REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. E027 OF 2021

1. NABATKHANU KARIM H.P

2. SHRIKESH GHEEWALA

3. KAMLESH V. GOHIL

4. NAGIB POPAT

5. PIUSH PATEL

6. SHAMIT SHAH

7. NAWAZ GULAMHUSSEIN C .P

8. TRUSHA PATEL

9. PANKAJ PATEL

10. SHEMZIN SHUJA D

11. HAMIDA SHUJA D

12. SUSHMA SHAH

13.NIMISH SHAH……..…….....……PETITIONERS

VERSUS

1. HWAOCK IM

2. INTERNATIONAL CHRISTIAN KINDERGARTEN.…….…...RESPONDENTS

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY…….....…INTERESTED PARTY

RULING

What is before the court is the Petitioners' Notice of Motion application dated 22nd July, 2021, the Respondents' Notice of Motion application dated 13th August, 2021 and the Respondents' Notice of Preliminary Objection dated 25th August, 2021.

The Petitioners' application:

The Petitioners have sought the following orders;

1. Pending the hearing and determination of the Petition, a conservatory order of injunction does issue to prevent, stop, discontinue or restrain the Respondents and anyone claiming under them from establishing, operating, carrying on any school and such school related activities whether as International Christian Kindergarten School or otherwise including but not limited to construction of school learning facilities or school related user facilities on residential low density single family house No. 49 on L.R. No. 209/8349 in Paradise Valley Estate, Kyuna, Nairobi or any infrastructural changes such as opening more gates into Paradise Valley Estate or parking facilities for the above stated school establishment without prior compliance with public participation requirements under Part VI of the Environment Management and Coordination Act, 1999, Fair Administrative Actions Act, 2015 and the Constitution of Kenya.

2. That the accompanying Petition be certified urgent and heard on a priority basis.

3. That costs of the application be borne by the Respondents.

The application has been brought on several grounds set out on the face thereof and on the supporting affidavit of the 1st Petitioner, Nabatkhanu Karim Hassanali Padamshi sworn on 22nd July, 2021. The Petitioners' case against the Respondents can be summarised follows:

The Petitioners and the 1st Respondent are proprietors of low density residential houses in Paradise Valley Estate within Kyuna, Nairobi constructed on L.R Nos. 209/8349 to L.R. No. 209/8360 with the 1st Respondent's house being on L.R No 209/8349. Each of the houses is to be used as a single family unit in accordance with the subleases under which they are held, zoning regulations and the fact that there is no government sewer system in the area. Any deviation from the said use should be done with approvals from the Nairobi City County Government and the Interested Party, and with the participation of the Petitioners as stakeholders.

The Petitioners have contended that the 1st Respondent has breached the above user conditions by seeking to put up on the property where her house is situated namely, L.R No 209/8349 (hereinafter referred to as "the suit property") a school with about 80 pupils (excluding teachers and other members of staff). The 1st Respondent has also made infrastructural changes to the suit property to accommodate more toilets, parking and other facilities for the school without due regard to the terms of the subleases, zoning regulations and provisions of the Environment Management and Coordination Act, 1999 (EMCA) aforesaid. The Petitioners have contended further that the plans for the development being undertaken by the 1st Respondent if any, were acquired illegally /fraudulently without the participation of the Petitioners who would be affected by the development.

The Petitioners have averred that there was no publication of the Change of User application by the 1st Respondent before the 1st Respondent commenced the development. The Petitioners have contended that the development would cause irreparable harm to the environment as it would overwhelm the physical infrastructure in Paradise Valley Estate (hereinafter referred to only as "the estate") which is not connected to the Nairobi City sewerage system but relies on individual septic tanks. The Petitioners have contended further that the population increase that would be brought about by the development would have adverse effects on clean water supply and security in the estate. The Petitioners have also contended that the estate will also have to grapple with pollution arising from waste disposal challenges. The Petitioners have contended that all these adverse effects of the development being undertaken by the 1st Respondent on the suit property would lead to depreciation of values of their properties. The Petitioners have contended that they will suffer irreparable loss and a miscarriage of justice if the orders sought are not granted.

The Respondents' response to the application:

The Respondents have opposed the application through a replying affidavit sworn by the 1st Respondent, Hwaock Im on 25th August, 2021. The Respondents' case as set out in the said affidavit is as follows:

The Respondents have contended that the Petitioners' case is based on material non-disclosure to the court. The Respondents have averred that contrary to the allegations made by the Petitioners, the following approvals have been sought and obtained by the Respondents from the relevant authorities; Change of User from the Nairobi City County Government and Renovation and Repair Permit from the Nairobi City County Government and National Construction Authority. The Respondents have averred that the Site, Outbuildings and Main House Plans accompanied the application for renovation/repair. The Respondents have averred further that the following approvals have been applied for but are pending issuance: Kenya Urban Roads Authority permit for driveway adjustments and drawing approvals from the Nairobi City County Government and the National Construction Authority. As for the sewer system, the Respondents have contended that their contractors have advised them that there is a government sewer line adjacent to the suit property which was designed to accommodate septic tanks.

The Respondents have contended further that they are not bound by any restrictive covenant to use the suit property as a single-family residential house. The Respondents have averred that the covenant referred to by the Petitioners only binds the 1st Petitioner and his lessor Nyaku Limited. The Respondents have contended that the said covenant applies only to 1st Petitioner and the owners of the maisonettes adjacent to the 1st Petitioner's premises. The Respondents have contended that the restrictions on the user of the properties in the estate do not apply generally and that the same bind parties to the subleases individually. The Respondents have averred that the 1st Respondent's title to the suit property does not contain any user restriction similar to the one alleged by the Petitioners. The Respondents have averred that the 1st Respondent published the Change of User application on the suit property but there was no response from the Petitioners. The Respondents have contended that these proceedings have been brought in bad faith since the Petitioners waited until when the school opening date was approaching to file the petition.

The Respondents have averred that all regulatory requirements have been complied with and that the Respondents should therefore not be

visited with adverse orders sought by the Petitioners. The Respondents have averred further that any further permits would only be sought if the same become relevant/necessary. The Respondents have contended that the Petitioners' concerns must be counterbalanced by the real and legitimate interests of the Respondents, school-going children, parents, staff and members of the public who are to benefit from the development being put up by the 1st Respondent. The Respondents have averred that if the school would not open on the suit property as had been planned, they stand to lose Kshs. 39,636,000/- in each academic year. The Respondents have averred that they also stand to lose goodwill and trust from the parents.

The Respondents have urged the court to set aside the interim orders made on 26th July, 2021, maintain the status quo and presume that the developments being undertaken by the Respondents on the suit property are regular and lawful on the basis of the permits and approvals so far obtained by the Respondents.

The Petitioners' response to the replying affidavit by the Respondents:

The Petitioners filed a supplementary affidavit sworn by Nabatkhanu Karim Hassanali Padamshi on 6th September, 2021 in response to the 1st Respondent's affidavit in reply.

In the supplementary affidavit, the Petitioners have contended that the Respondents contravened the Constitution and EMCA by failing to get the necessary approvals from the Interested Party and also by failing to ensure that public participation was undertaken before commencing development on the suit property. The Petitioners have contended that these failures go against the need to preserve the environment and ensure ecologically sustainable development. The Petitioners have averred that the approvals and permits obtained by the Respondents did not waive the approvals to be obtained from the Interested Party.

With regard to the 1st Respondent's contention that its title has no user restrictions, the Petitioners have contended that the 1st Respondent is bound by the terms of the sub-lease between the original owner of the suit property and Nyaku Limited which developed all the houses in the estate.

The Respondents' application and preliminary objection:

In their preliminary objection dated 25th August, 2021, the Respondents have sought the striking out of the petition filed herein with costs on the following grounds;

1. The court has no jurisdiction to hear the petition pursuant to section 75 of the Physical Planning and Land Use Act, 2019.

2. The statutory mechanism for appeals or complaints in respect of decisions regarding development approvals under the Physical Planning and Land Use Act is the relevant Liaison Committee established therein.

3. The petition discloses a purely ordinary civil dispute which is disguised as a constitutional issue contrary to clear statutory procedures laid down in the Civil Procedure Act and is an abuse of the court process.

4. The civil dispute disclosed in the petition raises no constitutional issue of public interest and is a private attempt by the Petitioners to limit the rights of the Respondents.

5. The attempt by the Petitioners to invoke the court's special jurisdiction cannot succeed since under Article 162 of the Constitution the court's special jurisdiction is subject to legislative determination.

6. The legislature has limited the jurisdiction of the Court to environmental matters, use and occupation of land.

In addition to the preliminary objection, the Respondents brought an application by way of Notice of Motion dated 13th August, 2021 seeking the setting aside of the interim orders made by the court in favour of the Petitioners on 26th July, 2021. The application was brought on the grounds set out on the face thereof and on the affidavit of Hwaock Im sworn on 13th August, 2021. The Respondents have contended that the orders sought to be set aside were issued ex-parte on the basis of misrepresentations and non-disclosure of material facts by the Petitioners. The Respondents have averred further that the orders were received by the Respondents a day before the start of the court vacation and as such the Respondents were unable to challenge the same within the time that they were given by the court to respond to the application.

The Petitioners' response to the Respondents' application:

In a replying affidavit sworn by the 1st Petitioner on 6th September, 2021, the Petitioners have contended that the Respondents' application does not meet the legal or evidential threshold for review or setting aside of orders.

The submissions:

The Petitioners' submissions dated 13th September, 2021:

On the preliminary objection:

The Petitioners have submitted that the Respondents' preliminary objection is misguided as the Petitioners are not challenging the approvals obtained by the Respondents but the Respondents' failure to comply with Articles 42 and 69 of the Constitution as well as sections 3 and Part VI of EMCA. The Petitioners have cited Kenya Association of Manufacturers & 2 others *v* Cabinet Secretary, Ministry of Environment and Natural Resources & 3 others [2017] eKLR and J. S Muiru & 2 others *v* Tigoni Treasures Limited & 3 others [2015] eKLR to buttress the point that public participation which goes to the core of the petition is a critical requirement in safeguarding the right to a clean and healthy environment.

On the Petitioners' application dated 22nd July 2021:

The Petitioners have submitted that the main issue arising for determination on the Petitioners' petition on which the application is based is whether the Respondents complied with the relevant provisions of EMCA particularly section 3 and Part VI thereof. The Petitioners have submitted that there is a threatened violation by the Respondents of the Petitioners' right to a clean and healthy environment. The Petitioners have submitted that the Respondents failed to carry out public participation and environmental impact assessment study in respect of their development on the suit property as required by sections 3(5), 58 and the second schedule of EMCA. The Petitioners have submitted that although the Respondents admitted that they were undertaking a development project on the suit property, they have not placed before the court any environmental impact assessment reports or approvals from the Interested Party. In support of this submission, the Petitioners have cited Ken Kasing'a *v* Daniel Kiplagat Kirui & 5 others [2015] eKLR.

The Petitioners have reiterated that the permits obtained by the Respondents did not waive the requirements and obligations imposed by the Constitution and EMCA with regard to the development being undertaken by the Respondents. With regard to the issue of change of user, the Petitioners have submitted that the application was not disclosed to them or their agents and that the same was addressed to a stranger to the suit, one Onguso Malitinus Maina.

On whether they stand to suffer irreparable loss, the Petitioners have submitted that they have demonstrated such loss in their affidavits in support of the application. The Petitioners have submitted that in any event in cases of threatened or breach of a right to clean and healthy environment, it is not necessary to demonstrate a likelihood of irreparable loss. In support of this submission, the Petitioners have relied on Article 70 (3) of the Constitution, section 3(4) of EMCA and Joseph Leboo & 2 others *v* Director Kenya Forest Services & another [2013] eKLR.

On the issue of balance of convenience, the Petitioners have argued that a right to a clean and healthy environment is a public right which outweighs constitutional right to private land.

On the Respondents' application dated 13th August, 2021:

The Petitioners have submitted that the application was brought after unreasonable delay. The Petitioners have submitted that the Respondents were served with the orders sought to be set aside on 28th July 2021 and it was until 18th August, 2021 that the Respondents brought the application to set aside the order. The Petitioners have cited Ken Kasing'a case (supra) and section 18 (4) of the Environment and Land Court Act and have urged the court to dismiss the application.

The Petitioners have submitted that they have met the threshold for the grant of an injunction as well as a conservatory order. In support of this submission, the Petitioners have cited Centre For Rights Education And Awareness (CREAW) & 7 others *v* Attorney General [2011] eKLR.

The Respondents' submissions dated 25th August, 2021:

On the preliminary objection:

The Respondents have submitted that their preliminary objection raises three issues for determination by the court namely; whether the Respondents have met the threshold for raising a preliminary objection, whether the jurisdiction of the Court on matters of Land Development, Land Use Planning and Physical Planning has arisen and finally, whether the Petitioners have raised any constitutional issue in the Petition.

On the first issue, the Respondents have submitted that they have met the threshold for raising a preliminary objection as set out in Mukisa Biscuit Manufacturing Co. Ltd. *v* West End Distributors Ltd. [1969] E.A 696. The Respondents have submitted that their objection raises a pure point of law namely, whether the Petitioners exhausted other dispute resolution mechanisms provided in the various statutes before approaching the Court and whether the Petitioners' petition raises any constitutional issue to be determined by a constitutional court.

On the second issue, the Respondents have submitted that time has not reached for the exercise of this court's jurisdiction. The Respondents have submitted that the Petitioners have faulted the acquisition by the Respondents of a change of user approval (given in form PPA2). The Respondents have submitted that the Petitioners have not submitted any evidence showing that the approval was obtained illegally. The Respondents have submitted that the court should presume the legality of the approval now that no evidence has been placed before the court to rebut the presumption. In support of this submission, the Respondents have cited Chief Land Registrar & 4 others *v* Nathan Tirop Koech & 4 others [2018] eKLR. The Respondents have contended further that the issuance of the said approval is an administrative action which should have been challenged before the Nairobi Liaison Committee whose decision is appealable to this court by way of Judicial Review. The Respondents have cited Whitehorse Investments Ltd. *v* Nairobi City County [2019] eKLR and have argued that the Petitioners ought to have exhausted available alternative remedies before approaching the Court.

On the third issue, the Respondents have submitted that the Petition does not raise any issue requiring interpretation of the Constitution. The Respondents have cited several cases including Kibos Distillers Limited & 4 others *v* Benson Ambuti Adega & 3 others [2020] eKLR and have argued that a civil court was the right forum to address the Petitioners' complaints. The Respondents have argued further that since the

Petitioners are private individuals, they cannot maintain an action for a declaration of breach of a constitutional right against another private individual. In support of this submission, the Respondents have relied on Uhuru Muigai Kenyatta *v* Nairobi Star Publications Limited [2013] eKLR.

On the Petitioners' application dated 22nd July, 2021 and the Respondents' application dated 13th August, 2021:

The Respondents have identified the following as the issues for determination in the petition and the applications before the court;

a) Whether the Respondents have obtained the relevant approvals for the development which they are carrying out on the suit property.

b) Whether the Respondents are bound by any restrictive covenants in the sublease for the suit property.

c) Whether the Respondents have an obligation to consult the Petitioners before proceeding with development on the suit property.

On the first issue the Respondents have submitted that pursuant to sections 56 and 58 of the Physical and Land Use Planning Act, 2019, the responsibility for granting development approval is vested in the County Government. The Respondents have submitted that the fact that they obtained such approval means that the development is regular.

On the second issue, the Respondents have submitted that the covenant to use the suit property for a single family dwelling unit is contained in a sublease contract between Nyaku Limited and the 1st Petitioner. The Respondents have argued that they are not parties to that contract and as such are not bound by the same. In support of this submission, the Respondents have relied on Shainaz Jamal & 9 Others *v* Zahir Abdulrasul Manji & Another [2017] eKLR.

On the third issue, the Respondents have submitted that under Article 40 of the Constitution and sections 24 and 25 of the Land Act, 2012, they have a right to own property. The Respondents have submitted that the ex-parte orders that were issued by the court have the effect of denying the Respondents such right. The Respondents have also cited Mahmood Shariff Ali & 10 others *v* Safaricom Limited [2018] eKLR and have argued that an adverse decision should not be reached without independent/expert evidence on the alleged impending harm of the development.

Determination:

As I stated earlier, this ruling is in respect of; the Petitioners' application dated 22nd July, 2021, the Respondents' application dated 13th August, 2021 and the Respondents' preliminary objection dated 25th August, 2021. I will consider the two applications together and the preliminary objection separately. I will start with the preliminary objection.

The preliminary objection:

The Respondents' preliminary objection is based on two issues namely; that the Petitioners should have exhausted the mechanisms provided for in various statutes before approaching the Court and that the petition raises civil and not constitutional issues.

On the first issue, the Respondents have contended that whether or not the change of user approval was validly obtained is an administrative issue that should have been referred in the first instance to the Nairobi Liaison Committee for determination under the Physical and Land Use Planning Act, 2019. The Respondents have contended that an appeal against the decision of the said Liaison Committee lies to this court. I find no merit in this limb of the objection. In their petition, the Petitioners have contended that as a result of the Respondents' violation of the zoning regulations, the provisions of the sublease under which the suit property is held and the provisions of the Environment Management and Coordination Act, 1999 (EMCA), their constitutional rights to among others, a clean and healthy environment is threatened with violation by the Respondents. The Petitioners have contended further that they were not consulted before a change of user approval was given to the Respondents for the development in dispute in breach of their constitutional and statutory right to be heard before a decision affecting their interests is made. Section 3 of EMCA provides as follows:

3. Entitlement to a clean and healthy environment

(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.

(2) ……

(2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.

(3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

Article 42 and 70 of the Constitution provide as follows:

42. Every person has the right to a clean and healthy environment, which includes the right—

(a) **to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and**

(b) **to have obligations relating to the environment fulfilled under Article 70.**

70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order,

or give any directions, it considers appropriate—

(a) **to prevent, stop or discontinue any act or omission that is harmful to the environment;**

(b) **to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or**

(c) **to provide compensation for any victim of a violation of the right to a clean and healthy environment.**

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

The Petitioners have a right both under EMCA and the Constitution to approach the court for redress for violation or threatened violation of their right to a clean and healthy environment. The Liaison Committees established under the Physical and Land Use Planning Act, 2019 and the National Environment Tribunal established under EMCA have no jurisdiction to determine issues regarding violation of a right to clean and healthy environment. I do not agree with the Respondents that the Petitioners have brought this petition to challenge the legality of the Change of user approval that has been issued to the Respondents. The Petitioners' case is that the change of user approval was issued or obtained without public participation and that the development that is being undertaken following that approval is going to violate their right to a clean and healthy environment.

I also find no merit in the second limb of the Respondents' preliminary objection. In C N M *v* W M G [2018] eKLR, the court stated as follows on what constitutes a constitutional issue:

"21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81(CC)* in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak (2001)(1)SA 912(CC)* notes that:-

> **"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too, ..., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."**

I am satisfied that the petition herein raises constitutional issues. As stated earlier, the Petitioners have contended among others that their right to a clean and healthy environment has been violated/is likely to be violated by the failure on the part of the Respondents to comply with the provisions of various statutes and the Constitution. I am not in agreement with the Respondents that the issues raised before the court are purely civil in nature and should be litigated as such. Due to the foregoing, the Respondents preliminary objection fails wholly and an appropriate order shall be made at the end of the ruling.

The Petitioners' application dated 22nd July, 2021 and the Respondents' application dated 13th August, 2021.

The Petitioners have sought a conservatory order of injunction pending the hearing of the petition while the Respondents have sought the discharge of the interim order that was granted on 26th July, 2021 pending the hearing of the present application inter-partes.

In Gatirau Peter Munya *v* Dickson Mwenda Kithinji & 2 others [2014] eKLR the Supreme Court stated as follows:

> **"[86] *"Conservatory orders"* bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest.* Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case,* bearing in mind the *public interest, the constitutional values,* and *the proportionate magnitudes, and priority levels attributable to the relevant causes.***
>
> **[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:**
>
> > ***(i) the appeal or intended appeal is arguable and not frivolous; and that***
> >
> > ***(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***
>
> **[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:**
>
> > ***(iii) that it is in the public interest that the order of stay be granted.***
>
> **[89] This third condition is dictated by the *expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."***

In Centre for Rights Education and Awareness (CREAW) & 7 others *v* Attorney General [2011] eKLR the court stated that:

> **"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

What I need to determine at this stage is whether the Petitioners have established a prima facie case against the Respondents with a likelihood of success and have also demonstrated that there is a real danger that they are likely to suffer violation of their constitutional rights unless the conservatory orders sought are granted.

Section 58(1) and **(**2) of EMCA provides as follows:

> **(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an (sic) financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.**
>
> **(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.**

Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 (EMCA Regulations) provides for public participation as follows:

> **(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.**
>
> **(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—**

(a) publicize the project and its anticipated effects and benefits by—

(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

(d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

The Second Schedule of EMCA lists activities for which an environmental impact assessment study is required unless exempted by the National Environment Management Authority (NEMA). They include projects involving construction of local roads and facility access roads, schools and related infrastructure for learners not exceeding one hundred and an activity out of character with its surrounding. The Respondents have admitted that they intend to convert a residential house into a school and that they have obtained approval from the Nairobi County Government to undertake the project. The Respondents have admitted further that they are in the process of renovating the residential house and the surrounding areas to create more parking and other physical infrastructure to accommodate the school. The Respondents have also talked of some drawings for the construction that they intend to carry out on the suit property which are awaiting approval by the Nairobi County Government. There is no doubt that the development being carried out by the Respondents on the suit property falls under the Second Schedule of EMCA and as such the same requires environmental impact assessment study unless the Respondents are exempted from conducting such study.

Although the Respondents have been accused of carrying out development which will have negative impact on the environment, the Respondents have not placed any evidence before the court showing that they have carried out a study on the impact their development is likely to have on the environment. Environmental Impact Assessment Study is mandatory for the project being undertaken by the Respondents unless they are exempted. There is no evidence that the Respondents' project is exempted from Environmental Impact Assessment Study. Although the Respondents have claimed that they have obtained all the required development approvals, the only such approval that has been placed before the court is the change of user approval which is contentious and approval to carry out renovations. These approvals do not exempt the Respondents from the requirement of Environmental Impact Assessment Study under section 58 of the EMCA.

In the absence of Environmental Impact Assessment Study that would have highlighted the impact that the Respondents' development will have on the surrounding areas and possible mitigation that can be put in place in case some of the impacts would be negative, the Petitioners contention that the Respondents' development is likely to have negative environmental impact that would affect their right to clean and healthy environment is not farfetched. The law places an obligation on the Respondents to carry out Environmental Impact Assessment Study on their development. In the circumstances, once the Petitioners established that the development is out of character with the surroundings and falls within the Second Schedule of EMCA, the burden was on the Respondents to prove that the development would have no negative impact on the environment and as such there is no threat of violation of the Petitioners' right to clean and healthy environment. In the absence of Environmental Impact Assessment Study required by law, the Respondents have not discharged that burden.

With regard to change of user approval, again, the obligation was upon the Respondents and the approving authority to ensure that there was public participation before the approval was granted. Sections 58 (7) and (8) of the Physical Planning and Land Use Act, 2019 which was relied on by the Respondents provide as follows:

(7) A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe.

(8) The notification referred to under sub-section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration.

There is no dispute that the law required notice of the application for change of user to be published in newspapers of nationwide circulation and also on the suit property. Once again, the burden was on the Respondents to demonstrate that they complied with the law on publication of the notice of the application before the approval was granted to them. Apart from the approval itself, the Respondents placed no evidence in the form of newspaper advertisements of the application or evidence showing that a notice of the application was posted on the suit property. In the absence of evidence that the notice of the application for change of user was advertised in the newspapers and also placed on the suit property, the Petitioners contention that there was no public participation in the issuance of approval for change of user of the suit property is well founded. The Respondents had called upon the court to presume that the approval for change of user was lawfully issued because it was administrative action. I can see no reason why I should make such presumption. The law required the Respondents to conduct public participation with regard to their application for change of user of the suit property. Whether they conducted public participation as by law required is a matter of fact to be established by evidence. The court cannot presume that public participation was conducted merely because the act was administrative.

Due the foregoing, I am satisfied that the Petitioners have established a prima facie case against the Respondents. The Petitioners have established that the Respondents are carrying out development without adhering to the law put in place to protect the environment thereby exposing the environment to degradation and threatening the Petitioners' right to a clean and healthy environment.

As to whether the Petitioners are likely to suffer irreparable harm unless the conservatory order sought is granted, the Petitioners have demonstrated that their constitutional right to a clean and healthy environment is likely to be violated if the orders sought are not granted. That to me is sufficient harm. In any event, I am in agreement with the Petitioners that in petitions for enforcement of a right to clean and healthy environment, the petitioners need not establish that they will suffer irreparable harm before an order aimed at preventing a likelihood of environmental harm or damage is given. Article 70 of the Constitution that deals with enforcement of environmental rights provides as follows in sub-Article (3):

> **For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.**

That position is echoed in section 3(4) of EMCA which provides as follows:

> **A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—**
>
> **(a) is not frivolous or vexatious; or**
>
> **(b) is not an abuse of the court process.**

This being a petition seeking enforcement of a right to a clean and healthy environment, the Petitioners are not required to prove irreparable loss before the court can grant the conservatory order sought.

In the final analysis, I am satisfied that a case has been made out for the grant of the conservatory order sought by the Petitioners. Since, the Respondents application dated 13th August, 2021 was seeking the setting aside of the interim orders that were made ex parte on 26th July, 2021 pending the hearing of the Petitioners' application inter-partes, the application has been overtaken by events. In any event, I am not persuaded that any valid ground has been put forward that would have justified the setting aside of the said orders. The Respondents have not convinced me that the Petitioners obtained the said orders through concealment of material facts.

In conclusion, I hereby make the following orders;

1. The Respondents' Notice of Motion application dated 13th August, 2021 and Notice of Preliminary Objection dated 25th August, 2021 are dismissed.

2. A conservatory order of injunction is issued restraining the Respondents and anyone claiming under them from establishing, operating, carrying on any school and such school related activities whether as International Christian Kindergarten School or otherwise including but not limited to construction of school learning facilities or school related user facilities on residential low density single family house No. 49 on L.R. No. 209/8349 in Paradise Valley Estate, Kyuna, Nairobi or any infrastructural changes such as opening more gates into Paradise Valley Estate or parking facilities for the above stated school establishment without prior compliance with public participation requirements under Part VI of the Environment Management and Coordination Act, 1999, Fair Administrative Actions Act, 2015 and the Constitution of Kenya pending the hearing of this petition or further orders by the court.

3. The costs of the Notice of Motion application 22nd July, 2021, Notice of Preliminary Objection dated 25th August, 2021 and Notice of Motion application dated 13th August, 2021 are awarded to the Petitioners.

Delivered and Dated at Nairobi this 16th day of November 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Litoro for the Petitioners

Ms. Mulei for the Respondents

N/A for the Interested Party

Ms. C. Nyokabi-Court Assistant