



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO 40 OF 2018**

**PROFESSOR ALBERT MUMMA *suing as the Chairman***

**KAREN LANGATA DISTRICT ASSOCIATION .....PETITIONER**

**=VERSUS=**

**COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT**

**JUDGEMENT**

1. This is a petition dated 21st June 2018. The Petitioner states that it is duly recognized by the Respondent as a neighborhood /residents association vide a recognition agreement signed on 3<sup>rd</sup> March 2017 which grants rights and imposes obligations on the Respondent and the Petitioner and which recognition is pursuant to section 5 of the Nairobi City County Community and Neighborhood Associations Engagement Act 2016. It is referred to as KLDA Zone herein.

2. It states further that the objective of the said recognition is to give statutory recognition to the initiative of the Petitioner in complementing service delivery by the Respondent particularly in controlling physical developments in the Petitioner's district, to enable structured cooperation and to give effect to public participation as required by Article 10 of the Constitution.

3. The Petitioner states that it is aggrieved by the Respondent's refusal and or/ neglect to put in place effective mechanism for informing/ sharing information with the Petitioner and seeking input from the petitioner regarding the Respondent's decisions on permitting a diverse range of development which adversely affect the local community and other decisions on physical planning, development control and environmental management.

4. The Petitioner prays for the following reliefs:

***a) A declaration that by failing to give effect to the Recognition Agreement entered into by the parties on 3<sup>rd</sup> March 2017, the Respondent is in breach of its constitutional and statutory duties and the Petitioner's legitimate expectations.***

***b) A prohibition to restrain the Respondent by itself, its officers and/or agents from approving physical developments or issuing development permissions or change of user in the Petitioner's zone for any development that requires such approvals or permission under the Physical Planning Act or other applicable law without giving the Petitioner all the information and documents regarding the development application and an opportunity to participate in the decision making by providing written and or oral comments as required by the applicable law and clause 2.4(a) of the Recognition Agreement.***

***c) A prohibition to restrain the Respondent by itself, its officers and/or agents from approving or issuing any development permission or change of user in the Petitioner's zone without giving written reasons which show how the decision has taken into account the views submitted by the Petitioner and, where it has rejected the said views, the reasons for the rejection.***

***d) A mandamus to compel the Respondent in line with clause 2.3 of the Recognition Agreement to appoint its representatives to the Physical Planning Liaison Committee, henceforth provide information on planning permission applications in the Petitioner's zone to the Committee, give the Committee an opportunity to provide comments, and give written reasons showing how the committee's feedback has been taken into account in respect to each pending permission decision.***

***e) A prohibition to restrain the Respondent from approving or issuing development permissions or change of user for any development that does not comply with the Local Physical Development Plan.No.42/25/2005/1-Approved plan No.292 published in the Kenya Gazette No.6137 of 4/8/2006 or any extension or replacement thereof and the requirements of environmental laws and the physical planning laws and regulations.***

***f) Any other relief as the Court may deem fit.***

5. The petition was supported by the supporting affidavit sworn on 21st June 2018 by Prof Albert Mumma, the Chairman of Karen and Lang'ata District Association. He deponed that the Petitioner being a residents' association operating under the provisions of the Societies Act, chapter 108 Laws of Kenya signed a Recognition agreement with the Respondent on 3<sup>rd</sup> March 2017. Under Section 6 of the Nairobi Community and Neighborhood Association Agreement Act, 2016 which empowers the Petitioner to compliment the Respondent in its mandate of service delivery and physical development control amongst other matters of mutual interest under the Act. He annexed a copy of the said Act, a copy of the Recognition agreement and a copy of the Petitioners' certificate of registration.

6. He further deponed that in line with the Physical Planning Act and in consultation with the Petitioner, the Respondent formulated the Local Physical Development plan NO. 42/24/2005/1-Approved plan No. 292 published vide gaze notice NO.6137 of 4/8/2006 and which covers the whole area delimited as zone 12 by the then City Council of Nairobi and registered as Karen/ Lang'ata with an objective to provide for orderly, coordinated, harmonious and progressive development to promote health, safety, order, amenity, convenience and general welfare of all inhabitants as well as efficiency and economy. He annexed a copy of the said plan which is referred to as the local plan herein.

7. He deponed that in preparing the local Plan an account was taken of the realities on the ground being among others risks of depletion of the ground water aquifer arising from overdependence of groundwater supply in the area, soil and contamination arising from waste water disposal to the ground due to lack of piped sewage system, and degradation of the ecosystem and indigenous forest and vegetation cover.

8. He also deponed that it was envisioned that the local plan would be a dynamic development which would be reviewed periodically to align it to the regional physical development plan of Nairobi but the Respondent has neglected and failed to finalize the Umbrella Nairobi Integrated Physical Development master plan which makes it imperative that the existing local plan be strictly adhered to and implemented to avoid creating a lacuna.

9. He deponed that the Respondent has refused and or neglected to put in place effective mechanism for informing/ sharing information with the Petitioner and seeking input from the petitioner regarding decisions of the Respondent on physical planning, development control and environmental management as provided for in the recognition agreement. He also deponed that the Respondent has violated the local physical plan, the recognition agreement and environmental management and coordination Act 1999(as amended in 2015) regulation4(2) of the Environmental Impact Assessment Audit/ Regulations 2003, by permitting a diverse range of development which adversely affect the local community.

10. He deponed that zone 1A Miotoni and 1B Ridge - Kerarapon, Zone 2 Mbagathi, Zone 3 Bogoni, Zone 4 Karen plains-forest edge and Zone 5 Karen-Triangle are experiencing adverse environmental effects despite the petitioners' verbal and written objections against the decisions undertaken that adversely affect the environment in the stated zones. He particularized adverse effects on Zone 1A Miotoni and 1B Ridge-Kerarapon as follows;

- i. Development of informal horticulture along the Mbagathi and Kandis Rivers.
- ii. Informal trading activities.
- iii. Emergence of new multi-dwelling developments at odds with the general appearance of and character of the area.
- iv. Public water supply is inadequate in the Miotoni area and in the area adjacent to Kerarapon leading to a dense concentration of private boreholes particularly in the Miotoni area
- v. The new multi-dwelling development on Warai South Road and flats on Miotoni Lane are at odds with the general appearance and character of the area.
- vi. The uncontrolled developments along Ngong River are increasing insecurity and violent crime, pollution from noise, dust and increasing litter on the road reserves.

11. He deponed that Zone 2 Mbagathi is experiencing the following;

- i. The forest around Tree Lane is being threatened by creeping commercial institutional development.
- ii. There are sewerage ponds which are polluted and located near the source of the Mokoyeti River.
- iii. Commercial activity is growing rapidly around Karen shopping Centre resulting in congestion, lack of access and parking, dumping of refuse on open spaces, and rampant hawking.
- iv. Informal trading activities are developing rapidly along Ushiriki Road and Hardy shopping center.
- v. Public water supply is inadequate throughout the zone.
- vi. There is a high density of boreholes in the area.
- vii. The aquifer in the area is threatened by over-abstraction.

viii. High density residential development is occurring in areas off Bogani, Ndege and Mukoma Roads contrary to the Physical Development plan that the zone remains low density population area.

ix. Land is being subdivided below the legal minimum size.

x. The unlawful subdivisions are occurring in the riparian reserve posing a threat to the local biodiversity and ecosystems.

**12.** He deponed that the area around Zone 3 Bogani is experiencing;

i. Rapid subdivision below the current legal minimum of 0.4 hectares is occurring to the North of Bogani

ii. Pockets of high density, low cost rental units are developing through the zone particularly along the Bogani Road, mostly without planning approval.

iii. Consequently, the public water supply is generally inadequate.

iv. New subdivisions are not provided with water and access roads.

v. Abstraction from institutional boreholes is too heavy for the ecosystem.

vi. The rapid sub-division below the legal minimum of 0.4 hectares with no infrastructure to support it is increasing demand for even more boreholes and tanker services on the already poor roads

vii. There is a rapid residential development much of which does not have development approval and covering higher than the permitted area of the land.

viii. Rapid increase of high density rental housing for low and medium income workers and students.

ix. Unauthorized mixed land uses are increasing.

**13.** Zone 4 Karen Plains-Forest edge is said to be experiencing the following;

i. A polluted water course originating at Karen sewerage ponds, runs through the Zone from west to east is joining Mokoyeti River.

ii. The man-made dams and a few patches of palustrine wetland remaining are threatened by illegal sub-divisions and pollution.

iii. The Karen Plains Estate has grown rapidly in an adhoc manner.

iv. There are numerous new subdivisions some smaller than the legal minimum plot size.

v. Rapid residential development much of which does not have development approval and has a higher permitted plot coverage including in the riparian reserve along the Mokoyeti River.

vi. Consequently water supply is inadequate.

vii. Mokoyeti River is being polluted by sewage from illegal high density developments and is now being used for laundry and car washing.

viii. The increasing mixed development occurring in a haphazard and uncontrolled manner possess severe burden on already inadequate piped water and electricity services and prevents the introduction of adequate road network and public transport system.

ix. Severe threat to the natural resources in the area including the water quality in the Mokoyeti River, the Palustrine Wetlands and the edge of the Ngong Forest.

**14.** He deponed that Zone 5 Karen Triangle is experiencing:-

i. Rampant informal trading activities on Ngong Roads and at Karen Roundabout.

ii. The formal commercial development is of low quality construction. These include car sales rooms, furniture sale point, which are all below standard for a high quality residential neighborhood.

iii. Kiosks and hawkers stands are entirely uncontrolled and pose threat to health, security and traffic safety.

**15.** He deponed that the Petitioners raised objections such is the letter dated 6<sup>th</sup> January 2018 which he annexed and that the Petitioner also held high level physical meetings with officials of the Respondents and frequent interrelations to find an amicable solution to the problems

revealed but they have all come to nothing. He annexed a record of meetings held with the then Deputy Governor of the Respondent on 27<sup>th</sup> September 2017. He deponed further that the petitioner filed **NET 185/2016-KLDA V. Nema and Cyton Investments Ltd** and **NET/05/2018 KLDA V. Nema and Afrigo Developments Limited** at the National Environment Tribunal in a bid to stop developments which are out of character with the local plan.

16. He also deponed that the actions and omissions of the Respondent and refusal to live up to its promises and assurance to implement agreement entered into not only contravenes the Constitution and the Fair Administrative Actions Act but also defeats the petitioners legitimate expectations that a state organ will honor its legal obligations, commitments and agreements entered into with the petitioner.

17. The Petitioner also filed a further affidavit sworn on 3<sup>rd</sup> February 2020 by its chairman Prof. Albert Mumba. He deponed that the Respondent has refused /failed to put in place mechanisms to enable the Petitioner to have meaningful and effective input into the Respondent's decisions regarding physical planning and development control processes which affect the Petitioner's zone as provided in the recognition agreement. He further deponed that the Petitioner has consistently objected in writing to the Respondent against decisions that approve development applications and permits licenses without complying with the Local Physical Development plan and the recognition agreement. He annexed a bundle of written objections to the Respondent about the uncontrolled development within the KLDA Zone.

18. He also deponed that vide the letter dated 28<sup>th</sup> October 2010, the Respondent's Governor wrote to the petitioner acknowledging the mess that the Physical planning Department of Nairobi City County has created in the KLDA Zone and promised that any approval or license issued against the set legal framework shall be revoked and the property in question demolished. He annexed the said letter and deponed further that despite the verbal and written assurance given to the Petitioner, the Respondent has persisted in exercising its development control mandate in blatant contravention of the statutory requirements, the Local Physical Development plan and the Recognition agreement.

### **The Respondent's Response.**

19. The Respondent raised a preliminary objection and opposed the petition vide the grounds of opposition dated 4<sup>th</sup> June 2021. It relied on grounds;

20. That the petition is premature, anticipatory and wholly misconceived as Section 15 of the Nairobi City County Community and Neighborhood associations engagement Act, 2016 provides that any dispute arising from the implementation of the provisions of the said Act shall be referred to a mediation committee and that alleged breaches on the part of the Respondent are matters which tend to oust the statutory and constitutional mandate of the Respondent.

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

21. They are dated 24<sup>th</sup> June 2020. The petitioner raised the following issues for determination;

*a) Whether the Respondent has violated the Petitioner's legitimate expectation by failing to give effect to the Recognition Agreement entered into by the parties on 3<sup>rd</sup> March 2017.*

*b) Whether the Respondent has violated the Petitioner's right to public participation by approving developments within the KLDA Zone without the Petitioner's input.*

*c) Whether the Respondent has violated the Petitioner's right to clean and healthy environment by continuing to approve developments that have adversely affected the environment within the KLDA zone.*

*d) Whether the Respondent has violated its obligations in respect of the environment under article 169 of the constitution.*

*e) Whether the Respondent has violated the Petitioner's right to fair administrative action by disregarding the Petitioner's objections to the continued approval of unlawful developments within the KLDA zone.*

22. It was submitted that by creating and entering into the recognition agreement dated 3<sup>rd</sup> March 2017, the Respondent created a legitimate expectation that it would engage the Petitioner but its refusal to cooperate in putting in place mechanisms to enable the Petitioner to have meaningful and effective input into the decisions of the Respondent in regarding physical planning and developmental control processes which affect the Petitioner's zone is a violation of the Petitioner's legitimate expectation. Counsel for the Petitioner relied on **Keroche Industries Limited V. Kenya Revenue Authority & 5 Others Nairobi [2007] e KLR**.

23. He also submitted that the Respondent violated the Petitioner's right to public participation by refusing to give effect to the recognition agreement.

24. He submitted further that while the Petitioners have a right to participate in the Respondent's decision on approval of physical development within Karen Lang'ata Development Zone, the said right had been curtailed by the Respondent who failed to incorporate the Petitioner's views. He relied on **Metropolitan PSV Saccos Union Limited & 25 Others V. County of Nairobi Government & 3 others [2013] eKLR**.

25. Counsel for the Petitioner also submitted that the Respondent has violated the Petitioner's right to a clean and healthy environment in disregard of Article 42 of the Constitution by condoning/approving physical developments that violate the Petitioner's zone regulations.

26. It was also the Petitioner's submission that the failure/neglect or refusal of the Respondent to cooperate in putting in place mechanisms

to enable the Petitioner to have meaningful and effective input into the decisions of the Respondent on physical planning and developmental control processes within the Petitioner's zone as provided for in the Recognition Agreement violates the right of the Petitioner under Article 69(1) of the Constitution. This is because it hinders the management and conservation of the local environment. It also hinders the Petitioner's performance of its duty under Article 69(1) (d) to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources of the local area. Further, it hinders the ability of the Petitioner and the Respondent to, among other things, work to achieve a tree cover of 10% of the land area in in the Karen and Lang'ata areas as contemplated under Article 69(1) (b) of the Constitution.

27. It also submitted that it had consistently objected in writing to the Respondent on approval of physical developments that violate the local physical development plan and the Recognition Agreement but the Respondent violated its right to fair Administrative action under Article 47 of the Constitution and breached Section 4(3) of the Fair Administrative Action Act by failing to give reasons for allowing or approving the offending physical structures within the KLDA zone. It relied on **Onyango Oloo –vs- Attorney General [1986-1989] E.A 456** where the court stated that denial of a right to be heard renders any decision made null and void. It prayed that the petition be allowed with costs.

### **The Respondent's Submissions**

28. They are dated 4<sup>th</sup> June 2021. Counsel for the Respondent submitted that since the Petitioner is aggrieved by the alleged actions or non-actions of the Respondent in Relation to the Recognition Agreement dated 3<sup>rd</sup> March 2017, the correct and appropriate forum is a mediation committee established under Section 15 of the Nairobi City County Community and Neighborhood Associations Engagement Act, 2016 which provides that where a dispute has arisen in regard to the implementation of the provisions of the Act, and specifically regarding a Recognition Agreement, the aggrieved party shall first refer the dispute to the mediation committee & since the Petitioner had failed to exhaust the remedies provided by the Act, this court's jurisdiction was invoked prematurely thus is not the appropriate forum to hear and determine the matter. He relied on decision in **Kibos Distillers Ltd & 4 Others V. Benson Ambuti Adega & 3 Others (2020) eKLR**.

29. He submitted further that Section 15 of the Nairobi City County Community and Neighborhood Associations engagement Act, 2016 has the same net effect as "Scott V. Avery" arbitration clauses, which do more than provide that disputes shall be referred to arbitration as they also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favorable award has been obtained.

30. He also submitted that the petition is premised on an alleged breach of contract therefore the Petitioners are merely seeking determination of contractual rights which can be achieved through a formal law suit and not a constitutional petition. He relied on **KAPI Ltd & Another V. Pyrethrum Board of Kenya [2013]e KLR AND JNN, (a minor) MNM, suing as next friend V. Naisula Holdings Limited t/a N School[2018]e KLR** where it was held that a constitutional petition is not an appropriate tool for determining contractual disputes. He added that the petition 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 V. Republic[1979]1KLR 154** and augmented in **Mumo Matemu V. Trusted Society of Human Rights Alliance [2013] eKLR**.

31. He submitted that whereas provisions of the Physical Planning Act Cap 286 Laws of Kenya, gives the Respondent the power to prohibit or control the use and development of land and buildings within its jurisdiction and also to consider and approve all applications for development and grant all development permissions, the petition seeks to oust the said constitutional and statutory mandate and it should be dismissed with costs.

### **The Petitioner's Further Submissions.**

32. They are dated 7<sup>th</sup> June 2021 and were a response to the Respondent's preliminary objection dated 25<sup>th</sup> January 2021 and addressed the issue whether Section 15 of the Nairobi City County Community and Neighborhood Associations engagement Act, 2016 ousts the jurisdiction of this court to hear and determine the petition. He submitted that Section 15 of the said Act does not oust the jurisdiction of this Honourable court as the wording of the section does not expressly oust the jurisdiction of the court. He relied on **Republic V. Principal Secretary Agriculture, Livestock and Fisheries & 3 Others Ex –Parte Douglas M. Barasa, Collins Wafula Makunja and Richard Wamalwa Makhino (2015) eKLR** cited with approval **East African Railways Corp V. Anthony Sefu [1973] EA 327** where it was held that no statute shall be so construed as to oust or restrict the jurisdiction of the superior Courts in the absence of clear and unambiguous language to that effect.

33. He also submitted that the Petitioner has expressly pleaded that it has exhausted the internal dispute resolution mechanism as provided under the Act. In the affidavit sworn on 21<sup>st</sup> June 2018 by Prof. Albert Mumma and the said averments were not controverted by the Respondent and even if they were challenged, then the preliminary objection would have failed since it would have been founded on disputed facts yet in **Mukhisa Biscuit Manufacturing Co.Ltd V. West End Distributors Ltd(1969) E.A 696**, it was held that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

34. He submitted further that it would be an infringement on the Petitioner's right to fair hearing guaranteed under Article 50(1) if the court were to decline jurisdiction pursuant to Section 15 of the Nairobi City County Community and Neighborhood Associations Engagement Act, 2016 since the petitioner had tried in vain to engage the Respondents on the issues raised in the petition in vain thus there is no effective remedy under the Act. He relied on the decision in **Republic V. Public Procurement Administrative Review Board & 2 others Ex –Parte Selex Sistemi Integrati [2008]Eklr**

### **Analysis and Determination**

35. I have considered the Petition, the affidavit in support and the annexures. I have also considered the grounds of opposition and the preliminary objection. I have also considered the written submission filed on behalf of the parties and the authorities cited. The issues for

determination are:-

- (i) Whether the Preliminary Objection dated 25<sup>th</sup> January 2021 is merited.*
- (ii) Whether the provisions of Section 15 of the Nairobi City county, Community and Neighbourhood Association Engagement Act, 2016 oust this court's jurisdiction to determine the petition.*
- (iii) Whether the Recognition Agreement signed on 3<sup>rd</sup> March 2017 imposes statutory and constitutional obligations on the Respondent.*
- (iv) Is the Petitioner entitled to the reliefs sought?*
- (v) Who should bear costs of this petition?*

36. The Preliminary Objection is dated 25<sup>th</sup> January 2021. The grounds are:-

- 1. That this honourable court is not the appropriate forum to hear this matter by dint of Section 15 of the Nairobi City County Community and Neighbourhood Association Engagement Act 2016.*
- 2. That the hounourable court lacks jurisdiction to handle the dispute the subject matter of this Petition.*

37. As to whether this is a preliminary objection. I am guided by the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** where it was held that:-

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact, has to be ascertained or if what is sought is exercise of judicial discretion”.*

*Lord J A proceeded to state thus:*

*“.....so far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.*

38. In paragraph 14 -17 of the Supporting Affidavit, the deponent states:-

*“14. The Petitioner has consistently objected in writing and verbally to the Respondent against decisions that approve development applications or issues permits and licences without complying with the aforesaid legal requirements and in contravention of the local physical development plan but the Respondent persists in exercising its development control mandate in blatant contravention of the Constitution, statutory requirement, the local physical development plan, the agreements entered into between the parties, the assurance given to the Petitioner in meetings with the Petitioner and the Petitioner's legitimate expectation.*

*15. That the Applicant has written letters pointing out the various breaches such as the letter of 6<sup>th</sup> January 2018 which the Petitioner wrote to the Respondent objecting to irregularly approved developments and requesting the Respondent to adhere to the provisions of the local physical development plan that recognized the KLDA Zone as fundamentally residential (annexed hereto and marked “KLDA 7” is a copy of the said letter addressed to the Respondent by the Petitioner).*

*16. That further the Petitioner tried repeatedly through meetings with high level officials of the Respondent and frequent interactions to find an amicable solution to the problems created by the Respondent's neglect and or refusal to give effect to the applicable laws and recognition agreement but the Respondent's promises and assurances have all come to nothing (Annexed hereto and marked “KLDA 8” is the Petitioner's record of one such high level meeting held with the then Deputy Governor).*

*17. That due to the Respondent's persistence in approving developments which contravene the laid down environmental and physical planning laws as well as the LPDP on more than one occasion the Respondent has been forced to file proceedings at the National Environment Tribunal in a bid to stop developments which are out of character with the LPDP. Examples of such proceedings include NET/185/2016 – KLDA v NEMA & Cytton Investments Ltd and NET/05/2018 – KLDA v NEMA & Afrigo Developments Limited.”*

I find that the above averments have not been controverted by the Respondent. It is the Respondent's position that the Petitioner has not engaged the Respondent. The Petitioner states otherwise. It is my view that the Preliminary Objection as framed does not amount to the Preliminary Objection as the facts are disputed.

39. **Section 15** of the Nairobi City County Community and Neighbourhood Association Engagement Act, 2016 provides as follows:-

***“Any dispute arising from the implementation of the provisions of this Act shall be referred to a mediation committee to be appointed by the governor in respect of that particular dispute and shall comprise:***

- a. A chairperson to be appointed by the governor who shall be a person knowledgeable in arbitration matters.***
- b. One person nominated by each association or federation of associations concerned in the matter and;***
- c. One person nominated by the professional association of a profession concerned with the issue in dispute.***
- d. Note more than two thirds of the members of the committee established under this section shall be of the same gender”.***

Clause 4:1 of the Recognition Agreement signed on 3<sup>rd</sup> March 2017 states:-

***“Any dispute arising between the parties regarding any aspect of this Agreement shall be settled amicably by discussion between the parties authorized officials”.***

40. It is the Petitioner’s submission that Section 15 of the Nairobi City County Community and Neighbourhood Association Engagement Act 2016 does not oust the jurisdiction of this court. It was the Respondent’s responsibility to set up the mediation committee. It was incumbent upon the Respondent to demonstrate that such a committee is in place. The averments by of Prof. Albert Mumma have not been controverted. He has deponed that the Petitioner has exhausted the internal dispute resolution mechanisms provided under the Act.

41. He further avers that the Petitioner has tried in vain to engage the Respondent in the issues raised in the Petition. In the case of **Republic vs Public Procurement Administrative Review Board & 2 Others Exparte Selex Sistemi Integrati [2008] eKLR** It was held as follows:-

***“The court guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the courts’ power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether or remedy or in order that his grievance may be remitted to some other tribunal.....it is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court”.***

For the foregoing reasons, I find no merit in the Preliminary Objection and the same is dismissed.

42. It therefore means that Section 15 of the Nairobi City County Community and Neighbourhood Association Engagement Act, 2016, does not expressly oust the jurisdiction of this court. **Section 13** of the Environment and Land Court Act provides that:-

***“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***

***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***

***(b) relating to compulsory acquisition of land;***

***(c) relating to land administration and management;***

***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***

***(e) any other dispute relating to environment and land.***

***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***

***(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.***

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

a) interim or permanent preservation orders including injunctions;

b) prerogative orders;

c) award of damages;

d) compensation;

e) specific performance;

f) restitution;

g) declaration; or

h) Costs”

43. I find that this court has jurisdiction to hear and determine the issues raised in this Petition.

44. Upon signing of the Recognition Agreement on 3<sup>rd</sup> March 2017, the Respondent was obligated to put in place mechanisms to enable the Petitioner to have meaningful and effective input into the decisions of the Respondent regarding physical planning and developmental control process which affect the Petitioner’s zone. The Respondent has failed to give the Petitioner this opportunity. In the case of **Keroche Industries Ltd vs Kenya Revenue Authority & 5 Others [2017] eKLR** where the court defined legitimate expectation as follows:-

*“...Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised”.*

I agree with the Petitioner’s submissions that the Respondent has violated the Petitioner’s legitimate expectation by failing to give effect to the Recognition Agreement entered into by parties on 3<sup>rd</sup> March 2017.

45. I have gone through the Petitioner and I find that the same meets the requirement set out in the case of **Anarita Karimi Njeru vs Republic [1979] 1KLR 154**.

46. It is the Petitioner’s case that it has a right to participate in the Respondent’s decision on approval of physical development within their zone as provided for under Article 10(2) of the Constitution.

I agree with their submissions that by failing to give effect to the Recognition Agreement, the Respondent has hindered the Petitioner’s right to participate in the Respondent’s decision and approval of the physical development permit within its zone. This would amount to a violation of Article 10 (2) of the Constitution.

47. As the residents of Karen and Langata District Association are entitled to a clean and healthy environment as provided under Article 42 of the Constitution. The Respondent’s disregard of the physical planning, legal framework has adversely affected the environment. I agree with the Petitioner’s submission that by failing to give effect to the Recognition Agreement, this has hindered the Petitioner’s members from effectively participating in the management and conservation of the environment as provided for under Article 69(1) of the Constitutional.

48. Article 47 of the Constitution provides that:-

*“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

*(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

- a) *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
- b) *promote efficient administration.”*

**Section 4(3) of the Fair Administrative Action Act**

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

- a)
- b) *prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard;*
- c) *notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- d) *a statement of reasons pursuant to section 6;*
- e) *notice of the right to legal representation, where applicable;*
- f) *notice of the right to cross-examine or where applicable; or*
- g) *information, materials and evidence to be relied upon in making the decision or taking the administrative action”*

Clause 2:1 of the Recognition Agreement required the Respondent to put in place the mechanisms to enable the Petitioner to give input of the decisions of the Respondent regarding physical planning and developmental control processes which affect the petitioner’s zone.

49. In conclusion, I find that the Respondent has breached its constitutional duties by failing to honour the Recognition Agreement by not taking the Petitioner’s input in decisions regarding physical developments within Karen and Langata District Association (KLDA) Zone.

50. I find merit in this Petition and grant the orders sought:-

- a) *A declaration is hereby issued that by failing to give effect to the Recognition Agreement entered into by the parties on 3<sup>rd</sup> March 2017, the Respondent is in breach of its constitutional and statutory duties and the Petitioner’s legitimate expectations.*
- b) *That a prohibition is hereby issued restraining the Respondent by itself, its officers and/or agents from approving physical developments or issuing development permissions or change of user in the Petitioner’s zone for any development that requires such approvals or permission under the Physical Planning Act or other applicable law without giving the Petitioner all the information and documents regarding the development application and an opportunity to participate in the decision making by providing written and or oral comments as required by the applicable law and clause 2.4(a) of the Recognition Agreement.*
- c) *That a prohibition is hereby issued restraining the Respondent by itself, its officers and/or agents from approving or issuing any development permission or change of user in the Petitioner’s zone without giving written reasons which show how the decision has taken into account the views submitted by the Petitioner and, where it has rejected the said views, the reasons for the rejection.*
- d) *That an order of mandamus is hereby issued to compel the Respondent in line with clause 2.3 of the Recognition Agreement to appoint its representatives to the Physical Planning Liaison Committee, henceforth provide information on planning permission applications in the Petitioner’s zone to the Committee, give the Committee an opportunity to provide comments, and give written reasons showing how the committee’s feedback has been taken into account in respect to each pating permission decision.*
- e) *That a prohibition is hereby issued restraining the Respondent from approving or issuing development permissions or change of user for any development that does not comply with the Local Physical Development Plan.No.42/25/2005/1-Approved plan No.292 published in the Kenya Gazette No.6137 of 4/8/2006 or any extension or replacement thereof and the requirements of environmental laws and the physical planning laws and regulations.*
- f) *Each party do bear own costs.*

It is so ordered.

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

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Ondego for the Petitioner

No appearance for the Respondent

Steve - Court Assistant