



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 41 OF 2017

(Formerly Petition No. 451 of 2017)

SAMUEL NYONA OTONGLO.....1ST PETITIONER
GEORGE ORR.....2ND PETITIONER
JOSEPH MBAI.....3RD PETITIONER
MOHAMOUD ALI MOHAMED.....4TH PETITIONER
SARAH ORR.....5TH PETITIONER

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT
WALTER KONI.....1ST INTERESTED PARTY
ELENA KUONI.....2ND INTERESTED PARTY
GEORGE ROBINSON ORR.....3RD INTERESTED PARTY
NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY (NEMA).....4TH INTERESTED PARTY
NATIONAL CONSTRUCTION AUTHORITY.....5TH INTERESTED PARTY

JUDGEMENT

1. This is the petition dated 11th September 2017 brought by Samuel Nyona Otonglo, George Orr, Joseph Mbai, Mohamoud Ali Mohamed and Sara Orr (hereinafter referred to as **“the Petitioners”**). They are jointly represented by Samuel Nyona Otonglo who has been authorized to swear an affidavit and make submissions on their behalf. The petitioners are long standing residents of Whispers Estate on Daisy Drive in Gigiri Nairobi. They are aggrieved by the ongoing and potential environmental and social degradation at Whispers Estate which is being caused by illegal construction, development on LR No. 9104/226- a plot along Daisy Drive Whispers Estate which belongs to the 1st and 2nd interested parties Walter and Elena Kuoni

2. It is the petitioners’ case that the 1st and 2nd interested parties have illegally built structures on their plot LR No.9104/226 causing structural damage to their neighbours property (LR No 9104/224) and devaluation of property in the neighbourhood affecting the petitioners.

3. The reliefs sought are:-

(i) A declaration that there has been a violation of the constitutional rights and fundamental freedoms of the petitioners.

(ii) An order that the multi-dwelling in a single dwelling housing zone violets physical planning laws and that the respondent herein is to forthwith demolish all the illegal structures, including but not limited to the guard house/gate house on their neighbour’s (LR No. 9104/224) boundary wall and swimming pool with no effluent treatment plan to treat the backwash before it is discharged into the septic tank or otherwise.

(iii) An order of mandamus compelling the 1st and 2nd interested parties to demolish all structures (including but not limited to the gate/guard house on their neighbour’s wall (LR 9104/224) for international violation of NCC building codes and bylaws and failure to conduct an EIA for constructing a multi-dwelling in a single-family dwelling zone (Gigiri zone 13).

(iv) An order of mandamus compelling the 1st, 2nd, and 4th interested parties to conduct an empirical environment impact assessment on any intended construction by the 1st and 2nd interested parties in light of the plant impact on the neighbours of Daisy Drive and the Karura forest area in general.

(v) An injunction restraining the 1st and 2nd interested parties from continuing the illegal construction work (including but not limited to the gate/guard house on their neighbour's (LR No. 9104/224) boundary was) on their property pending resolution of this petition.

(vi) Damages for the harm caused to the petitioners.

(vii) The costs of this application be provided for

4. The petition is supported by the affidavit of Samuel Nyona Otonglo, one of the petitioners sworn on the 11th September 2017. He deposes that the construction by the 1st and 2nd interested parties is resulting in an ongoing and future social and environmental violation which are adversely affecting the petitioners who are also neighbours and degrading the Whispers Estate and Karura Forest area of Gigiri. That the National Environmental Management Authority has failed to exercise its statutory duty by illegally authorizing the unauthorized construction by the 1st and 2nd interested parties without conducting an Environmental Impact Assessment on the large scale construction undervalued at Kshs.26 million. Such actions by the 4th interested party are contrary to Article 10 of the constitution of Kenya 2010 which enshrines the principles of governance and most specifically integrity, transparency and accountability. Further that the 1st and 2nd interested parties are violating their (petitioners') constitutional rights to a good environment (Article 42), private land enjoyment (Article 64), their rights to property (Article 40) right to privacy (Article 31), principles of land policy (Article 60) attendant fundamental freedoms and international environmental heritage legal provisions are infringed upon by their illegal construction and property development activities.

5. The petitioners are Daisy Drive residents and their owner occupied homes will be disturbed by noise, nuisance, utility, overload, breach of privacy and insecurity because of the creation of an illegal multi family dwelling by the 1st and 2nd interested parties which will result in the devaluation of the estate as a whole. The report by Dr. C. S Keriasek is attached and marked 'SNO-1'. The 1st and 2nd interested parties project works are disturbing the neighbourhood peace and turning Whispers Estate Gigiri Karura Forest area into a high density population area which will have an adverse effect on the flora and fauna in the area, primarily due to over population, noise, utility overload and illegal deforestation on the plot of the 1st and 2nd interested parties. They attached a report of the environmental experts as exhibit 'S NO 2'. The petitioners pray that the orders sought on the petition be granted.

6. The 1st, 2nd interested parties opposed the petition. The 1st interested party Walter Kuoni has sworn an affidavit, dated 5th November 2018. It is their case that they have obtained all requisite planning permissions and consents and approvals in order to complete their residential development for a single dwelling unit. That the respondent approved the site plan for the residential house and endorsed a minor change to the earlier plan, as to the resting of the gate house. They have attached a copy of the plan as exhibit 'WEK5'. All approvals for the proposed residential house were obtained from the 4th interested party (NEMA) through the registered expert Olive Ngugi, prior to commencement of building works by a letter dated 12th October 2015. They have attached a copy of exhibit 'WEK6'. The 4th interested party, after studying the plans and confirming that the development is a residential maisonette with 8 bedrooms stated that (the proprietors) "are not required to carry out an Environmental Impact Assessment". NEMA waived the requirement for an Environmental Impact Assessment to be carried out for the proposed development. All approvals and conditions including the laws and guidelines issued by NEMA have been complied with diligently and according to the law.

7. The 5th interested party issued approvals by a letter dated 22nd October 2015. It was attached as exhibit 'WEK8'. The respondent by its letter dated 19th February 2016 gave authority to construct a site latrine for construction workers. A copy of the letter together with the requisite fees and payments are attached as exhibit 'WEK9'. The 1st and 2nd interested parties obtained approvals from the Environment and Forestry Section of the Nairobi City County (Respondent) to cut trees and prune two trees on 4th September 2015. A copy of the certificate of authority is attached as exhibit 'WEK10'.

8. Linda Telles is the owner of LR 9104/224, the plot adjacent to LR 9104/226 belonging to the 1st and 2nd interested parties. A reference is made to Linda Telles in the heading of the petition and several references made to her property although she is not a party to these proceedings. That the said Linda Telles filed ELC No. 88 of 2017 in which she sought similar reliefs as those sought in this petition. By a judgment dated 12th March 2018, J Bor dismissed the entire suit with costs. The petitioners herein have made an attempt to revisit the same issues that have been argued by Linda Telles in ELC No. 88 OF 2017. The 1st and 2nd interested parties engaged a registered NEMA expert Olive Ngugi who had submitted that all building plans and approvals including the swimming pool for NEMA approval. The architects report issued by Joseph Odhiambo Registration NO. A577 dated 6th September 2017 and attached and marked exhibit 'WEK12' confirms that;

"the location of the septic tank is at a lower terrain than the buildings. Between ground floor main building level and septic tank is a height difference of 1M. That means the septic tank is minimum 1M lower than any sanitary facilities in the main building or guard house".

9. The guard house was erected with prior approval of the respondent, on the property, of the 1st and 2nd interested parties. It does not in any way encroach on the neighbours property. The alleged encroachment of the wall was a matter in dispute in ELC 88 of 2017 and it was concluded and determined by the aforesaid judgment in paragraph 59 in which the judge states "the respondent confirms it gave approval for re-siting of the of the guard house. The guard house is not on her (applicant) Linda Telles) boundary wall"

10. The petitioners exhibit 'S NO 2' and 'S NO 5' and an opinion by an Architect dated 24th August 2017 was prepared specifically for the

use of occupier of LR No. 9104/224 who is not a party to this petition. Exhibit 'SNO2' contains evidence that pertains to another suit which has been determined and ought to be struck out as being irrelevant. That all other regulations specified in the zone guide for Gigiri area have been observed and approved by the planning authorities. The 2nd and 5th petitioners have built a guest house on their property LR No. 9104/228 which is leased to a UN employee in clear breach of the aforementioned regulations since his premises must now be considered as a multi dwelling. The 1st petitioner also lives on a multi generational house together with his son's family. If NEMA would have been of the opinion that (the 1st and 2nd interested parties) building is a multi dwelling an EIA would have been a requirement.

11. That in paragraph 13 (mattes in issue petition page 6), the petitioner states that the estimate cost of construction is Kshs.26 million or thereabouts. The petitioner omitted to state that this is as per an estimate based on moderate to medium class finishes which was submitted with the planning documents in 2014. According to our experts opinion the architect confirms in paragraph 5 that the market prices have changed by about 20% since the last estimation and thus the estimates were accurate at the time they were presented to the planning authorities. The 1st and 2nd interested parties pray that the petition be dismissed with costs.

12. The 5th interested party has filed a response to the petition. The same is by way of affidavit sworn by Stephen Mwilu, regional manager sworn on the 14th November 2018.

13. On the 15th October 2018, the court with the consent of the parties directed that the petition be canvassed by way of written submissions.

The Petitioners' submissions

14. The petition is brought under Article 22(2) and 258 of the constitution for enforcement of the Bill of rights. They have put forward the case of **Mining Temoi & Another vs Governor of County of Bungoma & 17 Others; Kenya Bankers Association & Others vs Minister for Finance [2002] IKLR 61**; Article 70 of the constitution gives every person the right to apply to the court for redress if right relating to the environment under Article 42 are threatened or violated. Article 162(2)(b) of the Constitution gives this court jurisdiction to hear and determine disputes relating to the environment, and the use and occupation of, and title to land. Also Section 13 of the Environment & Land Court Act.

15. The ongoing construction by the 1st and 2nd interested parties has been authorized illegally (without an Environmental Impact Assessment, nor any public participation inquiry) causing negative environmental and social impacts on the neighbourhood and hearing the petitioners. The 1st and 2nd interested parties threaten the peaceful and healthy air atmosphere by causing devaluation of the neighbourhood. The guard house infringes on the petitioners' rights to privacy because of its colossal size and height it gives unauthorized 24/7 stewardship to the neighbouring properties of the petitioners. Further the guard house violates the physical planning laws since its close proximity to the boundary wall of the neighboring property (LR NO. 9104/224) without their permission detracting from their property rights. There will be over population in the low density area, by creating a multi family dwelling rental building in a single family dwelling residential zone. There will be increase in traffic, noise and insecurity in the area. It will also likely to introduce high number of short stay tenants and tourist in a private residential zone.

16. The respondent failed to follow due process in making the impugned decision by authorizing the 1st and 2nd interested parties construction without granting the petitioners and other stakeholders an opportunity for public participation. The Respondent's approval of the plan by the 1st and 2nd interested parties failed to conform to the provisions of the physical planning Act which requires mandatory publication of notice of such an application in the Kenya gazette in respect of a development that has an impact on adjacent land or that does not conform to any conditions registered against the title of the property. Section 20 of the Physical Planning Act provides for community participation in the preparation and implementation of all physical and development plans. In the instant case there was no display of planned physical works on a public board until one of the neighbours made several inquiries to the respondent and relevant authorities.

17. The illegal construction by the 1st and 2nd interested parties is in contravention of Article 11(1), (2) (a), 42, 69, 23 of the Constitution. Article 2(5), 2(6) of the Constitution, the RIO Declaration on Environment and Development (1992) UNESCO World Heritage Convention 1991. The respondent is under a duty to ensure that the historic Nairobi neighbourhood of Whispers Estate, Daisy Drive Gigiri and the Karura forest area are conserved and protected from environmental degradation. However it has illegally shirked this responsibility.

18. The human survival of the petitioners depends on the integrity of natural ecosystems and the availability of adequate natural resources namely water and land. In contravention to Article 42 of the Constitutions on the right to clean water and sanitation as a state responsibility, there is no sewerage system in the Gigiri area where Whispers Estate is situated and the actions of building a multi family rental building in the area will exert pressure on the local utilities, compromising the access of the petitioners to adequate amenities. Article 60(1) of the Constitution demands sustainable and productive management of land and sound conservation and protection of ecologically sensitive areas. Violation of area zoning and bylaws by the respondent and the 1st and 2nd interested parties shirks this obligation. Article 57 of the constitution provides for special treatments to be accorded to the elders and many of the Daisy residents are retired city elders who have contributed distinguished efforts to the Kenyan Society and deserves to retire in a quiet neighbourhood. Violation of the area zoning and bylaws by the respondent and the 1st and 2nd interested parties shirks this obligation.

19. A balance needs to be struck between the right to property under article 40 of the constitution and the right to enjoyment of the property under article 64 for individual and communal interest. The impugned approvals are in breach of the petitioners fundamental and in alienable right to equal protection and equal benefit of the law and particularly the right not to be discriminated against directly or indirectly, as provided for under article 27(1)(4) and (5) of the constitution. The petitioners stand to suffer irreparable damage should the orders sought not be granted. They pray that the petition be allowed as prayed.

The 1st and 2nd Interested Parties' Submissions

20. The 1st and 2nd interested parties have opposed this petition on the bases of factual information set out in the replying affidavit filed on

5th November 2018 and on the basis of the relevant laws applicable. The 1st and 2nd interested parties have an identifiable stake in the matter being the beneficial owners of LR 9104/226 and having lawfully obtained all planning permissions to develop a dwelling residential houses with amenities and having invested monies to achieve this purpose.

21. The issues arising are:-

(i) *Whether the petitioners obtained leave of the court vis a vis prayer 2 and 5.*

(ii) *Whether the petitioners are aggrieved parties particularly in prayer 2 and 5.*

(iii) *Whether the petitioners rights have been breached by the alleged inaction of the respondent vis a vis prayers 1 and 2.*

(iv) *Whether the matter is res judicata.*

(v) *Whether the injunction should be granted to restrain the 1st and 2nd interested parties from continuing with construction works.*

As provided for by order 53 of the Civil Procedure Rules, they have put forward the case of **R vs County Council of Kwale Exparte Kondo & 57 others HCMCA 384 of 1996 as cited in Lady Justice Khaminwa vs JSC [2014] eKLR** page 4. The 1st and 2nd interested parties have not been furnished with any orders of the court evidencing that leave was obtained. Without this, petitioners appear not to have obtained leave which is a pre-requisite for the court to consider their application on merit the petition should be dismissed in the first instance.

22. The petitioners have specifically referred to Plot NO. 9104/224 occupied and allegedly owned by one Linda Telles who is not a party to this suit. The petitioners have not disclosed to this court that one Linda Telles has argued the issues raised before the court in ELC 88 of 2017 and which issues have been determined fully by the court. The respondent and interested parties are identical in both suits. The petitioners have shown a connection to Linda Telles in that they are neighbours and have also referred to her specifically in the heading of the suit. Exhibit 'SNO2' was prepared specifically for Linda Telles. It is not a coincidence that the very same document was used in this matter. They have put forward the case of **Omondi vs National Bank of Kenya & Others [2001] EALR as cited in Kenyariri & Associates vs Salama Beach Hotel Ltd & Others [2017] Eklr; Njangu vs Wambugu & Another, Nairobi HCCC No. 234 of 1991 (UR) ET vs AG & Another [2012] eKLR; R vs City Council of Nairobi and 2 Others [2014] eKLR; IEBC vs Maina Kiai & 5 Others [2017] eKLR**. The common thread between the two cases is the causes of action and reliefs which are identical. The issues placed before the court have already been determined by the judgement of J Bor dated 12th March 2018. This court must dismiss the petition on the well established principle of res judicata.

23. The petitioners seek that the respondents do demolish the illegal structures namely the guard house on their neighbourss (LR 9104/224) boundary wall and secondly that the 1st and 2nd interested parties be restrained by injunction from continuing illegal works. The owner of LR 9104/224 is one Linda Telles. She is not a party to the suit. This is an attempt to bring a matter to court that has been litigated upon and determined. They have also put forward the case of **AW Sheikh and AH Sheikh as trustees of Sheikh Fazalilahi Noordin Charitable trust vs Commissioner of Lands [2018] eKLR; Mureithi vs AG & Others KLR (E & L) 1**. Prayers 2 and 3 of the petition are misconceived and an abuse of the process of the court as the matter of the boundary wall on LR 9104/224 has been determined by the court in ELC 88 of 2017 and Linda Telles is not an aggrieved party in this matter. The prayer sought ought to be dismissed.

24. The petitioners have sought an injunction to restrain the 1st and 2nd interested party from continuing with construction. The principles for granting of a temporary injunction are established in the well known case of **Giella vs Cassman Brown & Another [1973] EA 358**. They have also put forward the case of **Vitalis Peter Lukiri vs George Odongo Ogwang [2015] eKLR**. The claimant has not succeeded in demonstrating that there is a serious question to be tried and that damages is inadequate as a remedy. The claim of an injunction must fail on the basis that the grievances is at its best speculative.

25. The petitioners have sought a declaration that there has been a violation of the constitutional rights and fundamental freedoms of the petitioners. The petitioners have cited alleged violation of environmental rights. These prayers ought to be dismissed on the basis that they lack precision as required by section 10(d) of the constitution of Kenya (protection of rights and fundamental freedom) practice and procedure rules 2013. The petitioners have not made a strong case for any of the orders to be granted under Articles 23, 42 and 70 of the constitution. The petitioners have not proved that the constitution is unauthorized or without the requisite approvals. The 1st and 2nd interested parties followed all laid procedures to get their project approved by the authorities. The 1st and 2nd interested parties have provided uncontroverted evidence that all plans submitted, planning approvals have been obtained together with permission consents.

26. The petitioners have alleged violation of their environmental right violation under Article 42 and 70 of the Constitution. That there will be over population increase of traffic and decrease of the number of birds, trees, noise and security. The 1st and 2nd interested parties state that the development is single dwelling and it is fully compliant with the requirements under the building code 1968. The 1st and 2nd interested parties are entitled to acquire and own property under article 40 of the constitution, 2010. They also have a right to a quiet enjoyment of their property without undue interference from their neighbours as long as they have complied with the requisite laws in order to develop their property. They have relied on the case of **Cambridge Water [1994] 2AC 264**. The onus is on the petitioners to show there is an unreasonable use of land on the part of the neighbours. The petitioners have not provided details of any violation under Articles 57 and 62(2) of the Constitution. The references to the violation of the Bill of Rights are ambiguous and not worthy of the court's consideration.

27. The prayers for declaration that there has been violation of the constitutional rights and fundamental freedoms of the petitioners must fail on the basis that there is no infringement of the petitioners' right within the meaning set out in **Cambridge Water Co. Ltd vs Eastern Counter PLC [1994] 2AC 264**. The defendant is not liable for harm if the user is reasonable. The order compelling the respondent to

demolish the 1st and 2nd interested parties structure not limited to the guard/gate house on boundary wall of LR 9104/224 must fail, mandamus to compel 1st and 2nd interested parties to demolish structures must fail as no leave was obtained under order 53 rule 1 of the Civil Procedure Rules. The petitioners have failed to prove that the respondent has not complied/ignored a duty that is imposed on it and that the 4th interested party ignored or failed to carry out its duty in issuing the waiver and the expert opinion has not been contradicted in any way by the petitioners. They pray that the petition be dismissed with costs.

The 5th Interested Party's Submissions

28. There is no clear indication that the 5th interested party violated the petitioners rights as set out in Article 23, 42 and 70 of the constitution. Not all claims involving state and public entities should be presented as a constitutional issue. It has put forward the case of **Minister for Home Affairs vs Bickle & Others [1985] LRC Cost 755** cited with approval by Lenaola J in **Hon Uhuru Kenyatta vs The Nairobi Star Ltd HC Petition No. 187 of 2012**. The Petitioners must show the precise complaint the exact provision of the constitution and the manner in which it has or is likely to be infringed by the 5th interested party. The petitioners ought to have sought redress through the channels provided by as statute which do provide one with an avenue to challenge a decision of NEMA, in relation to the issuance of the Environmental Impact Assessment licence or a decision of the county government in relation to physical planning. It has also put forward the case of **Fatuma Mohamed Sharif vs The Principal magistrate's court Kajiado & Others Pet No. 67 of 2014; Judy Watiri Wambugu vs Chief Land Registrar & others Nakuru High Court Constitutional Petition No. 49 of 2012; Joseph Owino Muchesia & Another vs NEMA & Others**.

29. The Petition is res judicata. It has put forward the case of **John Florence Maritime Services Ltd & Another vs CS for Transport & Infrastructure & 3 Others [2015] EKLK**. The issues raised by the petitioners, were raised in ELC 88 of 2017, where Judgment has been delivered. The issue can only be canvassed on appeal. The 5th interested party confirms that the 1st and 2nd interested parties registered their project on LR No. 910/226 including all the necessary documents and approvals from the respondent and the 4th interested party. The petition ought to be dismissed since the remedies sought lack merit. The 5th interested party fulfilled its mandate under the National Construction authority Act No. 4 of 2011 and the NCA Regulations 2014.

30. I have considered the petition herein, the grounds, the verifying affidavit and the annexures. I have also considered the affidavits in response, the annexures, the written submissions filed on behalf of the respective parties, the oral highlights and the authorities cited. The issues for determination are:-

(i) Whether the petitioners obtained leave of courts vis a vis prayer 2 and 5.

(ii) Whether the petitioners rights and fundamental freedoms have been violated vis a vis prayer 1.

(iii) Whether the matter is res judicata.

(iv) Whether the petitioners' constitutional rights have been breached by the alleged inaction of the respondent, the 1st and 2nd interested parties.

(v) Whether the petitioners are entitled to the reliefs sought.

(vi) Who should bear costs?

31. **Order 53** of the Civil Procedure Rules 2010 provides that:-

Subrule 1

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave has been granted in accordance with this rule.

Sub rule 2

“An application for such leave as aforesaid shall be made ex parte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on”

The petitioners have sought orders requiring the respondent to demolish all the illegal structures and that the court issues orders of mandamus that the 1st and 2nd interested parties be required to demolish all structures. The grounds are that the government entitles irregularly approved the construction in breach of the Nairobi County Planning Laws, Physical Planning Act, Building Codes and International Principles of Law, including a waiver of the NEMA application to conduct Environmental Impact Assessment. Order 53(1) of the Civil Procedure Rules 2010 is set in mandatory terms. The requirement to seek leave is mandatory. There is no evidence that the petitioners sought leave of this court before seeking these two reliefs. In the case of **R vs County Council of Kwale Ex parte Kondo & 57 Others** as cited in **Lady Justice Khaminwa vs JSC [2014] ekLR**, Waki J held thus

“the purpose of application for leave for judicial review is to eliminate at any early stage any applications which are frivolous, vexatious or hopeless and to ensure that the application is only allowed to proceed to substantive hearing if the court is satisfied that

there is a case fit for consideration...The requirement that leave must be obtained before making an application....is designed to prevent time of the court being wasted...”

I find that the petitioners’ failure to seek leave is fatal to the petitioners case in regard to prayers (ii), (iii) and (v). Dr. Khaminwa for the petitioners’ submission that this is a technicality which can be cured by Article 159(2) (d) of the Constitution cannot stand. The express provisions ought to be complied with strictly.

32. In prayer (i) the petitioners seek a declaration that there has been a violation of their constitutional rights and fundamental freedoms. They have relied on Articles 23, 42 and 70 of the constitution that the 1st and 2nd interested party parties’ construction violets the constitutional rights in particular by over populating (creating a multi dwelling instead of a single dwelling) increase of traffic and decrease of the number of birds, trees, noise and in security. In answer to this the 1st and 2nd interested parties rely on Article 40 of the constitution which guarantees their right to acquire and own property, to develop and enjoy the use of it. That they have a right to equal enjoyment of their property without under interference from the neighbours. It is their case that they have complied with the requisite laws in order to develop their property. The 4th and 5th interested parties have confirmed that the 1st and 2nd interested parties construction was duly approved. I rely on the case quoted by the 1st and 2nd interested parties being the decision of Lord Goff in **Cambridge Water [1994] 2AC264** where he stated thus:-

“ the principle between give and take between neighbouring occupiers of land under which those acts necessary for the common and ordinary use and occupation of land and houses may be done if conveniently done without subjecting those who do them to an action.....?”

33. **Article 69** of the Constitution provides as follows:-

1) The State shall-

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

It was incumbent upon the petitioners herein to demonstrate that each of the respondents, 4th and 5th interested parties refrained or failed to carry out a duty. These three entities have confirmed that they issued approvals for the 1st and 2nd interested parties construction. The petitioners have therefore failed to show that the construction is unauthorized. The 5th interested party (National Construction Authority) particularly submitted that the construction works on LR 9104/226 were duly registered by the 5th interested party in line with the provisions of the National Construction Authority No 41 of 2011 and the National Construction Authority regulations 2014. The above averments were not controverted by the petitioners. I find that the petitioners have not made out a strong case for the orders to be made under Articles 23, 42 and 70 of the constitution. I also note that the alleged violations under Article 42, 69, 70, 23, 60 lack precision. In the case of **Anarita Karimi Njeru vs the Republic [1976-80] IKLR 1272** it was held that:

““This court is at a loss in so far as any declaration of infringement of the petitioners’ right can be made. The claimant provides little or no particulars as to the allegations and the manner of the alleged infringements.....”

I am guided by the above authority.

34. The petitioners have referred to plot LR No. 9104/224 occupied and owned by one Linda Telles who is not a party. Linda Telles instituted ELC 88 of 2017 raising the same issues raised in this petition. Judgment in ELC 88 of 2017 was delivered on 12th March 2018. The issues have been dealt with. It is not in doubt that the respondent and the interested parties are the same in both suits. The petitioners exhibit “SNo2” was prepared specifically for Linda Telles. She is not a party in this petition. In the case of **Omondi vs National Bank of Kenya & Others [2001] EALR** as cited in **Kenyariri and Associates vs Salama Beach Hotel Ltd & Others [2017] eKLR**, the learned J stated “*parties cannot evade, the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit....*” Similarly, in the case of the **IEBC vs Maina Kiai & 5 others Nairobi CA, Civil Appeal No. 105 of 2017 [2017] eKLR** the Court of Appeal held that:-

“Thus for the bar of res judicata to be raised and upheld on account of a former suit the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms:-

(a) The suit or issue was directly and substantially in issue in the previous suit;

(b) The former suit was between the same person or parties under whom they, or any of them claim;

(c) Those parties were litigating under the same title;

(d) The issue was heard and determined in the former suit;

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.....”

35. The court explained the role of the doctrine thus:-

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless road of litigation at the behest of intrepid pleaders hoping by multiplicity of suits and fora to obtain at last outcome favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or culmny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice”

36. It is not in doubt that the construction of the 1st and 2nd interested parties or LR No. 9104/224 was the same subject matter in ELC 88 of 2017. I agree with the 5th interested parties’ submission that the issues being canvased by the petitioners herein can only be canvassed on Appeal. For the above reasons I find that the issues raised in this petition are res judicata and cannot stand.

37. The petitioners herein have sought an injunction restrain the 1st and 2nd interested parties from continuing further construction. The principles for granting temporary injunction are set down in the case of **Giella vs Cassman Brown & Another [1973] EA 358**. I agree with the 1st and 2nd interested parties submissions that the petitioners must establish a prima facie case with probability of success. I also rely on the cited case of **Vitalis Peter Lukiri vs George Odongo Ogwang [2015] eKLR where J Nyamweya P** stated:

“The plaintiff must therefore tender evidence to show he has right which has been infringed or is threatened with infringement. In the instant case the plaintiff’s case is hinged on apprehension that the defendant has not made provision for sufficient parking space.....”.

I find that the petitioners have not demonstrated that there is a serious question to be tried and that damages is not an adequate remedy. I find that the prayers for injunction must fail.

38. All in all in find that the petitioners have failed to provide the exact provisions of the constitution, infringed and the manner in which it has been infringed by the respondent and the interested parties. The respondent and 4th and 5th interested parties fulfilled their mandates under the constitution. I find that the 1st and 2nd interested parties construction does not violate the Petitioners’ constitutional rights and fundamental freedoms as the said construction is approved by the relevant bodies. The petitioners have not demonstrated that the respondent, 4th and 5th interested party failed to fulfil their respective mandate under the constitution. The expert opinion attached as exhibit ‘WEK7’ has not been contradicted by the petitioners. The petitioners are therefore not entitled to any of the reliefs sought. I find no merit in this petition and the same is dismissed with costs to the respondent, 1st and 2nd, 4th and 5th Interested Parties.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28th day of May 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the petitioners

No appearance for the Respondents

No appearance for the 3rd, 4th and 5th Interested Parties

Mrs. Effendy present for the 1st and 2nd Interested Parties

Kajuju – Court Assistant