Shree Visa Oshwal Community Nairobi Registered Trustees v Nairobi City County & 2 others (Environment & Land Petition 49 of 2018) [2023] KEELC 20465 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20465 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 49 OF 2018

AA OMOLLO, J

OCTOBER 5, 2023

BETWEEN

SHREE VISA OSHWAL COMMUNITY NAIROBI REGISTERED TRUSTEES .... PETITIONER

AND

NAIROBI CITY COUNTY .... 1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 2ND RESPONDENT

HON ATTORNEY GENERAL .... 3RD RESPONDENT

JUDGMENT

Petition

1. The Petitioners filed this petition dated 9th August 2018 against the 1st, 2nd and 3rd Respondents seeking for the following prayers;

    i. Conservatory and declaratory orders restraining the 1st and 2nd Respondents and any other public officer(s) acting on the instructions of the Respondents and of the Government of Kenya as a whole, from entering, breaking, demolishing, destroying, evicting, defacing, flattening or in any way interfering with the buildings, compound, temple, halls and all amenities or the smooth operation and running of and the peaceful possession of the Petitioner's property situated in the Petitioner's Oshwal Religious Centre situated on LR. No.1870/1/119 Ring Road Nairobi.

    ii. An order of Certiorari bringing into the High Court for purposes of quashing the 1st Respondent's Enforcement Notice dated 11th July 2018, requiring the Petitioner to stop

further illegal occupation of its property and to remove structures on top of the river within seven days running from 11th July 2018, with respect to the Petitioner's property, Oshwal Religious Centre, situated on LR. No.1870/1/119 Ring Road Nairobi.

iii. A declaration that the 1st Respondent's Enforcement Notice dated 11th July 2018 with respect to Petitioner's property, Oshwal Religious Centre, situated on L.R No.1870/1/119 Ring Road Nairobi, violates the rights of the Petitioner and the Petitioner's members and that the Respondent's actions, threatened actions to remove the alleged illegal structures is unconstitutional, invalid and an abuse of the mandate, power and due process entrusted to the Respondents and the Government under *the Constitution*.

iv. A declaration that the threatened demolition of the whole or part of the Oshwal Religious Centre, situated on L.R No.1870/1/119 Ring Road Nairobi, is unconstitutional and violates the constitutional freedoms of the Petitioner and its members to worship and to associates as they will and wish.

v. A declaration that the threatened demolition of the whole or part of the Oshwal Religious Center, situated on L.R No. 1870/1/119 Ring Road Nairobi, by the Respondents and the Inter Government Agencies, constitutes a violation of the Petitioner's constitutional rights to the use and occupation of the property and the freedom from arbitrary loss of property or peaceful occupation.

vi. A declaration that the threatened demolition of the whole or part of the Oshwal Religious Center, situated on LR. No. 1870/1/119 Ring Road Nairobi, pursuant to the Enforcement Notice, constitutes a violation of the Petitioner's constitutional rights to fair administrative action and further to a fair hearing prior to the making of any decision against the Petitioner and the rights of its members.

vii. Costs of and incidental to these proceedings.

viii. Any other or further relief that the court may be pleased to grant.

2. The Petition was supported by an affidavit and further affidavit sworn on 9th August 2018 and 27th August 2018 respectively by Jinit Shah who is the vice Chairman of the Petitioner and a member of the Management Committee of the Community. The Petitioner also filed supplementary affidavits in support of the Petition sworn on 30/10/2018 by Suleman Abdulshakur Harunani and Samuel Ngugi Ndung'u respectively and a supplementary affidavit sworn on 6/11/2018 by Oscar Ogunde.

3. The Petitioners averred that it is the registered owner and occupant of piece of land LR. No.1870/1/119, Nairobi represented by Grant Number. IR 40666/1 issued on 23rd March 1986 herein after referred to as "the suit property." That the same was permitted for educational, religious and community centre purposes and obtained the necessary permissions from the then City Council of Nairobi, the predecessor to the 1st Respondent.

4. Further, the Petitioner averred that prior to the construction of the Religious Centre, it sought and obtained permission from the 1st Respondent's predecessor which was granted pursuant to the Plan registered as number DC 785 approved on 18th April 1997 and this included canalization of storm water drainage.

5. They contended that at the time of approval of the Petitioner's development, the 2nd Respondent was not in existence and therefore the mandate of approval was entirely on the 1st Respondent's predecessor and were also issued with a certificate of occupation on 23rd October 2007 giving a

legitimate expectation that the 1st Respondent was satisfied with the manner of construction and compliance undertaken by the Petitioner.

6. The Petitioners stated that by an Enforcement Notice dated 11th July 2018, the 1st Respondent issued a directive to the Petitioner to stop further illegal occupation and to remove structures on top of a river allegedly constructed without the approval of the 1st Respondent and its predecessor. That, by a letter dated 23rd July 2018, the Petitioner through their Advocates explained to the 1st Respondent that all approvals had been issued.

7. The Petitioner averred that as a matter of general notoriety, the week beginning 6th August 2018 the 1st and 2nd Respondents, assisted by the National Youth Service, started demolishing buildings and properties situated on alleged riparian land sites and river banks. That they became apprehensive that they could undertake the demolition any time which would destroy the Petitioner's temple, social hall, wedding hall, charter hall, auditorium, library and the entire facility that attends to children, the elderly and the needy within the Oshwal Community.

8. The Petitioner stated that the 1st Respondent's Enforcement Notice, was irregular, unconstitutional and in excess of the 1st Respondent's powers and that it vitiates the Petitioner's right to freedom of religion, worship and association and right to fair hearing. Further, considering they have erected a playground which is used by over 1000 pupils and other persons in the community, the Respondents' action shall violate the rights of the children.

9. The Petitioners particularized the Respondent's breach of *the Constitution* and Statute law; that the 1st Respondent's Enforcement Notice constituted a decision which was made prior to granting them a hearing, a threat to evict the Petitioner from occupation and use of its property violated their right to property, arbitrarily demolish their property and without having challenged the Petitioner's title to the suit property before the National Land Commission the Respondents have no jurisdiction to interfere with the ownership, use and quiet possession of their property. Further, that the Respondents did not revoke the approvals nor noted any breaches of any part of the drawings approved hence they had no legal right to interfere with their property and their actions violated the rules of natural justice and fairness.

10. The Petitioners contended that since the Respondents failed to complain to the National Land Commission on any matter or breach in connection with the suit property, the Enforcement Notice dated 11th July 2018, amounts to an arbitral review and nullification with a view to defeating the Petitioner's title, without following the due process provided for under the *National Land Commission Act*, 2012 and that the demolitions are being undertaken in violation of the values enshrined under Article 10 of *the Constitution*. It is pleaded that unless the court intervenes, their Constitutional rights shall be violated and the same shall not be capable of compensation by way of damages.

11. Jinit Shah deposed that as it can be noted in the copy of the survey plan for June 1948 identified as Folio Register No.54/190 which relates to the suit property the stream that passes next and partly on the outlines was already planned and surveyed as "canalized stream".

12. He stated that on 11th August 2018, the 1st Respondent sent bulldozers which broke down the perimeter walls of the Petitioner's main gate and subsequently marked the external building walls of the Petitioner's building thereby demanding a distance of 10 Meters from the canalized river with no basis and in violation of *Land Act*, the fair Administrative Action and rules of natural justice.

13. Oscar Ogunde, an architect by profession deposed that he has practised actively in the firm of Symbion International since 1993 which firm was instructed to act as the lead consultant for the construction of the Oshwal Religious Centre and it obtained the Certificate of title over the property and undertook

the necessary due diligence. That the firm prepared the architectural plans for the center noting that there was a canalized stream that run at the center of the petitioner's land. He added that the usage of the land and the development was such that the stream would remain canalized and it would flow underground but it would be diverted to accommodate the development and onward flow underground.

14. Mr. Ogunde deposed that the drawings contained details of the development and included the proposed re-routing of the existing canal and sewer that were presented to the then Nairobi City Council and registered as Number DC 785 after payment of the necessary approval fees paid on 11th November 1996 in the sum of Kshs.270,980/=. He further stated that the firm procured the structural drawings prepared on behalf of the Petitioner, by Messrs. R. K Boga Consulting Engineers and presented them before the predecessor of the 1st Respondent and were issued with the certificate of approval. He added that after being taken through the approval process in the committee meetings, the architectural and structural drawings were approved on 18th April 1997.

15. Mr. Ogunde continued to depose that as the hired firm, they prepared a separate detailed site location plan being drawings for the proposed sewer division and the canalized stream which demonstrated in very specific terms, the sewer diversion and the canalized stream. That the same were presented to the 1st Respondent's predecessor on 6th May 1997 and registered as P.D.S 1185 with payment of a fee of Kshs.5,500 paid in cash and were duly approved on 7th May 1997.

16. He averred that during the development, there were additional detailed structural drawings prepared by R.K Boga Consulting Engineers showing the connection of the new canalized stream within the Petitioner's property and the then existing canalized stream, which demonstrated how the canalized stream was properly diverted to the significant development that took place on the property and the same was specifically approved by the 1st Respondent's predecessor on 2nd August 1999.

17. Samuel Ngugi Ndung'u, an environmental lead expert licensed by the 2nd Respondent under Number 0396 and an active practitioner for the last 14 years, deposed that pursuant to the Enforcement Notice in subject, he received instructions from the Petitioner to review the environmental issues and advise on the Riparian matter connected with the Oshwal Religious Centre. That upon inspecting the canal constructed in 1997, he established that it was constructed with the approval of the 1st Respondent predecessor. He added that enactment of the *Environmental Management and Co-ordination Act* (EMCA) did not mean invalidation of the pre-existing developments and that the Act did not require any changes to be done on the pre-existing developments.

18. In his assessment, Mr. Ndungu stated that he did not find any evidence of detrimental impact that the Centre is causing to the environment and, in instances, where he noticed some environmental impact, the same had been more than adequately been mitigated by the deliberate actions and measures put in place by the Petitioner. He deposes that he had undertaken research on the best practices in the world and in particular as to how streams, waterways and rivers are managed and established that canalization of streams, rivers and other large water bodies has been done in places like Dubai, Pennsylvania in the USA, Paris, Bangkok in Thailand, Cape Town in South Africa and in Copenhagen, Denmark.

19. He deposed further that he tested the water before it streams into the underground canal which is highly contaminated and as it runs under the canal and after it exits the property it is less contaminated. Mr. Ndungu added that he also established that no effluent waste is released from the development thus posing no risk to the environment. He annexed his report dated 11th October 2018 where he explained in details the various options and concluded that canalization remains the best solution as already undertaken by the Petitioner. That it does not have any significant impact on the quality of the water or the physical, social and economic environment.

20. Suleman Abdulshakur Harunani, introduced himself as a registered licensed Surveyor Number 117 who has practiced for over 38 years. He deposed that under the instructions of the Petitioner, he undertook an extensive review of the planning and mapping of the Nairobi City since the colonial times to date in relation to the anti-malaria drain running through Parklands and Westlands Area. Mr. Suleman explained that upon perusal of various maps and plans for the Nairobi City with special emphasis on where the suit property is situated, he established that the area was seriously infested with mosquitoes despite there being no specific river that flowed within the area. He added that to counter the infestation of malaria in the area, the colonial government planned the area way back in 1920s to 1940s and built canalized streams which drained any water that created swampiness.

21. He stated that he also perused Folio Reference No.16/311 dated 26th September 1921 which plan does not delineate the existence of any river or riparin land as alleged by the 1st Respondent in the Enforcement Notice dated 11th July 2018. He perused another survey plan Folio Reference No.43/96 dated 19th May 1934 and established that the plan delineated a "canalized stream" next to first parklands avenue.

22. The surveyor avers that in the survey plan Folio Reference No.51/85 dated 29th December 1947, the canalized stream is mentioned in the same point as the previous plan and the same description is maintained in the subsequent plans to wit; Folio Reference No. 54/190 dated 9th June 1948, 59/35 dated 8th November 1948. That in the plans Folio Reference No.59/64 dated 15th March 1949; and 55/166 dated 14th November 1949, the canalized stream is described as an "Anti-Malaria Drain". Further in the plan Folio Reference 55/314 dated 17th April 1951, 93/124 dated 11th November 1960,120/88 dated 17th February 1971, 140/104 dated 16th April 1977 and 120/88 dated 17th February 1971 the canalized stream is described as an "Anti-Malaria Stone Drain" and that there is nowhere the canalized stream is described as a river or open river or riparian land.

23. Mr. Suleiman further deposed that the designation that the petitioner's property is sitting on a river or as part of riparian land is not well informed and not based on any statutory law existing in Kenya as it would have reflected in the plans. That the canalization of the drain was undertaken with the permission of the 1st Respondent predecessor, and from the more recent plan from the Director of Survey it shows that in some places, the Anti-Malaria drain is open and in others it is canalized at Oshwal Religious Centre.

1st Respondent's Response

24. In opposing the Petition, the 1st Respondent filed a replying affidavit sworn on 9th September 2018 by Fredrick Ochanda, who described himself as a member of the Nairobi Regeneration Project Committee. The Nairobi Regeneration Committee was a partnership between the National Government and the 1st Respondent mandated to implement the project of the renewal of the Nairobi City, part of which included the rehabilitation of Nairobi River and its tributaries.

25. Mr. Ochanda stated that in the months of May and June 2018, the enforcement officers of the 1st Respondent working in conjunction with officers from agencies falling under the National Government involved in Nairobi Regeneration Project Committee undertook an audit of all the developments which border the Nairobi River among them the Petitioner's property L.R No.1870/1/119 located at Ring Road Nairobi in order to establish whether the same are in compliance with the *Physical Planning Act* Cap 286 and the *Urban Areas and Cities Act* No.13 of 2011.

26. The 1st Respondent contended that it was merely executing its duty and that the Petitioner if aggrieved by the contents of the impugned Enforcement Notice, it had the right to appeal to the Liaison

Committee under section 13 and 38 of the Physical Planning Act. They added that the approvals and certificate of occupation if indeed they were issued by the 1st Respondent's predecessor, the same were issued illegally thus null and so is the Petitioner's occupation of the suit property.

27. The 1st Respondent stated that where there is a conflict between public and private interests as it is herein, the public interest must outweigh the private interest. That, in the event the reliefs sought by the Petitioner are allowed by the court, the 1st Respondent will be deprived of its constitutional mandate to preserve and manage riparian areas and the residents of Nairobi County would be highly prejudiced since they would have been dispossessed of the land preserved for public use and benefit.

28. Mr. Ochanda continued to depose that the action of the Petitioner poses a real danger to the public and as such the 1st Respondent's decision to issue an Enforcement Notice stopping any occupancy on the suit property was in the interests of the general public and in full compliance with the provisions of *the Constitution* of Kenya 2010, the *Physical Planning Ac*t and the *Urban Areas and Cities Act*.

29. He contended that the 1st Respondent is not required by any law to file complaints with the National Land Commission on any matter as it is mandated by virtue of Section 38 of the Physical Planning Act to prohibit, control the use and development of land and buildings within its jurisdiction.

2nd Respondent's Response

30. The 2nd Respondent in opposing the Petition filed an affidavit and supplementary affidavit sworn on the 4th September 2018 and 31st October 2022 by Salome Machua, its Deputy Director Enforcement and Njoki Mukiri, the County Director of Environment, respectively. They stated that the 2nd Respondent was within its mandate in marking the suit property for demolition as it has encroached on riparian lands and in breach of EIA license conditions by failing to adhere to the setback distance on riparian lands.

31. Further, it is deposed that the 2nd Respondent is not the one solely responsible for demolitions since the same was being done by a multi-agency team and that it did not serve any Enforcement notice on the Petitioner. The 2nd Respondent stated that the demolition of properties on riparian land is for the general good of the public since it seeks to conserve and protect the environment and that public interest override any individual interests that may exist.

32. The 2nd Respondent contended that the Petitioner has not demonstrated any reasonable cause of action against them and that the entire petition has no merit and this court ought to dismiss the same.

3rd Respondent's Response

33. The 3rd Respondent filed grounds of opposition dated 3rd September 2018 and a replying affidavit sworn on 15th October 2018 by Timothy Waiya Mwangi who works with the Ministry of Lands and Physical Planning in the Department of Physical Planning as a National Deputy Director, Physical Planning based at the Headquarters, Ardhi House.

34. He avers that the petition lacks any identifiable legal right upon which it is founded because no person, entity or organization has individual interest in riparian land. He contended that the conservatory orders sought by the Petitioner cannot issue as the public interest which is the clearance of the Nairobi River for purposes of controlling town flooding, sustainable use of wetlands and conservation of the wetland environment overrides the private and/or group interest. That the petition does not meet the standards as set by the Supreme Court of Kenya in *Gitirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR.

35. The 3rd Respondent asserted that the area of demolition is riparian land and that the properties in subject are erected on top of Nairobi river on one part and there was re-location of the River course during construction. They added that the building approvals obtained by the Petitioner from the defunct City Council of Nairobi, were obtained irregularly and illegally as they were issued in utter disregard of the overriding public interest in the waterway and riparian land.

36. The 3rd Respondent stated that the Petitioner cannot seek protection of article 40 of *the Constitution* of Kenya because it does not apply to properties acquired illegally. Further, that article 60 provides for principles of land policy in Kenya that land inter alia; land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with, among other principles, sustainable and productive management of land resources, sound conservation and protection of ecologically sensitive areas. That under article 69, the State has an obligation to conserve environment and ensure ecologically sustainable development and use of natural resources and therefore the demolition was in exercise of the duty invested by *the constitution* to the State which they cannot be barred from.

37. The 3rd Respondent continued that *the constitution* came into effect in the year 2010 and the approvals in subject were made prior to its promulgation therefore the court should take judicial notice that *the constitution* operates in all directions curing past and present legal ills. It adds that under Chapter four (4.66) of the Sessional Paper No.17 of 2017 on the National Land Use Policy 2, which was prepared by the National Executive to bring into effect Section 21 part 1 of the Fourth Schedule of *the Constitution* mandates the National Government to formulate general principles of land planning and coordination of planning by the counties. Furthermore, the National Director of Physical Planning is required to map and document disaster prone areas, riparian areas, wetlands, open spaces, parks and river deltas.

38. It is pleaded for the 3rd Respondent that the process leading to the marking of part of the suit property for demolition was undertaken under the auspices of the Nairobi Regeneration Programme by a Multi-Sectoral Agency Consultative Committee (MSACC) whose team was composed of representatives from Ministry of Lands and Physical Planning, National Environment Management Authority, Nairobi City County and Water Resources Authority and also in line with two presidential directives dated 19th January 2015 and 26th January 2015.

39. The 3rd Respondent further stated that restoration of riparian reserves by reclaiming riparian areas, wetlands escarpments, forests, open spaces and parks that may have been allocated was in compliance with Chapter 3(3.16(ii)) of the Sessional Paper No.17 of 2017 on the National Land Use Policy. In addition, that in respect of the mapping of encroachment into Kibagare river riparian reserve where the suit property falls, they adopted the 10 metres reserve as the legal basis as defined by the Physical Planning (subdivision) Regulations,1998 Section 15(c).

40. The 3rd Respondent pleaded that due to the development undertaken on top of the river by the Oshwal Community Center, one is unable to determine the course of the river due to interference with its course through canalization and the end result is flooding. Further, the 3rd Respondent stated that after the exercise of the mapping out of the original Kibagare stream channel, the Petitioner is not observing the indicated setback and in addition, violates the *Water Act* 2016, the *Water Resources Authority Rules*, Schedule 7 of 2017 and the County Government of Nairobi by-laws.

Evidence

41. The Petition was heard by adduction of viva voce evidence with the Petitioner calling 4 witnesses and the Respondents 3 witnesses. Jinit Shah testified as PW1 by adopting the contents of his affidavit sworn on 27/8/2018 in support of the Petition and the documents at pages 94 to 102 of Pex.1 and further

affidavit as PExh 2. He averred that the Petitioner acquired the suit property which is over 13 acres in 1985 and is now developed with a temple, a library, an auditorium, a funeral hall, playing fields and a playing area for small children.

42. PW1 testified that the construction in subject was approved on 18/4/1997 and that the stream that passed through the suit property was planned by the Director of Survey as a canalized stream. He stated that after construction which took 6-7 years, they were issued with a Certificate of Occupation in the year 2004. He explained that Oshwal Religious Centre is of great importance to the Jain Community in Kenya, it is the third largest temple in the world hosting approximately 7,500 persons in a year; and about 1,500 children play in there yearly. Further that it hosts upto 150 funerals in a year and he emphasized that it was their place of worship thus the mere threat of destruction was quite traumatizing for the community.

43. PW1 testified that the Report on canalization which was undertaken without public participation and consultation, produced by the 3rd Respondent was prepared on 14/8/2018 to 24/8/2018 yet the Notice served on them is dated 11/7/2018, thus it cannot be the basis of the issuance of the enforcement notice. Also, that the Petitioners had been paying land rent and rates and had not experienced any negative engagement with the 2nd Respondent. It is PW1's evidence that when the Petitioner purchased the suit property, it was already surveyed and planned by the Director of Survey as having a canalized stream. The stream which measures 3M by 4M in size was re-routed during the construction undertaken between 1997 and 2004. Further, that the Petitioner has engaged their employees to maintain the canal and ensure that it is cleaned.

44. PW2 adopted his affidavit as his evidence and produced the bundle of documents annexed to his affidavit as PExh 3. Equally, PW3 adopted his affidavit as part of his testimony in chief and produced the same together with the documents annexed as PExh 4. The contents of the two affidavits were summarized under the heading of pleadings by the parties hereinabove.

45. In addition, PW3 stated that the water body that passes through the Petitioner's property is not a river as it was surveyed as a Malaria drain since 1920. He also added that canalized stream is not only done through the Petitioner's property in Nairobi but canalization of the Nairobi River has been done at Hotel Boulevard, Ring Road Westlands in front of the Petitioner's property to create a culvert and that the canalization of the stream is undertaken under the car park and the field. He also stated that a Deed plan does not show a canalized stream but it is shown in a survey plan.

46. PW4 adopted his affidavit as his evidence in chief and produced the annexed documents as PExh 5 which included an Environmental Impact Assessment Project Report for Oshwal Religious Center Report dated 29/10/2018. The report detailed the manner of compliance by the Petitioner with the environment laws and asserted that based on the assessment, there was no possibility of water levels exceeding 70 Meters to cause flooding. This marked the close of the Petitioner's case.

47. DW1 testified and adopted his 2 affidavits sworn on 3/9/2018 and 9/10/2018 and stated that the 1st Respondent normally visits properties and issues enforcement notices and if aggrieved by it, they can appeal to the Liaison Committee. Further, he explained that once a developer obtains construction approval, they need to also obtain approvals from other agencies including NEMA, BNCA, KURA and KENHA. DW2 also averred that the 2nd Respondent is not the one solely responsible for the demolitions since the same is being done by a multi-agency team. She contended that the 2nd Respondent did not participate in mapping out Kibagare River and confirmed that canalization of streams is one of the options allowed by NEMA.

48. DW3 adopted his replying affidavit 15/10/2018 as his evidence in chief and the documents annexed produced as DExh 1 to 7. He confirmed that where there is canalization, approvals are granted by the local authority and that the Petitioner's property was planned with a canalized stream. Furthermore, DW3 confirmed that the Policy and Report had not been gazetted and that Physical Planning Act No.13 of 2019 and the Regulations thereunder were enacted 11th July 2018 while the Enforcement Notice was issued on 9th August 2018 and NCC visited the suit property and undertook partial demolition.

Submissions

49. The Petitioner filed submissions dated 10th February 2023 in support of their petition and outlined the genesis of the dispute and gave a summary of the evidence tendered in support of their case. They framed the issues for determination as follows;

    i) Whether the Petitioner required to exhaust the internal remedies by appealing to the Liaison Committee of the National City County (NCC) before filing the petition herein,

    ii) Whether the issuance and service of the Enforcement Notice dated 11/7/2018 and the partial demolition on 11/8/2018 amounted to a violation of the Petitioner's right to property,

    iii) Whether the issuance and service of the Enforcement Notice dated 11/7/2018 and the subsequent partial demolition on 11/8/2018 violated the Petitioner's constitutional right to freedom of worship for the Petitioner and its members and

    iv) Whether the Petitioner is entitled to the reliefs sought.

50. The Petitioner submitted that as confirmed by DW1, DW2 and DW3 that they were part of the Multi-Agency Team that was involved in the Nairobi Regeneration Committee, a team that was neither Gazetted nor known to the public making the Enforcement notice served part of a larger scheme of Government, encompassing National and County Government to interfere with property ownership rights of various persons without following the due process. That it is dishonest of the 1st Respondent to allege that the Petitioner ought to have followed the procedure set out under Sections 13 and 38 of the Physical Planning Act.

51. The Petitioners submitted that they considered the partial demolition as a violation of their constitutional rights, wrote to the 1st Respondent who instead of responding sent caterpillars to demolish their temple. Consequently, an appeal to the Physical Planning Liaison Committee of the County would not be efficacious because there was no hearing on merit on the issue that gave rise to the issuance of the Notice, as an appeal without having been heard would have amounted to validation of the illegal notice. Moreover, the 1st Respondent has not demonstrated that in fact there existed such a committee that is functional and actually resolves the illegal actions of the 1st Respondent. In support of their submissions, they cited the cases of *Republic vs Kenya Revenue Authority Ex parte KSC International Limited (In Receivership)* [2016] eKLR, William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others and Muslim for Human Rights & 2 Others (Interested Parties) [2020] eKLR and Whitehorse Investments Ltd vs Nairobi City County [2019] eKLR.

52. The Petitioners submitted that they have adduced credible evidence to support its contention that its rights were violated by the Respondents. They argue that DW3 had produced a report showing that there was a multi-Agency Team known as the Nairobi Regeneration Committee that was not formally created and mandated butt went about auditing the Petitioner's and other peoples' properties without according them any hearing.

53. The Petitioners further submitted that as confirmed by DW1 they did not verify whether they had granted approvals to the Petitioner to canalize the stream and approved the structure of the Calvert in which the canalized stream flowed and noting that DW2 from the 2nd Respondent disassociated herself with the Enforcement Notice.

54. Further, they submitted neither DW1 nor DW3 adduced any evidence that justified the issuance of the Enforcement Notice. Noteworthy, DW3, a planning expert of considerable experience, confirmed that in Kenya, there are known canalization solutions and from the documents shown to him the canalization undertaken by the Petitioner was approved by the 1st Respondent therefore the canalized stream would not be illegal. The Petitioners contended that in absence of regulations, gazettement of the team and issuance of disclosed guidelines and disclosure of the mandate, the logical reasoning is that the process was in violation of the transparency requirements of *the Constitution*.

55. Further, the Petitioners stated that there is no evidence presented by the respondents to show that the Petitioner's canalized stream was undermining the environment, causing any flooding or was occasioning any pollution. Instead, the Petitioner was able to prove empirically that its canalized stream was not only approved but that it was being maintained and managed according to the approval. In support, they cited the case of Japheth Nzila Muangi vs Minister for Lands and Environment of County Government of Mombasa & Another [2017] eKLR.

56. In citing the case of Serah Mweru Muhu vs Commissioner of Lands & 2 Others [2014] eKLR, the Petitioners also submitted that the 1st Respondent have reneged on legitimate expectation that the approvals, and use of property for 14 years would not be breached without due process. That DW1 did actually state that he saw no problem which required demolition of the development after allowing the developer to use it for many years. Therefore, the petitioner's rights were not put in context as the respondents only embarked on the historical origin of a river.

57. The Petitioner concluded that the court ought to uphold the Petitioner's legitimate expectation that the approvals made in 1997 and 2000 and the Certificate of occupation issued in 2007 for the place of worship bind the Respondents. Hither, matters religion transcend society and amount to issues of dignity, emotional and other well-being.

58. The 1st Respondent filed submissions dated 17th May 2023 first outlining the background facts and framed issues for determination as follows;

    a. Whether the Petitioner ought to have exhausted the available statutory remedies before filing this Petition;

    b. Whether the Petitioner illegally put up a development on the river and/or riparian land and what are the remedies,

    c. Whether the Petitioner's legitimate expectations and right to fair administrative action were violated,

    d. Whether private individual/group rights of the Petitioner override public interest and Costs of and Incidental to this suit.

59. The 1st Respondent submitted that Section 29 and 30 of the Physical Planning Act (now repealed) which was the law in force when the purported infringements took place provides that every County Government has, inter alia, the power to prohibit or control the use and development of land and buildings in the interests of proper and orderly developments of its area.

60. Further, Section 38 (1) and (2) of the said Act, provides that local authorities (county governments) have power to issue enforcement notices on landowners or occupiers of land within their area of jurisdiction. The Act also provides the procedure of challenging such a notice by an aggrieved person and the consequences of failure to challenge the notice. Therefore, a person who has not lodged an appeal is not entitled to question the validity of any action taken by the local authority (county government) on any grounds that could have been raised in such an appeal.

61. The 1st Respondent submitted that the impugned Enforcement Notice directed the Petitioner to lodge an appeal with the relevant liaison committee before 18th July 2018 if they were aggrieved by its contents, in which case, the operation of the notice would be automatically stayed pending the determination of the appeal. Instead, the Petitioners wrote a letter dated 23rd July 2018 to the Director of Planning, Compliance and Enforcement, Nairobi City County and later filed this Petition, which was not the correct and procedural steps to take in view of the statutory provisions.

62. The 1st Respondent submitted that Sections 7 to 10 of the Physical Planning Act establishes Municipal, District and National Liaison Committees, which are empowered to hear and determine appeals lodged by persons aggrieved by decisions made by the Director or local authorities (County Governments) but the Petitioner did not lodge any appeal before the liaison committee within the prescribed timelines or adduced any evidence to show that it filed an appeal; or made attempts to file an appeal as by the law required which attempts were frustrated by the 1st Respondent.

63. The 1st Respondent submits that the availability of the mandatory remedies which are equally convenient, beneficial and effective and available under Section 9(2) of the *Fair Administrative Action Act*, 2015, is a barrier to the exercise of this court's discretion to grant the orders sought by the Petitioner. They argued that the court should be guided by the exhaustion doctrine that was aptly articulated in Anthony Miano & others v Attorney General & others [2021] 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* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
>
>> 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."

64. The 1st Respondent distinguished the case of Whitehorse Investments Limited vs. Nairobi City County (2019) eKLR as relied on by the Petitioner that their circumstances were so unique and therefore could not be barred from seeking a more efficacious and expeditious remedy do not hold water because under the same case Whitehorse Investments Limited (supra) it was held that where there

was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for Judicial Review would be granted.

65. The 1st Respondent further submit that the issues in dispute in Whitehorse case(supra) were purely matters of building plans and ensuing development of a hotel within the county of Nairobi, issues that were entirely covered under the Physical Planning Act and the court noted that there was no good reason given as to why the appellant failed to pursue the avenue provided under Section 38 of the said Act.

66. They added that the Petitioner in the instant Petition has not adduced any evidence before this court demonstrating that the circumstances at hand were so exceptional to warrant them not to pursue the appeal procedure provided under the Physical Planning Act and that they have equally not adduced any evidence to show that the appeal mechanisms provided for in the Act were not efficient and efficacious.

67. The 1st Respondent also invoked the "principle of avoidance", or referred to as "constitutional avoidance" which deals with instances where a constitutional court will decline to deal with a matter because there exists another remedy provided in law, which the aggrieved party is yet to utilize and in support cited the case of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) and Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

68. The 1st Respondent refutes that either individually or jointly with other government entities, it undertook any demolitions on the Petitioner's property. They contend that the Petitioner only produced pictures showing demolitions but never led evidence of the particulars as to who did the demolitions or when they were done and what it did in response. Further, the 1st Respondent argues that canalization of the stream is not contested but the illegality lies in putting up the development on the river and on the riparian reserve and occupation of the same. That once the canalization has been approved and constructed, then the stream in between and the riparian reserve must not be infringed.

69. On the testimony by PW3, a Licensed Surveyor, showing that there has never been a river or open river or riparian land arguing that only a canalized stream existed and therefore no basis for the Respondents to designate the Petitioner's Oshwal Religious Centre as sitting on riparian land, the 1st Respondent submitted that evidence is replete with semantics and economical with the truth because a stream is by all means a river, whether canalized or not and is categorized as a water resource under section 2 of the *Water Act* (No. 43 of 2016). The 1st Respondent relied on the evidence of DW1 and DW3 who stated that River Kibagare passes through the Petitioner's property and that they have put up a development on the riparian reserve hence the issuance of the enforcement notice.

70. The 1st Respondent submitted that while it is legal in other jurisdictions to put developments where a river has been canalized, what determines whether one can put up a development on the river and/or riparian land is the applicable law of the jurisdiction where the project is located, therefore cannot form the basis or justification of infringing riparian reserve.

71. The 1st Respondent also critiqued the evidence of PW4, in particular the report dated 29th October 2018 which concluded that the canalisation of the stream at the Petitioner's facility does not pose any environmental challenge. The 1st Respondent stated that section 58 of the *Environmental Management and Co-ordination Act*, 1999 requires a proponent of any project as specified under the Second Schedule of the said Act to undertake a full environmental impact assessment study and submit the study report to the Authority prior to being issued with any licence by the National Environment Management Authority. That the Petitioner did not submit the purported Environmental Impact Assessment Study Report before the Authority as required by law and therefore the report is invalid.

72. The 1st Respondent further submits that article 62(1)(i) of *the Constitution* of Kenya 2010 lists all rivers, lakes and other water bodies as defined by an Act of Parliament and all land between the high and low water marks as being part of public land while Section 12 (2) (c) of the *Land Act* allows for allocation of public land but prohibits the allocation of public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas, riparian and the territorial sea as may be prescribed.

73. Section 2 of the *Land Act* defines riparian reserve to mean the land adjacent to the ocean, lake, sea, rivers, dams and watercourses, Regulation 15(c) of the Physical Planning (Subdivision) Regulations of 1998 requires wayleaves or reserves along any river, stream or watercourse be provided for of not less than 10 metres in width on each bank, except in areas where there is an established flooding and Regulation 111 of the Survey Regulations of 1994 provides for a reservation of not less than 30 metres in width above high-water mark to be made for Government purposes but allows the Minister to direct that a lower width of the reservation be made in special circumstances.

74. They assert that the development on and occupation of the river and the riparian land is unlawful therefore, the Petitioner acted illegally in putting up a development on the river and the riparian reserve as the purported approvals did not authorise the Petitioner to construct on top of the river or on the river's riparian reserve.

75. It is the 1st Respondent submission that article 40(6) of *the Constitution* on protection of the right to property does not extend to unlawfully acquired property therefore the Petitioner having converted the riparian land for private and personal use cannot rely on or seek protection under same Article. While in article 69 (1) enjoins the state to meet several responsibilities in relation to the environment some of which are to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable (both intra and inter-generational).

76. The 1st Respondent submitted that failure to execute Enforcement Notices in cases of breach of relevant statutory provisions by demolishing illegal structures and or evicting the trespassers shall be prejudicial to public interest as it would amount to dereliction of statutory duty and breach of its statutory mandate under Sections 4 and 7 of the *Fair Administrative Action Act*, Sections 29 and 30 of the Physical Planning Act, and Article 174 of *the Constitution* of Kenya 2010.

77. They defended the action of issuing the Enforcement Notice as a bid to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources and in support cited the case of Aloys Mataya Moseti v National Environment Management Authority & Another [2020] eKLR and Michael Mwaura Njoroge v Peter Kamau Munene; Beatrice Kori (Interested Party) [2019] eKLR.

78. The 1st Respondent submitted that Petitioner's legitimate expectation and right to fair administrative action were not violated because in as much as the Petitioner's contend that they sought and obtained the necessary permissions from the then City Council of Nairobi to construct the Oshwal Religious Centre located on the suit property. That the issuance of the impugned approvals does not create a legitimate expectation. On the test for legitimate expectation, the 1st Respondent cited Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) which held that statutory words override an expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. That there cannot be legitimate expectation against the clear provisions of a statute.

79. The 1st Respondent added that the Multi-Agency Team's report prepared between 14th and 24th August 2018 did not inform the issuance of the impugned Enforcement Notice. Moreover, that there is nothing wrong with government departments coming together, forming a multiagency team and jointly discharging their statutory mandates in the service to Kenyans.

80. They also submitted that Section 38 (1) of the repealed Physical Planning Act allowed the local authorities (County Governments) to serve an enforcement notices after giving development permission and in support cited the case of Abdille Abdiaziz Sabriye vs. Nairobi City County (2021) eKLR that held that Section 38 (1) of the Physical Planning Act empowers the County Government to issue an enforcement notice even after granting approval where any condition of the development permissions have not been complied with.

81. The 1st Respondent submitted that the private interests and/or rights of the Petitioner cannot outweigh the public good of conserving rivers and/or riparian reserves making them free of any encroachments and that Article 10 (1) of *the Constitution* binds all state organs, state officers, public officers and all persons to observe the national values and principles of governance when applying or interpreting *the Constitution*; enacting, applying or interpreting any law; or implementing public policy decisions.

82. They submitted that protection and conservation of rivers, riparian land and the environment in general is at the core of sustainable development, therefore, this Petition should be dismissed as the prayers sought if granted would grossly undermine public interest which requires that we conserve and protect the environment. Further, the decision reached in this suit is bound to have far-reaching consequences in view of the fact that there may be many other persons who may have interfered with rivers and riparian reserves and who would benefit from such an outcome.

83. The 2nd Respondent filed submissions dated 18th April 2023 and framed the issues for determination as;

   a. Whether the Petitioner exhausted all statutory remedies before filling the Petition;

   b. whether the Petitioner's Case suffices to be a Constitutional Petition;

   c. Whether the 2nd Respondent has violated the Petitioner's constitutional right to freedom of worship and;

   d. Whether the Petitioners is entitled to reliefs sought.

84. The 2nd Respondent submitted that where a statute has provided for a remedy to a party who is aggrieved by particular acts or omissions, the court ought first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. In support of this argument, they cited the case of Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR,Mutanga Ten & Coffee Company Limited v Shikara Limited & Another (2015) eKLR, Court of Appeal in Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425 among others.

85. Thus, following the line of authority these proceedings ought to be taken out under the legislative framework and not under *the Constitution*. That, where redress is available within the legislative framework then a Constitutional redress should only be sought if that redress has completely failed

as reiterated by Justice Tuiyott (as he then was) in Busia Petition No. 1 of 2014 Joseph Owino and Another Vs. NEMA & Africa Plysack Ltd [2014] eKLR that,

> "The words "in addition" should be read to mean that the Constitutional redress should be resorted to only where the other available remedies are not efficacious or adequate. Constitutional redress is in addition, not a substitute, to the other Legal remedies."

86. They submitted that the Nairobi County Liaison Committee is an available remedy to the Petitioner in challenging the impugned enforcement Order, and that it is efficient and adequate to address the issues raised by the Petitioner. Therefore, constitutional redress should not be used to substitute Committee redress relying in the doctrine of judicial abstention as cited by the Supreme Court in the case of Benson Ambuti Adega & 2 Others v Klboa Distillers Limited & 5 Others [2020] eKLR which is binding on this court, where it held that,

> "It would seem therefore that the Superior Court, determined, quite incorrectly, that it had the power or jurisdiction to hear and determine the Petition, which although raised issues that were clearly within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have bear effectively determined by another legislatively established Tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee."

87. The 2nd Respondent submitted that not all claims instituted by way of constitutional petitions raise constitutional issues citing the case of International Centre for Policy & Conflict & 5 Others Vs. Attorney General & 4 Others [2013] eKLR where the court held that the mere fact that *the Constitution* is cited or invoked is not enough to elevate it to a Constitutional matter and also cited the Supreme Court of India in Re Application by Bahadur [1986] LRC (Const) which held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute.

88. The 2nd Respondent submitted that it has not violated the Petitioner's constitutional right to freedom of worship and it relied on the evidence tendered to court through its witness Ms. Njoki Mukiri. They submitted that no notice or administrative action was taken by the 2nd Respondent in respect to the Petitioner or the Petitioner's property that is subject to this suit and that the Petitioner has failed to show any nexus between the actions of the 2nd Respondent and the alleged violation of its constitutional rights.

Determination:

89. I have gone through the Petition and the affidavits filed in support thereof and the Respondents' responses in opposition thereto, together with the submissions rendered. I have appreciated their tenor and also considered the evidence tendered before this court and summarize the gist of the case as follows.

90. The Nairobi City County issued an Enforcement Notice dated 11th July 2018 to the Petitioner which notice stated that they had violated the provisions of section 30(1) of the Physical Planning Act cap 286 (repealed) thus;

    i) constructing a temple on top of an existing river without approval from Nairobi City County

    ii) illegally occupation of the said structure

91. The impugned notice directed the Petitioner to stop further illegal occupation and also to remove the offending structure within a period of seven days. The Petitioner was aggrieved that the notice was a decision made without granting them a hearing and the threat to occupation is in violation of their constitutional right to fair hearing, property, religion and worship. Further, the Petitioners contended that they obtained the necessary approvals from the then Nairobi City Council, the 1st Respondent's predecessor for all their developments.

92. The 1st Respondent stated that the Enforcement Notice issued and the demolitions thereof was within their mandate to enforce the Physical Planning Act contending that if the Petitioner was issued with the requisite approvals, the same were illegally obtained. They also contended that the Petitioner ought to have filed an appeal with the Liaison Committee instead of filing the Petition.

Issues Framed.

a. Whether the Petition is properly before this court

b. Whether the Petitioner's canalization and development is illegal

c. Whether the Petitioner's constitutional rights were infringed

d. Cost

a. Whether the Petition is properly before the court:

93. The Respondents emphasized that the Petitioner ought to have filed an appeal against the impugned Enforcement Notice before the County Liaison Committee as provided for under section 13 and 38 of the Physical Planning Act (repealed). There was no license issued by the 2nd Respondent that was not complied with. This court does infer that the objection raised by the 2nd Respondent in so far as exhausting available statutory mechanisms in this case to mean failure to approach the Nairobi City County Physical Planning Liaison Committee.

94. Section 13 provides for Appeals to the liaison committees stating that any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith,may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner an may be prescribed. This is in the context of the functions of liaison committees as outlined under Section 10.

95. Section 38 provides (1) when it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land......

......(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

96. In support of their arguments, both parties relied on the case of Whitehorse Investments Limited vs. Nairobi City County (2019) eKLR with the Petitioner contending that their scenario amounted to an exceptional circumstance which warranted the filing of the instant petition before exhausting the mechanism set out in the Physical Planning Act.

97. In Whitehorse Investments Limited case (supra), the court cited the case of Republic vs. National Environmental Management Authority Civil Appeal No 84 of 2010 which expressed itself as follows as on what is exceptional;

> "The principle running through these cases is; where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.."

98. It is therefore, for this court to assess carefully in the context of this particular case, if the appeal mechanism as provided in the Physical Planning Act would provide efficacious and expeditious remedy. The Petitioner gave a background of what was taking place in the country at that time. The state of affairs is exhibited in reports contained in newspaper cuttings that are annexed to the petition (pages 149 - 153) which reported on-going random demolitions by a Multi-Agency teat constituted by the National government of structures that were considered offensive to the existing development and environmental laws.

99. This state of affairs is confirmed by the 3rd Respondent in their replying affidavit when they aver that they were implementing a presidential directive dated 19th and 26th January, 2015. That pursuant to that directive, the Multi-Agency team was constituted to undertake the exercise. The 1st Respondent who issued the notice was only part of that multi-agency team that had different line ministries inter alia, the Ministry of Lands and Physical Planning and the Water Resources Management Authority. It means that even if the petitioner filed an appeal to the Nairobi City County Physical Planning Liaison Committee, there property would still have been demolished. The exceptional circumstance here is that the directive to demolish structures of the petitioner was made not only by the 1st Respondent but by the National Government as a presidential directive.

100. Further, on the efficiency of the Liaison Committee, the question I pose is; if the impugned structures were to be demolished in compliance with the notice, and the petitioner's appeal if lodged before the Liaison Committee was successful, would the committee be capacitated to make an order for recompense? My answer is no because the Physical Planning Act Cap 286 (repealed) made no provision for powers of the Liaison Committee to award damages.

b) Whether the canalization and the development thereof are illegal

101. The 1st Respondent cited the case of Abdille Abdiaziz Sabiriye supra which held that enforce notices can be issued even after granting approvals where any condition of development permission has been breached. However, decision by the 1st Respondent now stating that the approvals are illegal, null and void was not communicated to the Petitioner before issuing the impugned notice. It would be against public policy and the rules of natural justice that they rescind the approvals which is administrative action without giving the Petitioner a hearing.

102. Section 35 of the Physical Planning Act Cap 286 (repealed) stated thus; "(1) A local authority shall refer any development application, which in its opinion involves matters of major public policy, to the relevant liaison committee.

(2) Where a development application has been referred to the relevant liaison committee under subsection (1) for determination, the provisions of this part relating to the consideration of development applications by local authorities shall apply mutatis mutandis to this section: Provided that before determining any such development application the liaison committee, if so requested by either the applicant or the Director, afford each of them an opportunity to make representations in writing to the committee for its consideration."

103. The reading of section 35 implies that if the 1st Respondent were unhappy with the Petitioner's development on the basis that it contravenes public policy as been alleged, they would raise a complaint to the City County Liaison Committee and that the Petitioner would be notified. There is no evidence of the complaint lodged against the Petitioner so that if there is non-compliance with the procedure, the 1st Respondent is guilt. The Petitioner could only lodge an appeal after the Liaison Committee rendered its decision declaring their approved plans illegal, null and void.

104. From the maps presented to this court by the Petitioner as Pex.4, it is evident that canalization of this stream had been previously undertaken on the suit property. According to the evidence of Mr Samuel Ndung'u, the canalization took place in 1921 and the 1940's before the Petitioner acquired the property. The 2nd canalization was undertaken by Petitioner in 1997 but after obtaining approvals for their development as shown by the 1st Respondent ref. DC 785 dated/stamped on 18th April 1997.

105. The Respondents contended that if the approvals were issued, the same were obtained illegally. The 3rd Respondent annexed as TWM-4 a report titled mapping of encroachment into Kibarage river riparian reserve conducted by a multi-agency team between 14th August to 24th August 2018. At page 4 of that reported, it is recorded thus; "4.2 Canalization is a common development along river Kibagare with long stretches to an extent that one cannot determine the course of the river. As a result, development have been constructed on top of a river."

106. As pointed out by the Petitioner and going by the date of the report, it was prepared after the impugned notice had been served. The report shared the challenges the team faced during the exercise and in particular, no 5 (page 17 of the report) where the multi-agency team said they received complaints from some developers in measuring and marking 10 meters contradicting the 6 meters reserve earlier issued by the Regeneration Committee. The team recommended that before demolition of the marked structures, there is need to establish the original course of the river and rationalize the marked structures with it.

107. The multi-agency team that prepared this report comprised amongst others Joseph Ngoroi, Wilfred Masinde and Vincent Alila who are all employees of the Nairobi City County. There also representatives from the Ministry of Lands and Physical Planning. This court is alive to the evidential burden of proof lying on the shoulders of the Petitioner but based on this recommendation, there is a gap which the 1st Respondent needed to elaborate on what constituted their decision to serve the notice; taking note that they were the ones who had given previous approvals.

108. Evidential burden of proof is captured in Sections 109 and 112 of the same *Evidence Act* states as follows:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

109. There are myriad case law on discussing burden of proof inter alia was held in the case of Anne Wambui Ndiritu -v- Joseph Kiprono Ropkoi & Anor [Civil Appeal No. 345 of 2000, [2005] 1 EA 334) which held that;

> "The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however also the evidentiary burden that is cast upon any party of proving any particular fact which he desires the court to believe in its existence..."

110. The 1st Respondent contended that the Enforcement notice was issued to the Petitioner because they had encroached on riparian reserve. In the case of Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR, the court discussed the law on riparian reserve as follows;

"42. It is useful to review the legislation on riparian reserves in Kenya. Section 29 of the Physical Planning Act empowers local authorities, which refers to county governments, to prohibit or control the use and development of plots within its area. The section mandates the local authority to consider and grant development permissions.

43. Rule 111 of the Survey Regulations of 1994 provides for a reservation of not less than 30 metres in width above high-water to be made for Government purposes but allows the Minister to direct that a lower width of the reservation be made in special circumstances. It is not clear from this regulation how the riparian reserve is to be measured considering that rivers vary in sizes and may also meander in their course as they flow downstream. Regulations 40 and 88 of the Survey Regulations of 1994 stipulate where and how line and river beacons are to be placed by the surveyor.

44. Rule 6 (c) of the Environmental Management and Coordination (Water Quality) Regulations, 2006 prohibits any person from cultivating or undertaking any development activity within the full width of a river or stream to a minimum of six metres and maximum of thirty metres on either side based on the highest recorded flood level.

45. Rivers and all land between the high and low watermarks constitute public land pursuant to Article 62 of *the Constitution*. Black's Law Dictionary, 10th edition defines a watermark as the highest or lowest point to which water rises or falls. The dictionary defines the high watermark in a river not subject to tides as the line that the river impresses on the soil by covering it long enough to deprive it of agricultural value and the low watermark as the point in a river to which the river recedes at its lowest stage.

46. The Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009 defines the high watermark as the historical recorded point of the highest level of contact between the water and the bank while the low watermark is defined as the

historical recorded point of the lowest level of contact between the water and the bank. The river bank is defined as the rising ground from the highest normal watermark bordering the river in the form of rock, mud, gravel or sand; and in case of flood plains would include the point where the water surface touches the land which is not the bed of the river.

47. The court notes that the Regulations under EMCA came into force later than those made under the *Survey Act* and Physical Planning Act. In defining the riparian reserve, all these pieces of legislation did not take into consideration the land between the high and low watermarks stated in *the Constitution* of 2010. From the definition of the high and low water marks in the Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009, it is evident that the measurement of the riparian reserve is to be pegged on the riverbank and the highest point on the land which water gets to during flooding."

111. The impugned notice was issued as stated on its face; because the Petitioner had contravened the provisions of section 30(1) of CAP 286 (repealed) which states thus; "no person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33." The Petitioner presented approved plans to wit; approval given on 18.4.1997 ref DC 785; Certificate of Occupation issued on 23.7.2007. They went further went on to present evidence in the first Folio Reference No.16/311 dated 26th September 1921 which plan do not delineate existence of any river or riparian land but "Anti Malaria drain."

112. The Petitioner also produced a plan that showed the stream was canalized in 1948 (pre-independence period) which was before the Physical Planning Act CAP 286 was passed. The Respondents did not object to these maps nor present any evidence to contradict their authenticity. The Petitioner further argued that they undertook the canalization of the suit property after obtaining approvals from Nairobi City Council and the said approvals were produced in court. Thus, the Petitioner presented a chronology of events leading to the issuance of the approvals for the construction and the certificate of occupation seamlessly.

113. The 1st Respondent who is the successor in title of the Nairobi City Council, the body which granted the approvals deposed that the approvals obtained by the Petitioner were illegal, null and void. However, the 1st Respondent did not give the particulars of the illegalities. In the event that there was policy change in regards to canalization of rivers after the approvals were given to the Petition, no such evidence was presented.

114. In justifying the action taken by the Respondents, it is only the 3rd Respondent who produced evidence contained in annexure TWM-1 which is a copy of the Sessional Paper No. 1 of 2017 on National Land Policy which was passed by the National Parliament. I have considered the relevant section which this court was referred to at chapter 4.6.6 which requires the National Director of Physical Planning to map and document disaster prone areas, riparian areas, wetlands, open spaces and river deltas. The 3rd Respondent averred that the restoration of the riparian reserves was in compliance with the Presidential directives dated 15th and 26th January 2015 and chapter 3.16(ii) of the Sessional Paper No 1 of 2017 (annex TWM-1) which empowered the government to restore and reclaim riparian areas.

115. Whereas these directives are in tandem with the Constitutional provisions with reference to environmental protection and sustainable development, their implementation did not state that they would ignore the approvals that had been done within the law. Second, their implementation did not infer that affected parties would not be notified to rectify/audit if need be before any demolition takes

place. Instead, the multi-agency team through the 1st Respondent caused a notice to be served without addressing themselves to the import of their previous decision in approving the canalization. That action contravened the rights of the Petitioner to a fair administrative action under article 47 of *the Constitution* and right to property as envisaged under article 40 of *the Constitution* and section 25 of the *Land Registration Act*.

116. In the case of Jyoti Hardware Limited v National Environment Management Authority [2021] eKLR, the National Environment Tribunal at Nairobi appreciated the Respondent's research on canalization which was as follows;

> "76. On the issue of what is the purpose of canalization of a water body vis a vis the riparian reserve, the Respondent's relied on secondary authorities to the effect that:- according to Macafferi Corporate Environmental Consultants https://www.macaferri.com/solutions/chanelling-works/, the canalization of a water course involves constructing a channel with a designed cross-section to meet the flow characteristics and capacity required. This can be to control the meandering of a river through a built up area, or in the vicinity of infrastructure. Without this managed containment, the water course would be free to erode and cause problems. Where channels transport clean water flow through polluted ground, or vice versa, the channel may be lined to render it impermeable, for example in agricultural irrigation schemes.
>
> 77. The Respondent's submitted that canalization presents the following advantages or uses:-
>
> a) Controlling the meandering of a river through a built up area or in the vicinity of a structure e.g. when a river channel has to pass under an existing building that ought not be demolished for compelling reasons; and
>
> b) Increase or maintain the flow or depth of a river to acceptable levels e.g. for subsequent damming purposes.
>
> 78. In relation to the matter at hand, the Respondent submitted that in the case of the Ngong river and from the evidence of the NEMA and Water Resource Authority officers/ Experts who attended the Tribunal site visit on the 5th September 2019, it is evident that the canalization was not to allow for encroachment of the river riparian but to control its meandering through a built up, high density area. This canalization, runs not only behind the Appellant's premises/ impugned structures, but all the way from Nairobi West Area and all the way to Likoni Road.
>
> 79. The Respondent further submitted that to maintain the long-term performance of these channels, a protective lining is often applied to the banks and, if required, to the channel bed. Without protection, erosion of the channel will occur as a result of the hydraulic shear stresses acting on the soil's surface.

135. Having established that canalization is a legal option that is undertaken in planning, the question that begs answering is whether the petitioners obtained the impugned approvals illegally or irregularly.

136. In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR, Tunoi JA (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." Emphasis ours.

138. The onus was on the Respondents to provide evidence to the Court the irregularity/illegality of the approvals issued which evidence must meet the standard of proof as was underscored by the Court of Appeal in Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt.

139. In the instant case, the Respondents needed to not only plead and particularize the fraud/illegality/irregularity, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was irregularity in issuance of the approvals for canalization and construction thereof. However, no such evidence was presented to the court except for producing policies regulating riparian reserves. The Petitioner can only be found guilty of contravening these policies had the Respondents taken the due process of cancelling the approved development plans in the hand of the Petitioner.

(c)Whether the Petitioner's constitutional rights were infringed:

140. In C N M v W M G [2018] eKLR, the court stated as follows on what constitutes a constitutional issue:

> " 21. The question of what constitutes a constitutional question was ably illuminated in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81(CC) in which Justice O'Regan recalling the Constitutional Court's observations in S vs. Boesak (2001)(1)SA 912(CC) notes that:-
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>> "*The Constitution* provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: If regard is had to the provisions of *the Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of *the Constitution* are also constitutional matters. So too, is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional

matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."

141. It has been submitted by the Respondents that Courts should not admit claims couched as constitutional petitions where there are civil remedies available and urged this Court to find that no rights have been infringed in this case. None of the Respondents have challenged the ownership and title of the Petitioner over the suit property. What is in contention is the use and in particular the alleged constructions done on top of the stream. In exercising powers conferred on them by Statute law, the National Land Use Policy and the Presidential directive, the Respondents and or their representatives issued an enforcement notice which gave the Petitioner seven (7) days to remove the offending buildings. They went ahead to send a bulldozer which demolished the Petitioner's wall partially and was only restrained by orders issued in this case.

142. Prior to service of the notice, the Petitioner had not been summoned to appear before any panel to be heard on whether they had obtained the requisite approvals for their alleged offending structures. They have shown that the structures are massive and were completed about 10 years to the date of the impugned notice. The seven days' notice served requiring them to demolish was short and does not meet the threshold of reasonable provided for under article 47 of *the Constitution*. These actions by the Respondents denied the Petitioner their right to a fair hearing as provided for under article 47(1) of *the constitution* states thus; Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

143. I agree with the Respondents that sections 29 and 30 of the Physical Planning Act (repealed) mandates every County Government to prohibit or control the use and development of land and buildings in the interests of proper and orderly developments of its area and that Section 38 (1) and (2) of the said Act, provides that county governments though her Physical Planning Directorate have power to issue enforcement notices.

144. However, this mandate should be executed in compliance with the general principles of law which include application and observance of the rule of law, principle of legality, access to justice, basic fairness and principles of equality. These principles are well discussed on Sweet & Maxwell, Burnett Hall on Environmental Law Second Edition page 268 to 271.

On the principle of Rule of law, it states that,

> "The principle of the rule of law requires that all actions taken by public bodies be subject to the law. The principle is aimed at ensuring that the state operates within legal boundaries and seeks to prevent State power being exercised in an arbitrary, oppressive or abusive manner. As such it enforces minimum standards of procedural and substantive fairness.

In order to ensure that the state adheres to the rule of law, the courts are charged with acting in an independent supervisory capacity. Judicial independence stems from the separation of powers between the courts and the executive and is an important check on legislative authority."

On the principle of legality, it is discussed that,

> "Under this principle, the government can only exercise powers where there is legal authority to do. Where certain actions would interfere with the ordinary rights of individuals, the government must be able to justify that interference with reference to law. As such, the government remains answerable for its actions before the courts.

One aspect of the principle ensures that statutory powers are subject to fundamental rights, unless there are clear indications to the contrary. This latter point was summarised by Lightman J. in R v Governor of Frankland Prison ex p Russell [2000] 1 W.L.R 2027 at para 11 as meaning:

> "In the absence of express words or necessary implications to the contrary, even the most general words in an Act of Parliament and in subordinate legislations must be presumed to be intended to be subject to the basic rights of the individual, and accordingly... regulations expressed in general language are presumed to be subject to fundamental rights, a presumption which enables them to be valid."

The Courts are therefore called upon to interpret the legislation in accordance with the fundamental rights where possible."

145. On the violation of the rights to own and use property which the Petitioner submitted was threatened, there are Constitutional and Statutory provisions guarding the right to property. Section 24 of the *Land Registration Act* provides; the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

146. Article 40 (3)(b) states thus; The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament

147. The intentions of the Respondents as expressed through the impugned enforcement notice if allowed to continue is likely to injure the rights to property of the Petitioner in so far as their investment would be demolished without any proof that the canalization was illegal, and caused harm to the environment. Secondly, the demolition was being undertaken with no compensation for any damage that was likely to be suffered. Such harm/damage includes the loss of a place of worship for the membership of the Petitioner.

148. I am satisfied with the evidence presented that the Petitioner has demonstrated that were it not for the orders of temporary injunction obtained, their peaceful enjoyment and occupation of their property would have been violated arbitrarily by the Respondents. In the case of Onyango Oloo vs AttorneyGeneral (1986-1989) EA 456, the Court of Appeal held that denial of the right to be heard renders any decision made null and void ab initio.

149. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR provided the standard of proof in Constitutional Petitions as follows;

> "...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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>> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow

the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

150. The Petitioner in my opinion has met this threshold to the extent that they have itemized the violations complained of their petition inter alia, the denial of right to a fair hearing, and threat to arbitrary loss of property and or peaceful occupation. As discussed hereinabove, the Petitioner has provided documents to show that they obtained the requisite approvals for their developments and went further to elaborate by calling an environmental lead expert that they are not undertaking any activities on the canal that is deleterious to the stream and the environment.

151. Although the 2nd Respondent urged this court to find that they did not do anything to infringe on the rights of the Petitioner, it vehemently opposed the petition. The 2nd Respondent does not feature in the documents relied on as the basis for decision to remove structures along Kibagare river riparian reserve but its role in protecting the environment is key. To avoid a re-currence in following due process on regulation of the riparian reserve of Kibagare river, the orders herein applies as against the 2nd Respondent who participated fully in these proceedings. The only exemption is that they are not liable to pay the costs of the petition.

152. Consequently, I am satisfied that the Petitioner has proved their claim within the required standards in law. I enter judgement in their favour as follows:

i. Conservatory and declaratory orders are hereby issued restraining the 1st and 2nd Respondents and any other public officer(s) acting on the instructions of the Respondents and of the Government of Kenya as a whole, from entering, breaking, demolishing, destroying, evicting, defacing, flattening or in any way interfering with the buildings, compound, temple, halls and all amenities or the smooth operation and running of and the peaceful possession of the Petitioner's property situated in the Petitioner's Oshwal Religious Centre situated on LR. No.1870/1/119 Ring Road Nairobi.

ii. An order of Certiorari be and issued bringing into the High Court quashing the 1st Respondent's Enforcement Notice dated 11th July 2018, requiring the Petitioner to stop further illegal occupation of its property and to remove structures on top of the river within seven days running from 11th July 2018, with respect to the Petitioner's property, Oshwal Religious Centre, situated on LR. No.1870/1/119 Ring Road Nairobi.

iii. A declaration is given that the 1st Respondent's Enforcement Notice dated 11th July 2018 with respect to the Petitioner's property, Oshwal Religious Centre, situated on L.R No.1870/1/119 Ring Road Nairobi, violated the rights of the Petitioner and the Petitioner's members and that the Respondent's actions, threatened actions to remove the alleged illegal structures is unconstitutional, invalid and an abuse of the mandate, power and due process entrusted to the Respondents and the Government under *the Constitution*.

iv. A declaration is given that the threatened demolition of the whole or part of the Oshwal Religious Center, situated on L.R No. 1870/1/119 Ring Road Nairobi, by the Respondents and the Inter Government Agencies, constitutes a violation of the Petitioner's constitutional rights to the use and occupation of the property and the freedom from arbitrary loss of property or peaceful occupation.

v. A declaration is made by this Court that the threatened demolition of the whole or part of the Oshwal Religious Center, situated on LR. No. 1870/1/119 Ring Road Nairobi, pursuant to the Enforcement Notice, constitutes a violation of the Petitioner's constitutional rights to fair

administrative action and further to a fair hearing prior to the making of any decision against the Petitioner and the rights of its members.

vi. Costs of the Petition is awarded.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE