



**Round Square Properties Limited v Winchester Ventures Kenya
Company Limited & 2 others (Environment & Land Case
E014 of 2023) [2025] KEELC 304 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E014 OF 2023**

**MD MWANGI, J
JANUARY 23, 2025**

BETWEEN

ROUND SQUARE PROPERTIES LIMITED PETITIONER

AND

WINCHESTER VENTURES KENYA COMPANY LIMITED .. 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

JUDGMENT

Background

1. The Petitioner initiated this matter by way of a petition dated 22nd March 2023 and which was supported by an affidavit of Reffin Turana sworn on the same date at Nairobi. The Petitioner pleaded that the Respondent, (meaning the 1st Respondent) who was the owner of L.R. No. 209/4902 (original No. 4639/18) (hereinafter referred to as ‘the suit property’) was in the process of constructing therein a four (4) semi-detached block comprising eighteen (18) floors with a total of 234 apartments. The development according to the plaintiff would grossly interfere with and negatively affect the environment comprising the subject property and the surroundings.
2. The Petitioner further alleged that the development blatantly breached the area zoning law and regulations but the Respondent had mischievously masked behind the design of duplex apartments. In spite of the proposed development breaching the zoning regulations, the Petitioner accused the 3rd Respondent, National Environment Management Authority (NEMA) of issuing the 1st Respondent with a development license No. NEMA/EIA/PSL/18400 on the 12th April 2022.



3. It was the Petitioner's case that it had actually complained to the Nairobi City County Government's Director of Planning, Compliance and Enforcement (hereinafter referred to as 'the Director'). The Director had acted on the complaint by the Petitioner against the 1st Respondent and issued an enforcement notice dated 8th February 2023 to take effect from the 1st March 2023, stopping further developments on the suit property pending re-submission of the architectural plans by the 1st Respondent and their re-evaluation by the Nairobi City County government Department of Urban Development and Planning. However, the Petitioner stated that, in spite of the enforcement notice, the 1st Respondent still continued with the construction on the suit property undeterred.
4. The 1st Respondent's defiance of the enforcement notice resulted in the cancellation of the development approval that had been issued by the Nairobi City County Government. Consequently, the 1st Respondent was ordered to stop any further construction and to remove any illegal structures therein and resubmit its development proposal for fresh evaluation by the Nairobi City County Government.
5. The Petitioner averred that the Nairobi City County government had however failed to take steps to ensure compliance with its enforcement notice by the 1st Respondent. The construction was going on violating the Petitioner's and by extension, the residents' (of Riverside Drive) right to a clean and healthy environment.
6. The Petitioner in his petition prayed for:-
 - a. A declaration that the ongoing construction on the suit property had infringed and continues to violate and or has threatened the Petitioner's right to a clean and healthy environment contrary to Article 42 of the Constitution.
 - b. A declaration that the acts of the Respondent as complained in the petition had violated and continues to violate, threaten and infringe on the Petitioner's rights under Article 10, 27 (1), 40, 42, 47 and 69 of the Constitution.
 - c. Damages and compensation for violations of rights be awarded to the Petitioner against the Respondent and an order compelling the Respondent to pay such damages to the Petitioner for violation of rights under Articles 10, 27 (1), 40, 42, 47 and 69 of the Constitution as enumerated in this petition on terms and in such quantum and proportion as the court shall determine.
 - d. An environment restoration order against the Respondent in respect of the subject property.
 - e. Costs incidental to this petition.
 - f. Interest on damages, compensation and costs.
 - g. Any other reliefs that this court may deem fit and just over and concerning the Respondent's activities over the subject property and their refusal to ensure a clean and safe environment to the Petitioners and other residents of Riverside Gardens.
7. The Petitioner amended its petition on 24th March 2023 adding the National Environment Management Authority (NEMA) as the 3rd Respondent.
8. I need to add that the supporting affidavit in support of the petition hereby repeats the allegations on the face of the petition.



Response by Respondents.

9. The 1st Respondent's response to the petition was by way of a replying affidavit sworn by one, MIAO MINI, a director of the 1st Respondent company at Nairobi on 26th September 2023.
10. The deponent asserted that the 1st Respondent was a law abiding entity that has always observed the rule of law and abided by the Constitutional dictates and principles in all its undertakings.
11. The deponent confirmed that the 1st Respondent is the registered owner of the suit property. The 1st Respondent is further a duly registered building works contractor company, category NCA1 and Registration No. 72947/B/0122.
12. The deponent averred that the 1st Respondent had sought and was indeed granted a change of user of the suit property from a single dwelling to multiple dwellings by the 2nd Respondent on 25th January 2022. This was prior to commencing the development, the subject matter of this matter.
13. Thereafter, the 1st Respondent made an application for an Environment Impact Assessment (EIA) License from the 3rd Respondent. It duly submitted the Environment Impact Assessment (EIA) Report as required for publication as per Section 59 (1) (2) of the Environmental Management Co-ordination Act (EMCA). The report included a social site assessment form showing all reservations by the neighbours in respect to the likely environmental impact as a result of the proposed project.
14. The 3rd Respondent, according to the 1st Respondent followed to the letter all the processes before issuing the 1st Respondent with an Environment Impact Assessment (EIA) License, which included publishing a notice through adverts in a newspaper, the Kenya Gazette and even Radio, inviting the public to submit comments on the Environment Impact Assessment study report for the proposed development. A public participation meeting was also held at the site of the project on 24th March 2022, in line with Section 9 of the *Environmental Management and Co-ordination Act*. The Petitioner in this matter was represented in the meeting alongside the other residents.
15. The 1st Respondent sought and obtained all the necessary approvals from the relevant authorities prior to commencing the construction on the suit property. The said approvals are attached as annexures to the Replying affidavit.
16. Having followed the due process and upon satisfying all the requirements in respect to the proposed development, the 1st Respondent was issued with a certificate of compliance by the National Construction Authority (NCA). It was only after that, that it commenced the project. The deponent affirms that the 1st Respondent has in the progression of the project complied with all the conditions issued to it prior to the commencement and even those subsequently issue after the commencement of the project.
17. The deponent narrates that the 1st Respondent was on 8th February 2023 issued with an enforcement notice No. 1857 suspending construction works for 21 days. There were conditions issued alongside the enforcement notice by the 2nd Respondent officers that were to be met by the 1st Respondent within the stipulated timelines.
18. The 1st Respondent, according to the deponent proceeded to implement the said conditions and after subsequent inspection by the 2nd Respondent to its satisfaction, it issued a letter reference No. UP/ADMN/95 dated 14th March 2023 which cancelled and withdrew the enforcement notice No. 1857. It gave a go-ahead to the 1st Respondent to proceed with the works under the supervision of the project



architect, project structural engineer and area planning compliance and enforcement officer. The letter was attached as an annexure to the Replying Affidavit.

19. The 1st Respondent opines that the Petitioner's amended petition is fully pegged on the enforcement notice No. 1857 issued against it by the 2nd Respondent. However, the same has since been wholly and unequivocally cancelled and or withdrawn. As such, the prayers sought in the petition are spent.
20. In response to the Petitioner's allegations that its project is in violation of the area zoning requirements, the deponent asserts that the allegations are unsubstantiated. In any event, approvals falling under zone four (4) are guided by the Nairobi Integrated Urban Development Master Plan of December 2014. The 1st Respondent obtained the approvals for its project legitimately having gone through scrutiny and adhered to the established zoning laws and regulations.
21. It is the 1st Respondent's case that adjacent buildings around the project are of similar nature. Interestingly, the 1st Respondent points out that the Petitioner has also constructed a high-rise residential apartment adjacent to the 1st Respondent's project that is over fourteen (14) floors.
22. The 1st Respondent posits that the Petitioner's allegations that the proposed development's height and density will expose the environment in the area to harsh and destructive effects is unfounded and unsubstantiated. The 1st Respondent insists that it submitted to the 3rd Respondent's mitigation measures and after due consideration the measures undertaken were found adequate. The Petitioner has not provided a scintilla of evidence in support of the allegations to show how the 1st Respondent's development is a risk to the environment.

Response by the 2nd Respondent.

23. The 2nd Respondent, the Nairobi City County Government responded to the petition by way of a replying affidavit sworn by one Patrick Analo Akivanga, its Chief Officer in charge of Urban Development and Planning. The replying affidavit is sworn at Nairobi on 22nd August 2023.
24. The deponent asserts that the 2nd Respondent duly approved the 1st Respondent's application for development permission on 20th December 2022. He further asserts that the development falls within zone 4 in the Nairobi City Development Ordinances and Zone's Guide. The policy for the types of developments allowed in the said Zone is under review but the Director of City Planning approved the plan submitted by the 1st Respondent having been satisfied that it was in accord with the changes being implemented through the said policy.
25. The deponent affirms that they indeed received a complaint from the Petitioner on various aspects of alleged non-compliance by the 1st Respondent. That was what prompted them on 8th February 2023, to issue an enforcement notice No. 1857 to the 1st Respondent suspending all construction works for a period of 21 days and further directing the 1st Respondent to resubmit its plans for re-evaluation.
26. The enforcement notice according to the deponent was followed by a letter from the 2nd Respondent's technical officers outlining the conditions that the 1st Respondent was supposed to meet in order to make the project site compliant. The deponent deposes that the 1st Respondent duly complied with all the conditions stipulated in the letter by the technical officers. After subsequent inspection of the project, the 2nd Respondent's officers were satisfied by the 1st Respondent's compliance with the said report. It was then that he 2nd Respondent issued the letter of 14th March 2023 which cancelled and withdrew the enforcement notice allowing the 1st Respondent to proceed with the development.
27. The deponent stated that under Section 9 of the Physical and Land Use Planning (Development Control Enforcement) Regulations, 2021), the 2nd Respondent has the power to withdraw an



enforcement notice on the advice of its technical team. Consequently, there is no illegality whatsoever in the ongoing construction by the 1st Respondent.

28. It is further pointed out that the Petitioner despite having participated in the public participation by the 1st Respondent did not appeal against the development permission issued to the 1st Respondent.
29. The Chief Officer of the 2nd Respondent concludes that the petition is without merits and the Petitioner has not established a case for the grant of the reliefs sought in its petition. The Petitioner has neither cited the violations the 1st Respondent has committed nor any failure on the part of the 2nd Respondent in the dispensation of its responsibilities and obligations in so far as the 1st Respondent's development is concerned. The Petitioner has failed to show how the 1st Respondent's development has violated or threatened to violate its rights to a clean and healthy environment because the 1st Respondent has complied fully with all the conditions upon which the development permission was granted.

Response by the 3rd Respondent.

30. The replying affidavit filed on behalf of the 3rd Respondent is deposed by David Ongare, the Director Environmental Compliance of NEMA.
31. The deponent confirms that prior to the commencement of the project by the 1st Respondent, it had submitted copies of terms of reference for Environmental Impact Assessment study report for the proposed development. The 3rd Respondent undertook all the necessary processes prior to issuing the 1st Respondent with an Environmental Impact Assessment license.
32. It is deposed that the 3rd Respondent received a complaint from the Petitioner on 8th and 24th March 2022 citing a varied number of reasons for its concerns. The 3rd Respondent consequently conducted a site verification exercise on the proposed development on 18th March 2022. The 3rd Respondent wrote to the 1st Respondent directing it, to amongst other things to provide a site layout indicating the 10 meters' riparian reserve and the management plan to preserve, protect and conserve the pegged Nairobi River riparian reserve and provide the excavation wall stabilization measures to be put in place to safeguard the neighbouring developments, road and the Nairobi River bank from collapsing.
33. The 3rd Respondent further received letters dated 29th March 2022 and 11th April 2022 from the Petitioner being a complaint on the pending application and an objection to the construction of the proposed project respectively.
34. The 1st Respondent satisfactorily responded to all the issues raised including addressing the issues raised concerning the riparian reserve, stabilization wall, planning compliance and traffic impact assessment.
35. The 3rd Respondent was satisfied that the proposed project was within the law and set standards and therefore issued an Environmental Impact Assessment license. It was satisfied that the project would have no possible negative impacts to the environment.
36. Additionally, it is averred by the deponent that the 3rd Respondent conducted a site monitoring visit on the proposed project site and made directions including stabilizing the river bank, seeking approval for gabion construction, maintaining the mature bamboo trees and felling the eucalyptus trees on the riparian reserve. It was satisfied that the 1st Respondent's activities are sustainably in line with the 3rd Respondent's mandate to promote a clean and healthy environment.



Court's directions.

37. The court's directions, with the concurrence of the parties and in line with Rule 20 of the Constitution of Kenya (Protection of Rights) and fundamental freedoms) Practice and procedure Rules, 2013, was that the petition be heard by way of affidavits' evidence and written submission. The parties complied and filed their written submissions, save for the 3rd Respondent. The court has had occasion to peruse and consider the submissions in writing this judgment.
38. There was an interesting development after parties had filed their submissions worth mentioning at this juncture. The Petitioner filed a Notice of Motion application dated 6th February 2024 seeking leave to adduce additional evidence. The new evidence was in form of two letters which the Petitioner stated provided a clear context of the extent to which the 1st Respondent had encroached the riparian reserve. The Petitioner asserted that the letters itemized the findings of the inspection by a joint team from Nairobi sub-basin area, Athi Basin area and the Water Resources Authority (WRA).
39. The 1st Respondent in its rejoinder, asserted that the additional evidence was inconsequential and sought to introduce an issue that was not pleaded in the amended petition. It does not challenge the issuance of the development license nor to blatant breach of the area zoning laws and regulations as alleged in the amended petition.
40. The 2nd Respondent too responded to the application by the Petitioner through a replying affidavit by Tom Achar sworn on 3rd May 2024. The deponent stated that the 2nd Respondent had conducted a site visit of the suit property on 7th March 2024 for purposes of establishing the veracity of the allegations by the Petitioner in the instant application.
41. The site visit confirmed that the 1st Respondent's construction was in accordance with the architectural plans together with the amendment plan duly approved on 20th December 2022. The 2nd Respondent further confirmed that the basic structure of the project had been completed and there was no encroachment on the riparian wayleave since the beacons erected by the Water Resources Authority had been observed and no structures had been erected therein.
42. on 15th April 2024, parties consented and agreed that the application by the Petitioner dated 6th February 2024 be allowed together and that all the replying affidavits filed in reply thereto by the Respondents together with all the annexures to be relied on in the hearing and disposal of the petition. Parties were at liberty to file additional submissions. None of the parties filed any supplementary submissions.

Issues for determination

43. Having considered the amended petition filed herein, the replies by the Respondents and the submissions filed by the parties and the additional evidence submitted after the filing of submissions, the court is of the view that the issues for determination herein are:-
 - a. Whether the Petitioner has established violation or threat to violation of its right to a clean and healthy environment.
 - b. Whether, and dependent on (a) above, the Petitioner is entitled to the reliefs sought in its amended petition.
 - c. What orders should issue on costs.



Analysis for determination

Whether the Petitioner has established violation or threat to violation of its right to a clean and healthy environment.

44. The amended petition by the Petitioner in this matter referred to violation of Article 10, 27 (1), 40, 42, 47, 69 and 70 of the Constitution. However, it fails to provide particulars as to the manner in which the 1st Respondent's development or the actions or inactions by the 2nd and 3rd Respondents violate the its right to a clean and healthy environment. After reading the petition and even the supporting affidavit, the court was left wondering and asking how the construction of the multi-residential block by the 1st Respondent on the suit property would violate the Petitioner's right to clean and healthy environment. The petition does not provide the answer to the question.
45. Both the 1st and 2nd Respondents have in their submissions brought out that issue of lack of clarity and precision in the amended petition.
46. The need for precision and clarity in constructional petitions was highlighted by the Court of Appeal in the case of *Mumo Matemu –vs- Trusted Society of Human Rights Alliance and 5 others* (2013) eKLR, where the court emphatically stated that;-
- “We cannot but emphasize the importance of precise claims, in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.
- ...precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated.”
47. The Court of Appeal reaffirmed the principle holding on the question of precision in the *Anarita Karimi Njeru* case. It noted that,
- “Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* established the rule that requires reasonable precision in framing of issues in Constitutional Petitions.”
48. The amended petition by the Petitioner in this case falls far short of the principle established in the *Anarita Karimi* case.
49. The Petitioner has tried to remedy the short coming by introducing the new evidence after parties had already filed their submissions. The Petitioner, in my considered view was just groping in the dark by trying to introduce an issue that was not pleaded in its petition.
50. As the Respondents rightly observed in their various responses and submissions, the amended petition was principally premised on the alleged non-compliance with the enforcement notice that had been issued by the 2nd Respondent to the 1st Respondent. The enforcement notice was however cancelled and withdrawn after the 1st Respondent duly complied with all the conditions issued by the 2nd Respondent.
51. As correctly averred by the 2nd Respondent, under Section 9 of the Physical and Land Use Planning (Development Control Enforcement) Regulations, 2021), the 2nd Respondent has the power to



- withdraw an enforcement notice. It lawfully withdrew the enforcement notice issued to the 1st Respondent upon the 1st Respondent fulfilling the conditions issued alongside the enforcement notice.
52. The issue of encroachment of the river was not pleaded in the amended petition. It is well settled that parties are bound by their pleadings.
53. I agree with the holding in the case of Daniel Otieno Migore –versus- South Nyanza Sugar Company Limited (2018) eKLR, where Mrima J held that;
- “It is now well settled that parties are bound by their pleadings and that evidence that tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence however strong, that tends to be at variance with the pleadings must be disregarded.”
54. In the case of IEBC & Another –versus- Stephen Mutinda Mule & others (2014) eKLR, the court stated that;
- “As parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The court itself is bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any enquiry into the case before it other than to adjudicate on the specific matter in dispute which the parties themselves have raised by their pleadings. In all adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither can complain if the agenda is strictly adhered to. In such an agenda, that is no room for an item called “A0B”.”
55. In any event, even if the court were to consider the allegations of encroachments of the riparian, the same has been sufficiently addressed in the responses by the 2nd and 3rd Respondents. In its replying affidavit to the Petitioner’s application after submissions were filed, the 2nd Respondent stated that it had conducted a site visit of the suit property on 7th March 2024 for purposes of establishing the veracity of the allegations by the Petitioner in the instant application. The site visit confirmed that the 1st Respondent’s construction was in accordance with the architectural plans together with the amendment plan duly approved on 20th December 2022. It further established that the basic structure of the project had been completed and there was no encroachment on the riparian wayleave since the beacons erected by the Water Resources Authority had been observed and no structures had been erected therein.
56. The Petitioner did not file any further affidavit to contradict the assertions by the 2nd Respondent.
57. It is necessary to add that the 3rd Respondent – NEMA, was joined into these proceedings on the directions by the court. The reason being that NEMA is the principal institution of the government that has the authority to exercise general supervision and co-ordination of all matters relating to the environment. It is tasked with issuing Environmental Impact Assessment (EIA) licenses.
58. Environmental Impact Assessment is a tool that assists in the ‘anticipation and minimization’ of the adverse effects of development. Where NEMA is satisfied that there will be no deleterious effect on the environment or that the project discloses sufficient mitigation measures, a license may be issued.
59. In this case NEMA through its Director, Environmental Compliance asserted that it was satisfied that the proposed project was within the law and set standards and therefore issued an Environmental



Impact Assessment license. It was satisfied that the project would have no possible negative impacts to the environment including the riparian section of the river.

60. Challenges to EIA reports or the issuance of EIA licenses in the first instance are to the National Environment Tribunal (NET) established under section 129 of EMCA. This petition was not a challenge to the issuance of an EIA license to the 1st Respondent by NEMA. No orders were sought against NEMA even after the amendment of the plaint.
61. All said and done, the Petitioner has not established any violations, or threats of violation to his or any other person's rights to a clean and healthy environment under Article 42 of the Constitution or the violation of any of the other articles cited in the petition by either of the Respondents.
62. Having arrived at the above finding, it goes without saying that the Petitioner is not entitled to any of the reliefs sought in the petition. The petition is hereby dismissed in its entirety and with costs to the Respondents.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 23RD DAY OF JANUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Chepkoyo h/b for Mr. Ndalila for the Petitioner

Ms. Chebon h/b for Mr. Otieno for the 1st Respondent

Ms. Irene Odhiambo h/b for Mr. Bake for the 2nd Respondent

Ms. Kahuria h/b for Mr. Gitonga for the 3rd Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

