



Tom Brown Limited & another v County Executive Committee Member in Charge of Planning & 2 others; Attorney General & 4 others (Interested Parties) (Environment & Land Petition E053 of 2022) [2023] KEELC 17853 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E053 OF 2022**

**OA ANGOTE, J
JUNE 8, 2023**

BETWEEN

TOM BROWN LIMITED 1ST PETITIONER

HON. JOHN MWAU 2ND PETITIONER

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF
PLANNING 1ST RESPONDENT**

NAIROBI CITY COUNTY 2ND RESPONDENT

NOVA REALTY GROUP LTD 3RD RESPONDENT

AND

THE ATTORNEY GENERAL INTERESTED PARTY

MINISTRY OF DEFENCE INTERESTED PARTY

THE CHINESE EMBASSY, KENYA INTERESTED PARTY

**DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS, NAIROBI
CITY COUNTY INTERESTED PARTY**

**NAIROBI CITY COUNTY, COUNTY PHYSICAL AND LAND USE PLANNING
LIAISON COMMITTEE INTERESTED PARTY**

RULING

1. The Petitioners filed a Notice of Motion application dated 17th November 2022 seeking the following orders:



- a. The Honourable Court be pleased to and hereby exempts the Petitioners from pursuing the alternative remedy and to admit this matter for hearing pursuant to Section 9(4) of the Fair Administrative Actions Act.
 - b. Pending the hearing and determination of this Petition, the Honourable Court be pleased and hereby grants an interim order of injunction restraining and/or stopping all development activities pursuant to the complained of Application for development permission and change of user and/or any other covert permission or approval issued in respect of L.R. No. 209/1458/2.
 - c. The Honourable Court be pleased to and hereby issues an order compelling the 1st and 2nd Respondents to provide all copies of applications and supporting documents for the change of user and building plan approvals, all documents and comments received from the relevant authorities in respect of the application for change of user and building approvals, all minutes concerning the approval of the change of user and building plan approvals issued in respect of L.R. No. 209/1458/2.
 - d. The Honorable Court be pleased to grant any other interim orders and reliefs it deems fit.
 - e. The costs of the Application be awarded to the Applicants.
2. The application is supported by the Affidavit of the 2nd Petitioner, who is also the director of the 1st Petitioner, in which he deponed that the 1st Petitioner is the registered proprietor of L.R. No. 209/1458/3 (now NAIROBI/ BLOCK27/231), which is adjacent to plot L.R. No. 209/1458/2 (the suit property) sharing a common boundary.
 3. The 2nd Petitioner deposed that the Petition concerns the 3rd Respondent's attempts, together with the 1st and 2nd Respondents, to construct a 12-storey 42 apartments development on L.R. No. 209/1458/2, a plot less than half an acre in size, within a gated community and next to strategic installations such as the Chinese Embassy and the Kenya Defence Forces Headquarters, threatening the constitutional rights of the Petitioners and other residents in the gated community.
 4. The 2nd Petitioner deponed that the 1st, 2nd and 3rd Respondents' change of user and development approvals are being undertaken in an opaque and clandestine manner, contrary to the law and in violation of the 2nd Respondent's constitutional duty under Article 186(1) of *the Constitution* of Kenya 2010 and that this violates the Petitioners' rights to privacy, a clean and healthy environment, fair administrative action under Article 47 and the right to access justice under Article 48 of *the Constitution*.
 5. It was deponed by the 2nd Petitioner that the development approvals, change of user and building approvals have been obtained in contravention of Sections 55, 58 and 60 of the *Physical and Land Use Planning Act* and regulations thereto and that the Respondents have refused to provide information concerning the purported change of user and building approvals, including the minutes of the Committee approving the development applications and the purported Zoning regulations for the area.
 6. It is the Petitioners' case that this court has powers under Section 68 of the Act to order the 1st and 2nd Respondents to provide the information requested for by the Petitioners before the hearing of the Petition and that by a letter dated 17th May 2022, the Nairobi Metropolitan Services on behalf of the 1st and 2nd Respondents confirmed that the purported development applications had been deferred pending clearance from the Ministry of Defence.



7. According to the Petitioners, the Petitioners have not been provided with copies of the application for change of user and development of the suit property for their comment yet the 3rd Respondent continues to carry out construction activities on the land purporting to have obtained the necessary approvals.
8. It is the Petitioners' case that it is a statutory requirement that for change of user and development applications, especially within a controlled development, the application for approval be served on every property owner or occupier of adjacent property; that the change of user herein has adverse effects on the neighbouring properties as it would infringe on the privacy of neighbours and that the said development will be a security threat to strategic installations, cause traffic congestion and noise pollution and devalue the adjacent properties.
9. The Petitioners averred that the whole neighborhood consists of single dwelling maisonettes and houses constructed not beyond one floor and that the reason the 2nd Respondent's predecessor imposed a height restriction on developments in the area was due to security restrictions and the nature of the area being a controlled development.
10. It was deponed that the development will adversely affect the intrinsic environmental value and character of the area as the trees that existed on the plot were cut down to allow for construction and that the Nairobi City County's decisions of 10th November 1987, 24, 17th July 1990 and 8th February 2007 to retain single dwelling residential buildings in the Petitioners' neighborhoods are consistent with the planning requirements and should be applied consistently as they are binding.
11. The Petitioners deponed that they have a legitimate expectation arising from the representation and the pre-conditional building approvals given over 35 years ago by the Nairobi City County and that the pre-conditional approval and the consistent past practice bars the Nairobi City County from approving the proposed change of user and development intended on plot L.R. No. 209/1458/2.
12. Further, it was deponed, prior to change of user from a low density single residential unit to high density multi-dwelling units, proper planning provision of increased utilities in the area, including increased sewerage capacity, water supply, electricity and waste management should be put in place and that since this has not taken place, any high-density multi-story building is likely to strain the existing utilities to the detriment and damage of the Petitioners and other area residents.
13. The 1st and 2nd Respondents opposed the application vide Grounds of Opposition dated 24th November 2022, in which they stated that the application is incompetent, defective and lacks merit. They averred that there must be exceptional circumstances for exemption to the rule of exhaustion which has not been demonstrated; that the application offends Section 14 of the [Access to Information Act](#) and that the application is made in bad faith and is an abuse of the court process.
14. In his Replying Affidavit, the 2nd Respondent's Deputy Director, Planning, Compliance and Enforcement Department deponed that Vandex East Africa Limited, the 3rd Respondent's predecessor, made an application for development permission and change of user from single dwelling unit to multi dwelling units (apartments) of the suit property and submitted planning briefs and building plans by a registered architect and registered planner to the Nairobi City County and made the requisite payments.
15. The 2nd Respondent's Deputy Director, Planning, Compliance and Enforcement deposed that an advertisement was lodged in the Daily Nation on 15th October 2021 inviting comments and objections on the 3rd Respondent's application for change of user within 14 days; that a notice was also placed on the site informing the neighborhood of the proposed change of user and that on 16th November



- 2021, the County Planning Committee held a meeting to discuss development applications and the development application for L.R. No/209/1458/2 was duly approved.
16. It was the deposition of the 3rd Respondent's Deputy Director, Planning, Compliance and Enforcement that the 3rd Respondent's predecessor was issued with a Construction Permit upon settling an invoice of Kshs. 1,733,325; that on 7th April 2022, the Urban Planning Technical Committee approved the 3rd Respondent's building plans and that the 3rd Respondent obtained a hoarding license dated 18th September 2022 for 12 months.
 17. It was averred by the 2nd Respondent that the change of user and building plan approvals were in line with the zoning policy; that the 3rd Respondent did lodge all the required documents, paid the fees and obtained approvals for construction; that the Nairobi City County does not engage in public participation when approving development permission; that at page 60 of the Petitioners' documents, the zoning policy shows that Kilimani area is zoned for apartments and that the area set out is 0.05 ha, but the 3rd Respondent's property stands on 0.15ha.
 18. It is the 2nd Respondents case that the zoning policy was adopted in 2006 and amendments in line with the character of the area continue to be incorporated; that the Petitioners did not pay the filing fee for the complaint/ claim dated 17th October 2022 to the County Physical and Land Use Planning Liaison Committee and as such, the Statement of Complaint has not been filed and that therefore the Petitioners have not exhausted the alternative available remedies and this court has no jurisdiction to hear and determine the Petition.
 19. The 3rd Respondent opposed the application vide a Replying Affidavit dated 22nd November 2022 sworn by Hassan Abdi Mohamed, a Director of the 3rd Respondent, who deponed that all approvals of change of user and development permission in respect to the suit property were obtained in a lawful manner from the regulatory bodies.
 20. It was deponed that the 3rd Respondent lawfully acquired the property from Vandex East Africa Limited after conducting due diligence and obtained indefeasible title to it; that the 3rd Respondent instructed a registered planner who did a planning brief which was submitted to the Nairobi City County, and that on 15th October 2021, the 3rd Respondent placed an advertisement in one of the local dailies informing the public on the change of use of the property from single dwelling to multi-dwelling.
 21. According to the 3rd Respondent's Director, on even date, they placed a project sign board at the property's entrance informing the public of the proposed change of use; that the County Planning Committee on 16th November 2021 approved the development application for change of user at its meeting and issued a notification of approval of development permission and that the 3rd Respondent thereafter sought an approval of building plans by Nairobi City County.
 22. It is the 3rd Respondent's case that the Town Planning Committee issued an approval and the 2nd Respondent paid the invoiced sum on 23rd December 2021 and that the 3rd Respondent duly obtained a hoarding license dated 18th September 2022 for 12 months in line with the approval conditions as well as an excavation permission for which it paid the invoiced amount.
 23. It is the 3rd Respondent's averment that it lodged an Environmental Impact Assessment (EIA) application license with NEMA and used a questionnaire for persons affected by the project; that the EIA Report was done by Environmental Management Consultancy (EMC) and included public participation through the questionnaire and interviews and that no one expressed objection to the proposed project.



24. According to the 3rd Respondent's Director, NEMA received the EIA Project Report and on 10th February 2022, issued certification for the report and a license for the implementation of the project on certain conditions and that the Petitioners are guilty of material nondisclosure as sufficient public participation was conducted at the change of user stage and through the Environmental Impact Assessment.
25. It was averred by the 3rd Respondent's Director that this court has no jurisdiction to hear and determine this suit; that Section 61(3) and (4) of the [Physical and Land Use Planning Act](#) (2019) provides that a party aggrieved by the decision of the Director of County Urban Planning is to appeal to the County Physical and Land Use Planning Liaison Committee and that pursuant to the said provision, the Petitioner filed an appeal dated 17th November 2022 under Section 61(3) of the [Physical and Land Use Planning Act](#) which is pending before the County Physical and Land Use Planning Liaison Committee.
26. According to the 3rd Respondent, the Petitioners failed to lodge the objection within 14 days of the 3rd Respondent's public notice on 15th October 2021 and that this court only has jurisdiction with regards to decisions on applications for development permissions under Section 61(4) of the [Physical and Land Use Planning Act](#) by way of an appeal of the decision
27. On this basis, 3rd Respondent seeks that the Petitioners' second prayer on exemption from pursuing the alternative remedy ought to be denied; that the Petition contravenes Article 159 (1) and (2) (c) of [the Constitution](#) which recognizes the authority of Tribunals and provide for Alternative Dispute Resolution Mechanisms and that the Petitioners have failed to exhaust the alternative means of dispute resolution provided by statute.
28. It was deposed by the 3rd Respondent's Director that an application for injunction one year after the public notice was published on 15th October 2021 is an abuse of court process and that the suit is premature, frivolous and an abuse of court process.
29. The Ministry of Defence, the 2nd Interested Party, through its State Officer in charge of land, deposed that the proposed development is approximately 200 meters to the Ministry of Defence headquarters and 950 meters to the State House and that section 58 (7) of the [Physical and Land Use Planning Act](#) requires a person applying for development permission to notify the members of public of the proposed development.
30. It was deposed by the State Officer in charge of land, Ministry of Defence that the proposed development is within a "safeguarding area" as defined under section 2 of the [Physical and Land Use Planning Act](#); that the Ministry of Lands objects to the approval granted to the 3rd Respondent to develop the suit proper and that the said approval should be revoked.
31. The 5th Interested Party responded to the application vide a Replying Affidavit sworn by the Chairman of the Nairobi County Physical and Land Use Planning Liaison Committee, who deposed that an appeal was lodged by the Petitioners on 17th October 2022 being complaint No. NCCG. PLUPLC/014/22 and that by 18th October 2022, the Petitioners had already raised a complaint through a letter purporting that the 5th Interested party had refused to accept payment of the prescribed fees.
32. It was deposed by the 5th Interested Party's Chairman that the committee does not receive any cash as prescribed fees is paid through appropriate pay bills within the public domain; that the Petitioners only moved this court after it was served with a Notice of Preliminary Objection dated 1st November 2022 in the dispute before the Liaison Committee on the issue of jurisdiction and the doctrine of laches and



- that the matter was listed for hearing on 6th December 2022 but the 5th Respondent was informed that the Petitioners did not wish to pursue the appeal having filed this suit.
33. The 2nd Petitioner filed Further Affidavits sworn on 11th January 2023 and 13th April 2023 respectively. According to him, in January 2022, people started demolishing the building and structures on L.R. No. 209/1458/2 without notice or information to the owners of neighbouring properties and that the demolition was carried out without a hoarding license.
 34. According to the 2nd Petitioner, he raised an objection with the County Executive Member for Land and Urban Planning, the County Secretary and the Director of Planning vide a letter dated 14th January 2022 and that aggrieved by the lack of response to his letters, he reported the matter to the Director, Directorate of Criminal Investigations, Nairobi City County.
 35. It is the Petitioners' case that he filed a complaint and appeal NCCG/PLUPLC No. 014 of 2022 on 17th October 2022 before the County Physical Planning and Land Use Planning Liaison Committee; that they only sought legal remedy before this court when the County Physical and Land Use Planning Committee failed to deliver its decision within the stipulated time and that they exhausted all the other alternative remedies available.
 36. It was deposed by the 2nd Petitioner that it was not true that Hassan Abdi Mohamed was a director of Nova Realty Group Limited as a search at the Company Registry revealed that the three directors of the company are Abdulaziz Abdulah Nur, Abdifatah Ali Hassan and Abdurahman W Jama.
 37. According to the Petitioners, the alleged change of user ought to have been from professional offices to multi-dwelling apartments as Vandex East Africa Ltd applied to change the user from single dwelling residential house to professional offices on 26th September which it was issued on 1st March 2007 and that the planning brief is not accurate as it indicates that the owners of the suit property are seeking a change of use from single dwelling to multi dwelling which is not the case.
 38. It was deposed by the 2nd Petitioner that it is not true that several public participation measures were undertaken with the public and adjacent neighbors as the adjoining neighbors were not informed of the alleged change of user and that there has never been a site notice on the said gate.
 39. The Petitioners averred that the questionnaires filled in the EIA Report were not filled by any person who owns property within the neighborhood and the people who purportedly filled the form cannot qualify as persons affected by the proposed project and that the County Planning Committee could not have approved the alleged change of user on 16th November 2021 and the Town Planning Committee issue building approvals and construction permits on 23rd December 2021 prior to the issuance of the NEMA license on 10th February 2022.
 40. In response to the Replying Affidavit sworn by the 5th Interested Party, the 2nd Petitioner deposed that it failed to disclose material facts; that upon lodging a complaint with the 5th Interested Party on 17th October 2022, the Secretariat only stamped the appeal received and did not issue a number to the appeal nor accept the cheque drawn in the 5th Interested Party's name or raise an invoice to facilitate payment of fees and that the 2nd Petitioner complained vide a letter dated 18th October 2022 and was given appeal number NCCG/PLUPLC/014/22 on 18th October 2022.
 41. The 2nd Petitioner averred that it was only after this court had issued orders that they called the Petitioners' advocate to collect a letter dated 28th November 2022, which invited the Petitioners for hearing of the appeal against an enforcement notice issued by CECM Planning on 8th November 2022 which the 2nd Petitioner was a stranger to, and called for payment of KShs. 3000 and that their advocates informed the Committee that since the matter was before this court, it would not proceed.



Submissions

42. The Petitioners' counsel submitted that they have shown that the 1st and 2nd Respondents acted contra-statute and are in violation of the Petitioners' constitutional rights; that the 3rd Respondent in a non-transparent manner connived with the 1st and 2nd Respondents to change the user of L. R. No. 209/1458/2 from single dwelling to multi-dwelling and proposed to erect a 12 story building overlooking into the Petitioners' houses and that they have met the threshold for the Court to compel the 1st and 2nd Respondents to release all requested documents under prayer 5.
43. It was Counsel's submission that the 5th Interested Party failed to perform all its statutory functions forcing the Petitioners to complain by two letters dated 17th October 2022 and 11th November 2022; that the 5th Respondent became hostile, biased and deliberately refused to receive the letter dated 14th November 2022 and that upon filing the appeal at the Liaison Committee, the 3rd Respondent filed a notice of preliminary objection on grounds that the appeal was defective as the Petitioners had failed to include the decision appealed, yet it was well aware that the 1st and 2nd Respondents had refused to provide the same.
44. According to the Petitioners' advocate, the Petitioners moved this Court upon the lapse of the statutory 30 days within which the 5th Interested Party was required in law to make a decision, and that the 5th Interested Party had not taken any steps to comply with the provisions of the *Physical and Land Use Planning Act* or the regulation thereunder.
45. The Petitioners' Counsel submitted that they have complied with Section 9 of the Fair Administrative Actions Act which requires exhaustion of an internal remedy and mechanism; that the Petitioners filed an appeal at the Nairobi City County Physical and Land Use Planning Liaison Committee.
46. According to Counsel, the Committee under Section 80 (2) of the *Physical and Land Use Planning Act*, is required to hear and determine an appeal within 30 days of the appeal being filed and that the Committee refused to set the matter down for hearing and to make a decision within the said 30 days, and was expressed biased against the Petitioners by refusing to accept letters and pleadings and that the appeal was thus not a viable remedy.
47. Counsel's submission was that this court has jurisdiction to hear and determine the Appeal No. NCCG/PLUPLC/013/022 as provided under the *Physical and Land Use Planning Act* 2019 and the Regulations. Counsel relied on Articles 162 (2) and (3) of *the Constitution* as well as the Court of Appeal case of Daniel N. Mugendi vs Kenyatta University & 3 others [2013] eKLR.
48. Counsel submitted that the court should exercise its discretion in this matter under Section 9 (4) of the Fair Administrative Actions Act to exempt the Petitioners from the general rule of exhaustion of internal remedy under Section 9(2) and (3) of the Act, as they have demonstrated exceptional circumstances that warrant this court to exercise such discretion.
49. The Petitioners' Counsel submitted that the 1st and 2nd Respondents have made decisions purportedly changing the user of L. R. no.209/1458/2 and refused to provide the Petitioners with the said decision, minutes, change of user and building plans to enable the Petitioners file a valid appeal and that the committee frustrated the hearing of the appeal. Counsel relied on the case of United Millers Limited vs Kenya Bureau of Standards & 5 Others [2021] eKLR and John Kabukuru Kibicho & Another vs County Government of Nakuru & 2 Others [2016] eKLR.
50. It was Counsel's further submission that the change of user, building plan approvals and NEMA EIA license were obtained unlawfully and illegally; that this Court is justified in confirming the interim



- orders pending the determination of the Petition and that there was no public participation with the adjacent neighbours.
51. It was submitted that the purported change of user was unlawful as the use of the property was professional offices and not a single dwelling unit; that there was no public participation and that the construction and demolition activities on the suit property began in January 2022 yet as at 17th May 2022, the NMS had deferred the application for building plans pending clearance from the Ministry of Defence and a letter of no objection from neighbours, which have not been tendered before this court.
 52. It was submitted that the 3rd Respondent's NEMA EIA License is illegal as it did not comply with Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2013 on public participation and Section 59 of the *environmental Management and Co-ordination Act*.
 53. With respect to the prayer for access to information, counsel relied on the case of Kevin Kundu Wambingwa (Personal Representative of Estate of Hillario Wambingwa) vs Attorney Genera & 2 Others [2021] eKLR which cited Charles Omanga & Others v A.G. (2004) eKLR and Andrew Omtata Okoiti v A.G. & Others.
 54. Counsel submitted that Section 14 of the *Access to Information Act* would not be effective in these circumstances as the 1st and 2nd Respondents have refused to respond to the request for information and have not made any decision on the same and that under Section 68(2) & (3) of the *Physical and Land Use Planning Act*, information in possession of the 2nd Respondent can only be disclosed by this court's order.
 55. Counsel for the 3rd Respondent submitted that this court lacks jurisdiction to determine this dispute as its jurisdiction is limited to decisions on applications for development permissions, if moved under Section 61(4) of the *Physical and Land Use Planning Act*. Counsel submitted that the appeal to the Liaison Committee was not filed within 14 days of the decision and that the Petitioners failed to pay filing fees and thereby the matter could not be set down for hearing. Counsel relied on the case of Mombasa Cement Limited vs Speaker National Assembly & Another (2018) eKLR.
 56. Counsel for the 3rd Respondent submitted that the Petitioners have not demonstrated exceptional circumstances for exemption under Section 9(4) of the Fair Administrative Actions Act and that the Petitioners failed to challenge the impugned decision within the stipulated time and cannot explain their indolence.
 57. Counsel relied on the case of Republic vs Kenya School of Law & 2 Others ex parte Kgaborone Tsholofelo Wekesa (2019) eKLR where the court considered the provisions of Section 9(2) of the *Fair Administrative Action Act*. They also relied on Mutanga Tea & Coffee C. Ltd. vs Shikara Ltd & Another where the court held that alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area.
 58. Counsel submitted that the Petitioners are couching a planning and land use dispute into a constitutional Petition and that the true intention of the Petitioners is the cancellation of the licenses. Counsel relied on the Court of Appeal decisions in Orange Democratic Movement vs Yusuf Ali Mohamed & 5 Others (2018) eKLR, Peter Ngoge vs Francis Ole Kaparo & 5 Others (2012) eKLR and Deepk Harakch & Another vs Anmol Ltd & 4 Others (2018) eKLR.
 59. With respect to whether the Petitioners have a prima facie case, the 3rd Respondent's Counsel submitted that the 3rd Respondent obtained change of user, the development permission and the NEMA license legally; that the planned development will not be harmful to the environment and that public participation was done.



60. Counsel for the 1st, 2nd and 5th Interested Parties (the Attorney General) submitted that the Petitioners have not proven the grounds that would warrant exemption under Section 9 (4) of the Fair Administrative Actions Act. Counsel relied on the maxim that equity aids the vigilant and not the indolent as well as the case of *Wanjiru Gikonyo & 2 others vs National Assembly of Kenya & 4 Others* (2016) eKLR.
61. The Attorney General submitted that the Petitioners filed the complaint with the Liaison Committee with no intention of prosecuting the matter, as evident from their letters of complaint dated 17th October 2022 and that this court should take judicial notice that neither the judiciary nor the quasi-judicial system in Kenya receives payment of filing fees in cash; rather, it is either paid via mpesa or via the bank.
62. Counsel relied on the cases of *William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR; *Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* (2015) eKLR; *R vs Independent Electoral and Boundaries Commission (IEBC) & Others ex parte amongst others*.
63. It was Counsel's submission that this application was not brought in good faith and did not meet the threshold for the grant of interim orders; that the Petitioners did not invoke their right to public participation despite admitting that the public was invited to participate in the change of user and that the Petitioners failed to object to the change of user within the stipulated timelines.

Analysis and determination

64. Having considered the application, the affidavit evidence and submissions of the parties, the following issues arise for this court's determination:
 - a. Whether this court has jurisdiction to determine the Petition
 - b. Whether the Petitioner has established the grounds for the grant of interim orders of injunction stopping all development activities on the 3rd Respondent's property pending the hearing and determination of the appeal.
65. It is not in dispute that the 1st Petitioner is the registered proprietor of L.R. No. 209/1458/3 (now NAIROBI/ BLOCK27/231), which is adjacent to plot L.R. No. 209/1458/2 (the suit property) sharing a common boundary. The 2nd Petitioner is the 1st Petitioner's Director. The Petitioners are opposed to the construction of a 12-storey 42 apartments development on L.R. No. 209/1458/2, on the ground that the suit property is less than half an acre in size, within a gated community and next to strategic installations such as the Chinese Embassy and the Kenya Defence Forces Headquarters.
66. According to the Petitioners, the 1st, 2nd and 3rd Respondents' change of user and development approvals were undertaken in an opaque and clandestine manner, contrary to the law and in violation of the 2nd Respondent's constitutional duty under Article 186(1) of *the Constitution* of Kenya 2010 and that this violates their rights to privacy, a clean and healthy environment, fair administrative action under Article 47 and the right to access justice under Article 48 of *the Constitution*.
67. It is the Petitioners' case that the development approvals, change of user and building approvals have been obtained in contravention of Sections 55, 58 and 60 of the *Physical and Land Use Planning Act* and the regulations thereto and that the Respondents have refused to provide them with information concerning the purported change of user and building approvals, including the minutes of the Committee approving the development applications and the purported Zoning regulations for the area.



68. The Petitioners have filed this Petition challenging the issuance of change of user and development approvals issued to the 3rd Respondent by the 1st and 2nd Respondents to construct a 12-story on the suit property. The Petitioners have sought for declaratory reliefs that the 1st and 2nd Respondents infringed on their rights to access justice by refusing to produce copies of applications, minutes, change of user and building plan approvals and that the purported change of user and building approvals was illegal and unprocedural and infringed on their rights.
69. The Petitioners have further sought for an injunction restraining all development activities on the suit property pursuant to the development permission and change of user; an order quashing all planning permission approval plans and change of user and an order prohibiting the Respondents from issuing planning permissions contrary to the developments in the area and the [*Physical and Land Use Planning Act*](#).
70. The Respondents and the 1st, 2nd, 4th and 5th Interested Parties have challenged the jurisdiction of this court. According to the Respondents and the Interested Parties, there must be exceptional circumstances for exemption to the rule of exhaustion which has not been demonstrated; that the application and the Petition offends Section 14 of the [*Access to Information Act*](#) and that the application is made in bad faith and is an abuse of the court process.
71. According to the Respondents and the 1st, 2nd, 4th and 5th Interested Parties, the Petitioners failed to lodge their objection within 14 days of the 3rd Respondent's public notice on 15th October 2021 and that this court only has jurisdiction with regards to decisions on applications for development permissions under Section 61(4) of the [*Physical and Land Use Planning Act*](#) by way of an appeal of the decision of the Liaison Committee.
72. Jurisdiction is everything, and without it, a court cannot move one step. In the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, the Supreme Court held as follows:
- “ Court’s jurisdiction flows from either [*the Constitution*](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by [*the constitution*](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
73. Disputes relating to development control, which include aspects of change of user and building plans, such as the Petition herein, are governed by the [*Physical and Land Use Planning Act*](#), 2019.
74. Section 56 of the [*Physical and Land Use Planning Act*](#) grants county governments the power to undertake development control within their jurisdictions, including determining development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas. A “Safeguarding Area” is defined under Section 2 as any area adjoining any land owned or occupied by the Kenya Defence Forces.
75. The Respondents have opposed the application and the Petition on the basis of the provisions of Sections 61(3) and (4) of the [*Physical and Land Use Planning Act*](#), 2019 which provides that the County Physical and Land Use Planning Committee shall hear and determine complaints arising from the decision of the county executive committee member, with a right of appeal against the Committee’s decision to this court. The said provision states as follows:
- “(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land



Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

- (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”

76. The Petitioners were aware of this provision while filing the Petition. In one of the prayers in the application, the Petitioners have sought for the following order:

“The Honourable Court be pleased to and hereby exempts the Petitioners from pursuing the alternative remedy and to admit this matter for hearing pursuant to Section 9(4) of the Fair Administrative Actions Act.”

77. According to the Petitioners, they did in fact exhaust the dispute resolution mechanism provided for under section 61 (3) of the *Physical and Land Use Planning Act*, 2019 because they filed complaint No. NCCG. PLUPLC/014/22 with the 5th Interested Party on 17th October 2022 but that the Committee failed to determine the complaint within the timelines, and second, that even if they did not exhaust this mechanism, this court can waive the principle of exhaustion and gain jurisdiction under Section 9(4) of the Fair Administrative Actions Act.

78. The 3rd Respondent and the 5th Interested Party have averred that while the Petitioners filed the complaint before the County Liaison Committee, the complaint was filed out of time as it was lodged more than one year after the Respondent’s public notice of 15th October 2021 and that this court only has jurisdiction with regards to decisions on applications for development permissions under Section 61(4) of the *Physical and Land Use Planning Act*.

79. The 3rd Respondent and the Interested Party have submitted that the Petitioner has not proved that there are exceptional circumstances that would warrant this court to exempt the Petitioners from pursuing the alternative remedies provided for in the *Physical and Land Use Planning Act*.

80. The question herein is whether the Petitioners have complied with the doctrine of exhaustion or have established exceptional circumstances for this court to waive the need by the Petitioners to exhaust the alternative remedy. The principle of exhaustion is provided for in Section 9(2) and (3) of the Fair Administrative Actions Act as follows:

“(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice.”



81. The doctrine of exhaustion was defined by a five-judge bench in *William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*.”

82. In *R vs Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, the Court opined thus:

“42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

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. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

83. In the *William Odhiambo Ramogi* case, the court discussed the exceptions to the doctrine of exhaustion as follows:

However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte*



The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

84. The history of the contestation between the Petitioners and the 3rd Respondent, including the subsequent filing of a claim before the Nairobi County Liaison Committee, which has since been withdrawn or struck out, will be apt to determine if indeed the Petitioners can fall within the exceptions to the exhaustion doctrine.
85. The evidence before this court shows that Vandex E.A. Limited, the previous owner of the suit property, made several applications for change of user of the suit property between 29th July 1987 and 1st December 2006 when the said change of user was finally approved.
86. The first application by Vandex E. A. Limited was vide a letter dated 29th July 1987 in which Vandex Ltd sought the change of user of the suit property from residential to office space. The then Nairobi



- City Commission declined to allow the change of user vide a letter dated 10th November 1987 on the ground that the plot is within a residential area.
87. On 1st December 1987, the 2nd Petitioner wrote a letter to the Nairobi City Commission, under the impression that a change of user had been granted to Vandex E. A. Ltd, and sought that the said change of user be revoked or reconsidered to enable affected parties to voice their objections. However, it was later on realized that the application for change of user had been declined.
 88. The 3rd Respondent's predecessor, Vandex E. A. Limited, appealed for reconsideration of the Commission's decision through letters dated 4th August 1988, and 25th June 1990 on grounds that there were other premises in the area being used as offices and that as the nature of their business is consultancy, it would not interfere with the comfort of the residents around the suit property.
 89. The then Nairobi City Commission, vide letters dated 24th August 1988 and 17th July 1990, responded to the request by Vandex E. A. Limited and stated that the application for change of user was still not acceptable.
 90. On 1st December 2006, Vandex E. A. Limited once again applied for development permission, in which it also sought the change of user of the suit property from residential to professional office, asserting that no construction would be involved. Upon receiving the application, the Nairobi City Council granted Vandex E. A. Limited development permission vide a notice dated 1st March 2007 on condition that no re-development would be permitted.
 91. It is not clear why the City Council opted to allow the change of user from residential to "professional office" in 2006 despite declining to do so in 1987, 1988 and 1990. However, the 1st and 2nd Respondents have not denied that indeed there was a change of user of the suit property to "professional office" on condition that the suit property is not redeveloped.
 92. The 2nd Respondent's Deputy Director, Planning, Compliance and Enforcement Department deponed that Vandex East Africa Limited, the 3rd Respondent's predecessor, once again made an application for development permission of the suit property, change of user from single dwelling unit to multi dwelling units (apartments) and submitted planning briefs and building plans by a registered architect and registered planner to the Nairobi City County and made the requisite payments.
 93. It is not clear to this court why the application for the change of user in the year 2021 was from "single dwelling unit" when the Council had earlier on in the year 2006 approved the change of user of the suit property from "single dwelling" to "professional office without any re development."
 94. According to the 2nd Respondent, an advertisement was lodged in the Daily Nation on 15th October 2021 inviting comments and objections on the 3rd Respondent's application for change of user within 14 days; that a notice was also placed on the site informing the neighborhood of the proposed change of user and that on 16th November 2021, the County Planning Committee held a meeting to discuss development applications and the development application for L.R. No/209/1458/2 was duly approved.
 95. It was the deposition of the 2nd Respondent's Deputy Director, Planning, Compliance and Enforcement that the 3rd Respondent's predecessor was issued with a Construction Permit upon settling an invoice of Kshs. 1,733,325; that on 7th April 2022, the Urban Planning Technical Committee approved the 3rd Respondent's building plans and that the 3rd Respondent obtained a hoarding license dated 18th September 2022 for 12 months.



96. According to the Petitioners, they were unaware of the advertisement in the newspaper, neither was any notice placed on site- announcing the said change of user as alleged.
97. What this chronology of events mean is that the application for change of user and development of the suit property was allowed by the 2nd Respondent's Planning Committee on 16th November, 2021. However, it was not until 7th April, 2022 that the building plans were approved. The 2nd Respondent paid for the transportation of the soil from the suit property on 18th October, 2022, while the hoarding license was issued on 18th September, 2022.
98. The preparation of the EIA Report seems to have been prepared around 12th January, 2022, which is the time that the 3rd Respondent's expert purportedly interviewed the people who were likely to be affected by the project, including the 2nd Petitioner. This chronology of events tallies with the 2nd Petitioner's narration that the social site assessment report was dropped at his gate on 11th January, 2022 in respect to the proposed development on the suit property.
99. This, according to the 2nd Petitioner, made him to make inquiries with the 2nd Respondent on the proposed development vide his letter dated 14th January, 2022 which was received on 18th January, 2022. In the said letter, the 2nd Petitioner sought to be provided with all the approvals in respect to the proposed development and any approval that may have been granted.
100. The 2nd Respondent never responded to the said letter, or the subsequent inquiries by the Petitioners. Despite the subsequent requests in writing by the Petitioners to be provided with information and approvals on the demolitions and the cutting of the trees on the suit property that were ongoing, the Petitioners were never supplied with the information.
101. In the letter dated 31st October, 2022 and received by the 2nd Respondent on 1st November, 2022, the Petitioners' advocate made another plea to be supplied with information to enable his clients protect their rights, including the copy of the application for the change of user of the suit property and the minutes approving the change of user and development.
102. Indeed, in the same letter, the Petitioners' advocates informed the 2nd Respondent that they had been asking for this information in their numerous letters, including the letters dated 14th January, 2022, 7th April, 2022, 24th April, 2022 and 11th October, 2022. However, in a very uncharacteristic manner of a public body, the 2nd Respondent did not respond to any of the many letters authored by the Petitioners' advocates. Nonetheless, the Petitioners filed a claim with the 5th Interested Party on 17th October, 2022.
103. With the above narration in mind, the Court finds that the Petitioners did not move to this Court directly, but first sought to exhaust the alternative remedy mechanisms without success, and only moved the Court as a last resort. The Respondents and the 5th Interested Party do not dispute that prior to moving the Court, the Petitioners first exercised the alternative remedy by filing an objection with the 1st and 2nd Respondents in respect of the 3rd Respondent's construction and demolition activities on L.R. No. 209/1458/2 by the letter dated 14th January, 2022 and received on 18th January, 2022.
104. In the said letter, the Petitioners also requested to be provided with the copy of the application for development permission and Minutes, if any. These documents were necessary for any appeal to be made under Section 61 of the *Physical and Land Use Planning Act* as read with Regulation 36 of the Physical and Land Use Planning (Liaison Committee) Regulations.
105. Despite the objection and the request for the said documents which were necessary for a valid and timely appeal, there was no response to the objection or the request for the documents which were necessary for a valid appeal to be filed by the 1st and 2nd Respondents.



106. The 1st and 2nd Respondents admit that they informed the Petitioners by way of a letter dated 17th May, 2022 that the application for development permission was deferred pending compliance because it had been established that there was no clearance from the Ministry of Defence despite the property being in close proximity to “safeguarding areas” and that there were no letters of no objection from the neighbours.
107. The parties do not dispute that apart from the letter dated 17th May, 2022, there is no any other communication from the 1st and 2nd Respondents to the Petitioners informing them of the grant of the development permissions or letters from Ministry of Defence giving clearance or any letter of no objections from the neighbours. In light of this, it is unclear when the development permission was granted to the 3rd Respondent. If the approval of the building plans by the Urban Planning Technical Committee was on 7th April, 2022 as alleged by the 5th Interested Party, then the letter of 17th May, 2022 was meant to mislead the Petitioners.
108. The question that arises is how one is supposed to appeal against a decision within 14 days, firstly, when the said decision is not known to the person and secondly, when a public body declines to supply to the person the impugned decision even after numerous requests. That, in my view, is an exceptional circumstance that this court should take into account while considering the obligation of the Petitioners to exhaust any remedy provided for in law in the interest of justice.
109. In the circumstances of this case, the court is satisfied that there is no way the Petitioners would have known the date that the 2nd Respondent approved the change of user and development of the suit property, or approval of the development plans to enable the Petitioners lodge their claim with the 5th Interested Party within 14 days as required under the *Physical and Land Use Planning Act*.
110. Secondly, considering the previous objections to the change of user of the suit property by the Petitioners dating back to 1987, which objections the 2nd Respondent ought to have been aware of, and the failure by the 2nd Respondent to respond to the Petitioners’ numerous letters seeking for information on the impugned application and approval of change of user and development of the suit property, and the right of the Petitioners to access justice, it is in the interest of justice that the exemption under section 9 (4) of the Fair Actions Administrative Act comes into play in this matter.
111. I will now consider if the Petitioners are entitled to an order of injunction pending the hearing of the Petition. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a prima facie case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (see *Giella vs Cassman Brown & Co Ltd (1973) EA 358* and *Fellowes and Son v. Fisher [1976] I QB 122*).
112. What amounts to a prima facie case, was explained in *Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR* as follows:
- “...In civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
113. This Court is empowered under Article 23 of *the Constitution* to grant appropriate reliefs, including injunctions. At this stage, the question the Court should deal with is whether it should extend the interim orders in place pending the hearing and determination of the Petition. At this interlocutory



stage, the Court must be cautious not to make determinative factual findings, as this may likely prejudice and embarrass the hearing of the main Petition.

114. In this matter, the Petitioners' case is that the 3rd Respondent, who is the legal owner of L.R. No. 209/1458/2, obtained a change of user and development approvals in an opaque and clandestine manner and contrary to the law; that this violates the Petitioners' rights to privacy, a clean and healthy environment, fair administrative action under Article 47 and the right to access justice under Article 48 of *the Constitution*.
115. Change of user and building plans are considered aspects of development control under Schedule 3 of the *Physical and Land Use Planning Act*. What were previously termed as approvals are now known as "development permissions."
116. Under Section 57 of the Act, it is mandatory for any person carrying out a development in a county to obtain a development permission granted by the respective county executive committee (CEC) member. In respect of an application for change of user, Regulation 15 (g) of the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021 prescribes as follows:

In case of change of user, extension of user, densification of use, extension of lease and renewal of lease, a copy of the notice published in at least one newspaper of nationwide circulation measuring five thousand square millimetres in Forms PLUPA/DC/2 and PLUPA/DC/3 set out in the First Schedule, that has been published for at least fourteen consecutive days prior to the date the application is submitted; and

Where the application is for a change of user or extension of user, a caption of an on-site notice inviting comments from the members of the public in accordance with section 58 (7) and (8)."
117. The Petitioners have alleged that these approvals were granted contrary to Section 55 which prescribes the objectives of development control and Section 58 which prescribes the process of application. In considering whether to approve or reject an application, a CEC member is to consider the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.
118. In the Planning Brief of Planner Lilian Maina annexed on the 3rd Respondent's Director's Affidavit, it was stated that several public participation measures were undertaken with both the general public as well as the adjacent neighbours.
119. The Petitioners and the 2nd Interested Party (Ministry of Defence) have stated that they were never consulted before the application for change of user was approved. Indeed, the 2nd Respondent has not adduced the Minutes of the committee that approved the change of user to enable this court ascertain if any members of the public, and specifically the people neighbouring the suit property, objected to the change of user as per the notice in the newspaper or not.
120. This also applies to the EAI report which shows that the people neighboring the suit property were consulted before the EIA Report was submitted to NEMA for approval and issuance of the license. It will be imperative that these people testify at trial, if at all they were interviewed as alleged to enable the court arrive at an informed decision.
121. Section 60 (h) of the *Physical and Land Use Planning Act* provides that within seven days of receiving an application for development permission, the county executive committee member shall give a copy of the application to the relevant authorities or agencies to review and comment and the relevant



- authorities or agencies shall comment on all relevant matters including national security in respect of land adjoining or within reasonable vicinity of safeguarding areas.
122. Considering that the Kenya Defence Forces headquarters is only 200 meters away, and in view of the concerns raised by the Ministry of Defence, this court need to be told if indeed that concern was addressed by the 2nd Respondent before it approved the alleged change of user and development of the suit property.
 123. Indeed, the Nairobi Metropolitan Services noted in its letter dated 17th May 2022 that the application was missing clearance from the Ministry of Defence and a letter of no objection from the neighbors under Section 58 (8) of the *Physical and Land Use Planning Act*. According to the Director General, the application for development permission was deferred pending compliance.
 124. All these are genuine questions concerning the process and procedure through which the 1st and 2nd Respondents allegedly issued approvals to the 3rd Respondent. The 1st and 2nd Respondents have not disputed the letter dated 17th May, 2022, where the Petitioners were informed that the 3rd Respondent's application for development approval was deferred pending compliance with two issues that were found to be missing: clearance from the Ministry of Defence as the area is in close proximity to "safeguarding areas"; and letters of no objection from the neighbours.
 125. Of more concern is that despite the letter dated 17th May, 2022 stating that the application for development permission was deferred, in their submissions, the 3rd Respondent allege that they were granted approvals on 7th April, 2022. I have looked at the pleadings and there are no approvals dated 7th April, 2022. But more importantly, why, if the approvals were indeed issued on the said date, the 1st and 2nd Respondents stated that the application for development permission applied for by the 3rd Respondents had been deferred in the letter dated 17th May, 2022?
 126. Further, there are valid questions for the 1st and 2nd Respondents to answer relating to the requests made by the Petitioners in the letters dated 14th January, 2022, 7th April, 2022, 11th October, 2022, 31st October, 2022 and 11th November, 2022 seeking to be provided with copies of the applications and supporting documents for change of user and building plan approvals; the minutes approving the change of user/building plan and copies of the change of user and building plan approvals.
 127. These requests were important for the Petitioners to challenge any decision of the 1st and 2nd Respondents, more so considering that they were likely to be adversely affected by the proposed development permissions.
 128. There is also evidence that the Petitioners herein made objections to the proposed development by the letter dated 14th January, 2022, and followed up on the same with several reminders on 14th January, 2022, 7th April, 2022 and 11th October, 2022. The 1st and 2nd Respondents ought to rebut this evidence by showing the decision that was made on the said objections, and whether the same was ever communicated to the Petitioners.
 129. The 2nd and the 3rd Respondents also did not explain what the use of the suit property was as at the time of the advertisement of 15th October, 2021. Was the user of the suit property "professional offices" as per the last records held by the 2nd Respondent and exhibited by the Petitioners or "single dwelling" as indicated in the notice that was published in the newspaper?
 130. The 2nd Respondent having refused to approve the change of user of the suit property until 2006, when it approved the change of user to professional office on condition that there should be no re-development, the court has not been informed what changed in the year 2021/2022 for the change of user with developments to be approved.



131. All these issues can only be dealt with conclusively upon trial. Suffice to say that on the basis of the material placed before me, the Petitioners have established a prima facie case with chances of success. Indeed, if the injunctive orders are not issued, and the construction of the 12-storey building is completed, the Petitioners and the public at large are likely to suffer irreparable harm that cannot be compensated in damages in the event the Petition succeeds.
132. The Petitioners have also prayed for the Respondents to supply them with all copies of applications and supporting documents for the change of user and building plan approvals, all documents and comments received from the relevant authorities in respect of the application for change of user and building approvals and all minutes concerning the approval of the change of user and building plan approvals issued in respect of L.R. No. 209/1458/2.
133. Article 35 of *the Constitution* guarantees every citizen the right to access information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom.
134. To the extent that the Petitioners have alleged that the change of user of the suit property has the potential of infringing on their right to privacy and a clean and healthy environment, the Respondents are under a duty to provide them with the documents in respect of the impugned approval of the change of user of L.R. No. 209/1458/2.
135. For those reasons, the application dated 17th November, 2022 is allowed as follows:
- a. The 3rd Respondent's Notice of Preliminary Objection dated 22nd November, 2022 and the 1st and 2nd Respondents' Notice of Preliminary Objection dated 12th January, 2023 are dismissed with costs to the Petitioners.
 - b. The Petitioners are hereby exempted from pursuing the alternative remedy pursuant to Section 9(4) of the Fair Administrative Actions Act.
 - c. Pending the hearing and determination of this Petition, an interim order of injunction is hereby issued restraining and/or stopping all development activities pursuant to the complained of Application for development permission and change of user and/or any other permission or approval issued in respect of L.R. No. 209/1458/2.
 - d. The 1st and 2nd Respondents are hereby compelled to provide all copies of applications and supporting documents for the change of user and building plan approvals, all documents and comments received from the relevant authorities in respect of the application for change of user and building approvals, all minutes concerning the approval of the change of user and building plan approvals issued in respect of L.R. No. 209/1458/2 within 30 days.
 - e. The costs of the application to be paid by the 2nd and 3rd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF JUNE, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ouma for Petitioners

Ms Olwe holding brief for Oketch for 1st and 2nd Respondent and 5th Interested Party

Mr. Adano for 3rd Respondent



Mr. Allan Kamau for 1st, 2nd and 4th Interested Parties

