deemed to be in contravention of the law.
40. Relying on the precedents in *Mary Waithira Njoroge vs Muranga South Water & Sanitation (2022)* eKLR, the Plaintiff contended that these procedural flaws invalidated the approvals granted to the 1st Defendant, which were obtained through material misrepresentation and lack of public consultation.
41. As with regard to the Plaintiff's entitlement to remedies, they submitted that the 1st Defendant's activities on the property were illegal from the outset and that the subsequent approvals could not remedy the illegality. In support, they cited the case of *Daniel N. Mugunda v County Government of Kirinyaga & Another (2020)* eKLR, where damages were awarded for illegal construction.
42. The Plaintiff also submitted on the issue of costs, citing the case of *Jasbir Singh Rai & Others vs Tarlochan Singh Rai (2014)* which restated that costs follow the event. Hence, the Plaintiff should be awarded costs due to the wrongful actions of the 1st Defendant that led to the institution of the suit.
43. The 1st Defendant submitted that it had not begun construction, but only carried out preliminary activities, including decommissioning an existing structure for a geotechnical survey and soil testing. That their witnesses confirmed that no deep excavation or actual construction took place. Instead, only unsuitable soil was stripped for testing purposes as confirmed by the 2nd Defendant's inspection report and photographic evidence.
44. The 1st Defendant maintains that its activities were strictly preparatory and did not require prior approvals for construction but the Environmental Impact Assessment (EIA) License was legally obtained. According to the Environmental Management and Coordination Act (EMCA) 2015, the project was categorized as medium risk, requiring only a summary project report instead of a full environmental assessment.
45. That the 2nd Defendant submitted that the EIA license was properly issued after submission of the required documentation and that the process complied with the Environmental (Impact Assessment and Audit) Regulations 2003, as amended. The 2nd Defendant averred that a detailed EIA Project Report was submitted on 12/10/2023, including information on the environmental impacts of the project and an Environmental Management Plan.
46. The 2nd Defendant submits that although the Plaintiff raised objections about the lack of advertisement for the report, exclusion from the process, and insufficient consideration of their concerns, the project being a medium-risk project, the submission of a summary report was sufficient and public participation was conducted through a meeting with affected parties.
47. They also submitted that the Plaintiff also challenged the public participation process, alleging that the individuals who signed the questionnaires were not from the affected area but confirmed attending a public meeting where they expressed their concerns. The 2nd Defendant affirmed that public participation was appropriately carried out, including disseminating questionnaires and holding a meeting with affected persons. Additionally, the concerns raised were taken into account, and mitigation measures proposed.
48. The Defendants argue that the public participation process met both qualitative and quantitative engagement standards and in support cited the case of *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County of Nairobi Government & 3 Others (2013)* Eklr and *Makau & 3 Others*



(Suing in their own name and on behalf of the Syokimau Residents Association) v Amana & 2 Others (Environment & Land Petition 14 of 2017) KEELC 2020(KLR).

49. Regarding the Change of User and Development Approvals issued to the 1st Defendant by the 3rd Defendant, the Plaintiff argues the project is out of character with the surrounding neighborhood.
50. That however, the 3rd Defendant's evidence shows that public notification and consideration of objections were properly handled but the Plaintiff's objection was not addressed because it was submitted to the wrong authority and in support cited the case of Nzomo ((Suing on Behalf of Kunde Road Residents Welfare Association)) v Ontime Real Estate Limited & 2 others (Environment & Land Petition E004 of 2023) [2024] KEELC 6011 (KLR).
51. The 3rd Defendant's witness clarified that objections must be directed to the County Executive Committee Member in charge of Physical Planning, and since the Plaintiff did not follow this procedure, the objection was not considered in the approval process.
52. The 2nd Defendant emphasizes that the EIA process adhered to legal requirements and adequately addressed environmental concerns. That the Plaintiff's allegations regarding potential harm, such as pollution and infrastructure damage, were assessed and mitigated in the EIA report. The 2nd Defendant points out that no substantial evidence was presented to prove significant environmental damage, and claims of unsubstantiated issues like broken pipes or structural damage were not proven.
53. That the Plaintiff specifically pleaded special damages for loss of rental income in the sum of Kshs.400,000/=. That he lost monthly rental income of Ksh.50,000 from August until March 2024 but did not produce any receipts and/or proof of the same. They further argue that the Plaintiff failed to follow up on requests for the EIA report, invalidating their claim of a violation of the right to access information.
54. On their part, the 3rd Defendant pointed out the lack of authority from the board of directors not filed alongside the plaint and cited several cases inter alia Bugurere Coffee Growers Ltd versus Sebaduka & Another (1970) EA 147. It is also their submission that the 1st Defendant's approvals were properly procured. That the basis for granting the change of user licence was premised on the review of the housing policy in Juja A as a designated commercial cum residential zone to adequately the rising population.
55. The 3rd Defendant submitted that the application for change of user was submitted on 3rd June 2023 and the approval granted on 5th July 2023 subject to the conditions set thereunder. In addition, the 3rd Defendant stated that the objection notice dated 28th July 2023 was served upon the Director Urban Planning instead of the County Executive Committee Member as provided in the law (section 61(3) of PLUPA). Further that the objections raised were considered before the development permit was granted on 30th November 2023. The 3rd Defendant urged the court to dismiss the case for lacking merit with costs.

Analysis and determination:

56. I have considered the pleadings, the evidence produced and the written submissions filed on behalf of the parties as well as the authorities cited. Arising therefrom, I frame the following questions for determination;
 - a. Whether the 1st defendant works on the suit property required the necessary approvals.
 - b. Whether there was public participation undertaken before the impugned licenses were issued.



- c. Whether there was damage to the plaintiff's property.
 - d. whether the Plaintiff should be awarded the reliefs sought, and
 - e. who should bear costs of the suit.
57. Regarding the first issue, the plaintiff alleged that the 1st defendant demolished the existing house as well as excavated the suit property upto 5 feet deep without the necessary approvals which excavation it alleged caused their house to shake, interfere with electricity lines, water pipes and broken roof tiles. In support of the said allegations, the Plaintiff adduced photographs which showing the broken roof tiles and the gaping grounds filled with water.
58. In response to the claim, the 1st Defendant stated that this suit is maliciously filed because they only demolished the structures that were on the suit property, admittedly so before obtaining any permit from the requisite authorities. DW3, acknowledged that while on site on 4th July 2023, the top soil had already been removed and they started their works of extracting the deep soil for testing before they were stopped by uniformed policemen.
59. Since there is admission of the demolition of the existing house and the excavation of the top soil on the impugned premises, the question which arises is whether the 1st Defendant required permission to undertake the impugned exercise. The Physical Land Use and Planning Act of 2019 defines development thus;
- “development” means carrying out any works on land or making any material change in the use of any structures on the land.”
60. It is my considered opinion that demolishing an existing house is a form of development since after the demolition, the place would not exist in its original form and as well as dangers associated with such. Secondly, the excavations done as shown on the photographs appeared to be much more than just removing the top soil on the suit property for testing. Both activities amounted to material change in the use of that land and so the 1st Defendant required permission from the 3rd Defendant in accordance with the provisions of section 57 of PLUPA. Section 57 states thus;
- “1. A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
 - 2. A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.”
61. To the extent that the 1st Defendant did not have permission to demolish the existing house and or excavate the soil whether for testing or otherwise, I find it acted in contravention of the law.



Whether there was sufficient public participation:

62. Public participation in decision making is entrenched in article 10(2) and 47 of our Constitution and the relevant Sectoral laws. Section 58 (7) & (8) of the Physical Land Use and Planning Act in making provision for public participation states thus;

“(7) A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe.

(8) The notification referred to under sub-section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration.”

63. The Plaintiff is challenging the two sets of licences issued to the 1st Defendant by the 2nd and 3rd Defendants respectively. In so far as the change of user of the land is concerned, the 3rd Defendant stated that a developer is required to put up the notice in daily newspaper and also on site to inform any member of the public who may not be happy with the proposed change of use to raise any objection. So, did the 1st Defendant comply?

64. In paragraph 12 of its defence, the 1st Defendant pleaded that this claim by the Plaintiff is rendered moot in view of the fact that they had obtained all the requisite approvals. Some of the documents produced was a notification of change of use dated 5th July 2023 granted pursuant to the application dated 3rd June, 2023. The 1st Defendant did not include a copy of the advertisement placed on site or in any of the daily newspapers of wide circulation.

65. In this instant, once the Plaintiff complained that they there was no public participation, the burden shifted on the 1st and 3rd Defendant to prove that there was compliance with the law in respect to informing the neighbours of the proposed change. In the persuasive authority of *Mwangi & 2 Others (Suing on behalf of Kisiwa West Estate Welfare Group) v Kiambu County Executive Committee Member for Land, Physical Planning, Housing and Urbanization & 2 others; Kago (Interested Party) (Environment and Land Appeal E076 of 2023) [2024] KEELC 5798 (KLR) (24 July 2024) (Judgment)*, B M Eboso J. held thus;

“47. In contending that there was no public participation, the appellants faulted the 2nd respondent on the ground that the alleged onsite notice was not posted. The appellant further contended that the alleged notice lacked key information. I have looked at the exhibited onsite notice. First, the notice was undated yet it required the public to raise objections within 14 days. Secondly, the exhibited onsite notice did not disclose the particulars of the proponent of the proposed development. Thirdly, it did not disclose the identity of the author of the notice itself. Fourthly, it did not disclose where the objection was to be lodged/forwarded. All the above are key elements in public participation. Without them, the purported notice cannot be said to have satisfied the requirements of the Law.

48. For the above reasons, it is the finding of this court that grant of the impugned approval for change of user and grant of the impugned construction permit violated the provisions of Section 58(7) of the *Physical and Land Use Planning*



Act 2019 as read together with rule 16 of the Physical and Land Use Planning [General Development Permission and Control] Regulations 2021.”

66. Under section 60(1), the 3rd Defendant is also required to share the application within seven days of receipt with the other relevant agencies before granting/refusing it. Their witness did not show evidence that the application was shared to any of these authorities. Consequently, it is evident that the 1st Defendant did not notify the public which included the Plaintiff to have opportunity for any input on the proposed change of user. Second, is the 3rd Defendant’s failure to comply with the law/regulations. Thirdly, the 3rd Defendant justified its action of approving the change of use premised on housing policy for Juja A was never presented to this court. Therefore, I find and hold that the Notification of development approval granted to the 1st Defendant was irregularly issued thus null and void.
67. The EIA license issued by the 2nd Defendant was also challenged for failure to carry out public participation. The 1st and 2nd Defendants contended that there was sufficient public participation held and referred to the contents of the EIA report submitted. The 2nd Defendant stated further that they also relied on the approvals issued by the 3rd Defendant.
68. The impugned EIA license was issued on 26th April, 2024 premised on the report dated 6th October, 2023 prepared by the consultant of the 1st Defendant. The report included some questionnaires filled by persons who live within the neighbourhood of the suit property who according to the Plaintiff were not immediate neighbours. DW2 stated the regulations treat immediate neighbours go upto to a radius of 500m and the 1st Defendant explained the location of properties of four of the persons whose names appeared on the forms. Further, the 1st Defendant said that as at the time of filing this suit in August, 2023 they had not started building on the suit property. While processing their application the 1st Defendant stated that they held a public meeting on 7th September 2023 with the residents and which meeting the Plaintiff confirms attending.
69. According to the Plaintiff, the meeting was called by the area Chief to afford the residents opportunity to air their grievances on the activities that were being undertaken on the suit plot but not for public participation towards the application of the EIA license. The Plaintiff produced an objection letter dated 28th July 2023 against the proposed construction and issuance of change of user. In the objection, 19 house owners in the estate have put their signatures on ten grounds among them being that the developer has demolished houses without notice to the neighbours, dug pipes causing effluence to leak into the estate, caused electricity outages and that social amenities such as water and sanitation available can only cater for low density among others.
70. The objection letter was received by both the 2nd and 3rd Defendants on 2nd August 2023 which was before the issuance of the EIA licence. The Plaintiff attached photographic evidence of part of their complaints raised in the objection. The 1st Defendant said they did not reply to this letter (anyway it was not addressed to them). Neither did the 2nd or 3rd Defendants reply. Based on this letter, the Plaintiff’s version that the meeting of 7th Sept 2023 was called to address their complaints makes sense. But addressing a complaint is also a stakeholder engagement as the meeting revolved the project to be undertaken on the suit property.
71. Besides the meeting of 7th September, 2023, there is no evidence that the 1st Defendant or their representatives held any other meeting/stakeholder engagement. Thus, the public participation was not quantitative and qualitative. I make reference to the finding by the Supreme Court in case of Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others (Petition E031, E032 & E033 of 2024 (Consolidated)) [2024] KESC 47 (KLR)



Has the Plaintiff made a case for compensation?

72. The Plaintiff's claim for damages is brought under the heading of special and general damages. For special damages, he claimed loss of rental income in the sum of Kshs 400000. It is trite law that special damages must be specifically pleaded and specifically proved. In his evidence PW1 said he lived in the house and even came from it while coming to court. There was no evidence adduced that the premises has ever been rented for income and for this reason, I find the claim for special damages is wanting in merit and dismiss it.
73. With regard to general damages, the Plaintiff alleged that it had suffered inconveniences such as water logging because of the excavations, loss of electricity due to the interferences with the power lines, noise pollution and general nuisance. From the pictures adduced, the properties to the Plaintiff and the 1st Defendant are beacon to beacon and any demolishing of structures needed proper underpinning so as to protect the neighboring existing properties.
74. It is therefore, considering the depth of the excavation and the fact that the defendants were carrying out a beacon to beacon excavation, the Plaintiff's house foundation of the wall was exposed. However, it did not present material evidence on the interference of its structural strength. Its claim can only lie on nuisance which though was not pleaded. In Clerk and Lindsell on Torts, 17th Edition page 1354 paragraph 24. It is stated;
- “Nuisance” is defined as an act or omission which is an interference with, disturbance of or annoyance to, a persons rights used or enjoyed in connection with land. It is caused usually when the consequences of a person's actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour's use and enjoyment of his land”.
75. With regard to the care one owes to a neighbor, the court in the case of Registered Trustees of the Missionary Sisters of the Precious Blood of Kenya v Goodman Agencies Ltd & another (Environment & Land Case 750 of 2012) [2022] KEELC 2755 (KLR), held that;
- “
- “45. The English locus classicus case of Donoghue v Stevenson [supra] captures the extent of the duty of care which the defendants owed the plaintiff in the following words:
- “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbor. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”
46. The plaintiff made a further claim of negligence anchored on alleged excessive noise and dust. No evidence from an environmental expert was led to establish the level of noise and the amount of dust that emanated from the defendants' construction site. Similarly, no evidence was led to demonstrate that the relevant regularity bodies mandated to deal with noise and air pollution were invited to establish the truth and take appropriate action against the defendants, if indeed there was excessive noise and dust. In the circumstances,



this court has no proper basis upon which to hold the defendants liable for negligence anchored on excessive noise and dust.”

76. Accordingly, it is my view that the Plaintiff has not proved the 1st Defendant’s actions caused damage to its property. On the basis that the excavations done on the land was without approval and the Plaintiff had not been duly notified, I award the Plaintiff general damages of Kshs 100000 for the inconveniences suffered.

77. My holding is grounded by the finding in the case of Professor David M. Ndeti vs Orbit Chemical Industries Ltd [2014] eKLR, where Emukule J. referred to excerpts from the English case of Rylands vs Fletcher [1861 – 73] ALL ER REP 1 which stated in part;

“ ... if it does escape and cause damage, he is responsible however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution but whether his acts have occasioned the damage.....”

78. On the quantum of general damages to be awarded, I am guided by the case of Livingstone vs Rawyards Coal Co. [1880] 5 App cases 25 where the court defined the measures of damages as:-

“that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”

Whether the Plaintiff deserves the orders of permanent injunction:

79. The Plaintiff has sought for a permanent injunction against the 1st Defendant from continuing with development on the suit property and a mandatory injunction against the 2nd and 3rd Defendant to withdraw and/or cancel any approvals for any change of user or approval of plans or any ELA licence in respect of the Property Number Nairobi/ Block 1X4/X2 due to lack of proper public participation.

80. The Court of Appeal in the case of Erdermann Property Limited v Safaricom Staff Pension Scheme Registered Trustees & 3 others (Civil Appeal 185 of 2017) [2023] KECA 282 (KLR) (17 March 2023) expounded in detail the principle of public participation as follows;

“

“45. To underscore the importance of participation of the people as a constitutional edict, the Supreme Court set out elaborate guiding principle for public participation in *British American Tobacco Kenya v Cabinet Secretary, Ministry of Health & others* [2019] eKLR, which we think it is important to reproduce verbatim: “From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation



(i)As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.

(ii)The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

(iii)The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

(iv)Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill ’a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

(v)Public participation is not an abstract notion; it must be purposive and meaningful.

(vi)Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

(vii)Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

(viii)Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

(ix)Components of meaningful public participation include the following:

- a) clarity of the subject matter for the public to understand;
- b) structures and processes (medium of engagement) of participation that are clear and simple;
- c)opportunity for balanced influence from the public in general;
- d)commitment to the process;
- e)inclusive and effective representation;
- f)integrity and transparency of the process;
- g)capacity to engage on the part of the public, including that the public must be first sensitised on the subject matter.”

81. Flowing from the evidence presented and the decision cited herein above, It is my observation that 2nd and 3rd Defendants casually took the issue on public participation, downplaying the need for a qualitative and quantitative involvement of the immediate neighbours and the surrounding area who would be highly impacted by the proposed development. Thus, I am persuaded to find that there was no sufficient and credible public participation engaging Juja Road estate home owners before approving the impugned development. Consequently, I hold that the Plaintiff has proved its case challenging the procedure followed while granting the development approvals to the 1st Defendant. The impugned licences must be revoked for the 1st Defendant to follow due process.



82. In considering what orders to issue, I have taken into consideration the fact that the 1st Defendant as the owner of the suit property, has proprietary rights to use and develop it just as the Plaintiff lives on its land. This right to property is protected under the provision of Article 40 (1), (2), (3), (4), (5) and (6) of *the Constitution* of Kenya and section 24 and 25 of the *Land Registration Act*, 2012. It follows that the order of permanent injunction against the 1st Defendant restraining them from developing their own private property can only issue for a limited period pending compliance with the development control laws/regulations.
83. In the upshot, judgment is entered for the plaintiff as against the defendants jointly and severally as follows;
- i. A mandatory injunction be and is hereby issued compelling the 2nd and 3rd Defendants to revoke the approvals for change of user and EIA license in respect of the Property Number Nairobi/ Block 1X4/X2 due to lack of proper public participation.
 - ii. An order of permanent injunction is hereby granted restraining the 1st Defendant from continuing with construction works or development on the Property Number Nairobi/ Block 1X4/X2 along Mukunga Road, Pangani Ward, Starehe Sub County — Nairobi City County whatsoever until it obtains the change of user in accordance with the law.
 - iii. General damages to the plaintiff of Ksh.100,000/= for the inconveniences suffered due to the irregular activities by the 1st Defendant.
 - iv. Cost of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE, 2025

A. OMOLLO

JUDGE

