



REPUBLIC OF KENYA



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**Kassam & 13 others v Njoroge & 23 others (Petition E021 of 2024)
[2025] KEELC 4860 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4860 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION E021 OF 2024

OA ANGOTE, J

JUNE 26, 2025

**N THE MATTER OF ARTICLES 1, 10, 19, 20, 22(1), 23(1), 70(1),
162(3) AND 232 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ONGOING BREACH, VIOLATION AND CONTRAVENTION, AND
FURTHER INTENDED BREACH, VIOLATION AND CONTRAVENTION OF ARTICLES
28, 35, 42, 43(1)(B), 47(1), 69(1), 70 AND 75 (1) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ACCESS TO INFORMATION ACT 2016

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF SECTIONAL PROPERTIES ACT NO. 21 OF 2020

AND

IN THE MATTER OF PHYSICAL LAND USE AND PLANNING ACT NO. 13 OF 2019

AND

**IN THE MATTER OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999**

AND

IN THE MATTER OF NATIONAL CONSTRUCTION AUTHORITY ACT

AND

**IN THE MATTER OF THE ONGOING BREACH AND CONTRAVENTION AND
FURTHER INTENDED CONTRAVENTION OF SECTION 20(J), 56(A), 57(1) & (3),
58(4), 61(1)(B), 62 AND 72 OF THE PHYSICAL LAND USE AND PLANNING ACT 2019**

AND



**IN THE MATTER OF ACTIVITIES DELETRIOUS TO THE ENVIRONMENT
ON L.R. NAIROBI/ BLOCK 37/66, NAIROBI/ BLOCK 37/65, NAIROBI/ BLOCK
37/66/1, NAIROBI/BLOCK 37/66/2, NAIROBI/BLOCK 37/66/3, NAIROBI/BLOCK
37/66/4, NAIROBI/BLOCK 36/66/5, NAIROBI/BLOCK 37/66/6, NAIROBI/BLOCK
37/66/7 AND NAIROBI/BLOCK 37/66/8- CITY PARK DRIVE, PARKLANDS**

AND

**IN THE MATTER OF INHUMANE AND DEGRADING TREATMENT OF THE
PETITIONERS, THE RESIDENTS OF L.R. NO. 209/871/13, L.R. NO. 209/20730,
L.R. NO. 209/161816, L.R. NO. 209/870/3, 209/9083 AND THE GENERAL PUBLIC**

BETWEEN

**KARIM KASSAM 1ST PETITIONER
J & J FAMILY VENTURES LIMITED 2ND PETITIONER
KUNAL BID 3RD PETITIONER
SANJAY ADVANI 4TH PETITIONER
HARSH NARAN CHAVDA 5TH PETITIONER
SHAFIQ DAWOODANI 6TH PETITIONER
MARGARET KAPTUIYA KOMEN 7TH PETITIONER
FAIZAL JERAJ 8TH PETITIONER
SAIRA GILANI 9TH PETITIONER
KETAN GOSWAMI 10TH PETITIONER
ASHMI SHAH 11TH PETITIONER
SHELINA MANJI 12TH PETITIONER
HEENAL TANK 13TH PETITIONER
RITA KUMARI ZAVERCHAND VISARIA 14TH PETITIONER**

AND

**GRACE NJERI NJOROGE 1ST RESPONDENT
WASHINGTON MBAYA MUTHAMA 2ND RESPONDENT
JULIE WANJIRU KIBATHI 3RD RESPONDENT
DAVID ALEXANDER RUBIA GATHURA 4TH RESPONDENT
ELIJAH MALEKYA MATIBO 5TH RESPONDENT
JOSEPHINE VIVIAN AWUOR 6TH RESPONDENT
QALI HUSSEIN SIAD 7TH RESPONDENT
LOUISE MUMBI MAHINDI 8TH RESPONDENT**



LEORNARD OPERE KWELU	9 TH RESPONDENT
DOROTHY OMINDE NYANGAYA	10 TH RESPONDENT
JOYCE KARIMI MUTHAMIA	11 TH RESPONDENT
AKHWAM CONSTRUCTION LIMITED	12 TH RESPONDENT
ARCH. MUNEEER KHALID OMAR ALKIZIM	13 TH RESPONDENT
ENG. NYAMWINARA SIBHORA SIMION	14 TH RESPONDENT
NAIROBI CITY COUNTY GOVERNMENT	15 TH RESPONDENT
PATRICK ANALO AKIVANGA	16 TH RESPONDENT
STEPHEN GATHUITA MWANGI	17 TH RESPONDENT
TOM ACHAR	18 TH RESPONDENT
ENG. MICHAEL ASWANI	19 TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	20 TH RESPONDENT
MAMO B MAMO	21 ST RESPONDENT
CATHELINE THAITHI	22 ND RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY	23 RD RESPONDENT
MAURICE A AKETCH	24 TH RESPONDENT

JUDGMENT

1. Vide a Petition dated 24th June 2024, the Petitioners have sought the following orders and declarations:
 - a. A conservatory order of injunction compelling the 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd and 24th Respondents to jointly and severally stop, prevent and discontinue any further construction and development activities on Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Respondents their agents/ servants/proponents, or any other person.
 - b. A declaration that the property referred to as L.R. No. 209/9316 in the various documents, licences and permits and also on the signage erected by the 12th Respondent along City Park Drive, Parklands, does not exist in law and on the ground.
 - c. A declaration that development and construction activities on Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands that commenced in December 2023 were not approved by the 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd and 24th Respondents or any of their employees/officers.



- d. A declaration that no Development Permission was or has been given or issued by the 15th, 16th and 17th Respondents to the 1st to 14th Respondents, their agents/servants or any other person, allowing or permitting commencement of construction and or development activities on the properties known as Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands.
- e. A declaration that the approval by Nairobi City County whose details appear on the signboard erected next to the properties known as Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive as PLUPA-BPM-003793-N is fraudulent, illegal, irregular, unprocedural, null and void.
- f. A declaration that the NEMA Licence whose details appear on the signboard erected next to the properties/ site known as NAIORBI/BLOCK 37/66 , Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands as NRB/PR/S/1/19383 was fraudulently, illegally, irregularly and un-procedurally and issued by the 20th, 21st and 22nd Respondents and is therefore null and void.
- g. A declaration that the NCA Approval appearing on the signboard erected next to the properties/site known as Nairobi / Block 37/66 , Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands as NCA No. 53127415710870 was fraudulently, illegally, irregularly and unprocedurally registered by the 23rd and 24th Respondents and is therefore null and void.
- h. A declaration that the acts, conducts and omissions of the 1st to 24th Respondents on the subject properties/sites, i.e. Nairobi / Block 37/66 , Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands from December 2023 have denied, breached and infringed, and continue threatening to deny, breach and infringe the Petitioners and the general publics' right to life and to a clean and healthy environment.
- i. A declaration that the acts, conducts and omissions of the 1st to 24th Respondents, jointly and/ or severally on the ongoing and/or proposed development of residential apartments on Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands are deleterious to the environment.
- j. An order of permanent injunction stopping, halting, preventing and discontinuing any act or omission by the 1st to 14th Respondents, their agents/servants /proponents or any other person, that is deleterious to the environment, which acts include undertaking construction and development activities on Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5,



Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands until and unless they first decommission and restore the degraded properties/site to its original condition or as near to its original condition as is possible as at 1st December 2023, within a period of ninety days from the date of the order.

- k. A mandatory order compelling the 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd and 24th Respondents, jointly and severally to stop, prevent and discontinue any act or omission by the 1st to 12th Respondents, their agents/servants/proponents or any other person, on Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands, until and unless they first decommission and restore the degraded properties/site to their original condition or as near to their original condition as is possible as at 1st December 2023.
 - l. An order that costs of decommissioning and restoring the degraded properties/site known as Nairobi / Block 37/66, Nairobi / Block 37/66/1, Nairobi / Block 37/66/2, Nairobi / Block 37/66/3, Nairobi / Block 37/66/4, Nairobi / Block 37/66/5, Nairobi / Block 37/66/6, Nairobi / Block 37/66/7 and Nairobi / Block 37/66/8- City Park Drive, Parklands to its/their original condition as at 1st December 2023 be met by the 1st to 24th Respondents, jointly and/or severally.
 - m. General damages.
 - n. Costs of the Petition.
2. According to the Petition, the Supporting Affidavit dated 24th June 2024 and the Further Affidavits dated 9th August 2024 and 24th March 2025, all sworn by Karim Sherali Kassam, the Petitioners are owners, occupiers and residents of residential apartment units developed on the parcels known as LR No. 209/871/13, LR No. 209/20730, LR No. 209/870/3, Nairobi / Block 37/65 and LR No. 209/161816 all situate along City Park Drive, Parklands, Nairobi.
 3. It is the Petitioners' case that these properties border LR No. Nairobi Block 37/66, on which a four-storey residential building containing eight units was registered under the *Sectional Properties Act* No. 21 of 1987 (Repealed) as Nairobi / Block 37/66/ 1-8 (the suit property). The Petitioners averred that the properties they own and occupy share common infrastructure with the suit property including access roads, water, sewer line and rainwater drainage systems.
 4. The facts underlying this Petition are that the Petitioners learnt in November 2023 that there was intention to develop the subject property into a mega residential apartment when they saw several occupants of the suit property were vacating their houses.
 5. By December 2023, the Petitioners contend, the developers commenced development activities by demolishing the existing residential houses, destroying the trees and other flora and erecting a hoarding wall along the boundary of the properties. Thereafter, it was averred, on 13th February 2024, the alleged owners of the suit property brought heavy excavation machines and started excavating the ground, with several trucks removing the excavated debris.
 6. It was averred by the Petitioners that a signboard was subsequently erected on 10th March 2024 next to the entrance of the subject properties, which stated that the property was known as LR No. 209/9316, that the client is Akhwam Construction Limited, that the Architect is Arch. Muneer Khalid Omar Alzikim (A2042), that the Structural Engineer is Eng. Nyamwinara Sibhora Simion (A4291), that the Service Engineer is Akhwam Construction Limited, that the Labour Contractor is Akhwam



- Construction Limited and that there is an NCC Approval No. PLUPA-BPM-003793-N, an NCA Approval No. 53127415710870 and a NEMA Approval No. NRB/PR/S/1/19383.
7. The Petitioners have challenged the validity of the NEMA Licence No. NEMA/EIA/PSL/31291 dated 12th March 2024 which was issued to the 12th Respondent, on multiple grounds.
 8. It was averred that on 17th January 2024, an Environmental Impact Assessment Project Report prepared by Greendime Consultants Limited was submitted to the 20th Respondent's office wherein it was reported that the owner of the property known as LR No. 209/9316 was seeking permission to develop and construct an 18 storey residential apartment comprising 68 residential units. The 20th and 21st Respondents then proceeded to issue to the 12th Respondent the impugned NEMA licence.
 9. The Petitioners averred that the 20th, 21st and 22nd Respondents refused to give information to the Petitioners on what they knew about the proposed development, despite several letters requesting the same; that the said Respondents deliberately and negligently failed to fully investigate, interrogate and review the Environmental Impact Assessment Project Report prepared by Greendime Consultants Limited dated January 2024 and that they deliberately and negligently failed to establish whether or not the property described in the EIA Project Report is registered at the Director of Surveys or at the Lands Registry Nairobi.
 10. It was deposed by the 1st Petitioner that the 20th -22nd Respondents issued the NEMA Licence to the 12th Respondent without the latter adducing any copy of title showing that they are the registered owner of that property and that the 20th-22nd Respondents failed to note when reviewing the EIA Project Report that none of the respondents to the public participation except one, had given the Land Reference Numbers of the properties they owners or leased.
 11. The Petitioners contended that the said NEMA licence was issued despite the EIA Lead Expert indicating in the project report that at the time he compiled the report, the site had been excavated and construction was underway and that it was also issued without consideration of the recommendation of the officers who visited the site and compiled a report dated 14th February 2024, in which they recommended that the project proponent must first obtain change of user from the 15th Respondent before an EIA Licence is issued.
 12. However, they dispute that no change of user of LR No. 209/9316 has ever been issued to the 12th Respondent or the 11th -14th Respondents. The Petitioners noted that on 16th March 2024 and 4th April 2024, the 20th-22nd Respondents and their officers visited the suit property and established that there were extensive development works being undertaken thereon.
 13. It was asserted that the NEMA Licence was issued without seeking views and comments from the Petitioners and other people who would have been the immediate neighbours, residing next to the alleged LR No.209/9316. Additionally, that the NEMA Licence was issued without any input from key agencies and authorities including Water Resources Authority, County Executive Committee Member- Built Environment and Urban Planning Sector of Nairobi City County Government, Ministry of Labour and Human Resource Development, Nairobi City Water & Sewerage Company, Kenya Urban Roads Authority and the Department of Housing, Arthi House.
 14. The Petitioners further indicated that the 20th, 21st and 22nd Respondents failed to review the allegation by the Lead Expert that there was an existing sewer line network near the site project, yet the same is a privately developed sewer (PDS) No. 4664 constructed without the 20th Respondents consent or approval.



15. Further still, it was averred that the EIA Project Report and NEMA Licence No. NEMA/EIA/PSL/31291 were prepared and issued by the 20th and 21st Respondents long after development had commenced at the project site in December 2023 without approval from the 15th, 16th and 17th Respondents, which was in violation of Section 57 of the *Physical and Land Use Planning Act* (PLUPA).
16. The Petitioners moreover stated that the 20th, 21st and 22nd Respondents failed to inform the 15th, 16th, 17th, 18th and 19th Respondents of the development that had commenced without approvals from the Respondents and that they failed to demand that the 15th, 16th and 17th Respondents issue notice to the developers or owners of the project requiring them to restore the said land to its original condition as at 1st December 2023 within 90 days of the notice.
17. It was averred that although the 20th, 21st and 22nd Respondents issued an Improvement Notice to the 12th Respondent on 12th March 2024, ordering him to cease from undertaking any further excavation on the construction site and demanded that he avail a copy of deed plan of the construction site on 27th March 2024, the 12th Respondent neither stopped excavation nor other construction activities on site.
18. It was averred that the 20th, 21st and 22nd Respondents, aware that the stop orders given were ignored and disobeyed, refused and/or failed to take any legal action against the 12th Respondent as mandated under Sections 108 and 109 of the *Environmental Management and Co-ordination Act*. Moreover, it was argued, the 12th Respondent never presented a copy of the deed plan for LR No. 209/9316 to the 20th, 21st and 22nd Respondents.
19. The Petitioners further challenged the issuance of NEMA Licence No. NEMA/EIA/PSL/31291 because the said licence was issued over a non-existent property referred to as LR No. 209/9316- City Park Drive, Parklands, and that the licence was issued to persons who were not owners of the fictitious property.
20. The Petitioners contended that the property known as LR No. 209/9316 which measured 0.2282Ha ceased existing following sub-division of the property known as LR No. 209/9316 into two distinct properties in 1999 and new files opened for the resultant sub-divisions at the Lands Registry being Nairobi/ Block 37/65 and Nairobi / Block 37/66, each measuring 0.1141 Ha (Approx) in area.
21. It was averred by the Petitioners that the 1st Respondent, being the owner of Nairobi / Block 37/66, thereafter developed a residential apartment of 8 residential units and a Sectional Plan registered at the Land Registry, with separate files opened for each unit and title deeds issued to the respective owners of Nairobi Block 37/66/1-8, which are the subject properties.
22. The Petitioners affirmed that the sectional plan for the units has never been terminated or the units sold or transferred in accordance with the *Sectional Properties Act*, nor has the property known as Nairobi / Block 37/66 been transferred from the original owner, and that the 12th Respondent is not the owner of LR No. 209/9316.
23. Karim Sherali Kassam claimed that they brought these facts to the attention of the 16th Respondent through a letter dated 8th May 2024 and that although they requested the 15th-18th Respondents to take immediate action to stop the illegal development activities on the subject properties, no action was taken by the 15th-19th Respondents against the 1st-14th Respondents.
24. Rather, it was averred, vide letters dated 4th and 7th June 2024, the 15th and 16th Respondents confirmed that they were aware of a dispute of ownership of the property previously known as LR No. 209/9316 and that they undertook to revoke the approved development until the matter is solved. However, it



- was averred, no development approvals for Nairobi / Block 37/66 City Park Drive were ever issued to the 12th Respondent following their application on 21st November 2023.
25. The Petitioners have also averred that no approvals for change of user from single dwelling to multi-dwelling units have been issued with respect to the suit property and that the 15th-17th Respondents have not granted any permission to develop the property to 68 residential apartments of 18 levels.
 26. Karim Kassam affirmed that the Petitioners wrote to the 12th Respondent letters dated 12th March 2024 and 15th March 2024 demanding copies of documents evidencing change of user of LR No. 209/9316 and development approvals of the said property by the 15th- 22nd Respondents. It was averred that the 12th Respondent, through its Advocates informed the Petitioners that he is the developer of LR No. 209/9316 (Nairobi/ Block/37/66/7 and that it had obtained all the necessary approvals and licenses, including NEMA Licence No. EIA/PSL/31291.
 27. He deponed that through a letter dated 23rd May 2024, the Petitioners advocates wrote to the 1st to 14th Respondents seeking copies of documents to confirm whether they had obtained the requisite approvals, licenses and permits, and that the 2nd to 12th Respondents however stated that they would not indulge them with a response since the matter in question was pending hearing and determination in ELC Petition No E009 of 2024. The 1st Petitioner additionally stated that even after Petition No. E009 of 2024 was withdrawn, the Respondents have not provided them with the requested documents and information.
 28. Per the Petitioners, the 15th to the 19th Respondents have failed or refused to give notice to the 1st to 14th Respondents stopping them from undertaking any further development on the properties and requiring them to restore the land to the condition it was in as at 1st December 2023 and that the 20th, 21st and 22nd Respondents being fully aware of the fraudulent, illegal and irregular development and construction activities by the 1st to 14th Respondents and the adverse environmental and fundamental rights that the said activities have upon the Petitioners and the general public, have failed to enforce the improvement order issued on 12th March 2024.
 29. The Petitioners argued that the document titled “Notification of Approval of Application” from the 15th Respondent addressed to the 12th Respondent is not an approval for change of user or development permission by the 15th-17th Respondents allowing commencement of any construction or development activities on the project site.
 30. It is averred by the Petitioners that a Certificate of Compliance No. 53127415710870 dated 20th February 2024 issued to the 12th Respondent by the 23rd and 24th Respondents is fraudulent, illegal, irregular, null and void. They contend that its issuance furthers the 12th, 23rd and 24th Respondents’ acts and omissions which are deleterious to the environment and are violating and threatening the Petitioners’ and the publics’ right to life, to a clean and healthy environment and their freedom not to be subjected to inhumane and degrading treatment.
 31. The Petitioners stated that the information on the signage erected near the subject properties is false and incorrect and intended to mislead them and the general public on the illegality and irregularity of the ongoing development on the subject properties and that any approval, licence or permit issued to any persons including the 1st-14th Respondents for change of user, development of the properties, including the hoarding/ scaffolding licence dated 18th January 2024 and the Authority to Excavate and Transport Soil from LR No. 209/9316 are fraudulent, illegal, irregular, null and void.
 32. The Petitioners averred that the ongoing construction and development work on the suit properties continue breaching and violating the Petitioners’ and the general publics’ right to life and to a clean



- and healthy environment, and subjecting them to inhumane and degrading treatment; that the said construction is illegal, irregular and is in violation of the provisions of EMCA, PLUPA, NCA and the [Sectional Properties Act](#) and that the construction is being undertaken in violation of the 15th Respondent's land use and development control by laws.
33. Further, that no by-laws, rules or regulations have been enacted by the 15th Respondent permitting construction and development of buildings and structures near the subject properties that are more than four levels high and that the 15th Respondent's Development Control Policy document cited by the 12th Respondent is yet to be legislated by the 15th Respondents County Assembly.
 34. It was pleaded that the illegal and irregular developments on the subject properties are similar to those being undertaken on properties neighbouring the Petitioners' including LR Nos 209/871/14, 209/871/11 and LR No. 209/20721 against which development activities the petitioners have filed different petitions at the ELC challenging the alleged approvals by the 15th -24th Respondents including Petition Nos. E002 of 2024 and E007 of 2024.
 35. The Petitioners also asserted that their right to access information secured under Article 35 of [the Constitution](#) has been infringed by the Respondents as on several instances, they wrote letters to the Respondents seeking information with respect to the development, to which no response was ever received.
 36. They contended that the development of several multi-story residential apartments will subject them to personal environmental damage and injury of immeasurable and irreparable value; that the development and construction activities have interfered with and will continually adversely interfere and affect the sewer and water drainage system within the area and that if completed, the proposed development will increase the residential population near and around the subject properties causing uncontrollable human and traffic congestion and will also adversely affect provision of water and electricity supply with the area.
 37. It was further argued by the Petitioners that the construction of multi-storey residential apartments near the Petitioners' residences will automatically interfere with and block natural air and light to their residences; that the construction activities on the suit property have negatively affected the physical and natural environment of the area near and adjacent to the subject properties and that the excavation and other properties have polluted and continued polluting their respective residences and the neighboring community.
 38. The Petitioners averred that the Respondents are bound by the national values and principles of governance set out under Article 10 of [the Constitution](#); that the Petition is also grounded on Article 35 which grants every citizen the right of access to any information held by the state; Article 42 which states that every person has the right to a clean and healthy environment which includes the right to have obligations relating to the environment fulfilled under Article 70; Article 70(2) of [the Constitution](#).
 39. The Petition is also grounded on Article 47 on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; Article 73 on responsibilities of leadership; Article 232 which provides for values and principles of public officers including high professional standards of professional ethics, responsive, prompt, effective, impartial and equitable provision of services, accountability of administrative acts and transparency and provision to the public of timely and accurate information and Article 162 on the establishment of the Environment and Land Court.



The 1st-11th Respondents' response

40. Through a Replying Affidavit sworn by Elijah Malekya Matibo, the 5th Respondent, on behalf of the 1st -11th Respondents, deponed that this Petition is based on mere allegations, suppositions and speculations and is liable to be struck off for want of merit.
41. The 5th Respondent asserted that the Petition is averse to the doctrine of exhaustion of remedies as Section 78 of the *Physical and Land Use Planning Act* 2019 and Section 125 and 129 of the Environmental Management and Coordination Act have provided mechanisms and juridical forums for hearing and determination of the matters herein.
42. Elijah Malekya Matibo, the 5th Respondent, averred that the 1st -11th Respondents are the registered and legal owners of the land subject of the impugned development constituted under Sectional Titles Nairobi / Block 37/66/1-8 also comprised under the Deed Plan registered as LR no. 209/9316.
43. He deponed that the property is properly identified on the ground with known and marked boundaries clearly delineated and that there is no dispute concerning the ownership or boundaries at all. He confirmed that the property previously comprised of a low density flat of 8 apartment units in which the owners were residing until it was demolished to pave way for the ongoing development.
44. It was deposed by the 5th Respondent that the 1st Respondent is the registered owner of Section Title 37/66/2 in respect of which she has granted Powers of Attorney to the 3rd and 4th Defendants, Julie Wanjiru Kibathi and David Alexander Rubia Gathura; that in 2019, they received interest from several developers who offered to purchase their property to re-develop the same and that the owners of the sectional titles met and agreed to consider an appropriate offer for a joint venture partnership in the development as opposed to an outright sale to the property.
45. It is the 1-11th Respondents' case that they later settled on the 12th Respondent, Akhwam Construction Limited and entered a joint venture investment with the said company to demolish the existing three-storey residential flat and to build in its place, a 68-unit high-rise residential complex.
46. Mr. Matibo contended that the Petitioners were aware of the land that was subject of the development as some of them were agents on commission and/or brokers for some interested developers with whom they visited the property for site visits and that the Petitioners were also aware of the applications for change of user and building permissions which were conspicuously displayed on the gate and walls of the suit property opposite the 1st petitioner's residence.
47. It was deposed that these applications were also advertised in newspapers of wide-circulation as required by law; that the re-development was intended for November 2023; that the owners vacated the premises in late January 2024 and that the development on the property could not have begun on 1st December 2023.
48. The 5th Respondent stated that during the notice period, the Petitioners did not raise any objection to the issuance of approvals and building permissions despite their knowledge and notice of the applications; that the legal threshold applicable for the grant of all the approvals and permissions and due diligence was undertaken by all relevant Government authorities who exercised their administrative powers and discretion judiciously in granting the approvals.
49. Mr. Matibo maintains that there is no doubt that the Petitioners had proper notice because from their correspondence, they clearly identified the property; that the fact that the approvals were never objected to give the owners a legitimate expectation to develop the property as approved by the



authorities and that the Petition is being pursued in bad faith as evidenced by the Petitioners' failure to challenge the approval process at the application stage.

50. It was deposed that the 1st Petitioner has failed to produce a properly executed authority or consent to act on behalf of the other Petitioners; that the 1st Petitioner has not produced any ownership documents other than his to substantiate the assertion that the Petitioners are neighbors of the subject property and that the claim that the wall of LR No. 209/161816 has been breached has no basis as no disclosed owner of the property has made such a claim.
51. According to the 5th Respondent, the Petitioners, through their Advocates, fabricated claims to the Nairobi City County claiming that there was a dispute over the ownership of the subject property to procure a stop order which the County eventually dismissed and that the owners are mostly retirees who are now living off the rental compensation paid by the Developer for the duration of the project set to be two and a half years.
52. In the event the project is stopped or delayed, Mr. Matibo pleaded, the owners are likely to be rendered homeless, destitute and deprived of their constitutional right to housing.
53. Further, it was posited that the Petitioners have not demonstrated with the specificity required of constitutional causes how the alleged irregularity in the approval process of the development has occasioned harm or is likely to prejudice them and that the Petitioners have bundled together a myriad of distinct claims and a multiplicity of allegations into a Petition, and have obfuscated the Respondents' ability to effectively respond, which is a deliberate derogation of the Respondents' right to a fair trial.
54. It was asserted by the 1st to 11th Respondents that the Petitioners failed to show how the irregular approvals would occasion injury to them and how it would violate their constitutional rights and that the Petitioners also failed to build a nexus between the allegations of violation of the law and the injuries that they have claimed, which injuries are as a result of the building itself rather than from the alleged irregularity of the approvals.
55. Mr. Matibo affirmed that the planning laws, including the Physical Planning and Land Use Act 2019 and the 2021 Regulations are premised on the need to repurpose land through densification of use, which constitutes the deliberate planning process to change and enhance land carrying capacity in terms of population and user activities. He urged that this is necessitated by the increase in population and consequent increase in demand for housing, utilities and services.

The 12th Respondent's Replying Affidavit

56. The 12th Respondent, through a Replying Affidavit sworn by Abdiwahab Mohammed Hussein, a Director of the 12th Respondent dated 5th July 2024 and 25th March 2025, deposed that the Petition is premised on conjecture, assumptions and gross misrepresentation of facts and that the Petitioners are guilty of material non-disclosure of facts; that the Petitioners filed a similar Petition against the Respondents vide Nairobi ELC Petition No. E009 of 2024 Karim Kassam & 13 others v Grace Njeri & 11 others and that save for the 2nd to 11th and 21st Respondents, all the other Respondents in the present Petition were named as Respondents in ELC PET E009 of 2024.
57. It was deposed that upon being served with the 12th Respondent's submissions, the Petitioners sought leave to withdraw the Petition ELC PET E009 of 2024 vide a notice dated 20th May 2024 which leave was granted; and that ELC PET E009 of 2024 is still pending before this court pending determination of the issue of costs. They contend that such withdrawal was to pre-empt or avoid accountability before the court.



58. The 12th Respondent's Director contended that this court is divested of the jurisdiction to hear and determine the Petition by dint of the mandatory provisions of Section 129(1)(a) of EMCA as read together with Regulation 46(1)(f) of the Environment (Impact Assessment and Audit) Regulations, 2003, and Section 78(b) of the *Physical and Land Use Planning Act* 2019. He asserts that the Petitioners have not exhausted the existing dispute resolution mechanisms before invoking the jurisdiction of this Court.
59. The 12th Respondent deposed that the NEMA license was issued on 12th March 2024 and on 14th March 2024, the 12th Respondent's advocates responded vide a letter and communicated details of the NEMA licence.
60. The 12th Respondent's Director deposed that the allegation that Parcel No. 209/9316 (Nairobi Block 37/66/1-8) does not exist is a blatant misrepresentation and emphasized that the said parcel exists and is well known to the Petitioners, who claim to be owners of the neighbouring properties.
61. It was asserted that the 12th Respondent is the contractor entrusted with the development on the subject property, which entails the construction of 18 floors with a total of 68 units and that the 12th Respondent is one of the beneficial owners jointly with the 1st-11th Respondents, who are the registered proprietors of the pre-existing 8 units pursuant to a Joint Venture Agreement dated 30th November 2023.
62. It was deposed that the 12th Respondent, as a beneficial owner and with the backing of the 1st -11th Respondents, sought and was granted permission to undertake change of user from single dwelling to multi-dwelling units, which process was preceded by the necessary publication onsite and in the Standard Newspaper dated 10th November 2023.
63. It was further averred that the 12th Respondent submitted drawings for approval by the County Government of Nairobi, which approval was granted on 30th November 2023 vide Ref. No: PLUPA-BPM-003793-N; that the 12th Respondent commissioned an accredited environmental consultant to undertake the preparation of an Environment Impact Assessment Project Report (EIA Report) and that during the preparation of the EIA report, views of the neighbours and other persons likely to be impacted by the proposed development were obtained through questionnaires.
64. The 12th Defendant's Director averred that the development activities on the subject property did not commence on 1st December 2023, but on 1st February 2024; that the activities on the suit property prior to 16th February 2024 and mid-March 2024 were the erection of a hoarding board in line with the hoarding license issued to the 12th Respondent on 18th January 2024, and that the license allowed the decommissioning of the pre-existing structure, clearing of the debris from the site and conduction of geotechnical tests.
65. He contended that the photos annexed as KSK-5 to the Supporting Affidavit of the Petition do not suggest an ongoing excavation as the trucks were carting away debris from the decommissioned building to pave way for soil testing and ground investigation.
66. The 12th Respondent's Director asserted that the Petitioners did not address any communication to the 12th Respondent or 1st-11th Respondent to seek answers to their alleged concerns. He denied that there was no information communicated regarding the proponent and owner of the project of the suit property, and that the excavation did not commence until after 16th February 2024 when an excavation permit was granted to the 2nd Respondent by the 5th Respondent.



67. He also stated that the sign board was erected on 13th March 2024 to replace the pre-existing one and to update details of the subsequent approvals/licenses and that information relating to the development was readily availed to the Petitioners and was displayed on site.
68. It is the 12th Respondent's case that the allegations that the activities on the subject property are causing emission of dust pollution and other waste is not true, and that necessary measures have been put in place to address such concerns including setting up of scaffolding, safety and dust nets, undertaking the works within the permitted hours and ensuring proper control of movements of trucks in and out of the site.
69. He stated that there are several other developments of similar nature with the proposed development within the neighbourhood; that the 12th Respondent's project is no way out of character with the surrounding developments and that the development on the subject property is within City Park Drive Parklands and is in line with the Nairobi County Development Control Policy dated December 2021, which allows mixed development in that area.

The 23rd and 24th Respondents' response

70. The 23rd Respondent opposed the Petition through a Replying Affidavit sworn on 6th September 2024 by Arch. Stephen Mwilu, the Manager Compliance of the 23rd Respondent.
71. He averred that in line with Sections 5(2)(g), 23A, 23(1) and (2) of the National Construction Act, the 23rd Respondent's compliance officers in Nairobi Region conducted a site inspection on 19th April 2024 of the construction works on the alleged non-existent property LR No. 209/9316- City Park Drive and that the officers observed that the construction was at excavation stage, and the site had been hoarded to prevent access by unauthorized persons and the project was duly registered by the National Construction Authority.
72. Arch. Mwilu asserted that the 23rd Respondent received a project registration application via its online project registration system from the developer, the 12th Respondent; that the 12th Respondent furnished the 23rd Respondent with all the requisite documents required for the project registration, including the approvals from the 15th and 20th Respondents and the 23rd Respondent and that it then issued its approval as well as a Compliance Certificate No. 53127415710870.
73. He also affirmed that in accordance with the 23rd Respondent's Deep Excavation and Abandoned Sites Policy Guides, the 12th Respondent submitted to the 23rd Respondent a geotechnical investigation report dated 24th February 2021 for the proposed residential apartments on the suit property.
74. It was deposed that the 12th Respondent also submitted a Construction Method Statement, which described the managements and systems of work to be adopted by the 12th Respondent during civil engineering and infrastructure groundwork operations, and that the Construction Method Statement included the manner in which the 12th Respondent would undertake the excavation works.
75. It is the 23rd Respondent's position that the Petitioners have not demonstrated how the 23rd Respondent failed to fulfill its legal duty and mandate under the *National Construction Authority Act* 2011 and the National Construction Regulations 2014.
76. The 24th Respondent, Eng. Maurice Akech, Executive Director of the National Construction Authority (NCA), averred in a Replying Affidavit dated 5th September 2024 that he has been improperly enjoined to this Petition as a Respondent by virtue of Section 37(1) of the *National*



Construction Authority Act, which protects the officers and employees of the 23rd Respondent, the NCA, from liability for executing functions, powers and duties of the 23rd Respondent under the Act.

Submissions

77. The Petitioners' counsel submitted that no development permission was applied for and approved for the development which commenced in November 2023 on LR Nairobi / Block 37/66, and that the alleged permission issued on change of user from single dwelling units to multi-dwelling units was illegal, irregular, null and void.
78. It was submitted that any agreement, approval, licence or permit referring to or based on the existence of the property referred to by the 1st to 12th Respondents as LR No. 209/9316 or former 209/9316 are fraudulent and deceptive and their intended purpose is illegal, and in breach of the Physical and Land Use Planning Act and the Physical and Land Use (Development Permission and Control) (General) Regulations, 2021.
79. The Petitioners submitted that the demolition of the eight sectional units on the subject property was illegal as the owners had not obtained approval for their demolition and that the 1st-12th Respondents did not adduce any evidence to prove that any person applied for development permission or change of user prior to December 2023 by submitting a copy of the prescribed form PLUPA/DC1 or by showing that the prescribed fees was paid.
80. Counsel contended that no evidence was adduced proving that that the person applying for the proposed development project notified the public of the proposed development and that such notification invited members of the public to submit any objections on the proposed development to the relevant county executive member for consideration or that there was any compliance with Section 58(7) and (8) of PLUPA.
81. They contend that the notice alluded to by the 12th Respondent is not a notice that meets the requirements under the Regulations of Development Permission and Control and that the notice lacked key information and was not in the prescribed form PLUPA/DC/3.
82. The Petitioners' counsel conceded that vide a letter dated 7th June 2024, the 15th and 16th Respondents confirmed that an application for development approval was received from the 12th Respondent for the proposed development, but they maintain that this application was sent back to the alleged developer and no approvals were granted.
83. It was argued that the NEMA licence dated 12th March 2024 was applied for and granted long after the purported approval for change of user and the proposed construction, yet the said licence is one of the documents that must be considered by the County Executive Member before approving an application for development permission, as required under Section 61 of PLUPA.
84. The Petitioners relied on the following cases: *Mwangi & 2 others (Suing on Behalf of Kisiwa West Estate Residents Welfare Group) v Kiambu County Executive Committee member for Land, Physical Planning, Housing and Urbanization and 2 others*; *Kago (Interested Party) [2024] KEELC 5798 (KLR)* and *Tom Brown Limited & Another vs County Executive Committee Member in Charge of Planning & 2 others*; *Attorney General & 4 others (Interested Parties) (2023) KEELC 17853 (KLR)*.
85. The Petitioners' submission was that there is no evidence to show that the plans and drawings were submitted to the CECM as statutorily required in the prescribed form PLUPA/DC/1E. They contend that the copies annexed to the 12th Respondent's Replying Affidavit are illegible and it is not possible to tell what kind of drawings they are for and whether they reference the subject property.



86. Counsel submitted that the Nairobi County Development Control Policy dated December 2021 is not an approved policy document and cannot be relied on for purposes of development control. Counsel relied on the case of Rhapta Road Residents Association vs County Executive Committee Member (CECM) Built Environment and Urban Planning Nairobi City County which held that the 2021 Policy was yet to be approved by the County Assembly.
87. Counsel also quoted the case of Sosplashed Limited & Another vs Pwani Maoni Limited & 3 others (2023) KEELC 22487 (KLR) where the court held that the power to undertake development control is donated under Section 56 of PLUPA, and that under Section 57, it is mandatory to obtain development permission before one carries out a development.
88. It was submitted that the development is being undertaken in an area where common infrastructure including sewer lines, roads and water drainage systems are stretched and inadequate, and there are no facilities to manage natural and man-made disasters and events like earthquakes, floods and fire.
89. It was submitted by the Petitioners' counsel that the excavation and ongoing construction work have negatively affected and will continue to negatively affect the physical and natural environment of the area adjacent to the suit property; that the construction work has polluted and continues polluting their residences and that the construction work is being undertaken in a haphazard and negligent manner which is a threat to the Petitioners' and the public' lives.
90. According to counsel, the Petitioners right to access information was breached by the Respondents contrary to Article 35 of *the Constitution*.
91. The 1st-11th Respondents' counsel submitted that while the Petitioners contended that the development was commenced without genuine approvals, the 12th Respondent annexed all permits and approvals by the relevant authorities including building permission required under the *Physical and Land Use Planning Act*, the NEMA Licence, and the permit by the National Construction Authority.
92. It was argued that the Petitioner did not provide any evidence or particulars as to how the development of the multi-storied apartment would occasion damage to the environment and how it would adversely interfere with the sewer and water drainage systems.
93. As to the claim that the completion of the construction would increase residential population causing uncontrollable human and traffic congestion, the Respondents' counsel queried the metrics used to determine what population is too much for an area. He contended that these are untested facts and mere allegations with no basis in evidence to support them.
94. It was submitted by the 1st-11th Respondents' counsel that although the Petitioners enumerated Articles 10, 35, 42, 70, and 232 as the Articles of *the Constitution* that have been infringed, no particulars have been pleaded with clarity on how they have been violated and the extent of the violation.
95. With respect to the validity of the approvals, the Respondents' counsel argued that the Petitioners interchangeably argued that the development were commenced without approvals, that the approvals were not genuine and that they were invalid, to the extent that the Respondents were unsure of which allegation to respond to.
96. It is their position that the Petitioners have not demonstrated how the question of regularity or otherwise of the building approvals issued herein is a constitutional question for the determination by this court, or what constitutional issue is determinable from such a matter.



97. It is counsel's position that the Petition is an attempt to get the court to resolve a matter that has no remote constitutional disposition or underpinning, contrary to the principle of constitutional avoidance.
98. The Respondents' counsel relied on the Court of Appeal case of Gabriel Mutava vs Managing Director Kenya Ports Authority & Another [2015] eKLR, the Trinidad & Tobago case of Re Application by Bahadur [1986] LRC (Const) 297, the South African case of SA Naptosa & Others vs Minister of Education Western Cape & others [2001] BLLR 338 at 395, Daniel M Mugendi vs Kenyatta University & 3 others [2013] eKLR, Communications Commission of Kenya & 5 others vs Royal Media Services & 5 others Petition No. 14, 14A, B & C of 2014 and Leonard Otieno v Airtel Kenya Limited [2018] eKLR.
99. The 12th Respondent's counsel submitted that this Petition is an abuse of court process as it is not driven by the desire to advance justice; that it is driven by malice and the Petitioners' selfish interests and desires and that it is an attempt to curtail the 1st-12th Respondents' right to property guaranteed under Article 40 of *the Constitution*.
100. Counsel submitted that this is the third Petition advanced by the Petitioners purporting to impugn the development of the subject property, having first filed Petition No. E001 of 2024 Karim Kassam & 13 others vs Grace Njeri & 12 others on 12th April 2024 which Petition was withdrawn midway after the Respondents had filed substantive responses and submissions.
101. Counsel relied on the case of Muchanga Investments Ltd vs Safaris unlimited & 2 others [2009] eKLR and Republic vs Anti-Counterfeit Agency & 2 others ex-parte Surgipharm Limited [2014] eKLR, on the power of the court to prevent abuse of the process of the court.
102. It was submitted that the Petitioners have not presented any evidence to demonstrate their allegations that no information was disclosed regarding the development and its proponents, that the development was being carried out at night, that it was being undertaken from beacon to beacon and was emitting dust and that it was a threat to the environment.
103. It was submitted that the 1st Petitioner resides in a block of apartments christened "Muthaiga Valley Apartments" that has about 10 floors comprised of fifty residential units; that there are other apartment blocks of similar nature and that the Petitioners have used these proceedings to propagate acts of profiling and discriminating against persons the Petitioners perceive to be from a different community from theirs, who in their view, should not establish themselves within Parklands, an area they perceive to be reserved for a certain community.
104. Counsel urged that while the Petitioners have alleged a violation of their right to a clean and healthy environment and the right to life, the Petitioners, are actually challenging the development approvals and the EIA License granted by the 15th, 20th and 23rd Respondents to the 1st - 12th Respondents in relation to the suit property.
105. The 15th-19th Respondents' counsel submitted that this court does not have jurisdiction to determine this matter because the Petitioners never exhausted Section 61(3) of the *Physical and Land Use Planning Act* which provides that an applicant aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the County executive committee member.
106. The Respondents counsel submitted that the Petitioners, being aggrieved by an alleged illegitimate approval of the Developments by the 15th Respondents ought to have appealed to the Nairobi City



- County Physical and Land Use Planning Liaison Committee. They maintained that the Committee was easily accessible as a local remedy, and that the Committee is effective and sufficient as a remedy and could have determined this matter satisfactorily.
107. They relied on the following cases on exhaustion of remedies: *William Odhiambo Ramogi & 3 others vs Attorney General & 4 others; Muslim for Human Rights & 2 others (interested Parties)* (2020) eKLR and *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR.
108. The 15th-19th Respondents confirmed that Land Parcel L.R. 209/9316 does exist in their records and on the ground. However, with the migration of the Nairobi City County from the old Land Registration System to the new blocking system, the parcel of land known as LR 209/9316 was given a new name, being Nairobi Block 37/66.
109. The 15th Respondent confirmed that it received an application for permission to develop a proposed development of an 18 level apartment building with 68 units on LR No. 209/9316 from the 12th Respondent on 29th November 2023 and that the application was accompanied with all required attachments and after being tabled before the Urban Planning Technical Committee of the 15th Respondent as item no.158 was approved on 30th November 2023 as evidenced by a Notification of Approval of Application addressed to Akhwam Construction Limited by the 15th Respondent.

Analysis and Determination

110. Having carefully considered the Petition, the Replying Affidavits and Submissions filed by the parties, the issues that arise for determination by this court are as follows:
- a. Whether this Petition meets the specificity test set out in the *Anarita Karimi* case.
 - b. Whether the Petition is an abuse of court process
 - c. Whether the licenses and approvals allowing the construction on the suit property were issued in violation of the Petitioners' rights to a clean and healthy environment.
 - d. Whether the excavation and construction activities on the suit property infringe or threaten the Petitioners' right to a clean and healthy environment.
 - e. Whether the Respondents infringed the Petitioners' right to information.
111. The Petition herein has challenged the development of a multi-storey residential block on the property known as LR No. Nairobi / Block/36/66, on which a four-storey residential building containing eight units was constructed and registered under the *Sectional Properties Act* No. 21 of 1987 (Repealed) as Nairobi / Block 37/66/ 1-8 (the suit property).
112. The suit property is owned by the 1st to 11th Respondents, with the 1st Respondent holding title to LR. Nairobi Block 37/66 and the 2nd-11th Respondents holding sectional titles to LR Nairobi Block 37/66/1-8.
113. It is not disputed that the 1st to 11th Respondents, of the one part, and the 12th Respondent as the developer, entered into a Joint Venture Agreement dated 3rd November 2023 with respect to the suit property, being Nairobi/ Block 37/ 66/ 1-8. The property owners agreed to provide the land and the developer agreed to provide the requisite financial resources and development expertise of the construction and development of a tower of residential apartments on the land.
114. Under the agreement, the 12th Respondent, the developer, was to procure the necessary notifications and approvals from the competent authorities for change of user and implementation of the



- development. The developer also contracted to compensate the landowners for loss of rent during the development period through payment of a lump sum of Kshs. 21,600,000.
115. The Petitioners have contended that the issuance of approvals and licenses to the development and the excavation and construction activities being undertaken on the suit property have infringed on their constitutional rights, particularly their right to a clean and healthy environment and right to life. They also asserted that their right to information was curtailed in several instances where the Respondents declined to avail information to them with respect to the suit property.
 116. The Petitioners have challenged the various approvals and licenses issued to the 1st to the 12th Defendants on grounds that they were fraudulent, illegal, null and void having referenced LR No. 209/9316 which is no longer in existence, and that they were issued to the 12th Respondent, who is not the owner of the suit property. The Petitioners also argued that the 16th, 17th, 18th, 19th, 21st, 22nd and 24th Respondents failure to perform their constitutional and statutory duties and mandates have aided and abetted the 1st to 14th Respondents in their acts and omissions.
 117. The Respondents opposed the Petition on multiple grounds. The first ground is that this court lacks jurisdiction on the basis of the doctrine of exhaustion of statutory remedies.
 118. They contended that the Petitioners ought to have filed an appeal before the National Environment Tribunal as prescribed under Section 129(1)(a) of the Environmental Management and Coordination Act to challenge the issuance of the EIA Licence as well as an appeal before the County Physical and Land Use Planning Liaison Committee to oppose the development permission, which remedy is provided under Section 61(3) of the *Physical and Land Use Planning Act* (PLUPA).
 119. A second ground raised by the Respondents is that this Petition is an abuse of court process because the Petitioners have filed two other cases on this subject matter, being ELC E001 of 2024 and ELC E009 of 2024 which have since been withdrawn. They also argued that this Petition fails to meet the standards established in the Anarita Karimi case.
 120. The Respondents maintained that the development on the suit property is lawful and that the 1st -12th Respondents have obtained the requisite approvals and licenses from the relevant authorities. It is their position that the Petitioners have not proven that their constitutional rights have been infringed, either in the process of issuance of the approvals and licenses or in the excavation and the ongoing construction on the suit property.
 121. With respect to the objection raised by the Respondents concerning the doctrine of exhaustion, this issue was heard and settled by this court through its ruling dated 19th September 2024.
 122. This court found that the Petitioners were not barred by the doctrine of exhaustion of statutory mechanisms from approaching this court by way of the Petition. The court took into consideration that at that point in time, if the court had found that it had no jurisdiction, the remedy of an appeal to the National Environment Tribunal under Section 129(1)(a) of EMCA would not have been available to the Petitioners as the same was out of time. Similarly, an appeal to the County Physical and Land Use Planning Liaison Committee under Section 61(3) of the *Physical and Land Use Planning Act* would also have been unavailable to the Petitioners.
 123. This court also appreciated in its ruling that this Petition raises issues that could not be fully resolved through the established administrative mechanisms, particularly, the determination of whether the Petitioner's right to a clean and healthy environment had been infringed.
 124. Further still, in the earlier ruling, this court also addressed the matter of the locus standi of the Petitioners. It appreciated that under Articles 22 and 258 of *the Constitution*, any person can institute



proceedings under the Bill of Rights on behalf of another person, or as a member of or in the interest of a group or in the public interest. The court upheld Article 70 of *the Constitution* which prescribes that with respect to environmental rights, an applicant does not have to demonstrate that they or any other person has incurred loss or suffered injury.

Whether this Petition satisfies the specificity test set out in the Anarita Karimi case.

125. As correctly stated by the Respondent, the court in *Anarita Karimi Njeru vs Republic (1979)* eKLR set out the legal threshold for a constitutional Petition thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

126. This principle was restated by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others (2013)* eKLR as follows:

“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent.

It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act, 2011*, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.”

127. In the same vein, the Supreme Court in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014]* eKLR stated as follows:

“Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic (1979)* KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”



128. On the strength of these decisions, it is not enough to just quote Articles of *the Constitution* and to lay out a stream of facts. A Petitioner must additionally set out the particulars of the violation with enough detail to enable the Respondent to reply.
129. In the instant Petition, the Petitioners have not only laid out the particular Articles of the Constitutions that they allege have been violated, but have also articulated the violations by the Respondents. They contend that the issuance of the approvals and licenses permitting the multi-story development on the suit property has infringed on their right to a clean and healthy environment, their right to life and their freedom not to be subjected to inhumane and degrading treatment.
130. Further, it is the Petitioners' case that the development has and is likely to infringe and violate their right to a clean and healthy environment; that the Respondents breached their right to information in failing to accord them information with respect to the development and that the officials of the 15th to 24th Respondents failed to undertake their mandates in consideration of the national values and principles of governance set out under Article 10 of *the Constitution*.
131. The 1st-11th Respondents have submitted that this Petition has no constitutional underpinning, as the question of whether or not building approvals are regular or valid is an issue of interpretation of statute and the remedies that should issue are statutory remedies.
132. The question of what constitutes a constitutional question was discussed at length in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* [2002] 23 ILJ 81 (CC) in which the court citing the Constitutional Court's observations in *S vs Boesak* [2001] (1) SA 912 (CC) stated thus;

“*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.”

133. This court must disagree with the Respondents' argument that the Petition does not raise constitutional questions, as the right to a clean and healthy environment provided under Article 42 of *the Constitution*, is integral to issues of physical and land use planning and development.
134. Conceptually, approvals, licenses and assessments are regulatory and administrative tools of urban planning, used in designing and regulating land use, and infrastructure towards the development of urban areas. Building approvals are critical as they ensure that developments comply with zoning laws, building codes, master plans and environmental standards.
135. Equally, Environmental Impact Assessments (EIAs) are a globally accepted mechanism to address environmental impacts of project development proposals. In this way, development planning decisions



are primary vehicles for either protecting or undermining the constitutional right to a clean and healthy environment.

136. The right to a clean and healthy environment has a uniquely broad scope. This was affirmed by the court in the case of *Peter K Waweru vs Republic* [2006] eKLR where the court stated, inter alia;
- “The right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding. This right and the other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.”
137. This is as the right guaranteed for the benefit of present and future generations, and which any person is mandated to protect by filing a constitutional Petition when the same is violated or threatened.
138. This court is satisfied that this Petition has raised Constitutional questions, particularly with respect to the right to a clean and healthy environment (Article 42); the right to information (Article 35) and the duties of state officials to undertake their mandate in accordance with the national values and principles of governance set out under Article 10 of *the Constitution*.
139. Indeed, the Petitioners gave adequate particulars and details of the alleged violations, enabling the Respondents to respond to their claims.

Whether the Petition is an abuse of court process

140. The 12th Respondent argued that this Petition is an abuse of court process as this is the third petition advanced by the Petitioners purporting to impugn the development of the subject property. While the 12th Respondent’s referenced ELC Petition N0. E001 of 2024, the citation of that suit is *Joginder Kaur Chadha & Another vs Thermax East Africa Limited and Others*. This suit has no relation or nexus to the Petition before this court.
141. The 12th Respondent did however annex to their Affidavit the pleadings that were filed with respect to ELC Petition No. E009 of 2024, *Karim Kassam and 13 others versus Grace Njeri and 11 Others*.
142. Courts have on many occasions found that the concept of abuse of court or judicial process involves varying circumstances and situations. It is regarded as an abuse of court process when a party improperly uses the judicial process to the irritation and annoyance of his opponents. In the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, the Court of Appeal stated as follows:-
- “The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and frivolous, vexatious or oppressive.”
143. The Petitioners do not deny that they initially filed ELC E009 of 2024 vide a Petition dated 12th April 2024 against the Respondents herein. The Petitioners subsequently sought leave to withdraw the matter vide a notice dated 20th May 2024, which leave was granted. The Petition was withdrawn after the majority of the Respondents had responded to the Petition.



144. While the withdrawn Petition bears striking resemblance to the Petition before this court, this court notes that it had not delved into the merits of the Petition in ELC No. E009 of 2024, and in any case, the suit was duly withdrawn with the leave of court. This Petition therefore does not constitute abuse of court process and does not cause prejudice to the Respondents to this suit.

Whether the licenses and approvals allowing the construction on the suit property were issued in violation of the Petitioners' rights to a clean and healthy environment.

145. Although the Petitioners intimated that no approvals or licenses have been issued with respect to the construction on the suit property, the documents presented by the Petitioners themselves as well as by the 12th Respondent, shows otherwise.
146. The 12th Respondent and the developer of the impugned project, Akhwam Construction Limited adduced the following permissions, approvals and licences with respect to the development: A Notification of Approval of Application for permission to carry out Change of User from Single Dwelling Unit to Multi- Dwelling Units (Apartments) with respect to LR No. 209/9316 which was submitted on 14th November 2023 and approved on 29th November 2023. A Notification of Approval of Application for permission to develop the proposed development of 68 apartments 18 levels on LR No. 209/9316, which was submitted on 29th November 2023 and approved on 30th November 2023. An Environmental Impact Assessment Licence No. NEMA/EIA/PSL/31291 issued on 12th March 2024, with respect to the Construction of an 18 storey (basement and ground with parking spaces plus 1st-17th floor) residential building comprising 68 No. residential units (51 No. four-bedroom units and 17 No. two-bedroom units with associated amenities) located at Plot LR. No. 209/9316 along City Park Drive, Parklands area, Nairobi City County. Certificate of Compliance Proj Reg. No. 53127415710870 issued by the National Construction Agency to Akhwam Construction Limited with respect to the Proposed Residential Apartments on LR No. 209/9316 City Park Drive Road Nairobi Kenya, with validity from 20th February 2024 to 20th February 2026. Hoarding/ Scaffolding Licence issued to Akhwam Construction Ltd on 18th January 2024 with respect to LR No. 209/9316. Authority to Excavate and Transport Soil from LR No. 209/9316 issued by the Nairobi City County to Akhwam Construction Limited through a letter dated 16th February 2024.
147. It was the Petitioners' contention that the excavation and demolition activities on the suit premises began before the issuance of the necessary approvals, in December 2023.
148. It is a well-established principle of law that he who alleges must prove. The burden of proof was thereby upon the Petitioners to establish that the construction activities did actually begin in December 2023 and not in February 2024 as averred by the Respondents.
149. Save for the sworn statement of the 1st Petitioner, Karim Sherali Kassam, the Petitioners did not adduce any further evidence to confirm or buttress their claim that construction activities on the suit property began in December 2023, prior to the issuance of the relevant approvals and licenses.
150. The Petitioners did present pictorial evidence of trucks carrying out debris from the suit property on 16th February 2024, which is the same date on which the 12th Respondent received approval to excavate and transport soil from the subject property. This was also after a hoarding/ scaffolding licence was issued to them on 20th January 2024.
151. Based on the foregoing, this court concludes that the excavation activities begun on 16th February 2024, at which point in time the 1st-12th Respondents had already obtained change of user, development permission to construct the development and a hoarding/scaffolding licence. The NCA licence was



issued shortly after on 20th February 2024 and on 12th March 2024, the 1st-12th Respondents received an EIA licence from NEMA.

152. According to the Petitioners, these approvals and licenses are fraudulent because they refer to the suit property as LR No. 209/9316 rather than LR Nairobi / Block 36/66 (Nairobi / Block 36/66/ 1-8).

153. The Black's Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

154. It is trite law that fraud must not only be pleaded and particularized, but strictly proven by way of evidence. It is also settled that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

155. The Petitioners have ably set out the history of the suit property. They have averred that Land Reference Number 209/9316 measuring 0.2282Ha was subdivided in 1999 into two portions, parcel numbers 65 and 66, each measuring 0.1141 hectares in area. parcel number 66 was later given Land Reference Number Nairobi Block/ 37/66 while parcel number 65 was given Land Reference Number Nairobi Block 37/65.

156. As admitted by the parties to this Petition, the owner of Nairobi / Block 37/66 constructed a residential block of eight units, with respect to which a Sectional Plan was registered and sectional titles Nairobi Block 37/66/1-8 were issued. It is not disputed that the 1st Respondent is the registered proprietor of LR No. Nairobi/ 37/66 and the 2nd to 11th Respondents are the owners of the sectional titles Nairobi Block 37/66/1-8.

157. From the facts and evidence adduced herein, it is apparent that the impugned development has been constructed on LR No. Nairobi Block 37/66, which includes (Nairobi Block 37/66/1-8), and which is a subdivision or a portion of the former LR No. 209/9316.

158. The Petitioners have not adduced any evidence to satisfy this court that the reference to LR No. 209/9316 rather than Nairobi Block 36/66 was done deliberately and with intent to deceive; that the description misrepresented the location of the proposed development; that the description affected the rights of third parties or circumvented zoning and regulatory laws or that it misled authorities, neighbours and the public.

159. Indeed, there is notably no dispute as to ownership of suit land. The proprietor of the Parcel No. 35 is not known to this court and there is no claim that the 1st-12th Respondents have undertaken excavation or construction activities beyond the boundaries of their property. The reference to the property as LR No. 209/9316 rather than LR No. Nairobi / Block 36/66 (Nairobi Block 37/66/1-8) has therefore not deprived the proprietor of Parcel No. 35 of their right to property.

160. As far as can be seen, the reference to the suit property as LR No. 209/9316 did not prejudice and did not cause confusion to the Petitioners. Indeed, even before the signboard was erected and before



- the Petitioners became aware of the various approvals issued to the Respondents, the Petitioners themselves identified the suit property as LR No. 209/9316 and ascertained that it was the land adjacent to their own properties.
161. This is evident in their letter to the Nairobi City County dated 14th February 2024 in which they (the Petitioners) inquired as to the development which they identified as being on LR No. 209/9316 which they stated was adjacent to their properties.
 162. They also referred to the development as being on LR No. 209/9316 in their letters dated 26th February 2024, 12th March 2024, 5th April 2024 to the Nairobi City County and its officials, the letter dated 12th March 2024 to the National Construction Authority, the letter dated 12th March 2024 to Akhwam Construction Limited and the letter dated 15th March 2024 to the 12th Respondent's Counsel.
 163. The upshot of the foregoing is that the Petitioners have not established to the requisite standard that the reference of the suit property as LR No. 209/9316 in the above listed approvals and licenses was fraudulent.
 164. The Petitioners have also challenged the validity of the approvals and licenses having been issued in the 12th Respondent's name, who is not the lawful proprietor of the suit proprietor, but a developer.
 165. Under Section 58 of the Environmental Management and Coordination Act (EMCA), it is not stipulated that an Environmental Impact Assessment Licence can only be issued to a landowner. This section states that an EIA Licence is to be obtained by the proponent of a project specified in the Second Schedule of the Act.
 166. Under Section 2 of EMCA, a proponent is defined as a person proposing or executing a project, program or an undertaking specified in the Second Schedule.
 167. Section 57 of the *Physical and Land Use Planning Act* prohibits a person from carrying out a development within a county without a development permission granted by the respective county executive committee member.
 168. Section 58(4) allows for such application to be made by proxy by either a developer, an agent or an architect. It provides that where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall provide that written consent to the respective county executive committee member at the time of applying for development permission.
 169. In this matter, it is not known whether the 12th Respondent adduced the written consent of the 1st to 11th Respondents in their application for development permission.
 170. Justice Dena in considering a similar question in the case of *Sosplashed Limited & another vs Pwani Maoni Limited & 3 others* (Environment & Land Case 12 of 2021) [2023] KEELC 22487 (KLR) opined that the absence of consent under Section 58(4) of PLUPA would render the approval voidable at the instance of the authorizing office. She persuasively argued as follows:

“But would the absence of the consent invalidate the entire approval? In my view the answer is in the negative. I think it is voidable at the instance of the authorizing office. Why do I say so? Firstly, it is because the said section 57 is silent on the consequences to be deployed in the absence of such consent unlike for the development permission where Section 72 of the Act (Part IV) is dedicated to enforcement provisions and outlines the sanctions to be meted where there is failure to obtain development permission.”



171. This court is in agreement with the above holding. I say so because in this case, it was an express term of the joint venture agreement between the 1st-12th Respondents that the 12th Respondent would obtain the necessary approvals for the development. This satisfies the requirement for consent by the registered owners of the land under the Act, and who in any not complaining.
172. Further, Regulation 4 of the Physical and Land Use Planning (General Development Permission and Control) Regulations also generally provides that person who seeks to put land into a use other than that which it is registered under shall apply to the planning authority for a change of user or an extension of use.
173. Under the National Construction Authority Regulations, Regulation 17 stipulates that an owner shall make an application for registration of a project to the Authority in writing within thirty days from the date on which a tender for construction works, contract or project is awarded to a registered contractor.
174. An owner is defined under Regulation 2 as meaning a person, body of persons or organ of state who enters into a main contract with a contractor for the provision of construction works. Regulation 18 stipulates that the owner shall identify a representative who shall act as a contact person to liaise with the Authority on the construction works.
175. In the absence of evidence of fraud, this court is not satisfied that the issuance of the licenses and approvals in the 12th Respondent's name was indeed fraudulent and that it automatically rendered the said documents null and void. This is especially in consideration of the consent accorded by the property owners, being the 1st-11th Respondents in the Joint Venture Agreement.
176. In the specific circumstances of this matter, this court finds that the listed licenses and approvals were not rendered invalid for their reference to LR No. 209/9316, neither were they voided by the fact that they were issued to the 12th Respondent, being the developer of the project.
177. Did the 12th Respondent lawfully obtain all the approvals and licenses? With respect to an application for change of user, Regulation 15 of the Physical and Land Use Planning (General Development Permission and Control) Regulations requires an application to be made in the prescribed form, which can be transmitted either electronically or in paper form.
178. The 12th Respondent has presented a copy of the Notification of Approval for the permission to carry out Change of User from Single Dwelling Unit to Multi- Dwelling Units (Apartments) with respect to LR No. 209/9316 which was submitted on 14th November 2023 and approved on 29th November 2023. The application was drafted in accordance with the prescribed template set out as PLUPA/DC/8 in the Development and Control Regulations.
179. The 12th Respondent also presented a copy of the public notice informing the public of the intention of the owners of LR No. 209/9316 to change the use from Single Dwelling Residential to Commercial cum Multi-Dwelling Residential (Apartments).
180. This notice, which was published by the CECM, Built Environment & Urban Planning Nairobi City County Government, was published in the Standard Newspaper on 10th November 2023 and invited the public to give their comments and objections within 14 days of the publication of the notice. The said public notice was also published near the gate to the suit property as evidenced by photographs adduced by the 12th Respondent.
181. The 16th Respondent, the Acting Secretary and Head of County Public Service confirmed the lawful issuance of a Change of User to development on the suit property. He affirmed that the approval was



- accorded after an onsite and newspaper advertisement in the Standard on 10th November 2023 showing the intention of changing the use of the plot.
182. The 16th Respondent confirmed that there being no objection to the change of use, and after the building plans were submitted (PLUPA-BPM-003793-N), the application was approved on 29th November 2023. These documents establish that the Change of User was lawfully issued.
183. With respect to development permission, Section 58 of the *Physical and Land Use Planning Act* prescribes that a person shall apply for development permission from the county executive member in the prescribed form and after paying the prescribed fee. As already indicated above, where an applicant is not the owner of the property, they are required to provide the written consent of the registered owner of the land to the CEC member.
184. The 12th Respondent produced in evidence a copy of the Notification of Approval of Application which was approved on 29th November 2023, but did not avail copies of the public notice inviting comments on the development permission. The 16th Respondent, however, confirmed that the 12th Respondent duly submitted the application.
185. In law, there is a presumption of regularity, where a court presumes that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary. The Supreme Court in the case of *Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) vs National Environment Management Authority & 3 others [2024] KESC 75 (KLR)* stated as follows with respect to the doctrine of regularity:
- “In general, the presumption of regularity presupposes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done. The doctrine provides a degree of deference to the actions or decisions made by government officials or institutions. It is grounded in the assumption that these officials act within the bounds of the law, follow established procedures, and operate in good faith when performing their duties. This presumption also relieves courts or reviewing bodies from conducting a deep, thorough review of every action or decision unless there is specific evidence to suggest wrongdoing, procedural lapses, or irrational behavior. (See *The Presumption of Regularity In Judicial Review Of The Executive Branch Harvard Law Review* pg. 2432). The idea is that, in the absence of clear evidence to the contrary, administrative actions should be presumed to be regular, lawful, and reasonable.”
186. The Court of Appeal’s in *Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 others [2020] eKLR* held that the evidence required to rebut the presumption of regularity must be cogent, clear and uncontroverted and that the presumption of regularity cannot be rebutted through conflicting interpretation of a statutory or regulatory provision.
187. In this Petition, the Petitioners have not led any factual evidence to dislodge the presumption of regularity in the issuance of the development permission by the Nairobi City County.
188. The Petitioners further contend that there is no development policy or guideline permitting construction and development of buildings and structures near the subject properties that are more than four levels high.
189. The 1st Petitioner and several other Petitioners are admittedly residents of Anahita Apartments, which by the photograph produced by the 12th Respondent, far exceeds the four levels stipulated in the 2004



Guidelines, A Guide of Nairobi City Development Ordinances and Zones, 2004. This illustrates that the 2004 Guidelines are far from relevant to the present context of urban development in Nairobi.

190. This court stated as much in its decision in *Millennium Gardens Management Limited vs Metricon Home Nairobi Company Limited; Nairobi City County Government & 2 Others (Interested Parties)* [2024] KEELC 6040 (KLR) as follows:

“214. It is abundantly clear from the foregoing that the 2004 Zoning Guidelines in question have long been superseded by events that were unforeseen at the time of their formulation. These guidelines, once relevant, fail to account for the dynamic and evolving nature of urban and environmental planning, a phenomenon recognized by the NIUPLAN and Nairobi City County Development Control Policy, 2021.

215. The Court recognizes that the application of these outdated guidelines (2004) without consideration of the current realities and the operative Master Plan (2014-2030) and Nairobi City County Development Control Policy, 2021 may result in unjust outcomes that do not reflect the needs and contexts of contemporary society.

216. Nonetheless, it is clear from the foregoing excerpts that the 1st Interested Party has at all times been alive to the conflict between the 2004 Zoning Guidelines in place and the Nairobi Integrated Urban Development Plan, and Nairobi City County Development Control Policy, 2021 which identified the need for review of the zoning policy.”

191. In its subsequent decision in *Anami & 2 Others (Suing as Officials of Rhapta Road Residents Association) vs County Executive Committee Member(CECM) Built Environment and Urban Planning, Nairobi City County & 20 Others* [2025] KEELC 128 (KLR), this court upheld the position that the unapproved Nairobi City County Development Control Policy is a clear, unambiguous, and lawful communication by the County Government of Nairobi on the zonal guidelines and restrictions, and until the contents therein change, the Nairobi City County is bound by it. The said policy is still pending public participation and is yet to be amended and tabled before the County Assembly. This decision is therefore still applicable at this time.

192. Under the 2021 Development Control Policy, City Park Estate is under Zone 3E which is described as a mixed development area, commercial, residential apartments, market and recreational. The number of floors in this zone are limited to 20. As the development permission for the impugned development allowed the construction of 18 levels, it is within the prescribed limit therein. The development permission was therefore regular and lawful.

193. The presumption of regularity similarly applies to the Certificate of Compliance issued to the 12th Respondent by the 23rd Respondent. The 23rd Respondent affirmed in its Replying Affidavit that the 12th Respondent met all the requirements and submitted the necessary approvals. It was on this basis that Compliance Certificate Registration No. 53127415710870 was issued to the 12th Respondent.

194. The Petitioners have not presented any evidence of arbitrariness or impropriety on the part of the 23rd Respondent in the review of the 12th Respondents’ application and the subsequent issue of the Certificate.

195. Lastly, the Petitioners vehemently opposed the issuance of the EIA licence, and alleged that the license is invalid for the reasons that the 20th -22nd Respondents:Failed to establish whether or not the property



described in the EIA Project Report is registered at the Director of Survey or at the Lands Registry Nairobi; Issued the NEMA Licence to the 12th Respondent without the latter adducing any copy of title showing that they are the registered owner of that property; Failed to note when reviewing the EIA Project Report that none of the respondents to the public participation except one, had given the Land Reference Numbers of the properties they own or leased; Issued the licence despite the EIA Lead Expert indicating in the project report that at the time he compiled the report, the site had been excavated and construction was underway; Issued the NEMA Licence confirming that views and comments were sought from the Petitioners and the immediate neighbours, residing next to the alleged LR No.209/9316. Issued the NEMA Licence without any input from key agencies and authorities including Water Resources Authority, County Executive Committee Member- Built Environment and Urban Planning Sector of Nairobi City County Government, Ministry of Labour and Human Resource Development, Nairobi City Water & Sewerage Company, Kenya Urban Roads Authority and Department of Housing, Arthi House. Failed to review the allegation by the Lead Expert that there was an existing sewer line network near the site project, yet the same is a privately developed sewer (PDS). Issued the EIA licence long after development had commenced at the project site in December 2023 without approval from the 15th, 16th and 17th Respondents, which was in violation of Section 57 of the *Physical and Land Use Planning Act* (PLUPA).

196. The process of application for an Environmental Impact Assessment Licence is set out in Section 58 of the Environmental Management and Coordination Act. A project proponent is required, before commencing or executing a project specified in the Second Schedule of the Act, to submit a project report to the National Environmental Management Authority in the prescribed form.
197. The Environmental (Impact Assessment and Audit) Regulations 2003 further stipulate under Regulation 7(2) that the project report should specify the nature of the project; the location of the project including proof of land ownership, where applicable, any environmentally sensitive areas to be affected, availability of supportive environmental management infrastructure and conformity to land use plan or zonation plan: and potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.
198. Regulation 9 requires NEMA to submit the project report to each of the relevant lead agencies, the relevant District Environment Committee for their written comments, which comments shall be submitted to the Authority within twenty-one days from the date of receipt of the project report from the Authority, or such other period as the Authority may prescribe.
199. Thereafter, on determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.
200. The 12th Respondent presented a copy of the Environmental Impact Assessment Project Report which was submitted to the County Director of Environment on 17th January 2024 as Application Reference No. NEMA/EIA/PSR/47647.
201. The Report contains conflicting assertions as to the status of the property at the point of its preparation. While at the introduction it is indicated that there was a structure that was to be demolished to pave way for the proposed project, under Section 2.5.1 on Demolitions/ Excavations/ Earthworks, it is admitted that the site had been excavated and construction activities were underway.
202. Clarity is offered to the conflicting information in the Project Report as to when excavation began, through the Site Visit Report prepared and submitted by an officer from NEMA on 14th February



2024. In the report, it was indicated that the project site had existing apartments that were to be demolished to pave way for the new development.
203. Furthermore, this court notes that the Petitioners contended that there was no public sewerage system and that there was instead a privately developed sewer.
204. The presence of the privately developed sewer has not been proved to this court. It also runs counter to the report of the site visit by NEMA conducted on 14th February 2024, where it was indicated that the area is served by a conventional sewer line for liquid waste discharge. It also directly contradicts the Petitioners' initial statement in the Petition, that the suit property and the neighbouring properties share facilities, including a sewer line.
205. Despite service of the Petition, the 20th -22nd Respondents did not enter appearance in this matter and did not respond to the allegations raised by the Petitioners.
206. In the pleadings adduced by the 12th Respondent with respect to E009 of 2024, the Director General of NEMA affirmed that upon receipt of the Project Plan, they did in fact write to the relevant authorities through a letter dated 17th January 2024. A copy of the letter was annexed to the 12th Respondent's Replying Affidavit.
207. It appears that in this case, after NEMA reviewed the project report, it did not deem it necessary for the 1st to 12th Respondents to conduct a full Environmental Impact Assessment Study.
208. This was in accordance with Regulation 10(2) of the Environmental (Impact Assessment and Audit) Regulations, which provides that where NEMA is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence. NEMA issued an EIA Licence with respect to the subject matter on 17th March 2024.
209. The Court of Appeal in *Kibos Distillers Limited & 4 others vs Benson Ambuti Adegga & 3 others* [2020] KECA 875 (KLR) opined as follows with respect to this procedure:
- “In my considered view, Regulation 10 (2) and (3) must be given meaning. When the 4th respondent issued the EIA Licence No. 0000259 pursuant to its power under Regulation 10 (2), it did not require the 3rd appellant to conduct an EIA study. I thus find that the 4th respondent was satisfied that the Project Report submitted by the 3rd appellant in 2004 indicated that the project would not have a significant impact on the environment and that the said Project Report disclosed sufficient mitigation measures.”
210. As indicated by the Petitioners, the 12th Respondent did not annex a title document to the project report. This, however, did not invalidate the EIA Project Report and the subsequent licence that was issued. In the case of *London Distillers (K) Limited vs National Environment Management Authority & Another* [2023] KEELC 19075 (KLR), Nyukuri J ably propounded that a project proponent need only prove their right to ownership and not necessarily registration. She opined as follows:
- “In my opinion, the question of ownership would be relevant in these proceedings if the 2nd Respondent's claim of ownership was contested, because what a project proponent is required to demonstrate under EMCA is merely ownership and not necessarily registration. While ownership may be confirmed by registration, it can also be confirmed by other means including an agreement of sale that is not contested by the registered proprietor. In the premises since the 2nd Respondent was the registered proprietor of the project property before issuance of the EIA Licence, I find and hold that failure to demonstrate registration



of the project property in the 2nd Respondent's name at the time of application for the EIA licence did not invalidate the EIA Study report.”

211. The question of the location of the development was later the subject of an Improvement Notice by NEMA following a complaint that the excavation was being undertaken on two plots. NEMA issued an Improvement Order dated 26th March 2024 to cease/ stop any further excavation works, and to report to Nyayo House 16th Floor on 27th March 2024 with a copy of their deed plan.
212. In his affidavit dated 2nd May 2024 in ELC E009 of 2024, which was annexed on the 12th Respondent's affidavit in this Petition, NEMA's Director General confirmed receiving a letter from the 12th Respondent where they asserted that they were carrying out the development on LR 209/9316 as per the licence issued to them. They then availed a copy of the deed plan.
213. NEMA, through its Environmental Inspectors carried out another site visit on 4th April 2024 and confirmed that the license conditions were being adhered to. They thereafter allowed the 1st to 12th Respondents to continue with their excavation and construction activities.
214. With respect to the public participation that was conducted, the 12th Respondent adduced 10 questionnaires filled by members of the public on 11th and 12th January 2024. As already held above, the 1st to 12th Respondents were not required by NEMA to undertake a full EIA Study, which would have required publication of notices in the Gazette, in two newspapers of nationwide circulation and onsite.
215. The Petitioners have challenged the public participation exercise as they asserted that it was only one respondent who indicated that he was a land owner in the area.
216. Benjamin Nyandika Ombati, the Environment Lead Expert working under M/S Greendime Consultants Ltd, averred in his sworn statement that he was engaged by Akhwam Construction Ltd to conduct an environment impact assessment in respect of the development project on the subject property. He attested that he designed the data collection tools used to engage the public in a public participation process.
217. He averred that he and his team circulated the questionnaires and support documents to homes and establishments within the locality of the intended project. While they received responses from some neighbours, others were not responsive.
218. Although the 1st-12th Respondents were not required to undertake a full EIA study, they still bore a responsibility to undertake a real and meaningful public participation exercise in their project report prior to obtaining the EIA licence.
219. Public participation is a critical component in environmental governance and is one of the procedural rights to the right to a clean and healthy environment, alongside the right to access information and the right to access justice. These procedural rights are set out in Principle 10 of the 1992 Rio Declaration on Environment and Development, as follows:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”



220. The Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019], prescribed the following guiding principles with respect to public participation:
1. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
 2. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
 3. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
 4. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
 5. Public participation is not an abstract notion; it must be purposive and meaningful.
 6. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
 7. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
 8. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
 9. Components of meaningful public participation include the following: a. clarity of the subject matter for the public to understand; b. structures and processes (medium of engagement) of participation that are clear and simple; c. opportunity for balanced influence from the public in general; d. commitment to the process; e. inclusive and effective representation; f. integrity and transparency of the process; g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.”
221. It was noted from the public participation undertaken that there were concerns about noise population, dust pollution and environmental hygiene, which are concerns raised by the Petitioners to this suit. These concerns have been addressed by the EIA Project Report.
222. In order to mitigate the environmental impacts of the project during the operational phase, the following measures were proposed: enhance effective flow of surface run-off impermeable areas within the site; put in place measure to manage construction wastes; management of air pollution through provision of full protective gear for workers; sensitization of workers on hazards encountered in such work environments; proper maintenance of all machinery and equipment and the proponent to provide waste bins and ensure they are disposed regularly and appropriately
223. The following mitigation measures were proposed to address noise pollution: sensitization of construction truck drivers to switch off vehicle engines when offloading materials and to avoid gunning



- engines and generators and heavy duty equipment to be insulated in enclosures to minimize ambient noise levels.
224. The proposed mitigation measures to address dust emissions in the Report were through regularly cleaning or sprinkling water to suppress dust. It is also noteworthy that dust nets are also being used by the developer in the construction.
225. This court has found that the licenses and approvals were lawfully issued to the 12th Respondent with respect to the development on the suit property. Apart from the letters exchanged between the Petitioners and the Respondents, the Petitioners have not presented any evidence to rebut the legality of the approvals and licenses.
226. The Petitioners equally failed to show that the officials of the 15th- 24th Respondents acted in breach of the national values and principles of good governance set out in Article 10(2) in issuing the licenses and approvals to the development.
227. It is also apparent from the facts that the officials of the Respondents acted on the various complaints raised by the Petitioners by conducting periodic inspections of the impugned development and holding the developer to account. These inspections however reaffirmed that the development was in compliance with the relevant laws and regulations.
228. The Petitioners did not also adduce any evidence showing the linkages between the approval of the development on the suit property and their violation to their right to a clean and healthy environment. To this end, this limb of the Petition must fail.
229. The Petitioners have further argued that the development of the multi-story residential apartments will visit environmental damage to their detriment. They contend that the increased population will exert pressure on existing sewer and water drainage system and that the increased human and traffic will affect provision of water and electricity supply in the area.
230. Further, they have alleged that the apartments will block natural air and light to their residences; that the excavation has polluted and continues polluting their respective residences and the neighboring community, specifically through dust pollution and the immeasurable noise emanating from the excavating equipment; and that the construction work was undertaken in a haphazard manner and caused extensive damage to the walls of the 17 houses erected on LR No. 209/161816.
231. It is a well settled principle that he who alleges must prove. This principle is set out under Section 107(1) and (2) of the *Evidence Act*, which provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
232. This provision (section 107 of the *Evidence Act*) requires a Petitioner to demonstrate credible grounds for concern, for example, through credible reports, expert affidavits, public complaints, or circumstantial evidence of environmental risk.
233. Most of the Petitioners’ claims relate to threats to the environment and to their rights which they are yet to suffer. They urged this court to apply the precautionary Principle and prevent the development from getting to completion.



234. The Precautionary principle is encapsulated in Principles 15 of the Rio Declaration as follows:
- “In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”
235. The Environmental Management and Coordination Act defines the precautionary principle as the principle which postulates that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental degradation.
236. The principle has four central parameters, namely; taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possible harmful actions; and increasing public participation in decision-making.
237. Did the Petitioners offset their burden of proof by establishing that there is a reasonable risk or threats of serious or irreversible damage to the environment? This court is not persuaded of the same. Some of the claims of injury have not been particularized such like the claim for noise pollution and dust pollution and the actual impact to the environment and to the Petitioners has been left to this court’s imagination.
238. This is especially considering that Respondents have endeavored to mitigate dust pollution and noise pollution as has been iterated earlier in this decision.
239. The Petitioners additionally contended that the excavation has been conducted from beacon to beacon in violation of the Physical and Land Use (Building) Regulations 2021 and that the security of the adjacent buildings now and in future is unknown and undetermined.
240. It behooved the Petitioners to adduce technical reports highlighting that the excavation undertaken by the 1st -12th Respondents was ineffective and was conducted in such a manner it did not protect the walls of the Respondents’ properties.
241. In the absence of such reports prepared by a subject matter expert such an engineer, this court is unable to evaluate this claim. It is not enough to simply assert that the excavation was done beacon to beacon. The Petitioners needed to prove that the excavation was done in such a manner that it jeopardized the existing neighboring properties.
242. Similarly, while the Petitioners claimed that the excavation and construction activities on the suit property had caused damage to the walls of houses constructed on LR No. 209/161816, the Petitioners neither adduced evidence of the alleged damage nor present technical reports drawing a nexus between the said damage and the activities by the 1st -12th Respondents. This claim is therefore without any basis.

Whether the Respondents infringed the Petitioners’ right to information

243. The Petitioners have also alleged that their right to information was violated by the Respondents to this suit. The right to information is enshrined under Article 35(1) of *the Constitution* as follows:

- “(1) Every citizen has the right of access to -
- a. information held by the State; and



- b. information held by another person and required for the exercise or protection of any right or fundamental freedom.”

244. Section 3A of the *Environmental Management and Co-ordination Act*, 2015 (EMCA) equally provides that every person has a right to access any information that relates to the implementation of the Act that is in the possession of the Authority, lead agencies or any other person. Section 3A(2) states that a person desiring information should apply to the National Environmental Management Authority (NEMA) or the relevant lead agency and may be granted access on payment of a prescribed fee.
245. Discussing the provision of Article 35 of *the Constitution*, the Supreme Court in *Njonjo Mue & Another vs Chairperson of Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR stated thus;
- “Article 35(1)(a) and (b) of *the Constitution*, read with section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to Access Information held by the state, or public agencies including bodies such as the 2nd respondent.”
246. Section 8 of the *Access to information Act* provides that a request for information should be made in writing. Indeed, Section 3A(2) of the EMCA provides that a person desiring information should apply to NEMA or the relevant lead agency and may be granted access on payment of a prescribed fee.
247. The Petitioners argued that they had on multiple occasions sought for information from the Respondents, which requests were ignored. The Annexures presented by the Petitioner however prove otherwise, as they indicate that the Respondents did respond to their inquiries, enabling them to access the necessary information concerning the development, albeit with some delays.
248. This is evident through the responses sent by the 12th Respondent’s advocate on 14th March 2024, forwarding the NEMA licenses and development approvals issued by the Nairobi City County; the letter dated 25th April 2024 and 7th June 2024 sent by the 16th Respondent confirming that the 12th Respondent had applied for change of user and development permission; and the letter from the 1st-11th Respondents in which they confirmed being the legal owners of the suit property.
249. On this basis, this court does not find that the Petitioners’ right to information was curtailed, save for the delays in the responses. In any case, these delays did not in any way prevent the Petitioners from advancing their case before this court.
250. In conclusion, this court finds that the Petition dated 24th June 2024 wholly lacks merit and the same is dismissed.
251. This being an appeal filed in the interests of the public, each party shall bear its/his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of;



Mr. Ndambiri for Petitioners

Mr. Muchoki for 12th Respondent

Mr. Ndungu holding brief for Juma for 15th – 19th Respondents.

Mr. Masila for 1st – 11th Respondents

Court Assistant: Tracy



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JUDGMENT

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