



**Kyuna Neighbours Association (Suing Through Its Officials Kimani Mathu, Chairman, Atul Shah, Vice-Chairperson Chris Ndegwa Secretary) v National Environment Management Authority & 2 others (Environment and Planning Petition E017 of 2025) [2025] KEELC 4977 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING PETITION E017 OF 2025**

**OA ANGOTE, J  
JULY 3, 2025**

**BETWEEN**

**KYUNA NEIGHBOURS ASSOCIATION ..... PETITIONER  
SUING THROUGH ITS OFFICIALS KIMANI MATHU, CHAIRMAN, ATUL  
SHAH, VICE-CHAIRPERSON CHRIS NDEGWA SECRETARY**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER, NAIROBI CITY  
COUNTY GOVERNMENT BUILT ENVIRONMENT AND URBAN  
PLANNING ..... 2<sup>ND</sup> RESPONDENT  
MONTESSORI LEARNING CENTRE MLC) ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 11<sup>th</sup> April, 2025, brought pursuant to the provisions of Articles 3(1), 20(1), 21(1), 23, 50(1), 159(2)(a) & (e), 165(3)(d)(ii), (6) & (7) and 258 of *the Constitution* of Kenya, 2010, as well as Rules 4, 13, 23(1) of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice Procedure Rules, 2012, the Petitioner seeks the following reliefs:
  - i. That the Honourable Court be and is hereby pleased to certify that the matter before the court raises substantial questions of law in accordance with Article 165(4), Constitution warranting to be placed before the Honourable Chief Justice to empanel a bench of an uneven number of judges being not less than three to hear and determine the matter, and proceed to so do.



- ii. That pending the hearing and determination of the Petition or until further orders of this Honourable Court, the Honourable Court be and is hereby pleased to issue an order of temporary injunction maintaining the status quo and restraining the 3<sup>rd</sup> Respondent or anyone claiming under or through their authority from in any way howsoever continuing with construction works and/or any activity on Plot L.R No 7158/62 Kyuna, Nairobi.
  - iii. That pending the hearing and determination of the Petition or until further orders of this Honourable Court, the Honourable Court be and is hereby pleased to grant an interim order suspending and/or otherwise staying the implementation, operationalization, validity, execution and/or coming into effect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents impugned decision and or directives approving, authorizing and/or permitting the proposed school development on Plot No LR No 7158/62 Kyuna, Nairobi and all actions and/or decisions made subsequent thereon.
  - iv. That an urgent date and such further orders be set for the expeditious inter-partes hearing of the Application and Petition.
  - v. That this Honourable Court be pleased to grant such other appropriate relief as it may deem fit, to give effect to the orders sought herein.
  - vi. That the costs of this Application be provided for.
2. The Application is based upon the grounds set out on the face of the Motion and supported by the Affidavit of QS Kimani Mathu, the Chairman of the Petitioner of an even date.
  3. QS Mathu deponed that the Petitioner is a society, legally registered under the *Societies Act*, whose main purpose is to promote and protect the interests and welfare of the community in the Kyuna/Shanzu road area as well as advocate for the broader public residing in and around the area.
  4. It was deposed by the 1<sup>st</sup> Petitioner that the Petitioners' neighborhood is lawfully zoned and classified by the 2<sup>nd</sup> Respondent as a low-density residential apartment characterized by single dwelling residential homes each sitting on a minimum acreage of at least half an acre and that the neighborhood has attracted senior members of the society due to its general character and scale of buildings as well as its unique and remarkable natural environment defined by green ambience and heavy tree cover.
  5. The 3<sup>rd</sup> Respondent, it is asserted, seeks to actualize a project out of character with the area and which seeks to materially alter the user of the property from strictly residential to educational, being a primary school for at least 220 students.
  6. According to the Petitioners, due to this deviation, the 3<sup>rd</sup> Respondent was mandatorily required to conduct a full Environmental Impact Assessment Study pursuant to Section 58(2) of the Environment Management and Co-ordination Act, hereinafter EMCA as read with Regulations 11, 16, 17 and 20 of the Environment (Impact Assessment and Audit) Regulations and Legal Notices No 31 and 32 of 2019. This, it is contended, was not done.
  7. It is the Petitioners' case that neither Association, nor its officials or any of its project affected members, including those immediately neighbouring the subject property, were party to or participated in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's decision making, and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decisions were equally never served upon the Petitioners.
  8. According to QS Mathu, the grant of an Environmental Impact Assessment(EIA) license by the 1<sup>st</sup> Respondent on the strength of an irregular and incompetent application failed to comply with the law as well as the provisions of Articles 10(2)(a), 27(1) and 47 of *the Constitution* and Sections 7(2)



- (b), (f), (n) & (o) of the *Fair Administrative Action Act* and that the Respondents' general failure to require strict compliance with the law amounts to dereliction of their statutory duty and breach of the Petitioners' constitutional rights as guaranteed under Articles 27(1 & 2), 29(d), 40, 42 and 69(1)(a), (d), (f), (g) and (h) of *the Constitution*.
9. He asserts that the 3<sup>rd</sup> Respondent is engaged in felling of indigenous trees which is significantly altering the physical aspects of the Petitioners' surroundings as well as biological factors including the birds and that despite lodging their complaints with the 2<sup>nd</sup> Respondent through its predecessor, the Nairobi Metropolitan Services, Directorate of Investigations and Information Analysis, no meaningful action or outcome was ever realized in respect of the irregular approvals of change of user and inquiries into the architectural building plans.
  10. It is the 1<sup>st</sup> Petitioner's position that despite the fact that the impugned approvals were dubiously obtained, in contravention of Sections 5, 46, 56 & 61(1) of the *Physical and Land Use Planning Act*, hereinafter PLUPA, the 3<sup>rd</sup> Respondent has begun excavation works and construction occasioning gross noise and excessive vibration pollution making the Petitioners' members residence un-inhabitable contrary to the underpinnings in Regulations 3, 4 and 5 of EMCA (Noise and Excessive Vibration Pollution] (Control] Regulations.
  11. While conceding to the existence of previous litigation on similar matters, being NET Appeal 10 of 2021-Kyuna Neighbours Association v NEMA and Montessori Learning Centre, ELCCA E032 of 2022- Kyuna Neighbours Association v NEMA and Montessori Learning Centre and a complaint and challenge of irregular approvals in respect of change of user and architectural building designs along Kyuna road, he asserted that none has addressed the clear constitutional violations in the Respondents' joint and several conduct in violation of Articles 35(1) and 47 of *the Constitution*
  12. Further, he stated, despite having earlier on challenged the Environmental Impact Assessment License issued to the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent, the same was never determined on its merits because the National Environment Tribunal held that it lacked jurisdiction under Section 129(1), EMCA despite the fact that the appeal was filed under Section 129(2), EMCA.
  13. It was deposed by the 1<sup>st</sup> Petitioner that in any event, attempts by the Petitioners to have the matter resolved has been constrained as the Nairobi County Physical Liaison Committee is currently not sitting and the court ought to admit the Petition for hearing without requiring the exhaustion of remedies.
  14. The deponent urged that the Petition raises substantial questions of law and fact including whether the law establishes a contiguous but differentiated locus standi under Section 129(1)EMCA as distinguished from that accruing under Section 129(2) as read with Rules 4(1) & (2) of the NETT Procedure Rules; whether the proposed school development on plot L.R No 7158/62 is not only out of character with its surroundings but seeks to materially alter the user of the land and as such an EIA study must be conducted, and whether a major change in land use can be approved by a planning authority without demonstrable and meaningful public participation.
  15. Further, it was deposed, the Petition seeks an answer to whether the emission of noise and excessive vibrations contrary to Regulations 3, 4 and 5 of the EMCA (Noise and Excessive Vibration Pollution] (Control] Regulations contravenes the principles of sustainable development and whether in light of the polycentric and multi-faceted cause of action accruing herein, only this court can issue adequate and appropriate reliefs. It was urged that it is in the public interest that the court exercises its jurisdiction and upholds its adjudicatory function to facilitate the ordered functioning of public authorities.



16. The 1<sup>st</sup> Respondent did not respond to the Motion.
17. The 2<sup>nd</sup> Respondent filed Grounds of Opposition dated 4<sup>th</sup> June, 2025 premised on the grounds that:
- i. The Honourable Court lacks jurisdiction to hear and determine the matter herein by virtue of the Petition and the Application being *res judicata* as the issues raised therein are similar to those of the proceedings at the National Environment Tribunal (NET] in NET Tribunal Appeal No. 10 of 2021 Nairobi, which were heard and determined on the strength of the same being time-barred pursuant to the Environmental Management and Coordination Act.
  - ii. The Petitioner, being dissatisfied with the decision of the National Environment Tribunal (NET], appealed in ELC Civil Appeal No. E032 of 2022 Milimani wherein this Honourable Court found the Appeal unmerited and dismissed it.
  - iii. The Application and Petition are incompetent, bad in law, an abuse of the court process and devoid of any merits and thus null and void *ab initio*.
  - iv. The Petitioner is actively engaging in forum shopping looking for whichever court that will grant them favorable Orders. The Orders sought in the Application and Petition are orders that were already dispensed with in the NET, on the first instance, and the ELC on Appeal.
  - v. The Honourable Court lacks jurisdiction to hear and determine the matter herein by virtue of the express provisions of Section 9 (2) of the *Fair Administrative Action Act* which limits the High Court or a subordinate court not to review an administrative action or decision under the *Fair Administrative Action Act* unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
  - vi. The Petitioner/Applicant has not complied with the said provision as it has not demonstrated how they sought to exhaust the remedies either in the National Environment Tribunal (NET] or the Nairobi City County Liaison Committee hence this court lacks jurisdiction to hear the matter as it offends Sections 9 (2] of the Fair Administrative Actions Act.
  - vii. The Petitioner/Applicant has not demonstrated that the Petition and Application raise substantial questions of law and that they have met the threshold stipulated in Article 165(4) of *the Constitution* to warrant the Petition being placed before the Honourable Chief Justice to empanel a bench of uneven number of judges to hear and determine the matter.
  - viii. The Application and Petition herein are frivolous, vexatious, hopeless and merely intended to propagate a nullity and hence the same is untenable in law.
  - ix. The Application and Petition are fatally bad and/or incurably defective and grossly incompetent and should not be entertained by this Honourable Court. The same ought to be struck out forthwith.
  - x. The orders sought cannot be issued as the Application is improperly on record and is a nullity.
  - xi. On the foregoing, the Application is incurably defective, misconceived and a proper candidate for dismissal.
18. The 3<sup>rd</sup> Respondent, through its Director, Sahil Dodhia, swore a Replying Affidavit on the 13<sup>th</sup> May, 2025. Mr Sahil deponed that the Motion and Petition constitute a repeat and regurgitation of the proceedings undertaken at the National Environment Tribunal, NET, in NET Tribunal Appeal No. 10 of 2021 Nairobi, as well as ELC Appeal No. E032 of 2022 Milimani which was determined.



19. He stated that at the NET Tribunal Appeal No. 10 of 2021 Nairobi, the Petitioners were challenging the EIA and the approvals granted by the 1<sup>st</sup> Respondent herein and the then Nairobi Metropolitan Services and that at the appeal, the issues of planning approval, EIA approval, and constitutional violations were equally discussed and as such, there are no new matters before this court.
20. According to Mr. Sahil, the Petition herein challenges the same development permissions which were initially granted on 15<sup>th</sup> October 2020 by the then Nairobi Metropolitan Services (the temporary manager of the Nairobi City County) [Change of User], renovations and extensions of a primary school issued by the Nairobi Metropolitan Services on 15<sup>th</sup> April 2021, EIA License dated 26<sup>th</sup> March 2021, and the National Construction Authority (NCA) certificate of compliance dated 19<sup>th</sup> May 2021.
21. As provided by EMCA, he stated, there was a stop order against any construction activities by the 3<sup>rd</sup> Respondent between 2020 when the Petitioners filed an appeal before the National Environment Tribunal and the determination of the same and that prior to the hearing and determination of the appeal in ELC Civil Appeal No. E032 of 2022 Milimani, there was a temporary injunction granted to the Petitioners which only lapsed after the Petitioners' appeal was determined through dismissal on 30<sup>th</sup> May 2024.
22. As a result of the foregoing, he asserted, the aforesaid permissions and in particular, the EIA License and approvals for the renovations and extension of the Primary School expired; that the EIA expired in October 2022 and the NCC permission in April 2023 thus necessitating extension of the same and that following determination of the ELC Appeal No. E032 of 2022, the 3<sup>rd</sup> Respondent sought and obtained a renewal of the NCC permission for renovation and extension of the existing Primary School and the NCA Compliance Certificate and also notified the 1<sup>st</sup> Respondent that it was resuming construction and that it was relying on the EIA earlier issued by the 1<sup>st</sup> Respondent.
23. The 3<sup>rd</sup> Respondent deponed that the injunctive orders issued herein amount to a repeat of the previous injunctive orders issued in 2020 and which subsisted until 30<sup>th</sup> May 2024 and therefore, the Petitioner is no longer entitled to the grant of another set of injunctive orders, and that considering the reliefs sought seeking to quash by way of judicial review reliefs of certiorari and prohibition the planning approvals granted on 15<sup>th</sup> October 2020, 15<sup>th</sup> April 2021 (both by the NCC through the Nairobi Metropolitan Services) and the EIA granted on 26<sup>th</sup> March 2021, the said decisions have since passed six (6) months permitted by the Law Reform Act.
24. He noted that further, the allegations by the Petitioners have failed to meet the standard of precision as set out in the case of Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR); that the Petition and Motion do not reveal the approvals challenged and the date they were issued and by which specific party, the manner of the irregularity of the approvals and licenses and the reason for the challenge and that the reliefs sought by the Petitioners are generic and fail to specify whether the Petitioners are challenging the EIA License issued by the 1<sup>st</sup> Respondent or the approvals issued by the 2<sup>nd</sup> Respondent.
25. In response to the factual averments, Mr. Dodhia stated that they sought a change of user from low density residential houses to educational use (Primary School] under PLUPA and the notification of approval of development; that the application for change of user was duly publicized in the Daily Nation on 30<sup>th</sup> June, 2020 and all objections arising therefrom addressed at a public hearing convened by the 1<sup>st</sup> Respondent on the 3<sup>rd</sup> October 2020 and that none of the Petitioners' members attended the said public hearing.



26. It is the 3<sup>rd</sup> Respondent's case that under Sections 61 (3) and (4) of the PLUPA, an objector is required to file any objection with the County Physical and Land Use Planning Liaison Committee within 14 days during the change of user process and no objection having been filed by the Petitioners on the same, it could not be the subject of an appeal before the National Environment Tribunal, as was the case with the appeal filed by the Appellants herein. Similarly, it was deposed, there was no objection to the approval for the building plans from the Nairobi City County.
27. It was deposed that a full Environmental Impact Assessment (EIA) study was undertaken and an EIA Study Report was prepared by Greendime Consultants Ltd (a NEMA accredited Environmental Impact Assessment/Audit Firm) and issued to the 1<sup>st</sup> Respondent who acknowledged receipt of the same on 4<sup>th</sup> March 2021.
28. According to the 3<sup>rd</sup> Respondent's Director, public participation was undertaken through numerous questionnaires and public meetings and that consequently, there was no dereliction of duty by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as alleged.
29. The 3<sup>rd</sup> Respondent's Director urged the court to decline to grant the orders sought on account of the fact that the orders of 30<sup>th</sup> April 2025 were granted without service being effected upon the 3<sup>rd</sup> Respondent or its advocates and that the 3<sup>rd</sup> Respondent has suffered atrocious losses following its inability to complete the renovations and extensions of the existing Primary School for the last five (5) years since the year 2020 to date.
30. Contrary to the Petitioners' regular deposition, Mr Dodhia stated, the 3<sup>rd</sup> Respondent's works were 70% complete prior to stoppage; that the number of the students that is likely to enroll with the 3<sup>rd</sup> Respondent is only 30 but the number shall increase gradually to approximately 200 over a period of 4-5 years and that the newly enrolled students are scheduled to join school and begin learning on 2<sup>nd</sup> September 2025 and therefore, the 3<sup>rd</sup> Respondent must complete the remaining works three (3) months before this date, which is around June 2025.
31. It is the 3<sup>rd</sup> Respondent's case that the losses it has suffered is so significant that it is now irreparable and any further stoppage orders against the 3<sup>rd</sup> Respondent will not only be oppressive but will undermine the 3<sup>rd</sup> Respondent's right to use its property to offer education to children who deserve a good education under the *Children Act* and the *Basic Education Act*.
32. The Petitioners, through QS Kimani Mathu, swore a Supplementary Affidavit on 5<sup>th</sup> June, 2025. He deposed that the present Motion is not res judicata as the previous matters already alluded to in the Affidavit in support of the Motion, were based on contiguous but disparate issues and none of these previous issues ever addressed the clear constitutional violations in the Respondents' joint and several conduct.
33. He deposed that not only was the matter before the National Environment Tribunal concluded preliminarily, it did not raise constitutional issues, and that the appeal to this court was limited to the matters before the Tribunal.
34. According to QS Mathu, contrary to the 3<sup>rd</sup> Respondent's deposition, the judicial review reliefs of certiorari and prohibition are not anchored nor based on an invocation of the *Law Reform Act* and those timelines are immaterial and that in any event, the *Law Reform Act* having predated *the Constitution* should be read in conformity with it.
35. He urged that the Petition and Motion raise a prima facie case as they raise substantial questions of law adequate for the court to fashion an appropriate remedy, on account of the complained constitutional



violations and that they seek to halt the Respondent's blatantly illegal actions in the issuance of the unlawful and irregular approvals and the unlawful manner in which the development is being undertaken.

36. According to QS Mathu, the 3<sup>rd</sup> Respondent and Mr Dodhia, committed perjury by lying to the court that a full EIA study and an EIA Report were prepared whereas what was prepared was an EIA Project report, an inferior and inapplicable environmental impact assessment; that the purported invitation for public participation was addressed to a Mugumo Crescent Residents Association, a stranger to these proceedings and that neither the Petitioners nor any of the residents were invited for any public participation.
37. He stated that despite numerous complaints on noise, the 3<sup>rd</sup> Respondent continues to aggravate the situation depriving the residents of their rights to a clean and healthy environment and that he has since learned that the 2<sup>nd</sup> Respondent issued stay orders number 197 accompanied by enforcement notice number 6779, all dated 9<sup>th</sup> May, 2025 seeking to impeach the validity of the approval documents issued to the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and requiring cessation of all further works on the suit property in accordance with Section 72 of PLUPA.

### Submissions

38. The Petitioners' counsel filed written submissions on 5<sup>th</sup> June 2025. Counsel submitted that the Petitioners have satisfied the requisite legal threshold for the grant of conservatory orders as prayed. In support of this position, reliance was placed on the principles enunciated in *Wilson Kaberia Nkunja v The Magistrates and Judges Vetting Board & Others* [2016] eKLR, where the court held that an Applicant must demonstrate the existence of a prima facie case with a likelihood of success in order to merit the grant of such orders, that there exists a real and imminent danger that the Petitioner's constitutional rights may be violated or continue to be violated in the absence of conservatory relief rendering appeal nugatory, and that public interest should be considered.
39. Counsel asserted that the Petition discloses a prima facie case and that the project being undertaken by the 3<sup>rd</sup> Respondent is not only inconsistent with the character of the surrounding neighbourhood, but the approvals granted for the development were done in violation of mandatory legal processes.
40. Counsel cited several decisions in support of this submission, including *Law Society of Kenya v Attorney General & 3 Others*; *Katiba Institute & 6 Others* [2023] eKLR, *Ken Kasinga v Daniel Kiplagat Kirui & 5 Others* [2015] eKLR, and *Aura v Cabinet Secretary, Ministry of Health & 11 Others*; *Kenya Medical Practitioners & Dentists Council & Another (Interested Parties)* [2024] KEHC 8255 (Constitutional Petition E473 of 2023).
41. On the issue of whether the failure to grant conservatory orders would render the Petition nugatory, Counsel answered in the affirmative. It was submitted that in the absence of interim reliefs, the 3<sup>rd</sup> Respondent would proceed to actualize a development project that is both out of sync with the character of the area, based on unlawful approvals and one that threatens to fell indigenous trees, which are integral to the aesthetic and ecological value of the property in question.
42. Lastly, Counsel urged the court to give due regard to public interest considerations noting that in *Agengo & Another v Kituyi & 3 Others (Petition E005 of 2023)* [2024] KEHC 2687 (KLR), the court observed that public interest encompasses the general welfare of the populace and warrants recognition and protection. It was submitted that this is one such case where the public, as a collective, has a vested stake, thereby justifying the issuance of the conservatory orders sought.



43. The 2<sup>nd</sup> Respondent filed submissions on 11<sup>th</sup> June, 2025. Counsel submitted that the present Motion and Petition are res judicata as provided for in Section 7 of the *Civil Procedure Act* which prohibits parties from re-litigating matters already litigated and finally determined by the court. Reliance in this regard was placed on the cases of *Nguruman Limited v Jan Bonde Nielson* [2014] KEHC 1718 (KLR), *Kenya Commercial Bank Limited & Another v Muiri Coffee Estate Limited & 3 Others* [2016] KESC 6 (KLR).
44. It was urged that the issues raised in this instant Motion and Petition, are issues that have already been canvassed and determined in NET Tribunal Appeal No. 10 of 2021, Nairobi, and further in ELC Civil Appeal No. E 032 of 2022, and that finality of court decisions is subject only to special scenarios such as fraud, mistake and lack of jurisdiction, none of which has been referenced herein.
45. Counsel submitted that whereas he is aware that the courts have differed on whether the doctrine of res judicata is applicable to constitutional matters, the court should be guided by the disposition in *William Kabogo Gitau v Ferdinand Ndung'u Waititu* [2016] eKLR where it cited with approval the cases of *Aggrey Chiteri v Republic* [2016]eKLR and *Edward Okongo Oyugi & 2 Others v The Attorney General* [2016]eKLR which found that the doctrine was applicable.
46. According to counsel, the Petitioners are forum shopping, defined by the court in *Stanley Muia Makau v Republic* [2020] KEHC 5755 (KLR), as the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity or to throw the dice in one's favour and which action constitutes subversion of justice.
47. Similarly, it was argued, the Petitioner is having a second bite at the cherry which is not permitted. In support, counsel cited the cases of *Mbugua & another (Suing as Legal Representatives of the Estate of Lawrence Githua Mbugua - Deceased) v Kariuki & 12 Others (Environment and Land Case Civil Suit 104 of 2023)* [2025] KEELC 4315 (KLR) (9 June 2025) (Ruling).
48. It was urged that in any event, the doctrine of exhaustion as guided by Section 9(2) of the Fair Administrative Act prevents this court from determining the matter until all dispute resolution mechanisms are resolved. It was urged that ultimately, the Petition and the Motion ought to be dismissed.
49. The 3<sup>rd</sup> Respondent filed submissions on 9<sup>th</sup> June, 2025. Counsel submitted that the present Motion is res judicata and ought to be struck out. In this respect, it was urged that during the proceedings before the National Environment Tribunal and this court on appeal, the Petitioners enjoyed automatic injunction/status quo orders and that the Petitioners cannot be granted similar injunctive orders.
50. It was submitted that if this court found that the National Environment Tribunal had no jurisdiction because the appeal filed at the Tribunal was out of time, it follows that the Petitioner cannot invoke the same issues before this court. Reliance on the principle of res judicata was placed on the cases of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* [1996] KECA 102 (KLR) and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] KECA 472 (KLR).
51. Counsel urged that no new approvals have been granted to the 3<sup>rd</sup> Respondent to warrant a finding that the Petitioners have a different cause of action from what they were pursuing before the National Environment Tribunal. It was urged that a party cannot lawfully pursue an appeal from the National Environment Tribunal to this court, and subsequently commence a fresh Petition on the same set of facts before the ELC and that that is sheer abuse of court process.



52. It was urged that the present proceedings constitute an abuse of the process of the court as it is inconceivable that the Petitioner had two alternatives but concurrent dispute resolution processes/ forums being the National Environment Tribunal and the ELC, and that having chosen to invoke the National Environment Tribunal's jurisdiction followed by an ELC Appeal, the Petitioner can now not purport to invoke this court's parallel jurisdiction. Reliance in this regard was placed on the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* [2009] KECA 453 (KLR).
53. Counsel submitted that in any event, the Petition does not meet the specificity test as set out in the *Anarita Karimi* case; that whereas the Petitioners seek judicial review orders of certiorari and prohibition which seek to challenge decisions made by public authorities, no dates or particulars of the decisions challenged are specified in prayers (f) and (g) of the Petition.
54. It was further contended that pursuant to Rule 6(1) of the Fair Administrative Actions Rules, 2024, judicial review proceedings should be instituted within six weeks of the impugned administrative action and that the challenged decisions having been made in the year 2020, the Petitioners are out of time.
55. If the Petitioners deemed the alternative dispute resolution mechanism was unavailable or ineffective, it was deponed, it ought to have sought a waiver or exemption from this requirement under Section 9 of the Fair Administrative Actions Act which they did not. In support, the following cases were referenced, *Republic v County Executive Committee Member Environment Natural Resources and Urban Planning County Government of Kwale & another; Tajano Limited (Exparte Applicant)* (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 6823 (KLR) (16<sup>th</sup> October 2024) [Judgment].
56. On the issue of empanelment of a bench, counsel urged that this issue not having been submitted on, the Petitioners are assumed to have abandoned the same. Nonetheless, it was stated, the issues herein do not raise any substantial questions of law warranting the said order.
57. The Petitioners advocate filed supplementary submissions on the 24<sup>th</sup> June, 2025. According to Counsel, the issues raised by the Petitioners meet the established criteria for certification as involving substantial questions of law as articulated in *Okiya Omtatah Okoiti & Another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR.
58. In particular, it was emphasized that the issues for determination extend beyond the interests of the immediate parties and have a significant impact on the public interest; that there exists a state of uncertainty in the law that requires clarification by the court, and that the matter falls squarely within the ambit of Article 165(3)(b) or (d) of *the Constitution*. Also, it was submitted, the specific substantial question(s) of law have been outlined for consideration.
59. It was urged that the balance of convenience, the overriding public interest, and the constitutional imperative to protect the environment and uphold participatory governance strongly support the granting of the interim reliefs sought.

### **Analysis and Determination**

60. Having considered all the pleadings and submissions, the following issues arise for determination:
  - i. Whether the Petition and the Notice of Motion are res judicata, and if not?
  - ii. Whether the Petition and the Notice of Motion constitute an abuse of the court process, and if not?



- iii. Whether the Petition and the Notice of Motion meet the specificity test as set out in the Anarita Karimi case, and if so?
- iv. Whether the Petitioners have met the conditions necessary to warrant the grant of conservatory orders?
- v. Whether the Petition raises substantial questions of law warranting empanelment of a bench?

**Whether the Petition and Motion are *res judicata*?**

61. Section 7 of the [Civil Procedure Act](#) which sets out the principle of res judicata provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

62. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(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 is raised.”

63. Delving into a more in-depth discussion on this concept, the Supreme Court in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) [Judgment], discussed thus:

“This court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata: “Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon Norbert Mao v Attorney-General*, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking



similar relief; and Judgment had been given in Hon Ronald Reagan Okumu v Attorney-General, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment. In Silas Make Otuke v Attorney-General & 3 others, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v The AG of Trinidad and Tobago (1991] LRC (Const] 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".<sup>54</sup>The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.<sup>56</sup>... The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010] eKLR, under five distinct heads: (i] the matter in issue is identical in both suits; (ii] the parties in the suit are the same; (iii] sameness of the title/claim; (iv] concurrence of jurisdiction; and (v] finality of the previous decision. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012] eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, (2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported] where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.'



64. Indeed, the apex Court in John Florence Maritime Services Limited (supra) was categorical that the doctrine of res judicata applies to constitutional Petitions unless a Petitioner establishes special circumstances warranting the exclusion of the doctrine thereto.
65. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents asserted that this matter is res judicata, the issues herein having been canvassed in NET Tribunal Appeal No. 10 of 2021 Nairobi and further in ELC Civil Appeal No. E032 of 2022. This is disputed by the Petitioners who contend that the matters alluded to were based on contiguous but disparate issues and neither the Tribunal nor the court addressed the clear constitutional violations. Further, that the matters were concluded preliminarily.
66. The court has considered the proceedings in all the suits alluded to. NET Appeal No. 10 of 2021 was instituted by the Petitioners herein as the Appellants against NEMA as the 1<sup>st</sup> Respondent, Montessori Learning Centre as the 2<sup>nd</sup> Respondent, and the Director General of Nairobi Metropolitan Services as an Interested Party.
67. The subsequent ELC Civil Appeal No. E032 of 2022 arose from the same dispute and retained the same parties. In the present Petition, the named Respondents are NEMA, Montessori Learning Centre, and the County Executive Committee Member (CEC) for the Built Environment, Nairobi City County, which now exercises the planning and development control functions previously held by the Nairobi Metropolitan Services.
68. The court notes that the doctrine of res judicata encompasses not only identical parties, but also those litigating under the same title or through whom the original parties claim. On that basis, the court finds that the parties in the current Petition are similar to those in the prior proceedings to satisfy the first limb of res judicata.
69. Moving to the issues in dispute, the court has examined the pleadings and the record of proceedings in NET Tribunal Appeal No. 10 of 2021. In that matter, the Petitioners herein, then appearing as the Appellants, challenged the decision by NEMA to issue the EIA Licence No. NEMA/EIA/PSL/10439 for the proposed development of a school on L.R. No. 7158/62.
70. The reliefs sought included the quashing of the said license, cessation of construction and restoration of the area to its original state and a declaration that NEMA violated the Petitioners' constitutional rights to property and fair administrative action.
71. The Petitioners' case before the Tribunal was premised on the contention that the proposed development was incompatible with the character of the surrounding residential area. It was further alleged that no EIA study had been carried out, that there had been no public participation, and that the necessary approvals from the lead agencies had not been obtained.
72. Vide the present Petition, the Petitioners seek to impugn the 3<sup>rd</sup> Respondents proposed school development on L.R. No. 7158/62. They impugn the project on similar grounds, to wit, that it is out of character with the residential area, that no valid EIA study or public participation process was conducted, and that the development approvals were unlawfully obtained. The Petitioners further contend that the approvals issued for the project and the ongoing implementation of the project infringes upon a host of its members' constitutional rights.
73. At the Tribunal, the then 2<sup>nd</sup> Respondent, now the 3<sup>rd</sup> Respondent, raised a Preliminary Objection, asserting that the appeal was time-barred pursuant to Section 129(1) of EMCA. The Tribunal upheld the objection and dismissed the appeal on that ground.



74. Dissatisfied with the Tribunal’s decision, the Petitioners lodged ELC Civil Appeal No. E032 of 2022 before this court. That appeal was similarly dismissed, the court affirming that the Tribunal lacked jurisdiction by reason of statutory limitation of time.
75. From the foregoing, it is apparent that neither the Tribunal nor this court, in the subsequent appeal, considered or made findings on the merits of the substantive claims raised. The court opines that a suit that has been dismissed or struck out for non-attendance of a party or for want of jurisdiction or on account of limitation of time can hardly be said to have been “heard and finally decided” which is a requirement of Section 7 of the *Civil Procedure Act*.
76. It is however noted that vide the Petition, the Petitioner asks this court to make a declaration that Section 129(1) and (2) of EMCA as read with Rule 4(1) and (2) of the NETT Rules establishes a contiguous but differentiated locus standi when challenging an Environment Impact Assessment. This precise issue, the interpretation and interaction of Sections 129(1) and (2) of EMCA with Rule 4 of the NET Procedure Rules was exhaustively argued at the Tribunal and ultimately determined in ELC Appeal E032 of 2022. As such this issue is res judicata.
77. Turning to the present Motion, the 3<sup>rd</sup> Respondent contends that it is barred by the doctrine of res judicata, on the ground that injunctive or status quo orders had previously been issued in favour of the Petitioners during the proceedings before the National Environment Tribunal and this court on appeal, and that as such, the Petitioners are not entitled to further injunctive orders.
78. Indeed, it is not disputed that the Petitioners had previously obtained temporary injunctive reliefs in NET Tribunal Appeal No. 10 of 2021. However, those orders were granted pursuant to the provisions of Section 129(4) of EMCA which provides that an appeal to the Tribunal shall operate as a stay of the decision or action appealed against, pending the determination of the appeal. The injunctive effect of that statutory provision is therefore automatic, and procedural in nature.
79. Notwithstanding the substantial similarity of the underlying issues, it has not been shown that the Tribunal or the court in ELC Appeal E032 of 2022 considered, evaluated or made a finding on whether the Petitioners were entitled to interim injunctive/conservatory reliefs based on the traditional tests of prima facie case, irreparable harm/substantial loss, and balance of convenience which would therefore invoke the principle of res judicata.
80. Ultimately, save for the issue of Section 129(1) and (2) of EMCA vis-a-vis Rule 4 of the NET Procedure Rules as discussed above, it is the finding of the court that neither the Petition nor the Motion are res judicata.

#### **Whether the Petition and the Notice of Motion constitute an abuse of the process of the court?**

81. Abuse of the judicial process refers to legal proceedings that lack good faith and are instituted with improper motives. This concept has been the subject of many a decision by our superior courts. In the case of *Commission of Jurists & another v Attorney General & 5 Others* (Criminal Appeal 1 of 2012) [2012] KESC 4 (KLR) (15 November 2012) (Ruling) the Supreme Court stated:

“(36)The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. (37)The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption...” [D.T. Dobie & Company (Kenya) Ltd. v Muchina [1982] KLR 1



– per Madan, JA at p.9]. Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process. As an example, the Court of Appeal held in *Nishith Yogendra Patel v Pascale Miraille Baksh & Another* [2009] eKLR that: “[W]e are of the view that the application before us is an abuse of...Court process..., by pursuing the same remedies in parallel Courts which are competent to deal with the application. Such conduct must be deprecated and discouraged.”

82. The Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009] eKLR 229, had earlier on stated as follows:

“The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona-fides and frivolous, vexatious or oppressive. Abuse of the Court process is a settled legal principle applicable on two fronts. First, from a public interest perspective, duplication of proceedings is a waste of precious Court time and resources. That is in addition to the risk of inconsistent findings which threaten to bring the administration of justice into disrepute. Second, from a private interest perspective, it is highly vexatious and oppressive to the opposite parties not only in terms of time and costs, but also in that the “dry-run” of the claim in the prior proceedings affords the Plaintiff an opportunity to refine its case and work around any defence, evidence or explanation that the opposite party in the subsequent action put forward.”

83. In *Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, the court outlined some of the instances which would fall within the realm of the definition of an abuse of the legal process. It stated thus:

“The situation that may give rise to an abuse of court process are indeed exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]



- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”

84. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that proceedings herein constitute an abuse of the process of the court. The 2<sup>nd</sup> Respondent argues that the Petitioners are engaging in forum shopping, the reliefs now sought through this Petition having been previously pursued before the National Environment Tribunal and subsequently before this court in ELC Appeal No. E032 of 2022.
85. According to the Respondents, this renewed attempt to pursue similar reliefs under a different guise undermines the integrity of the judicial process and offends the principle of finality in litigation.
86. Additionally, the 2<sup>nd</sup> Respondent argues that the court lacks jurisdiction to entertain the matter by virtue of Section 9(2) of the Fair Administrative Actions Act which bars this court from reviewing an administrative action unless all internal dispute resolution mechanisms provided under the relevant law have been first exhausted.
87. The 3<sup>rd</sup> Respondent similarly contends that having voluntarily submitted to the jurisdiction of the National Environment Tribunal and thereafter appealed its decision before this court, the Petitioners are estopped from invoking the court’s original jurisdiction in respect of the same subject matter. It is submitted that this conduct amounts to approbating and reprobating and seeking a second bite at the cherry.
88. It was also contended by the 3<sup>rd</sup> Respondent that as the decisions being challenged were granted in the year 2020, judicial review proceedings ought to have been commenced within 6 weeks of the occurrence of the administrative action challenged failure to which this court lacks jurisdiction to issue the same.
89. In response, the Petitioners maintained that the issues raised in the present Petition are materially distinct from those previously canvassed before the National Environment Tribunal and in ELC Appeal No. E032 of 2022. On the question of limitation with respect to judicial review remedies, it was asserted that that the reliefs sought herein are not predicated on the *Law Reform Act*, and therefore, the statutory timelines applicable to judicial review proceedings are inapplicable in this context.
90. With respect to the objection raised under Section 9(2) of the *Fair Administrative Action Act* on exhaustion of remedies, it was submitted that no meaningful response or action has been forthcoming from the 2<sup>nd</sup> Respondent concerning the legality of the planning and development approvals, the architectural designs, and related decisions and that attempts to approach the Nairobi County Physical Planning Liaison Committee have been impeded by the fact that the Committee is currently non-functional.
91. The Petitioners further argue that the issues at hand raise polycentric and complex constitutional questions which can only be effectively addressed by this court.
92. The court has anxiously considered this issue. As earlier outlined, the matter initially filed before the National Environment Tribunal in Appeal No. 10 of 2021 sought to challenge the issuance of



EIA Licence No. NEMA/EIA/PSL/10439. The Petitioners' case then was that the proposed school development on L.R. No. 7158/62 was out of character with the surrounding residential area, that no EIA study had been conducted, and that there had been no meaningful public participation. That appeal was dismissed on the grounds that it had been filed outside the timeframe prescribed under Section 129(1) of EMCA.

93. The Petitioners thereafter filed an appeal to this court, as they were entitled to do, seeking to overturn the National Environment Tribunal's dismissal. However, this court upheld the Tribunal's finding that the matter was time barred.
94. From the pleadings and annexures, it is clear that the factual basis of the Petition remains substantially unchanged from what was before the Tribunal and this court on appeal. The same development, the same EIA licence and alleged irregularities, and the same administrative actors are in issue.
95. However, in addition to the original claims relating to the EIA licence, the Petitioners now raise further complaints concerning alleged irregular approvals for change of user, architectural designs, felling of trees, noise pollution, and environmental degradation.
96. While this court acknowledges the importance of the right of access to justice under Article 48 of *the Constitution*, it must also emphasize that litigation must be conducted in good faith and within the confines of procedural and substantive legal rules.
97. Indeed, the principle of constitutional avoidance, well established in our jurisprudence requires courts to refrain from determining constitutional questions where a matter can be properly resolved through an existing statutory framework. In *Speaker of the National Assembly v Njenga Karume* [2008] 1 KLR 425, the court held that where there exists a clear procedure for redress under statute, that procedure ought to be followed.
98. The Court of Appeal restated this principle in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others* [2015] eKLR, thus:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
99. The present dispute, in its essence, is governed by sector-specific legislation, namely, the Environment Management and Co-ordination Act (EMCA), in relation to EIA licensing, and the *Physical and Land Use Planning Act* (PLUPA) in relation to change of user and development approvals.
100. Considering that the Petitioners commenced their proceedings before NET, it follows that the Petitioners were aware of these mechanisms. Indeed, they invoked Section 129 of EMCA which provides for an appeal process to the National Environment Tribunal concerning environmental licensing decisions.
101. Sections 61 and 78 of PLUPA assign jurisdiction over development control disputes to the County Physical and Land Use Planning Liaison Committee. While the Petitioners claim that the Committee is currently non-functional, citing a notice dated 26<sup>th</sup> November 2024, it is noted that the approval of change of user in issue was granted on 15<sup>th</sup> October 2020.



102. Apart from correspondence to NMS dated the 10<sup>th</sup> September, 2020, and objections by Mugumo Crescent Residents Association dated the 3<sup>rd</sup> July, 2020 and 20<sup>th</sup> January, 2021, there is no evidence to show that the Petitioners took any steps to challenge this decision through the appropriate statutory mechanisms under the *Physical and Land Use Planning Act* (PLUPA).
103. The Petitioners have repeatedly asserted that the present dispute is multi-faceted and involves a complex interplay of environmental, planning, and constitutional concerns. However, the court finds it telling that the Petitioners did not initially approach this court with a comprehensive Petition framed in that manner. Rather, the Petitioners first elected to proceed before the National Environment Tribunal, focusing singularly on the alleged irregular EIA Licence issuance and attendant constitutional breaches.
104. If the Petitioners had filed the appeal at the National Environment Tribunal within time, and had that Tribunal considered the merits of the case, whether to allow or dismiss the same and had the Petitioners thereafter proceeded to this court on appeal, and the Tribunal's decision was ultimately upheld by this court, would it then be permissible for the Petitioners to return again before this court in the form of a fresh constitutional Petition, challenging the same development, raising the same facts, and seeking substantially similar reliefs? The answer is a categorical no.
105. To allow what the Petitioners now seek to do would set a dangerous precedent. It would open the floodgates for litigants who, having failed to meet the strict procedural requirements under specialised statutory frameworks such as EMCA and PLUPA, would simply recast their grievances to circumvent lawful timelines.
106. The Petitioners cannot be permitted to gamble with the judicial system, testing their case in different courts. Such a scenario, if allowed, will open floodgates to repetitive suits, bringing the administration of justice into disrepute. It would undermine the finality of decisions made through statutory forums and weaken the structure of Kenya's environmental and planning adjudication regime.
107. Consequently, and in addition to what I have stated above, I am in agreement with the Respondents' counsel's submissions that the filing of the present Petition amounts to forum shopping, defined by the court in *Stanley Muia Makau v Republic* [2020] KEHC 5755 (KLR), as the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity or to throw the dice in one's favour, which action constitutes subversion of justice.
108. As regards the Petitioners' complaints regarding the alleged ongoing environmental degradation, noise pollution, and tree felling, these concerns speak to post-approval conduct and possible non-compliance with EIA License conditions and are subject to enforcement under the existing laws, which is a separate issue from the current substratum of the Petition.
109. The Petitioners have also informed the court that the 3<sup>rd</sup> Respondent has been issued with enforcement notices. This demonstrates the presence of ongoing regulatory oversight. In this regard, Section 72 of the *Physical and Land Use Planning Act* No. 13 of 2019 empowers the County Executive Committee Member to issue enforcement notices where developments are carried out without permission or in contravention of permission conditions. Where a developer is served with such a notice, It has a recourse to the liaison committee, or to this court, as the case may be.
110. In view of the foregoing, the court finds that these proceedings are improper and constitute an abuse of court process. In the circumstances, it would serve no practical purpose to consider the remaining issues as enumerated. To do so would amount to an academic exercise.



111. In the end, the court proceeds to dismiss the Motion and the Petition. The Petition and motion having been filed in the interest of the public, each party will bear its own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 3<sup>RD</sup> DAY OF JULY, 2025.**

**O. A. ANGOTE**

**Judge**

In the presence of;

Mr. Lusi for Petitioners/Applicants

Mr. Mwangi for 3<sup>rd</sup> Respondent

Ms Aswani holding brief for Kusow for 2<sup>nd</sup> Respondent

Mr. Keaton with Mr. Mwangi for 3<sup>rd</sup> Respondent

Court Assistant: Tracy



**ELCEP PET. NO. E017 OF 2025**

**RULING**

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