



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 255 OF 2018**

**TIARA VILLAS MANAGEMENT LIMITED.....1ST PLAINTIFF**

**COTTERS BROOK VILLAS 1 MANAGEMENT LTD.....2ND PLAINTIFF**

**MUGUMO HEIGHTS MANAGEMENT COMPANY LTD.....3RD PLAINTIFF**

**MARY WANJA IBUTU..... 4TH PLAINTIFF**

**SHARADCHANDRA MANHARLAL KALIDAS DAVE..... 5TH PLAINTIFF**

**=VERSUS=**

**HON JOE MUTAMBU..... 1ST DEFENDANT**

**SOLOMON GICHINA.....2ND DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT.....3RD DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY.....4TH DEFENDANT**

**JUDGMENT**

1. The dispute in this suit revolves around change of user, development approvals, and environmental impact licensing of a project undertaken by the 1st defendant on Land Reference **Number 3734/812 [the suit property]**, owned by the 2nd defendant and leased to the 1st defendant. The land is situated along Mugumo Road, Lavington, Nairobi. Through a plaint dated 30/3/2018, filed through the firm of *Iseme Kamau & Maema Advocates*, the plaintiffs alleged that the 1st and 2nd defendants were undertaking the project without the mandatory statutory approvals and licenses and were violating their right to a clean and healthy environment as enshrined in Article 42 of the Constitution of Kenya 2010.

2. Consequently, the plaintiffs sought the following verbatim reliefs against the **defendants**:

*a) A declaration that the development, works and construction being undertaken by the 1st and 2nd defendants are a violation of the plaintiff's right to a clean and healthy environment as enshrined under Article 42 of the Constitution as read together with Section 3 of the Environment Management and Co-ordination Act No. 8 of 1999.*

*b) A permanent injunction restraining the 1st and 2nd defendants from continuing with any development, works and /or construction as LR 3734/812 located along Mugumo Road, Lavington Nairobi which is deleterious to the environment and/or out of character with the residential use of the area.*

*c) A mandatory injunction compelling the 1st and 2nd defendants to restore the degraded environment by restoring the surrounding environment LR 3734/812 located along Mugumo Road, Lavington Nairobi to the position as at 27th March 2018.*

*d) A mandatory injunction compelling the 3rd and 4th defendants to undertake public participation and to consider the environmental impact of any development, construction and/or works which the 1st and 2nd defendants may wish to undertake in respect of LR 3734/812 located along Mugumo Road, Lavington Nairobi and to monitor that the said development, construction and works do not injure the environment.*

*e) Damages against the 1st and 2nd defendant for occasioning pollution.*

*f) Any other and further relief as this honourable court may deem fit and just to grant.*

### **Case of the Plaintiffs**

3. The plaintiffs' case is that the 1st, 2nd, and 3rd plaintiffs are property management companies in which reversionary interests in various properties in the neighbourhood vest and they are charged with the management of their respective gated properties in the neighbourhood within which the suit property is located. The 4th and 5th defendants are proprietors of properties and residents in the same neighbourhood. The 1st defendant is a tenant of the 2nd defendant in respect of the suit property. The plaintiff contend that they are entitled to a clean and healthy environment and they have a corresponding duty to safeguard and enhance the environment.

4. The plaintiffs further contend that the neighbourhood is a residential area and their properties are adjacent to and/or adjoining the suit property, and by virtue of the proximity of the suit property, they are directly affected by any developments or works being undertaken on the suit property. In April 2018, they noticed that the 1st defendant was undertaking building works/construction works on the suit property which is directly opposite the 1st plaintiff's property, Land Reference Number 3734/1361. They contend that the 1st and 2nd defendants had purported to change the user of the suit property from residential to commercial without any due process and or approval. They further contend that the subject development was being undertaken without public participation and without approval from the physical planning regulator under the repealed Physical Planning Act and the Environment Impact Assessment License (the EIA Licence) under the National Environment Co-ordination and Management Act (the **EMCA**).

5. The plaintiffs add that the 1st and 2nd defendants' activities constitute a blatant violation of the Statutes and the Constitution and infringement on their right to a clean and healthy environment enshrined in Article 42 of the Constitution. They urge the court to grant the above reliefs.

### **Case of the 1st defendant**

6. The 1st defendant filed a statement of defence dated 23/8/2018 through the firm of *Katunga Mbuvi & Co Advocates*. He denied each and every allegation made in the plaint. He averred that the plaintiffs were not his immediate neighbours and put the plaintiffs to strict proof. He contended that the suit property neighboured Shell Petron Station and a night club at Lavington Green Mall. He added that the project had an approved environmental impact assessment report. He contended that the project was not a nuisance.

7. The 1st defendant added that he had procedurally procured a temporary change of user for three (3) years and the requisite development approval had been granted by the 3rd defendant. It was the case of the 1st defendant that the suit against him was frivolous, vexatious and an abuse of the court process. He urged the court to dismiss the suit.

### **Case of the 2nd Defendant**

8. The 2nd defendant filed a statement of defence dated 23/8/2019 through the firm of *Mwangi Kigotho & Co Advocates*. He denied the allegation that the suit property neighboured the plaintiffs' properties and put the plaintiffs to strict proof. He denied the plaintiff's contention that the developments around the suit property were for residential purposes and put the plaintiffs to strict proof. He admitted that the developments on the suit property required development permission under the physical planning law.

9. The 2nd defendant further denied undertaking any construction works or developments on the suit property and put the plaintiffs to strict proof. He denied authorising or permitting the 1st defendant to undertake construction works or developments on the suit property without complying with the relevant laws. Further, he denied being privy to any letter or authority approving any construction works or development on the suit property or being privy to any violation of any approvals by the 3rd defendant.

10. The 2nd defendant averred that on 28/2/2018, he entered into a lease agreement with the 1st defendant pursuant to which he leased the suit property to the 1st defendant. He added that it was the legal obligation of the 1st defendant to apply and obtain all the requisite permits, licences and approvals from the relevant authorities and to use the demised premises in compliance with the law. He contended that he had wrongly been joined in the suit. He denied being served with a demand notice nor a notice of intention to sue. He urged the court to dismiss the suit against him.

11. The 3rd defendant did not file a defence but filed written submissions.

12. Although the 4th defendant filed a replying affidavit sworn on 27/6/2018 by **Samuel Ngaanga**, it did not file a statement of defence. The deponent deposed that he was a Senior Compliance and Environment Officer in the employment of the 4th defendant, stationed at the Nairobi County Field Office. He added that the impugned project entailed renovation works on an existing building to put up offices and construction of temporary structures for car wash, tyre centre and motor vehicle service and maintenance. He further deposed that the site of the project was located along Mugumo Road in Lavington Area on a predominantly residential area with a few commercial establishments along the Road. He further deposed that the project was commercial in nature and was surrounded by several residential houses ranging from ground to one floor town houses along and across the Road. It was the 4th defendant's case that the development fell within the categories of developments that were supposed to undertake environmental impact assessment and obtain environmental impact assessment licence before commencement of works. The 4th defendant added that the project commenced without an EIA licence, an act which constituted an offence under the EMCA. It was the position of the 4th defendant that it issued an improvement notice dated 19/6/2018 stopping any further reconstruction works until the project was licenced. The 4th defendant contended that at the time of swearing the affidavit, it had not received any application for an EIA licence relating to the project.

### **Plaintiffs' Evidence**

13. Trial commenced on 13/7/2021. The plaintiffs called one witness, **Ann Wanjugu Kinyanjui - PW1**. She adopted her witness statement dated 31/1/2019 as part of her sworn evidence-in-chief. She produced seven (7) exhibits, among them: (i) titles relating to parcel numbers LR 3734/1361 and LR 3734/423, bearing various leases relating to units developed thereon; (ii) Photographs; (iii) 3rd defendant's letter dated 29/3/2018 to the 1st defendant; (iv) 1st plaintiff's letter dated 17/4/2018 to the 3rd defendant; (v) 3rd defendant's letter dated 20/6/2018 to Paul Omoti; (vi) Replying affidavit of Samuel Ngaanga sworn on 27/6/2018; and (vii) 1st plaintiff's letter dated 25/5/2018 to the 4th defendant.

14. PW1 testified that she was a resident of Tiara Villas, Mugumo Road, Lavington. She was a director of Tiara Villas Management Limited and she had been authorised by all the plaintiffs to testify on their behalf. She outlined the case of the plaintiffs as summarized above. She added that the impugned construction consisted of a car wash and a garage. It was her evidence that the suit property was located in a residential area. There was a lot of noise coming from the site during construction and construction works were being carried out at night and on weekends. Children in the neighbourhood could not sleep. Further, there was a lot of dust from the site. The plaintiffs asked the occupant of the suit property to provide approvals for the project and the occupant provided a letter dated 29/3/2018 from the 3rd defendant authorizing construction of a car park, temporary canopies, cabro parking and repair of existing house and domestic quarter.

15. She added that they were not satisfied because the works being undertaken related to commercial use of the suit property and were outside the scope of works authorized by the 3rd defendant. Secondly, there was no change of user. Thirdly, there was no NEMA approval. They engaged relevant authorities and when they realized there was no immediate intervention by the relevant authorities, they brought this suit. Subsequently, NEMA stopped the project.

16. She added that the plaintiffs' properties neighboured the suit property. She further testified that they were not privy to the EIA report which the 1st defendant served on the plaintiffS on the day the hearing of the case commenced. She urged the court to grant the reliefs sought in the plaint.

17. The 1st defendant testified as **DW2**. He adopted his written statement dated 26/9/2019 as part of his sworn evidence-in-chief. He produced a bundle dated 26/9/2019 consisting of the following documents: (i) Letter from the Nairobi County Government dated 29/3/2018; (ii) Survey Plan showing Mugumo Road and various properties, among them LR No 3734/6812 (the suit property), 3734/1361, 1334/617, 3734/610, 3734/611, 3734/612, 3734/615, 3734/813, 3734/814 and 3734/815; (iii) Public Notice dated 16/3/2018; (iv) Copy of Newspaper Notice; (v) Letter dated 20/6/2018 from 3rd defendant addressed to Peter Omoti; (vi) Invoice relating to change of user dated 23/3/2018; and (vii) Receipt relating to application for change of user. Further he produced an environmental impact assessment report dated 19/9/2018 prepared by M/s Eco Plan Kenya Ltd.

18. In summary, DW2's evidence was that he was a lessee of the 2nd defendant. The impugned project was a car wash that was complete but not operational and that it was a temporary structure. All due process was followed in the procurement of change of user and he was granted a temporary change of user for a period of 3 years. He placed a notice in the **Star Newspaper**, inviting interested members of the public to participate. He added that the plaintiffs' properties did not neighbour the suit properties, contending that the suit property was surrounded by other properties including Shell Petrol Station and a night club at Lavington Green Mall. He further testified that the project had an EIA Report dated 19/9/2018. He contended that the project was not a nuisance. During cross-examination by **Ms Sakami**, counsel for the 4th defendant, he stated that NEMA had not licensed the project. During cross-examination by **Mr Kimaru**, counsel for the 3rd defendant, he stated that he started construction after he obtained a development permission but before he was granted the temporary change of user.

19. During cross-examination by **Mr Mwangi**, counsel for the 2nd defendant, he stated that he had not obtained an EIA licence for the project. He added that NEMA told him that the EIA report had to bear the name of the registered proprietor. He confirmed that he was the one who procured the EIA report and that the 2nd defendant did not sign any document relating to the EIA report. He did not know who appended a purported signature of the 2nd respondent on the EIA Report.

20. During cross examination by **Mr Nyaburi**, counsel for the plaintiffs, he stated that he could not remember when he started the construction works and when he finished them. Pressed further, he stated that he finished the works either in June or July 2018. He used to supervise the construction works. He was not aware the construction used to be carried out at night. He was not aware of any construction noise from the site. He did not obtain a NEMA license prior to commencing construction. He confirmed that there were no public participation forms in the EIA report exhibited. He added that the public notice he placed on the site in relation to change of user was dated 16/3/2018; the notice in the Star Newspaper was dated 23/3/2018; and the approval to commence construction was issued on 29/3/2018. It was his evidence that the notice required members of the public to object to the notice within 14 days from the date of publication. It was his evidence that the structure did not warrant waiting for the expiry of 14 days. He added that he did not have information on the process of change of user.

21. The 2nd defendant testified as DW1. He adopted his written statement dated 18/11/2019 as part of his sworn evidence-in-chief. He produced three (3) documents, namely: (i) Lease Agreement dated 28/2/2018; (ii) Demand Letter dated 2/11/2018; and (iii) Pleadings in Nairobi CMC Civil Case No. 174 of 2019. His evidence was that he leased the suit property to the 1st defendant vide a lease agreement dated 28/2/2018, for a period of 5 years. The suit property was situated along Mugumo Road, Lavington. Under clause 2(v) of the lease agreement, the 1st defendant was obligated to obtain prior written consent from him authorizing him to make any alterations or additions to the suit property. The 1st defendant did not seek his consent in relation to the impugned works.

22. The 2nd defendant (DW1) added that it was the responsibility of the 1st defendant to apply for and obtain, at his cost, all permits, licences and approvals from relevant authorities. He stated that he (the 2nd defendant) never applied for any change of user and neither did he undertake any construction works on the suit property. He was surprised when he was served with the suit papers.

23. It was the evidence of the 2nd defendant that the 1st defendant had refused to pay rent for the suit premises prompting him to file Milimani CMC No 174 of 2019 to recover rent. He added that had the plaintiffs served him with prior notice, this suit would have been avoided. He contended that he was not aware that the 1st defendant was undertaking construction works on the suit property. Shown the EIA report bearing what was expressed to be his signature, he stated that the signature on the EIA report was a forgery because he never

signed the report and he was not privy to the EIA report.

24. During cross-examination by Mr Nyaburi, counsel for the plaintiffs, he testified that the user of the suit property was residential but it had previously been used for sale of cars. He reiterated that he did not make any application to NEMA and that the 1st defendant never sought his authority to undertake the impugned works.

25. In cross-examination by Mr Mbuvi, counsel for the 1st defendant, he stated that he leased the suit property to the 1st defendant and that prior to that, the suit property was used for business. He confirmed that clause 2 (viii) of the lease provided that the 1st defendant was to use the suit property for motor vehicle market, car wash and motor garage. He was not aware there was change of user procured by the 1st defendant. He learnt about the impugned works after he was sued. He further stated that the suit property fronted Mugumo Road and the Petrol Station he was aware of was located on James Gichuru Road.

26. Shown his previous affidavit in this suit, he stated that it was the duty of the 1st defendant to obtain the change of user. He further stated that the 1st defendant was entitled to apply for licences provided he did not forge his signature. In answer to a question by Ms Sakami, counsel for the 4th defendant, he stated that he had not submitted any EIA report to NEMA.

27. In re-examination by Mr Mwangi, he stated that the 1st defendant inspected the suit property prior to entering into the lease. The 1st defendant never requested for his consent to erect the impugned structures. The 1st defendant was the one to apply for necessary business licences. He (the 2nd defendant) did not publish the notice exhibited by the 1st defendant. The 1st defendant never requested him to apply for change of user and neither did he request him to apply for a NEMA licence. The 1st defendant never told him about any challenge relating to the lease.

### **Plaintiffs' Submissions**

28. The plaintiffs filed written submissions dated 27/9/2021 through the firm of *Iseme Kamua & Maema Advocates*. Counsel for the plaintiffs identified the following as the key issues falling for determination in the suit: (i) *Whether the plaintiffs' properties were adjacent to the suit property and could be affected by the developments going on at the suit property;* (ii) *Whether the operations at the suit property were a nuisance and in violation of the plaintiffs' right to a clear and healthy environment;* (iii) *Whether the 1st defendant complied with the law on change of user and had a valid approval for change of user;* (iv) *Whether the 1st defendant conducted an environmental impact assessment study and had a valid NEMA licence allowing his operations;* and (v) *What are the appropriate reliefs in this matter.*

29. On whether the plaintiffs' properties were adjacent to the suit property and could be affected by the developments going on at the suit property, counsel relied on the survey plan exhibited by the plaintiffs and submitted that the suit property and parcel number LR 3734/813 were separated by a narrow lane surveyed as LR No 3734/814. Counsel added that the suit property and parcel number 3734/1361 were separated by Mugumo Road. Relying on the evidence of PW1, counsel submitted that any operations on the suit property would inevitably affect the occupants of the plaintiffs' properties. Counsel argued that the plaintiffs' properties were sufficiently proximate as to be directly and indirectly affected by any activities at the suit property.

30. Without prejudice to the above argument, counsel cited Section 4(4) of the EMCA and contended that by dint of the said provisions, the plaintiffs were vested with the *locus standi* to initiate proceedings to prevent acts or omissions deleterious to the environment, regardless of whether personal injury or loss was occasioned to them or was likely to be occasioned to them. Counsel added that even if the impugned project was not yet operational, the plaintiffs were entitled under **Section 3(3)** of the EMCA to initiate these proceedings to prevent violation of their right to a clean and healthy environment.

31. On whether the operations at the suit property were a nuisance and in violation of the plaintiffs' right to a clean and healthy environment, counsel for the plaintiffs relied on the photographs exhibited; the evidence of the 1st defendant (DW 2); and the evidence of PW1 and invited the court to invoke Section 60(m) and (o) of the Evidence Act and take judicial notice of what the impugned works would ordinarily entail. Counsel added that the evidence of PW1 had not been countered. Counsel invited the court to find that the operations undertaken on the suit property were a nuisance and violated the plaintiffs' right to a clean and healthy environment.

32. On whether the 1st defendant complied with the law on change of user and had a valid approval for change of user, counsel for the plaintiffs submitted that the applicable law at all material times was the Physical Planning Act 1996 [*now repealed*]. Counsel referred to the definition of "**development**" under the repealed Act. Citing Sections 31 to 36 of the repealed Act, counsel submitted that the repealed law provided an elaborate procedure for procuring a change of user and contended that there was no evidence of due process in the procurement of the purported temporary change of user dated 20/6/2018. Counsel argued that the repealed Physical Planning Act did have provision for a temporary change of user. Counsel added that the letter dated 20/6/2018 was not a legitimate approval of change of user granted to the 1st defendant because it purported to be approving an application dated 17/8/2017, made by one **Peter Omoti**, yet the 1st defendant was not a lessee in the suit property in 2017 and the 2nd defendant had denied making any application for change of user in relation to the suit property. Counsel added that the letter dated 20/6/2018 was not a change of user because a change of user was a development permission whose form was prescribed under Section 33(1) (a) of the repealed Act.

33. On whether the 1st defendant conducted an environmental impact assessment study and had a valid NEMA licence allowing his operations, counsel for the plaintiffs submitted that the 4th defendant had filed a replying affidavit in this suit which was subsequently produced as an exhibit by PW1. Counsel submitted that the 4th defendant took the view that the impugned project required an EIA licence before commencement of works and none had been obtained. Counsel added that the EIA report dated 19/9/2018, which the 1st defendant served on the morning of the hearing of this suit, was prepared long after this suit was filed. Counsel added that the 1st defendant had confirmed in his evidence that no EIA licence had been obtained from the 4th respondent. Further, counsel argued that the said report did not contain any evidence of public participation. Counsel urged the court to find that the 1st defendant violated the provisions of **Sections 58 and 63** of the EMCA.

34. On the appropriate reliefs to be granted, counsel for the plaintiffs cited Section 3(3) of the EMCA and submitted that the said provisions

gave this court wide powers to fashion appropriate orders to protect the environment. Counsel added that the 1st defendant had owned up to undertaking the impugned project without the requisite approvals and the 2nd defendant was deemed to have known the 1st defendant's actions, moreso, having leased the suit property for use as a car wash and tyre centre. Counsel faulted the 3rd defendant for issuing an irregular letter dated 20/6/2018 purporting to be an approval of change of user. Counsel urged the court to grant the reliefs sought in the plaint.

### **1st Defendant's Submissions**

35. The 1st defendant filed written submissions dated 8/11/2021 through the firm of *Katunga Mbuvi & Co advocates*. Counsel submitted that the issue falling for determination in the suit was whether the law relating to change of user was adhered to by the 1st defendant. Counsel submitted that the 1st defendant followed due process by placing a notice of intended change of user in the **Star Newspaper** on 23/3/2018 and upon expiry of 14 days, he erected a site board notice at the gate of the suit property. Counsel faulted the plaintiffs for failing to comply with the proper procedure before coming to this court. Counsel contended that this case was brought prematurely. Counsel stated [from the bar] that the City Planning Committee had on 7/7/2006 expanded the Lavington Green Shopping Centre as a designated commercial zone and that the suit property fell within the expanded limits. Counsel argued that this suit was a representative suit and contended that the plaintiffs had failed to seek leave of the other interested parties. Counsel added that PW1 had confirmed that there was no construction going on at the suit property.

36. Counsel for the 1st defendant further submitted that the EIA report had indicated that the impugned project was given a green light by the 3rd defendant. It was the position of counsel for the 1st defendant that all the necessary approvals had been obtained by the 1st defendant. Counsel urged the court to dismiss the suit.

### **Submissions by the 2nd Defendant**

37. The 2nd defendant filed undated and unsigned written submissions through the firm of *Mwangi Kigotho & Co Advocates*. Counsel submitted that the 2nd defendant leased to the 1st defendant a residential building and the 1st defendant was obligated to obtain all permits, licences and approvals necessary for running business on the suit property. Counsel added that the 1st defendant covenanted not to make any alteration to the suit property without the written consent of the 2nd defendant. Counsel contended that the 1st defendant further covenanted not to do anything on the suit property which would become a nuisance to the neighbours or injurious or detrimental to the premises.

38. Counsel for the 2nd defendant submitted that the 1st defendant never obtained consent from the 2nd defendant, adding that the 2nd defendant got to learn about the impugned project when he was served with court papers relating to this suit. Counsel added that whereas the 1st defendant insisted that he applied for and obtained all the necessary approvals prior to commencement of construction, his own evidence told a different story, contending that the construction was illegal and had been undertaken without the requisite change of user and without NEMA approval. Counsel noted that whereas this suit was initiated on 30/5/2018, the 1st defendant purported to procure a temporary change of user on 20/6/2018 and that the purported temporary change of user was expressed as having been applied for by one **Peter Omoti** of P. O. Box 94 Kitengela on **17/8/2017**, long before the suit property was leased to the 1st defendant.

39. Counsel for the 2nd defendant added that the approval purportedly granted through the letter dated 29/3/2018 was for car park temporary canopies, cabro parking and repair of existing house and DSQ and was subject to the 1st defendant receiving consent from the 2nd defendant, adding that the 2nd defendant did not authorize the 1st defendant to change the user of the premises. Neither did the 2nd defendant consent to the works. Counsel submitted that the 1st defendant did not bother to apply for consent of the 2nd defendant. Counsel added that under the repealed Physical Planning Act, only the owner of land was permitted to apply for change of user. Counsel contended that by using the name of the 2nd defendant without involving the 2nd defendant in the purported applications, the 1st defendant was acting dishonestly.

40. On the EIA licence, counsel submitted that the 1st defendant had admitted commencing construction works without the requisite NEMA licence and it was apparent from the subsequent EIA report that the 1st defendant was attempting to cover his tracks. Counsel added that the 1st defendant had engaged in criminal activity by impersonating the 2nd defendant and forging a purported signature of the 2nd defendant.

41. Counsel for the 2nd defendant added that the plaintiffs' grievance is about the construction works undertaken by the 1st defendant and the added structure on the suit property and contended that the complaint would not be there if the 1st defendant had used the suit property the way it was. Counsel urged the court to absolve the 2nd defendant of any wrong doing because he was not privy to nor aware of the illegal construction by the 1st defendant.

### **Submissions by the 3rd Defendant**

42. The 3rd defendant filed written submissions dated 8/11/2021 through the firm of *Njenga Maina & Co Advocates*. Counsel for the 3rd defendant submitted that the issue falling for determination was whether the 1st defendant procured a change of user from the 3rd defendant. Counsel submitted that the 1st defendant was, vide the letter dated 29/3/2018, only granted conditional authority for repair of canopies, cabro-paving and temporary car parks within an existing residential house, but the letter did not authorise alteration to the suit property. Counsel contended that the 1st defendant was to ensure there was no nuisance to the neighbourhood and added that the 1st defendant deviated from the authority granted.

43. Counsel disowned the letter of temporary change of user and stated [from the bar] that it did not emanate from the 3rd defendant, contending that the letter dated 20/6/2018 was fraudulent and suspicious. Counsel added that, in any event, the letter was procured long after this suit had been initiated. Lastly, counsel for the 3rd defendant submitted that the 1st defendant did not have the requisite approvals, specifically the change of user, prior to the commencement of the impugned works as required under the repealed Physical Planning Act.

### **Analysis and Determination**

44. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the issue falling for determination in this suit. Parties did not agree on a common set of issues to be determined by the court. Having considered the pleadings, evidence and submissions presented to the court, the following are the seven key issues that fall for determination in the suit: (i) *Whether the jurisdiction of this court was invoked prematurely;* (ii) *Whether the impugned construction and intended business project on Land Reference Number 3734/812 had the requisite NEMA approval;* (iii) *Whether the impugned construction and intended business project on Land Reference Number 3734/812 had the requisite development permission in terms of change of user under the relevant law;* (iv) *Whether the impugned construction and intended business project on Land Reference Number 3734/812 had the requisite development permission in terms of building approval under the relevant law;* (v) *Whether the suit property, Land Reference Number 3734/812, neighbours the plaintiffs' properties;* (vi) *Whether the activities complained of were a nuisance to the plaintiffs and violated the plaintiffs' right to a clean and healthy environment;* and (vii) *Whether the plaintiffs are entitled to the reliefs sought in the plaint.* I will make brief sequential pronouncements on the seven issues in the above order.

45. The first issue is whether the jurisdiction of this court was invoked prematurely. This dispute arose in 2018 when the repealed Physical Planning Act was still in force. That is the law to guide the court on issues relating to development permission. There is no dispute that under the repealed Physical Planning Act, disputes relating to land use and building permission [both called development permissions] were to be ventilated in the relevant Liaison Committees. Similarly, disputes relating to EIA licensing were to be ventilated in the National Environment Tribunal [the NET]. However, under Section 33(3) of the repealed Physical Planning Act, the jurisdiction of the Liaison Committee would be invoked only after the approving authority had made a decision on a development application. The jurisdiction of the Liaison committee was duly triggered by a decision of the approving authority. Where a developer elected to undertake a development without an approval, the Liaison Committee was not available as an adjudicator. The adjudication organ in a challenge against the actions of the developer were the courts of law.

46. Similarly, under Section 129 of the EMCA, the jurisdiction of the NET is invoked only after NEMA has made a decision on an application. Where a project proponent decides to undertake a project without NEMA approval, persons aggrieved by the activities of the project proponent do not have recourse to NET. Their recourse lies in the courts of law.

47. Two key questions to be determined in this suit relate to whether there were prior change of user approvals [development permission] and NEMA approvals [EIA license]. Until those key questions are answered in the affirmative, we cannot say that the plaintiffs ought to have sought redress elsewhere. We cannot therefore say at this point that the jurisdiction of this court was invoked prematurely. I do not, in the circumstances, agree with counsel for the 1st defendant in his contention that the jurisdiction of this court was invoked prematurely. My finding on the first issue is that, at this point, this dispute is properly before this court.

48. The second issue is whether the impugned construction and intended project on Land Reference Number 3734/812 had the requisite NEMA approval. The plaintiffs produced, as an exhibit, an affidavit filed in this suit by NEMA. NEMA made a finding to the effect that the impugned project required an EIA report and an EIA licence. Further, NEMA confirmed that the project proponent did not obtain an EIA licence and, as a consequence, they issued a notice stopping the project. No evidence of an EIA licence was tendered by the 1st defendant during trial. The only document which was tendered by the 1st defendant was an EIA report expressed as having been procured by the 2nd defendant in September 2018, long after this suit had been initiated. The 2nd defendant disowned the report and testified that the signature appended on the report and expressed to be his was a forgery. Further, it emerged during cross-examination that there was no public participation in the procurement of the report. Indeed, during cross examination, the 1st defendant stated that he did not have an EIA licence for the project. Based on the above evidence, it is my finding that the impugned construction and business project did not have the requisite NEMA approval under Section 58 of the EMCA.

49. The third issue is whether the impugned construction and business project had the requisite development permission under the relevant law relating to change of user. Under Section 2 of the repealed Physical Planning Act, "development" was defined as:

***“(a) the making of any material change in the use or density of any building or land or the subdivision of any land which for the purpose of this Act is classified as Class “A” development; and***

***(b) the erection of such buildings or works and the carrying out of such building operations as the Minister may from time to time determine, which for the purpose of this Act is classified as class “B” development.”***

50. A reading of the above definition reveals that change of user of a parcel of land was a **Class “A” development**. Under Section 33 of the Act, it required a development permission. Secondly, change of user required a development permission granted by the relevant authority pursuant to an application presented in the prescribed form under Section 32 of the Act. Thirdly, the development permission granted under Section 33 was in a prescribed form. The application was to be in the form prescribed under the **Fourth Schedule [Form PPA1]** while the development approval itself was to be in the form prescribed in the **Fifth Schedule [Form PP 2]**.

51. The 1st defendant contended that he procured a change of user [Class “A” development permission] from the 3rd defendant. The 2nd defendant as the owner of the suit property denied being privy to any application for change of user. The 3rd defendant similarly denied issuing the letter dated 20/6/2018 which the 1st defendant was waving as a class “A” development permission [change of user]. The letter dated 20/6/2018 was not generated as per the mandatory requirements of Section 33 (1) (a) of the repealed Act which stipulated that a development permission had to be as per **Form P.P.2**. Further, the 1st defendant did not exhibit any application made to the approving authority in terms of **Form P.P.1**. The letter dated 20/6/2018 refers to an application made in 2017 by one **Peter Omoti**. In 2017, the 1st defendant did not have any interest in the suit property and could not have made any application for change of user. Most significant in terms of this issue is that the dispute in this suit arose in April 2018 when the 1st defendant commenced construction on the suit property. This suit was subsequently initiated in May 2018 after the 1st defendant failed to avail requisite approvals. The purported change of user which the 1st defendant is waving is dated 20/6/2018. In his own evidence under cross-examination, the 1st defendant said that he could not remember the exact date when he completed construction works but it was around June or July. Further he testified that he commenced construction as soon as he obtained what he described as building approval dated 29/3/2018. What this means is that there was no change of user when this suit was initiated.

52. Further, the letter dated 20/6/2018 is captioned “TEMPORARY CHANGE OF USER FROM RESIDENTIAL TO CAR WASH AND TYRE CENTRE ON LR NO 3734/812 MUGUMO ROAD – LAVINGTON.” I have looked at the entire framework in the repealed Physical Planning Act 1996. The Act did not have provision for a temporary change of user. The Act provided for a class “A” development permission which was popularly known as change of user. For the above reasons, the letter dated 20/6/2018 cannot in the circumstances be described as a valid class “A” development permission.

53. It does also emerge from the dates when the purported notices of intended change of user were published that the statutory timelines were not observed.

54. The totality of the foregoing is that the impugned construction and business project did not have a development permission in the context of change of user at all material times. Secondly, in any event, the validity of the said letter, if any, lapsed in June 2021.

55. The fourth issue is whether the impugned construction and intended business project had the requisite development permission in terms of building approval. The 1st defendant relied on the letter dated 29/3/2018 and contended that the said letter was a valid class “B” development permission. I have explained that the relevant Act prescribed the form of the development permission and the form of the application that one was required to present in order to procure a development permission. The letter dated 29/3/2018 does not meet the mandatory requirements of the repealed Act. Secondly, the said letter authorized construction of car park canopies, cabro parking and repair of existing house and DSQ on the suit property. It did not authorise the construction of a car wash and tyre centre on the suit property. Further, the 1st defendant was required to obtain the consent of the 2nd defendant in order for the authority contained in the said letter to be valid. The 2nd defendant has been categorical that he did not authorise any works on the suit property. For the above reasons, I form the view that there was no valid class “B” development permission (building approval) in relation to the impugned project which involved the construction of a car wash and tyre centre on the suit property. That is my finding on the fourth issue.

56. The fifth issue is whether the suit property neighbours the plaintiffs’ properties. The suit property is Land Reference Number 3734/812. The 1st to 3rd plaintiffs are management companies and reversionary title holders of Land Reference Numbers 3734/1361; 3734/815; and 3734/1423 respectively. The 4th and 5th plaintiffs are proprietors and residents of Land Reference Numbers 3734/1424 and 3734/813 respectively. The plaintiffs produced and relied on Land Survey Plan Number 309533. The 1st defendant produced a copy of the same Survey Plan as the one relied upon by the plaintiffs. From the above Survey Plan, it is evident that the suit property abuts Land Reference Number 3734/815. Secondly, there is a narrow stretch of land separating the suit property from Land Reference Number 3734/813. Thirdly, the suit property is directly opposite Land Reference Number 3734/1361 and the two are separated by Mugumo Road. It is not clear if there have been subsequent sub-divisions culminating in Parcel Numbers 3734/1423 and 3734/1424. The Survey Plan certainly confirms that the suit property neighbours three out of the five properties.

57. Besides the above evidence, PW1 testified that the suit property neighbours the plaintiffs’ properties. Her evidence is supported by the Survey Plan relied on by the plaintiff and by the 1st defendant, to the above extent. In the circumstances, the court finds that the suit property neighbours three out of the five properties itemized by the plaintiffs.

58. The sixth issue is whether the activities complained of were a nuisance to the plaintiffs and violated the plaintiffs’ rights to a clean and healthy environment. PW1 testified that the impugned construction works polluted the environment in that when the construction materials were being poured on the construction site, they emitted a lot of dust into the residential environment, besides causing noise pollution occasioned by the heavy machinery used over the weekends and at night. PW1 contended that the construction activities disturbed the peace and tranquility of the neighbourhood, occasioning adverse effects on the welfare of the families of the residents of the area, and in particular, the children who started developing flu-like symptoms and breathing difficulties.

59. On his part, the 1st defendant was unable to tell the court when the construction works started and when they ended, denying himself the opportunity to provide credible controverting evidence. In the circumstances, the court does accept the evidence of PW1 but only to the extent that there was nuisance and pollution of the environment. That is the finding of the court on the sixth issue.

60. The evidence presented to the court points to liability on part of the 1st defendant. Although the 2nd defendant leased the suit property to the 1st defendant, there was no evidence to suggest that he was privy to the impugned project. Similarly, although there appears to have been no prompt intervention by the 3rd and 4th defendants, there was no sufficient evidence to warrant an order of liability on part of the 3rd and 4th defendants. Indeed, the 4th defendant subsequently acted to forestall further damage to the environment.

61. The result is that the court finds that the plaintiffs have proved their case against the 1st defendant. Consequently, the plaintiffs are entitled to reliefs in terms of prayers (a), (b), (c) and (d) of the plaint as against the 1st defendant. The 1st defendant will bear the plaintiffs’ cost of this suit. I will not award the 2nd defendant costs because this suit would not have been necessary if he hadn’t leased out residential premises for commercial purposes. Similarly, I will not award the 3rd and 4th defendants costs because this suit would not have been necessary if they had acted on the plaintiffs’ grievances promptly.

62. Lastly, the plaintiffs’ sought general damages. Two of the plaintiffs are management companies. Secondly, no proper materials were presented to assist the court assess general damages and direct appropriate award to the affected residents and children. The court does not have the identity of the residents or children who were affected and who should be indemnified. In the circumstances, the court takes the view that **prayers (a), (b), (c) and (d)**, together with costs, are adequate remedies in the circumstances of this suit.

63. In the end the following disposal orders are made:

*a) That the development, works and construction works being undertaken by the 1st defendant on Land Reference Number 3734/812 are a violation of the plaintiff’s right to a clean and healthy environment as enshrined under Article 43 of the Constitution as read together with Section 3 of the Environment Management and Co-ordination Act, No. 8 of 1999.*

*b) A permanent injunction is hereby issued restraining the 1st and 2nd defendants from continuing with or undertaking any*

*development, works and /or construction on LR 3734/812 located along Mugumo Road, Lavington, Nairobi, which is deleterious to the environment and/or out of character with the residential use of the area.*

*c) A mandatory injunction is hereby issued compelling the 1st defendant to restore the degraded environment by restoring the surrounding environment on LR 3734/812 located along Mugumo Road, Lavington Nairobi to the position as at 27th March 2018.*

*d) A mandatory injunction is hereby issued compelling the 3rd and 4th defendants to undertake public participation and to consider the environmental impact of any development, construction and/or works which the 1st and 2nd defendants may wish to undertake in respect of LR 3734/812 located along Mugumo Road, Lavington Nairobi and to monitor that the said development, construction and works do not injure the environment.*

*e) The 1st defendant shall bear the plaintiffs' costs of this suit.*

*f) The 2nd, 3rd and 4th defendants shall bear their respective costs of the suit.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF MARCH 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Githua for the Plaintiffs

Mr Azangalala for the 1st Defendant

Mr Mwangi Kigotho for the 2nd Defendant

Court Assistant: Lucy Muthoni