



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO 30 OF 2019**

**IN THE MATTER OF ARTICLES 1(1), 2(1), (2), (4), (5) & (6), 3(1), 6(1), 10,  
22(1) & (2), 42, 47, 50(1), 69(1) (d), 258, 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 5(e) & f, 10(2) (c), 41(3) of the PHYSICAL PLANNING ACT, CAP 286**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENT ACT 2012**

**AND**

**IN THE MATTER OF KENYA ROADS ACT (2007)**

**AND**

**IN THE MATTER OF ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999**

**IN THE MATTER OF ENVIRONMENTAL (IMPACT ASSESMENT AND AUDIT) REGULATIONS, 2003**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT (2012)**

**AND IN THE MATTER OF THE ACCESS TO INFORMATION ACT (2016)**

**IN THE MATTER OF PUBLIC PARTICIPATION**

**AND**

**IN THE MATTER OF OBJECTION TO CHANGE OF USER AND COMMERCIAL DEVELOPMENT**

**OF LAND ON RESIDENTIAL PLOT NAIROBI /BLOCK 110/172 THOME ESTATE**

**BETWEEN**

**ERASTUS RIUNGU MUTIGA.....1<sup>ST</sup> PETITIONER**

**MWENDA NICHOLAS M'TWARUCHIU.....2<sup>ND</sup> PETITIONER**

AND

NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT

MIDAX INVESTMENTS LTD.....2<sup>ND</sup> RESPONDENT

KENYA URBAN ROADS AUTHORITY.....3<sup>RD</sup> RESPONDENT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....INTERESTED PARTY

### JUDGMENT

1. This is a petition dated 18<sup>th</sup> June 2019 and amended on 25<sup>th</sup> October 2019. The petitioners state that they are members of Mukuyu Court Residents Association where the 1<sup>st</sup> petitioner owns plot **L.R No. Nairobi/Block 110/170**, while 2<sup>nd</sup> plot **L.R.NO. Nairobi/Block 110/172** located within the Mukuyu Court in Thome area, a residential estate abutting to the Nairobi-Northern by pass corridor.

2. They state further that their plots are immediate and adjacent to the 2<sup>nd</sup> Respondent's plot **L.R.NO Nairobi/ Block 110/172** which is referred to as ("the suit property") and they bring this petition on their own behalf being aggrieved by the 2<sup>nd</sup> Respondents' change of user of the suit property from residential to commercial use.

3. They also state that the 1<sup>st</sup> Respondent, 3<sup>rd</sup> Respondent and the Interested Party violated statutory and constitutional provisions and rights of the Petitioners and other residents of Mukuyu Court in Thome area by issuing the 2<sup>nd</sup> Respondent with approvals and licences to put up a petrol station on the suit property.

4. They seek for the following reliefs:

*a) A declaration that the first Respondents' action of granting approval to the 2<sup>nd</sup> Respondents' application for change of use was unlawful, unreasonable, procedurally unfair and therefore was a violation of article 47 of the constitution of Kenya.*

*b) A declaration that the 1<sup>st</sup> Respondents' decision to intentionally misrepresent facts about the status of the 2<sup>nd</sup> Respondents application for change of use was unlawful, unreasonable, procedurally unfair and was therefore a violation of Article 47 of the constitution of Kenya.*

*c) A declaration on the 1<sup>st</sup> Respondents' decision to intentionally misrepresentation of facts about the status of the 2<sup>nd</sup> Respondents' application change of use was unlawful, unreasonable, and procedurally unfair and was therefore a violation of Section 4(1) of the Fair Administrative Action Act, 2015.*

*d) A declaration that the 1<sup>st</sup> Respondent's intentional action to issue approval for the 2<sup>nd</sup> Respondent's application to change of use without complying with the attendant constitutional and legal requirements was a violation of its obligation to observe National values and principles of good governance in line with Article 10 of the constitution.*

*e) An order of certiorari removing into this Honourable court for purposes of quashing all the administrative actions of the 1<sup>st</sup> Respondent involving the grant of approval for the 2<sup>nd</sup> Respondent's application for change of use from residential to petrol station due to their unconstitutionality and illegalities.*

*f) A permanent injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether through their servants, agents, employees or any other person acting for or through them, whether directly or indirectly to immediately and unconditionally cease all the activities and processes relating to ongoing development and or operations of a petrol station on plot numbers 110/171 and 110/172 situated in Thome Estate on the Northern by pass owing to its unconstitutionality and illegality.*

*g) An injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to demolish all commercial developments on plot number 110/171 and 110/172 situate in Thome Estate on the Northern by pass as the same were done illegally in an area zoned for low density residential dwelling with the necessary change of use approval being obtained unprocedurally, illegally and unconstitutionally.*

*h) An order of mandamus directing the 1<sup>st</sup> Respondents' to appropriately perform its statutory duties involving a violation of the 2<sup>nd</sup> Respondents application for change of use in strict compliance with both constitutional and statutory terms.*

5. Consequently, they seek an order that judgment be entered for the petitioners as follows:-

*i. General damages against the Respondents for losses and inconveniences suffered by the Petitioners owing to the unconstitutional and illegal actions of the Respondents' both jointly and severally, for the 1<sup>st</sup> Respondents' approval of the 2<sup>nd</sup> Respondents' application for change of use of their land.*

*ii. Costs consequent upon this petition be borne by the Respondents, in any event on indemnity basis.*

*iii. Interests on (i) and (ii) above as per the court rates.*

*iv. The Honourable court do make any such other or further orders as may deem fair, just and expedient in the circumstances in enforcing violation of fundamental rights of the petitioner.*

6. The petition is supported by the joint affidavit of Professor Erustus Riungu Mutiga and Mr. Nicholas M'twaruchiu Mwendwa, sworn on 18<sup>th</sup> June 2019. They deponed that they are residents of Mukuyu Court and members of Mukuyu Residents Association, a welfare association formed by residents of Mukuyu Court in Thome estate. They deponed further that Thome estate is a residential area subject to controlled development and currently zoned as a low density single dwelling area.

7. They annexed a copy of a guide of Nairobi City County Development Ordinances and Zones and deponed that in 2012, the then owner of the suit plot sought a change of user of the said plot from residential to a church and training school but the residents of Mukuyu Court in Thome were opposed to it since the area was unsuitable for construction of a social/public utility being that it is zoned as low density single dwelling area and as a consequence of the objection, the defunct City Council of Nairobi wrote to the proprietor vide the letter dated 11<sup>th</sup> September 2012, advising them that the proposal would contravene defunct City Council of Nairobi development policy as the area was zoned for low density residential development. They annexed the said letter.

8. They deponed that the suit plot changed hands to the 2<sup>nd</sup> Respondent who vide the Standard newspaper advertisement of 4<sup>th</sup> July 2015 sought change of use of the suit plot to a petrol station but no notice was placed on the property itself to notify the public of the intended change as required by law.

9. They also deponed that that vide the letter dated 7<sup>th</sup> July 2015, Mukuyu Court residents raised objections to the proposal citing numerous grounds including the fact that the area was zoned as a low density single dwelling area, pollution concerns, lack of sewerage systems, among others. They deponed further that vide the letter dated 19<sup>th</sup> August 2015, the first Respondent wrote to the proprietor of the suit property informing him of the objections to the proposed change of use by Mukuyu Residents Association and informing him that his application would not be processed further until the issues raised by the residents had been addressed satisfactorily.

10. They deponed that in December 2016, the 2<sup>nd</sup> Respondent put up a perimeter wall of between 6-10 meters against an approval of 2.7 meters granted by the 1<sup>st</sup> Respondent and that aware of the danger it posed, they reported the hazard to the 1<sup>st</sup> Respondent who in turn served the 2<sup>nd</sup> Respondent with an Enforcement Notice dated 31<sup>st</sup> January 2017 to demolish the wall and stop further construction and the 2<sup>nd</sup> Respondent demolished the wall.

11. They also deponed that in September 2017, they noticed that the 2<sup>nd</sup> Respondent had put up an obscured site notice on the suite property seeking approval of change of use from residential to commercial use and they raised an objection through the letter dated 6<sup>th</sup> November 2012 addressed to the 1<sup>st</sup> Respondent and the letter dated 8<sup>th</sup> November 2017, addressed to the Interested Party but the said letters were never responded to.

12. They deponed that they were aware that vide the letter dated 22/11/2017, the 3<sup>rd</sup> Respondent wrote to the Chief Planning Officer, urban planning of Nairobi City County objecting to the proposed change of use and the 3<sup>rd</sup> Respondent advised that before such an approval was considered, a Traffic Impact Assessment (TIA) needed to be done and approved by the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent further contended that the suit plot had been planned to have access from the back and direct access from the highway was not tenable.

13. They also deponed that the 2<sup>nd</sup> Respondent did not seek the views of Mukuyu court residents as the immediate neighbours of the suit property who are the key stake holders on the proposed change of user. However, on 5<sup>th</sup> June 2019, they noticed the 2<sup>nd</sup> Respondent had commenced construction on the suit plot together with the adjacent plot **Nairobi/Block 110/171** and construction works for creation of an access road into the site began. They deponed further that they learnt that the 2<sup>nd</sup> Respondent had obtained approval for change of user and approval of development plans from the 1<sup>st</sup> Respondent, an Environmental Impact Assessment license from the Interested Party and approval from the 3<sup>rd</sup> Respondent for creation of an access road.

14. They deponed that vide the letter dated 6<sup>th</sup> June 2019, their Advocates wrote to the 1<sup>st</sup> Respondent, 3<sup>rd</sup> Respondent and the Interested Party to inquire whether the approval had been granted but the 1<sup>st</sup> Respondent made misrepresentation of facts by giving them assurances as late as February 2019 that approval for change of user to the 2<sup>nd</sup> Respondent would only be considered if the 2<sup>nd</sup> Respondent had conducted adequate consultations and addressed all the issues which they had raised. However, unknown to the Petitioners, the 1<sup>st</sup> Respondent had already issued approval for change of user to the 2<sup>nd</sup> Respondent. They annexed all the letters they referred to.

15. They deponed that the 1<sup>st</sup> Respondent acted illegally, irrationally and unprocedurally when it purported to approve building plans of a petrol station on the suit plot when it had full knowledge that the area is zoned for low density residential dwellings, the residents had opposed change of user and in complete disregard of express advice of the 3<sup>rd</sup> Respondent that the change of user was not tenable as it would interfere with traffic flow management.

16. They also deponed that the Interested Party acted illegally, irrationally and unprocedurally when it purported to issue an Environmental Impact Assessment (EIA) licence to the 2<sup>nd</sup> Respondent despite objections raised by the residents, the fact that no public participation had taken place in the conduct of the Environmental Impact Assessment and in disregard of the grievous environmental health hazard concerns raised by the residents.

17. They deponed that the 3<sup>rd</sup> Respondent abdicated its statutory mandate of controlling urban road reserves and access to roadside development, when it purported to approve an application for access to the 2<sup>nd</sup> Respondent's plot in disregard of its own earlier stated position that the suit plot was planned for access from the back and not directly from the highway. That it also abdicated its statutory mandate of implementing road policies in relation to urban roads by failing to follow through its advise to the 1<sup>st</sup> Respondent's urban planning department that the Northern by pass is a restricted access road which is to be dualled in due course and that allowing direct access along the above road reserve, the same would potentially interrupt traffic flow.

#### **The 1<sup>st</sup> Respondents Response**

18. The 1<sup>st</sup> Respondent filed a notice of appointment of advocates dated 26<sup>th</sup> June 2019 through M/S Moronge & Company Advocates but it did not file a response to the petition.

#### **The 2<sup>nd</sup> Respondent's Response**

19. The 2<sup>nd</sup> Respondent filed a response vide the replying affidavit of George Muhoro Wanderi, the 2<sup>nd</sup> Respondent's managing director, sworn on 23<sup>rd</sup> August 2019. He deponed that the 2<sup>nd</sup> Respondent is the registered proprietor of the suit plot located along the Northern Bypass and that it placed a notice of change of user in the daily Newspapers and also simultaneously placed a notice board on the land and that it is in the process of constructing a petrol station on the said land.

20. He deponed further that the 2<sup>nd</sup> Respondent also obtained the following approvals and licenses which copies he annexed;

- i. Nema Licence No.NEMA/EIA/PSL/7454 dated 27<sup>th</sup> February 2019.
- ii. Hoarding/Scaffolding license No.4946 dated 4<sup>th</sup> April 2019 from the Nairobi City County.
- iii. Approval Ref: KURA/URD/CONS/1/19 dated 29<sup>th</sup> November 2019 from Kenya Urban Roads Authority.
- iv. Approval for building plans Ref:CPD/DC/L.R NO.NBI /BLOCK /110 /172 /5K DATED 8<sup>th</sup> May 2018.
- v. Certificate of compliance Ref No.53127915710051 dated 29<sup>th</sup> March 2019 from the National Construction Authority(NCA).
- vi. Permit No.ERC/PET/80 dated 21<sup>st</sup> May 2019 from the Energy Regulatory Authority.
- vii. Bundle of photographs of the development on the suit land.

21. He also deponed that the 2<sup>nd</sup> Respondent is not familiar with the letters dated 19<sup>th</sup> August 2015 and 11<sup>th</sup> September 2012 and all other correspondences to various authorities as the letters were not copied to it.

22. He deponed further that the Petitioners do not represent the views of Mukuyu Court house owners as they filed the suit in their individual capacity and for personal vendetta since the 2<sup>nd</sup> Petitioner had tried to blackmail the 2<sup>nd</sup> Respondent into buying the adjacent land Title No. Nairobi/Block 110/171 owned by Spic & Span cleaning services limited where the 2<sup>nd</sup> Petitioner is a director and shareholder but the 2<sup>nd</sup> Respondent declined. He annexed letters of offer to buy the suit land and a CR 12 form of the said company.

23. He deponed that since human population has increased, the road network has also changed prompting change of land use dynamics and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and other government agencies have the capacity to assess and determine the suitability of any change of land use and development since the Petitioners have no expertise on such matters. He deponed further that in the neighboring Garden Estate, Thindigua, Runda and most petrol stations around the area were established after change of user of the respective land.

24. The petition was also opposed vide the supplementary affidavit of John Ndungu Kuria sworn on 26<sup>th</sup> March 2019. He deponed that he is the owner of L.R. No. Nairobi/Block 110/173 neighboring the suit plot. He deponed further that in 2018, most occupants of Mukuyu area were consulted by the Interested Party on the proposal for construction of a petrol service station on the suit land, and a notice of change of user was placed both in the newspaper as an advertisement and a notice board was also placed on the land but only the Petitioners objected to the proposal. He added that seven (7) of the residents filled questionnaires on the proposal. He annexed the letter dated 9<sup>th</sup> January 2019 addressed to Nairobi County Director of Environment confirming his support for the proposed construction of a petrol station on the suit land and the said 7 questionnaires.

25. He deponed further that most parcels touching the Northern Bypass changed to commercial use and that he is aware that there are other commercial developments along Northern Bypass including Gulf petrol station right opposite the suit property and Eden Bliss Hotel opposite the 2<sup>nd</sup> Petitioner's parcel.

26. The 2<sup>nd</sup> Petitioner swore a supplementary affidavit on 10<sup>th</sup> October 2019 in response to the 2<sup>nd</sup> Respondent's replying affidavit and supplementary affidavit. He reiterated the averments in support of the petition and deponed that the Petitioners have *locus standi* to institute the petition as residents of Mukuyu Court and individuals directly affected by the acts or omissions of the Respondents. He denied owning the property known as Nairobi Block 110/171 and deponed that he could not have blackmailed the 2<sup>nd</sup> Respondent to buy property he has no claim over.

27. In response to the averment that there are other petrol stations around the suit property, he deponed that change of land use is a legal process and cannot be effected/assumed from collateral dynamics or happenings in a surrounding area. On the averment by John Ndungu Kuria, on behalf of the 2<sup>nd</sup> Respondent that the members of Mukuyu Court were consulted by the Interested Party, he deponed that it cannot be concluded that views of seven residents represent those of the other stakeholders. He also deponed that decisions of public bodies are subject to challenge by all persons aggrieved by the decisions of those public bodies.

### **3<sup>rd</sup> Respondent's Response**

28. The 3<sup>rd</sup> Respondent opposed the petition vide the Replying Affidavit of Eng. Joseph Kimanthi Kivanguli, an Assistant Director in the Road Asset and Corridor Management Directorate at the 3<sup>rd</sup> Respondent's, sworn on 4<sup>th</sup> July 2019.

29. He deponed that the 2<sup>nd</sup> Respondent applied to the 1<sup>st</sup> Respondent seeking change of user of its property to enable it construct and carry out a business of a petrol station on its property which lies within a zoned residential area. The 1<sup>st</sup> Respondent then wrote to the 3<sup>rd</sup> Respondent seeking its views thereon as the property in question abuts a road under the jurisdiction of the 3<sup>rd</sup> Respondent.

30. He further deponed that the 3<sup>rd</sup> Respondent responded twice objecting against the request for change of user on grounds that a Traffic Impact Assessment and Environmental and social impact studies had not been undertaken. The application for change of user was eventually granted and the 2<sup>nd</sup> Respondent then formally moved the 3<sup>rd</sup> Respondent seeking approval to construct an access on its property from the adjoining Northern bypass which was made on 19<sup>th</sup> November 2018. The same which was accompanied by copies of the certificate of change of user, the Environmental Impact Licence and building approvals from National Construction Authority and the 3<sup>rd</sup> Respondent issued the relevant approvals to the 2<sup>nd</sup> Respondent on 29<sup>th</sup> November 2018.

### **The Interested Party's Response**

31. The Interested Party filed the replying affidavit sworn on 12<sup>th</sup> August 2019 through its Compliance and Enforcement Officer, Gideon Rotich. He deponed that the Interested Party received an environmental Impact Assessment project report on 11<sup>th</sup> January 2019 from the 2<sup>nd</sup> Respondent for purposes of consideration for issuance of an Environmental Impact Assessment license and the Interested Party issued an acknowledgement letter dated 11<sup>th</sup> January 2019. He annexed the said letter. He deponed further that the EIA project met the statutory requirement of public participation as it contained questionnaires filled in by persons likely to be affected by the project.

32. He deponed that vide a letter dated 15<sup>th</sup> January 2019, the Interested party sought the views and comments of lead agencies regarding the project and having not received any responses from lead agencies within the timeline of 14 days, it conducted a site visit on the proposed project site and approved the project on condition that all other approvals would be obtained from other relevant agencies. He annexed a copy of the site visit report.

33. He also deponed that on 20<sup>th</sup> February 2019, it received a time barred response from Energy Regulatory Commission indicating that the proponent had not conducted baseline studies of soil and ground water or surface water as applicable and that the interested Party advised the 2<sup>nd</sup> Respondent to address the concerns raised by Energy Regulatory Commission vide the letter dated 20<sup>th</sup> February 2019 and in response, the 2<sup>nd</sup> Respondent addressed the letter dated 21<sup>st</sup> February 2019 to the 2<sup>nd</sup> Interested Party indicating that the project site had not been used on petroleum related activities and as such the Total Petroleum Hydrocarbons (TPH) levels were low and insignificant.

34. He deponed that the Interested Party issued the 2<sup>nd</sup> Respondent with an Environmental Impact assessment Licence on 27<sup>th</sup> February 2019 having been satisfied with the project report and proposed mitigation measures. He further deponed that the Interested Party also received a letter dated 27<sup>th</sup> February 2019 from Water Resources Management Authority with recommendations regarding the project but they were time barred as the EIA Licence had already been dispatched. He annexed a copy of the Licence and the letter dated 27<sup>th</sup> February 2019.

### **The Petitioner's Submissions**

35. They are dated 24<sup>th</sup> March 2020. They raise the following issues for determination;

*a) Whether or not the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violated the national values and principles of good governance, integrity, transparency, participation of the people and accountability as enunciated in Article 10(1) of the constitution of Kenya hence acted illegally and unconstitutionally.*

*b) Whether or not the 1<sup>st</sup>, 3<sup>rd</sup> Respondent and Interested Party violated the Petitioner's rights to a clean and healthy environment entrenched in Article 42,69(1)(a),(d),(f) of the Constitution of Kenya(2010).*

*c) Whether or not the 1<sup>st</sup> and 3<sup>rd</sup> Respondent violated the right of access to information held by the state guaranteed under Article 35 of the Constitution of Kenya.*

*d) Whether the 1<sup>st</sup> and 3<sup>rd</sup> Respondents violated the right to fair administrative Action guaranteed under Article 47 of the Constitution of Kenya (2010).*

36. On whether the 1<sup>st</sup> Respondent and the Interested Party violated the Petitioner's right to a clean and healthy environment, the Petitioners submitted that they objected to change of user of the suit plot from single dwelling residential to a commercial use specifically

a petrol station vide their letter dated 6<sup>th</sup> November 2019 in which they raised grounds that under Section 29 of the Physical Planning Act, Thome Estate is a low density dwelling area therefore change of user would fundamentally alter the physical development of the area. That before undertaking the proposed project, a proper impact assessment study ought to have been undertaken. Specifically the Petitioners feared that such an installation as a petrol station would pose a serious health hazard as it would expose them to increased air, noise and dust pollution. They submitted further that they were also fearful that the inevitable discharge and spillage of fuels and lubricants coupled with surface runoff of water from the carwash bay would find their way to their compounds through slippage and overflow as there is no proper drainage system in the area.

37. On whether the 1<sup>st</sup> and 3<sup>rd</sup> Respondents violated the right of access to information guaranteed under Article 35, they submitted that the Respondents' refusal and or failure to respond to the Petitioner's queries raised through its letter dated 6<sup>th</sup> June 2019 and the letter dated 7<sup>th</sup> June 2019 violated their right to access to information guaranteed under Article 35 of the Constitution and the Access to information Act, (2016). They relied on the case of **Katiba Institute V. President's Delivery Unit & 3 Others [2017]Eklr.**

38. On whether the 1<sup>st</sup> and 3<sup>rd</sup> Respondents violated the Petitioner's right to fair administrative action guaranteed under Article 47 of the Constitution, they submitted that the 1<sup>st</sup> Respondent granted approval for change of user to the 2<sup>nd</sup> Respondent to convert a residential property to a commercial use, and consequently the authority to construct a petrol station, with full knowledge that such developments shall invariably adversely affect the residents of the area among them the petitioners without bothering to invite the public to give their views on the impact of such approval as required by law.

39. They added that there is no indication whatsoever that the Petitioner's objections were given any consideration in approval of the change of user instead, the 1<sup>st</sup> Respondent kept the Petitioner "busy" through misrepresentation that the 2<sup>nd</sup> Respondent's application for change of user had not been received while in other instances they informed them that whereas an application had been received, no decision had been made while in reality the 1<sup>st</sup> Respondent was frantic in the background preparing approvals and issuing them to the 2<sup>nd</sup> Respondent.

40. They submitted further that the conduct of the 1<sup>st</sup> Respondent annihilated its obligations envisioned in Article 47 of the Constitution and in Section 4(3) of the Fair Administrative Actions Act. They relied on the case of **Muslims for Human Rights (MUHURI) AND Another V Inspector –General of Police and 5 others [2015] eKLR** cited in **Gregory Kitonga Wambua & 2 Others V. County Government of Kiambu(2019) eKLR.**

#### **The 2<sup>nd</sup> Respondent's Submissions**

41. The 2<sup>nd</sup> Respondent raised the following issues for determination by this Honourable Court;

*a) Did the petitioners exhaust all the relevant dispute resolution mechanisms before approaching this court, can this Honorable Court hear the matter before the petitioner has exhausted all the relevant legal mechanism?*

*b) Whether the 1st, 2nd and 3rd Respondents violated the national values and principles of governance, integrity, transparency, participation of the people and accountability as enunciated in article 10 (1) of the Constitution of Kenya 2010 hence acted illegally and unconstitutionally.*

*c) Whether the Petitioners' right to a healthy environment was violated.*

*d) Whether the Petitioners should be granted the orders sought in the Amended Petition dated 25th October 2019.*

*e) Who should bear the costs of this suit?*

42. The 2<sup>nd</sup> Respondent submitted that since the suit is premised on the decision by the 1<sup>st</sup> Respondent to grant approval to the 2<sup>nd</sup> Respondent to construct a petrol station in an alleged contravention of the provisions of the Physical Planning Act, the Petitioners commenced this suit without exhausting the relevant statutory dispute resolution mechanisms.

43. It submitted further that the physical Planning Act, establishes a mechanism for resolving the disputes raised by the Petitioners. Under Section 7 of the Act, the Physical Planning Liaison Committee is established and in accordance to Section 13, a person aggrieved by a decision concerning any development plan has a right to appeal within sixty (60) days to the respective liaison committee.

44. It submitted that the Petition is premature as the same has been brought to court without preferring an appeal of the decision of the concerned Director in writing to the Liaison committee contrary to Section 13(1) of the Physical Planning Act. It also submitted that the Petition also offends and contravenes the provisions of section 129 of the Environmental Management and Co-ordination Act, No. 8 of 1999 which establishes the National Environment Tribunal (NET) under section 125 of the Act. It relied on **Runda Gardens Association Vs NEMA & Anor ELC Case No. 76 of 2020** and the case of **Runda Gardens Association Vs NEMA & Anor ELC Case No. 76 of 2020.**

45. On Whether the 1st, 2nd and 3rd Respondents violated the national values and principles of governance, integrity, transparency, participation of the people and accountability as enunciated in article 10 (1) of the Constitution of Kenya, 2010 hence acted illegally and unconstitutionally, the 2<sup>nd</sup> Respondent submitted that it followed the prescriptions of the law and observed the principles of good governance, integrity, transparency, participation of the people and accountability as enshrined in the Constitution and met the threshold in **John Kabukuru Kibicho & another v County Government of Nakuru & 2 others [2016] eKLR.**

46. On whether the Petitioner's right to a clean and healthy environment was infringed, It submitted that the Petitioners made assumptions in the grounds forwarded to the 1st Respondent for instance assuming that the erection of a Petrol Station would change the zoning

particulars from low density to commercial but three and a half years after the change of user approval was granted, the Petitioners have not demonstrated whether the zoning requirements changed and the area is considered a commercial zone.

47. It submitted further that the petitioners also anticipated run off water, oil spillage, air, noise and dust pollution that shall be borne as a consequence of construction of the petrol station but they have not demonstrated the pollution allegations. It also submitted that no Environmental Impact Assessment reports have been filed to support existence of pollution.

48. It submitted that the Petitioners failed to meet the standard of proof in constitutional petitions as set in **Mumo Matemu v Trusted Society of Human Rights Alliance & and 5 others [2013] eKLR** and that they also failed to prove their allegations thus they did not comply with the provisions under section 107(1) of the Evidence Act.

49. On whether the Petitioners should be granted orders sought in the Amended Petition, it submitted that the Court may face a situation where it lacks jurisdiction to grant orders touching on the myriad of violations of rights under the specified Articles of the Constitution captured in the Petition like issues of violation of right to access to information, violations of fair administrative action among others, since they fall outside Articles 42, 69 & 70 of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Court Act as they issues are preserved for the High Court. It relied on **Republic vs Karisa Chengo & 2 Others [2017] eKLR** where the Supreme Court held that jurisdiction of Environment and Land Court is limited to the matters provided for in the statute regulating it. It prayed that the petition be disallowed with costs to the Respondents.

50. The 1<sup>st</sup> Respondent, 3<sup>rd</sup> Respondent and the Interested Party failed to file submissions.

### **Analysis and Determination**

51. I have considered the amended petition, the affidavits in support and the annexures. I have also considered the affidavits in response and the annexures, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

*(i) Whether this court has jurisdiction to hear and determine the issues raised in this Petition.*

*(ii) Whether the Petitioner's rights have been infringed by the actions of the 1<sup>st</sup>-3<sup>rd</sup> Respondents and the Interested Party.*

*(iii) Are the Petitioners entitled to the reliefs sought?*

52. It is not in dispute that the 1<sup>st</sup> Respondent granted an approval to the 2<sup>nd</sup> Respondent to construct a petrol station. The Petitioner's claim that this was in contravention of the provisions of the Physical Planning Act. Under the Physical Planning Act, there is an elaborate dispute resolution mechanism that is set out under Section 7 of the Act. Under Section 13 of the Act, a person aggrieved by a decision concerning any development has a right to appeal to the respective liaison committees.

53. The Petitioners were aware of the intention to set up a petrol station from way back in 2015. There are various correspondences between the petitioners and the relevant agencies.

They have not exhibited and/or adduced any evidence to show that they went through the appeal process under the Physical Planning Act.

54. Similarly, Section 125 of the Environmental Management and Coordination Act establishes the (National Environment Tribunal. Under Section 129, an aggrieved party has the right to appeal to the National Environment Tribunal against any decision of the (National Environmental Management Authority) Interested Party. They have not adduced any evidence to show that they approached the National Environment Tribunal.

55. I find that this Petition is premature as it was brought without exhausting the dispute resolution mechanism under the Physical Planning Act and Environmental Management and Coordination Act. I find that this court lacks original jurisdiction to deal with the issues raised in this Petition.

56. It is the Petitioner's case that the Respondents'/Interested party's decisions and/or actions are in violation of their constitutional rights. That they are in violation of Article 10, 42, 69, 37 of the Constitution.

57. **Article 10** of the Constitution provides that:-

*(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*

*(a) applies or interprets this Constitution;*

*(b) enacts, applies or interprets any law; or*

*(c) makes or implements public policy decisions.*

*(2) The national values and principles of governance include*

*(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

*(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*

*(c) good governance, integrity, transparency and accountability; and*

*(d) sustainable development”.*

58. The question of public participation and the circumstances in which it will be deemed to be sufficient has been the subject of various judicial determinations. In the case of **Nairobi Metropolitan PSV Sacco Union Ltd & 25 Others vs County Government of Nairobi & 3 Others**; [2013] eKLR the court observed as follows:-

*“....It does not matter how the public participation was effected. What is needed in my view is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health vs New Click South Africa (PRY) Ltd (Supra) where he expressed himself as follows:-*

*“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite valuation. What matters is that at the end of the day reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”.*

59. I am guided by the above decision and I am of the view that public participation was conducted before the Interested Party approved the Environmental Impact Assessment Report. John Ndirangu Kuria in his affidavit sworn on the 26<sup>th</sup> March 2019 deponed that most residents of Mukuyu Court were consulted by the Interested Party on the proposal for construction of a petrol station in the area. He stated that seven residents filled questionnaires. He annexed a letter dated 9<sup>th</sup> January 2019 to the Nairobi City County –Director of Environment confirming his support for the proposed construction of a petrol station. He also forwarded the seven filled questionnaires. These averments were not controverted by the petitioners in any way.

I find that sufficient public participation was conducted before the Environmental Impact Assessment Licences was issued.

60. I also find that there was no violation of Article 47 of the Constitution as a notice of change of user was placed both on the Daily Newspapers and on a notice board placed on the land. The petitioners are informed people who know where to take their objections. As stated earlier the petitioners were aware of the proposed construction from way back in 2015.

61. As to whether there were violations of Articles 42 and 69 of the Constitution, I am of the view that the petitioners squandered the opportunity of proving the violations when they failed to go through the dispute resolution mechanism set out in Section 129 of the Environmental Management and Coordination Act. The National Environment Tribunal is better equipped to deal with all these issues relating to effect of the said petrol station on the environment. The National Environment Tribunal would have called in experts to deal with such issues.

In the case of **Kibos Distillers & 4 Others vs Benson Ambuti Atega & 3 Others** [2020] eKLR; the Court of Appeal held:-

*“....in this matter the key dispute in the Petition before the trial court was whether the three Appellants were polluting the environment and whether the three Appellants’ EIA Licences were lawfully processed. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal or NECC”.*

62. I have considered the Petition herein and I find it neither discloses any constitutional questions for determination by this court nor does it meet the principles on pleadings in constitutional petitions as enunciated in **Anarita Karimi Njeru vs Republic** [1979] 1KLR 154 and augmented in **Mumo Matemu vs Trusted Society of Human Rights Alliance** [2013] eKLR.

63. I also find that they failed to prove the allegations to the required standard under Section 107 (1) of the Evidence Act.

64. In conclusion, I find no merit in this Petition and the same is dismissed with costs to the Respondents/Interested Party.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 21<sup>ST</sup> DAY OF OCTOBER 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Odhiambo for the Petitioner

Mr. Obed for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

No appearance for the Interested Party

Steve - Court Assistant