Irungu v Hayer Marquis Limited & 2 others (Environment and Land Petition E034 of 2021) [2025] KEELC 6602 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6602 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E034 OF 2021

OA ANGOTE, J

SEPTEMBER 30, 2025

IN THE MATTER OF ARTICLE 232 AND 23 OF THE CONSTITUTION
IN THE MATTER OF ALLEGED INFRINGEMENT AND/OR ONGOING INFRINGEMENT OF ARTICLES 42 & 70 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTION 58 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT CAP 387 OF THE LAWS OF KENYA

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

BETWEEN

PROFESSOR LUCY IRUNGU ..... PETITIONER

AND

HAYER MARQUIS LIMITED ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI ..... 3RD RESPONDENT

JUDGMENT

Background

1. Vide a Petition dated 15th September 2021, the Petitioner has prayed for the following reliefs:

    a. A declaration that the Petitioner is entitled to an order of compensation for the violations of her rights.

    b. A declaration that the Respondents are in contravention of Article 10 of *the Constitution*, 2010 by rendering the Petitioner's dwelling house inhabitable by herself and future generations.

c. A declaration that the Respondents are in contravention of Article 26 of *the Constitution* 2010 as their actions have threatened the inherent right to life of the Petitioner by causing her a psychological condition of mental depression.

d. A declaration that the Respondents are in contravention of Article 40(1) and (2) of *the Constitution*, 2010 by depriving the Petitioner's right to enjoy over the property she personally acquired.

e. A declaration that the Respondents are in contravention of Article 42 of *the Constitution*, 2010 by denying the Petitioner a right to a clean and healthy environment for the benefit of present and future generations.

f. A declaration that the Respondents are in contravention of Section 58 of the *Environmental Management and Co-ordination Act*.

g. A declaration that the Respondents violated their obligations to ensure a mandatory public participation prior to the issuance of the licenses herein.

h. Costs of and incidental to this Petition; and

i. Any other order that this Honourable Court deems fit and just to grant in the circumstances.

2. According to the Petition and the Supporting Affidavit sworn by the Petitioner on 15th September 2021, the Petitioner is the registered proprietor of land parcel LR No. 209/16014 on which she has constructed her dwelling house.

3. The Petitioner averred that on 16th June 2016, the 2nd Respondent issued EIA Licence No. NEMA/EIA/PSL/3309 to Nirbau Gulshan Ventures Limited in respect of Land Reference No. 209/9674 for the construction of two blocks of detached apartments consisting sixteen floors and a penthouse. She averred that the said EIA Licence was subsequently transferred to the 1st Respondent on 26th October 2018.

4. According to the Petitioner, the EIA license issued to the 1st Respondent was subject to general construction, operational and other conditions, including a requirement for continuous monitoring for compliance throughout the project cycle. Of particular relevance was General Condition 1.1 which permitted the construction of a sixteen-storey block comprising 250 apartment units on the suit property.

5. The Petitioner contended that the 1st Respondent contravened General Condition 1.1. by constructing six additional blocks that were not contemplated in the approved license. She asserted that this breach constituted a substantial change from the licensed project which necessitated the undertaking of a new Environmental Impact Assessment Study and Licence.

6. The Petitioner contended that the 2nd Respondent acquiesced and/or affirmed the 1st Respondent's breach of General Condition 1.1 by allowing the 1st Respondent to continue carrying out the said construction of an illegal building. She further alleged that the 2nd Respondent failed in its duty to monitor compliance of the project and as a result, did not take action against the 1st Respondent who had breached General Condition 1.1.

7. It was her case that the 1st Respondent failed to take into account the adverse impact of the project on her well-being notwithstanding that her property shares a perimeter with the development. The Petitioner pointed to General Condition 2.10 of the license which imposed an obligation on the

1st Respondent to comply with the Environmental Management and Coordination (Air Quality) Regulations, 2014.

8. The Petitioner further averred that the 2nd Respondent issued the impugned licence without adequately assessing the potential physical and health dangers that the Highrise development on LR No. 209/9674 posed to her and her dwelling house. She maintained that this omission violated her constitutional right to a clean and healthy environment under Article 42 of *the Constitution*.

9. It was her further contention that the 2nd Respondent's questionnaire detailing the public participation content in the EIA Study Report was inadequately distributed to the stakeholders including herself, the most affected neighbour to the development.

10. The Petitioner also asserted that the 1st Respondent intentionally and unreasonably invaded the peaceful enjoyment of her residence; that this interference caused grievous waste on the said premises and that consequently, her residence has been rendered uninhabitable, exposing her and her family to perpetual health risks.

11. The Petitioner set out the particulars of waste occasioned on her residence as including falling debris from the construction of the development which has damaged and compromised the structural integrity of her house roof; that the podium wall of the new building is in such close proximity to her house that water from the site slipped into the walls of her house; and the resultant dampness caused the interior paint of her house to peel off.

12. She further claimed that the new building's podium, which closely borders her residence, has significantly obstructed natural light from entering her house through the windows adjacent to the construction. She averred that the resulting poor natural lighting has adversely impacted the psychological well-being of the occupants, contributing to what she described as "Sick Building Syndrome." She asserted that she has been forced to rely on artificial light thereby increasing her electricity consumption.

13. The Petitioner also contended that the persistent dampness and structural deterioration of her house have introduced chemical contaminants into the indoor air from the peeling paints, significantly compromising the air quality. She added that the construction activities on LR No. 209/9674 generated significant noise, which was amplified to her house making the space uninhabitable because of the proximity of the two buildings.

14. Additionally, she contended that the high-rise development proximity to the perimeter line of her house coupled with its height has resulted in invasion of her privacy, as the outdoor space of her residence can now be easily overlooked.

15. The Petitioner stated that she has resided in her dwelling house on LR No. 209/16014 since 2010 and had enjoyed peaceful occupation until 2018, when the house became hazardous for human occupation.

16. She further averred that on 1st June 2018, she entered into a tenancy agreement with one Peter Paul Mburu Ndururi in respect of the house erected on Plot No. LR. 2955/73 Mamboromoko for a term of six years commencing on 1st June 2018.

17. The Petitioner further averred that the destruction visited upon her retirement home, to which she holds a sentimental attachment has affected her psychologically to an extent of causing her a mental breakdown and that between May and July 2019, she was admitted to hospital on various occasions and diagnosed with depression, for which she has incurred medical expenses.

18. The Petitioner itemized the special damages incurred as follows:

    a. Kshs. 28,729/- for admission at Chiromo Lane Medical Centre from 2nd to 3rd May 2019.

    b. Kshs. 107,329/= for admission to Chiromo Lane Medical Centre from 24th to 29th May 2019.

    c. Kshs. 21,590/= for admission to Chiromo Lane Medical Centre between 12th and 13th June 2019.

    d. Kshs. 3,770/= paid to Chiromo Lane Medical Centre for medication on 17th June 2019.

    e. Kshs. 122,528,32/= for admission at Mater Misericordia Hospital from 6th to 11th February 2020.

    f. Kshs. 574,755.27/= for admission at the Nairobi Hospital from 13th to 21st February 2020.

    g. Kshs. 276, 774.64/= for admission at Chiromo Lane Medical Centre from 12th to 23rd November 2020.

19. The Petitioner further stated that her house was broken into in 2019, and that on 6th July 2019, the Officer in Charge at Ndururumo Police Post issued a police abstract confirming the incident during which goods worth thousands of shillings had been stolen. She contended that the said burglary would not have occurred had she not been compelled to vacate her home due to the Respondents' actions.

20. As a result of the continued psychological distress, the Petitioner averred that she became more depressed and was compelled to relocate again on 27th November 2019 and that she entered into a tenancy agreement in respect of Townhouse No. 11 on LR No. 28736- Bahati Ridge.

21. It is the Petitioner's case that the Respondents have infringed upon her right to life under Article 26 by occasioning upon her a psychological condition amounting to mental depression; that the Petition is brought pursuant to Articles 22(1) and 70 of *the Constitution* of Kenya, in defence of her environmental rights and that the Respondents' actions and omissions resulted in the violation, threat and denial of her rights to life, health, food, water and sanitation, which are dependent on a clean and healthy environment.

22. It was further contended that the Respondents infringed upon her right to property under Article 40(1) and (2) of *the Constitution* because she had to abandon her only dwelling house due to the Respondents' conduct.

23. The Petitioner reiterated that her right to a clean and healthy environment guaranteed under Article 42 of *the Constitution* had been violated by the respondents as elucidated in the Petition.

24. She further argued that Articles 10 and 69 of *the Constitution* were violated by the Respondents in that they issued the purported license in the absence of adequate public participation and that the Respondents also acted in contravention of Section 58 of the *Environmental Management and Co-ordination Act*.

25. She argued that as a proponent of a project listed in the second schedule of the Act, 1st Respondent was under a legal obligation to submit a project report to the 2nd Respondent, undertake a full environmental impact assessment study and submit a report of the same prior to being issued with the EIA License, steps which the Petitioner maintained were not complied with.

The responses

26. The 1st Respondent opposed the Petition through a Replying Affidavit sworn on 2nd October 2021 by Mr. Chetan Singh Hayer, a Director of the 1st Respondent. The gravamen of the 1st Respondent's case is that the entire Petition constitutes a collateral challenge to the Environmental Impact Assessment (EIA) Licence, a matter over which this Court lacks original jurisdiction.

27. The 1st Respondent averred that the Petition is premised on Environmental Impact Assessment (EIA) Licence No. NEMA/EIA/PSL/3309, issued by the 2nd Respondent on 16th June 2016 to Nirbau Gulshan Ventures Limited pursuant to Section 58 of the *Environmental Management and Co-ordination Act* (EMCA) and that the said licence authorized the proponent to undertake construction of a multi-storey residential development.

28. Mr. Hayer averred that the said license was transferred to the 1st Respondent with effect from 26th October 2018. Crucially, he averred that in accordance with the EIA (Audit) Regulations 2003, the 1st Respondent applied for and was granted approval to vary the initial project by adding two additional floors, comprising 28 residential units and two (2) penthouses.

29. The 1st Respondent annexed copies of the EIA licence, approval letters, and related documents as evidence of compliance with all applicable statutory and regulatory requirements. It was further stated that construction was substantially completed in August 2021.

30. The 1st Respondent contended that all the legal requirements were complied with at every stage of the project. It was asserted that developments of similar scale and nature have been approved and erected in accordance with the Nairobi City County's By-Laws.

31. The 1st Respondent further maintained that as a condition for the issue of the EIA Licence, an EIA project report was submitted in accordance with EMCA requirements; that the Petitioner was aware of the public participation exercise undertaken, including dissemination of questionnaires, and that the Petitioner's own pleadings acknowledge the existence of such participatory efforts.

32. Regarding the challenge to the EIA Licence, Mr. Hayer asserted that the appropriate forum for such dispute is the National Environment Tribunal as provided under Section 129(1) of EMCA. According to the 1st Respondent, the Petitioner's challenge is time-barred, having not been lodged within the 6 month limitation period prescribed by law.

33. It was further contended that this court's jurisdiction to entertain the dispute in relation to the issuance of the EIA Licence is appellate in nature, in accordance with Section 130 of EMCA and Section 13(4) of the *Environment and Land Court Act*. In the absence of a determination by the National Environment Tribunal, the 1st Respondent argued, this court lacks original jurisdiction to adjudicate the matter.

34. The 1st Respondent submitted that the Petition amounts to a collateral attack on the EIA licence, disguised as a constitutional challenge, and urged the Court not to permit the circumvention of express statutory timelines under the pretext of enforcing environmental rights under Article 42 of *the Constitution*.

35. The 3rd Respondent similarly opposed the Petition, relying on Grounds of Opposition dated 8th October 2021. It was its position that the Petition does not disclose any cause of action against the 3rd Respondent, nor are any orders sought against it.

36. The 3rd Respondent contended that the Petitioner had not demonstrated any infringement of her constitutional rights by the 3rd Respondent or any unlawful conduct on its part in the execution of its statutory and constitutional mandate.

37. This Petition was canvassed by way of written submissions.

Submissions

38. Learned Counsel for the Petitioner submitted that the 1st Respondent acted in breach of the EIA Licence No. NEMA/EIA/PSL/3309, issued for the construction on Land Parcel L.R. 209/9674, by adding six extra blocks that were not contemplated and licensed. Counsel argued that these significant changes warranted the conduct of a fresh Environmental Impact Assessment study and licence.

39. It was further submitted that the 2nd Respondent failed in its statutory duty by permitting the 1st Respondent to proceed with the alleged unauthorized development of the construction of the illegal building, which has since been completed.

40. Counsel contended that the actions of both Respondents constituted a violation of the Petitioner's constitutional rights. It was alleged that the development has adversely contaminated and compromised the Petitioner's residence making the same unfit for human habitation. Consequently, it was submitted, the Petitioner was compelled to vacate her home and incur unplanned rental expenses.

41. The Petitioner's Counsel submitted that the Petitioner is entitled to her rights under Article 42 of *the Constitution*, which declares that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, as contemplated under Article 69 of *the Constitution*.

42. It was submitted that the Petitioner had suffered mental anguish and psychological trauma as a result of the actions of the Respondents. Counsel invoked Article 26(1) of *the Constitution*, arguing that the Petitioner's inherent right to life had been imperiled by the continued exposure to environmental hazards and the resulting mental anguish. The sentimental value attached to her residence, it was argued, had compounded the psychological harm suffered.

43. The Petitioner's Counsel submitted that it would only be fair and just that the Petitioner be entitled to an order of compensation. He urged the court to take into consideration the physical injuries suffered by the Petitioner, the mental and psychological trauma, depression and the economic loss incurred by the Petitioner. Finally, Counsel prayed for costs of the Petition pursuant to Section 27(1) of the *Civil Procedure Act*.

44. Counsel for the 1st Respondent submitted that the Environmental Impact Assessment (EIA) License challenged in this Petition was issued in accordance with Section 58 of EMCA and that the same was issued after the 1st Respondent had submitted an EIA Project Report, which formed the basis upon which the 2nd Respondent granted the impugned licence.

45. It was the 1st Respondent's counsel's position that if the Petitioner was dissatisfied with the grant of the EIA License, the proper forum for redress was the National Environment Tribunal pursuant to Section 129(1) and (2) of EMCA. Counsel submitted that an appeal under Section 129(1) ought to be filed within 6 months of the impugned decision but argued that the Tribunal retains the discretion to enlarge time within which an aggrieved party may lodge an appeal.

46. Reliance was placed on the case of Mathu, Chariman & 2 others (All Jointly suing as and on behalf of Kyuna Neighbours Association (KNA) vs National Environment Management Authority (NEMA)

& another; Director General, Nairobi Metropolitan Services (Interested Party) [2024] KEELC 4360 (KLR) where this court considered the locus standi of an aggrieved party to challenge the EIA Licence process under Section 129 of EMCA.

47. Counsel further submitted that the Environment and Land Court only exercises appellate jurisdiction under Section 130 of Environmental Management and Coordination Act and not original jurisdiction in matters where an appeal lies with NET. It was submitted that this position is also anchored on Section 13(4) of the *Environment and Land Court Act*.

48. To reinforce the argument that this Court lacks jurisdiction, the 1st Respondent relied on the decisions in United Millers Limited vs Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 Others [2021] eKLR and Adega & 2 Others vs Kibos Distillers Limited & 5 Others [2020] KESC 36 (KLR).

49. Counsel argued that the Petitioner was aware of the grant of the EIA license as early as 2018, but chose not to take any action to challenge the license until this Petition was filed. It was submitted that the Petition was drafted in a manner to clothe an otherwise time-barred challenge in constitutional language, and that the Petitioner had not offered any reasonable explanation for the delay.

50. In support of the argument that not all disputes should be constitutionalized, Counsel cited Leonard Otieno vs Airtel Kenya Limited [2018] KEHC 9063 (KLR), where the Court cautioned against the transformation of every legal issue into a constitutional question when other adequate remedies exist.

51. As to whether the Petitioner has discharged the burden of proof, the 1st Respondent's Counsel submitted that although the Petitioner made various allegations against the 1st Respondent, she offered no evidence in support of those allegations.

52. Counsel relied on Samson Gwer & 5 Others vs Kenya Medical Research institute & 3 Others [2020] KESC 66 (KLR) where the Supreme Court held that constitutional petitions must meet a higher evidentiary standard than ordinary civil claims.

53. Additionally, Counsel cited Ndambuki vs Nungu & 6 Others [2024] KEHC 4008 (KLR) and Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 Others [2021] KECA 328 (KLR) to submit that claims for special damages or compensation under constitutional law must be specifically pleaded and proved.

54. It was further argued that the Petitioner did not, in her pleadings, seek compensation or general damages. Her prayer for compensation first appears in her submissions, which, it was submitted, cannot cure the deficiency in her pleadings. Counsel invoked the case of Independent Electoral and Boundaries Commission & Another vs Mule & 3 Others [2014] KECA 890 (KLR), where the Court of Appeal emphasized the long-standing principle that a party is bound by their pleadings.

55. On the whole, the 1st Respondent urged the Court to find the Petition to be a collateral attack on a lawfully issued EIA Licence, disguised as a constitutional claim, and to dismiss it for being incompetent and unsubstantiated.

56. Counsel for the 2nd Respondent submitted that the dispute raised in the Petition squarely falls within the jurisdiction of the National Environment Tribunal (NET) pursuant to Section 129(1) of the Environmental Management and Coordination Act (EMCA). It was their submission that the doctrine of exhaustion confines the Petition to the mandatory provisions of Section 129 of EMCA.

57. It was submitted that this court's jurisdiction under Section 130 of EMCA is strictly appellate and that the Petitioner failed to exhaust the mandatory statutory dispute resolution mechanisms. In support,

Counsel cited the Court of Appeal decision in Kibos Distillers Limited & 4 others vs Benson Ambuti Adega & 3 Others (2020) eKLR where the Court affirmed the primacy of the Tribunal in matters touching on environmental licensing under EMCA.

58. Counsel also relied on the case of Buku vs National Environmental Authority & 3 others [2021] KEELC 4752 (eKLR) and the well cited authority of Speaker of National Assembly vs the Honourable Njenga Karume (1992) eKLR.

59. On the basis of the foregoing, the 2nd Respondent urged this court to refer the dispute back to the forum created under EMCA, and to decline to assume jurisdiction in the first instance.

60. Further, it was submitted that the Petitioner had not discharged the burden of proof on allegations of environmental degradation or resultant health risks. Counsel noted that although the Petitioner had attached medical receipts and hospital documentation, she failed to demonstrate the correlation between the alleged environmental harm and her medical condition.

61. It was contended that the Petitioner's medical records were either illegible or unexplained and that no medical expert was called to interpret the documents, leaving their interpretation to the parties and to the court.

62. The 2nd Respondent's C0unsel further submitted that the Petition was premised on generalized allegations of environmental violations, without corroborating evidence. Counsel noted that the Petitioner had not furnished the court with any report, photographs, videos or an environmental expert report to establish the extent of the alleged damage on her property.

63. Counsel submitted that the Petitioner had also failed to quantify the cost of repairs or compensation, if any, to be awarded by the court.

64. According to the 2nd Respondent, the burden lay with the Petitioner to prove the allegations and to establish the causal link between the 1st Respondent's project to the alleged environmental harm and health challenges. In support of their submissions on evidentiary thresholds, Counsel cited Ngugi vs Kimunio [2024] KEELC 1518 (KLR), Samson S. Maitai & Another vs African Safari Club Limited & Another [2010] eKLR and Stratpack Industries vs James Mbithi Munyao Naiorbi HCCA No. 152 of 2013.

65. The 2nd Respondent urged the Court to dismiss the Petition with costs, arguing that the claims were speculative, unsubstantiated, and without any evidentiary foundation.

66. On his part, the 3rd Respondent's Counsel submitted that the Petition does not disclose any specific cause of action or relief sought against the 3rd Respondent. Counsel stated that the grievance raised by the Petitioner lies with the issuance of the EIA Licence, in which the 3rd Respondent had no involvement.

67. Relying on DT Dobie & Co. (Kenya) Ltd vs Muchina [1982] eKLR, Counsel submitted that the Petition, as against the 3rd Respondent, fails to disclose a reasonable cause of action and should be struck out accordingly.

68. Counsel reiterated that the burden of proof rests on the Petitioner to demonstrate the facts alleged in the Petition. Counsel argued that the Petitioner failed to meet the threshold of proof under civil standards.

69. Reference was made to Section 107 of the *Evidence Act* and to the decisions in Hellen Wangari Wangechi vs Carumera Muthini Gathua [2005] eKLR and Miller vs Minister of Pensions [1942] 2 ALL ER 372.

70. It was Counsel's submission that the petition was frivolous, vexatious, lacks merit and ought to be dismissed.

Analysis and Determination

71. Upon consideration of the Petition, Replying Affidavits filed by the Respondents, the evidence adduced and the submissions filed by the parties to the Petition, the following issues arise for determination:

    a. Whether this court has jurisdiction to hear and determine this suit.

    b. Whether adequate public participation preceded the issuance of the EIA Licence.

    c. Whether the 1st Respondent constructed the development negligently and caused air pollution in the Petitioner's house.

72. The Petitioner has made the following allegations which she contended violated her constitutional rights: that the public participation conducted prior to the development was inadequate; that the development was constructed in breach of the EIA License issued on 16th June 2016 and that the 1st Respondent carried out the construction activities on the suit property so negligently that they caused damage to her property. And affected her health, both physically and mentally.

73. The Petitioner further alleged that the 2nd Respondent failed in its oversight duty by acquiescing to the 1st Respondent's continued construction and by neglecting to take appropriate enforcement action.

74. On the other hand, the 2nd Respondent's case is that the issues raised in the Petition fall within the jurisdiction of the National Environment Tribunal (NET) pursuant to Section 129(1) of the Environmental Management and Coordination Act (EMCA). It is NEMA's contention that the Petitioner's challenge to the issuance and scope of the Environmental Impact Assessment (EIA) Licence ought to have been pursued before the Tribunal within the prescribed statutory timelines.

75. In this regard, the 2nd Respondent invoked the doctrine of exhaustion, submitting that this Court lacks original jurisdiction in the matter and can only entertain an appeal from the Tribunal in accordance with Section 130 of EMCA.

76. The 2nd Respondent further contended that the Petitioner failed to adduce credible evidence demonstrating environmental harm or health risks arising from the development in question.

77. The 3rd Respondent similarly opposed the Petition, contending that no relief was sought against it and that no cause of action had been disclosed in the pleadings. It was its position that the Petitioner's grievance stemmed solely from the issuance of the EIA Licence and the actions of the 1st and 2nd Respondents, in which it did not play any role.

78. It is evident from the Petition that the Petitioner neither advanced any cause of action against the 3rd Respondent, nor did she seek any substantive reliefs against it. In the absence of any pleaded wrongdoing or prayers directed at the 3rd Respondent, the Court finds no basis upon which liability can attach to it, and the Petition as against the 3rd Respondent is therefore liable to be dismissed.

Whether this court has jurisdiction to hear and determine the Petition.

79. The 2nd Respondent herein has asserted that this court lacks the jurisdiction to hear and determine this Petition because the Petitioner has not complied with the doctrine of exhaustion of the available

dispute resolution mechanisms as stipulated in the Environment Management and Coordination Act (EMCA).

80. The Respondents claim that pursuant to Section 129(1) & (2) and 130 of the *Environmental Management and Co-Ordination Act* 1999, (EMCA) the Petitioner's challenge ought to have been lodged before the National Environment Tribunal.

81. Section 129(1) and (2) of EMCA provides as follows:

> "(1) Any person who is aggrieved by-
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> (a) the grant of a license or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
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> (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
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> (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
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> (d) the amount of money required to paid as a fee under this Act or its regulations;
>
> (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
>
> (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose."

82. Section 130(1) of the EMCA states that any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.

83. The Respondents have claimed that the Petitioners failed to exhaust the doctrine of exhaustion. The doctrine of exhaustion prescribes that a party ought to exhaust a dispute resolution mechanism as prescribed under statute, before seeking redress before a court of law.

84. The Court of Appeal in Geoffrey Muthinja and Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR addressed itself to the rationale of this doctrine as follows;

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution

outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

85. The doctrine of exhaustion has been upheld by several courts. (See Secretary, County Public Service Board & Another vs Hulbhai Gedi Abdille [2017] eKLR and Kibos Distillers Limited & 4 Others vs Benson Ambuti Adega & 3 Others [2020] eKLR).

86. The Supreme Court has since established that a case by case and nuanced approach ought to be adopted in evaluating whether a matter is to be exempted from the doctrine of exhaustion.

87. In the case of Benson Ambuti Adega & 2 Others vs Kibos Distillers Limited & 5 Others [2020] eKLR the Apex Court stated:

> "51. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court "in the interests of justice." It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.
>
> 52. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...
>
> 54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st , 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected.
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> 55. The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate

institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance."

88. More recently in Nicholus vs Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) [2023] KESC 113 (KLR), the Supreme Court held that a court must adopt a nuanced approach:

> " Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party..."

89. In the same case, the court held as follows:

> "(107) Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).(108)It was therefore sufficient that the appellant alleged that a right in *the Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of *the Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why Section 3 of EMCA provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment."

90. This Court is guided accordingly.

91. Turning to the facts before the Court, while the Petition partly challenges the legality of the Environmental Impact Assessment (EIA) Licence issued to the 1st Respondent, it is evident that the Petitioner's claim is broader in scope.

92. The Petition invokes several constitutional provisions and alleges that the Respondents' actions and omissions violated not only statutory environmental obligations but also multiple constitutionally protected rights.

93. Specifically, the Petitioner alleges that the development in question was undertaken in contravention of Article 10 of *the Constitution*, by failing to ensure adequate and meaningful public participation prior to the issuance of the EIA Licence. She further claims that the adverse environmental and physical impacts of the development have infringed upon her right to life under Article 26, her right to property as protected under Article 40, and most critically, her right to a clean and healthy environment under Article 42.

94. In addition, the Petitioner contends that the conduct of the 2nd Respondent, in failing to enforce compliance with the EIA Licence, and that of the 1st Respondent, in allegedly exceeding the licensed scope of construction, amount to a breach of the State's obligation under Article 69(1)(d) to ensure sustainable management of the environment and to promote public participation in environmental decision-making processes.

95. It is then apparent that the Petitioner is seeking to redress the alleged violation of her constitutional rights. Under the provisions of *the Constitution* and Section 13(4) of the *Environment and Land Court Act*, it is this court which has the jurisdiction to determine if indeed the Petitioners' rights under Articles 42, 69 and 70 of *the Constitution* have been or are likely to be infringed upon and not the National Environmental Tribunal (NET).

96. This was the position that was taken by this court in John Muthui & 19 others vs County Government of Kitui & 7 others [2020] eKLR and by the Supreme Court in Nicholus vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR).

97. Accordingly, this court finds that it has the requisite jurisdiction to determine this Petition on its merits.

Whether adequate public participation preceded the issuance of the EIA Licence

98. 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."

99. Section 107 of the *Evidence Act* requires a Petitioner to demonstrate credible grounds of concern, for example, through credible reports, affidavits, public complaints, or circumstantial evidence of the allegations raised in the Petition.

100. Reinforcing the established principle that the burden of proof in constitutional Petitions rests upon the Petitioner, the Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR observed 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 vs. 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." (Emphasis added)

101. In Gwer & 5 Others vs Kenya Medical Research Institute & 3 Others [2020] KESC 66 (KLR), the Apex Court further iterated the initial burden upon the Petitioner to discharge the evidentiary burden of proof:

> "(49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> [50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> "...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
>
> (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

102. In the same case, of Gwer & 5 others vs Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR) the Supreme court held that the standard of proof in constitutional Petitions is higher than on a balance of probabilities. It stated:

> "It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of Constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case."

Whether there was public participation

103. The Petitioner's first grievance was that the process of public participation preceding the impugned development was inadequate. It was her contention that the questionnaires intended for stakeholder input were not widely disseminated, and that she, being the immediate neighbour most directly affected by the project, was not afforded an opportunity to present her views.

104. Public participation is one of the national values and principles of governance enshrined in Article 10 of *the Constitution*. Article 69(1)(d) further entrenches this requirement by obligating the State to encourage public participation in the management, protection and conservation of the environment.

105. This constitutional dictate is reinforced through the provisions of the Environmental Management and Coordination Act (EMCA) and the *Environment and Land Court Act*, which require the

Environment and Land Court to be guided by the principle of public participation in the development and implementation of policies, plans and processes for the management of the environment.

106. In Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, the three-judge bench outlined the elements of the principles which public participation in the area of environmental governance should entail at a minimum as follows:

> " First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter...
>
> Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation...
>
> Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)...In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.
>
> Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance...A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
>
> Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme...
>
> Sixth, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

107. Building on those principles, the court in Okiya Omtata Okoiti vs Commissioner General, Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR observed that there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.

108. Similarly, in Mohamed Ali Baadi & Others v Attorney General & 11 Others [2018] eKLR, a five-judge bench underscored the centrality of public participation as a constitutional imperative, and articulated its rationale in the following terms:

> "It may be tempting to ask why the law and indeed *the Constitution* generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representative and also participate in the appointment of most, if not all public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual. We also have no doubt that our local jurisprudence deals at length with why *the Constitution* and statute law have imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation."

109. In 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] eKLR, the Supreme Court, upon reviewing various judicial pronouncements, set out the parameters for effective public participation and observed as follows:

> "From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:
>
> Guiding Principles for public participation
>
> i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
>
> ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> iii. 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.
>
> iv. 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.
>
> v. Public participation is not an abstract notion; it must be purposive and meaningful.
>
> vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

vii. 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.

viii. 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.

ix. 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."

110. From the foregoing jurisprudence, the burden rests upon the project proponent to demonstrate compliance with these constitutional and statutory obligations. It must show that the requisite public participation was undertaken, that the views received were considered in good faith, and that any departure from such views was explained.

111. In the present matter, the 1st Respondent produced an EIA Licence No. NEMA/EIA/PSL/3309 for the construction of 250 apartment units. It further tendered a subsequent licence, No. 0062622, issued on 28th October 2019, permitting the addition of twenty-eight units and two penthouses.

112. Both licenses are indicated to have been issued pursuant to project reports. The question before this court, however, is not whether the licenses were issued, but whether the process leading to their issuance complied with the law. The extent of public participation required to be undertaken by a project proponent depends on the environmental risk posed by the project.

113. Regulation 7 of the Environmental (Impact Assessment and Audit) Regulations, requires proponents of low and medium risk projects to submit a summary project report. Where the Authority determines that a project may cause significant adverse impacts, it directs the proponent to prepare a comprehensive report or a full Environmental Impact Assessment study under Regulation 17.

114. Conversely, if satisfied that a project poses no significant harm, or that adequate mitigation measures have been proposed, the Authority may exempt the proponent from further reporting and issue the requisite licence.

115. Proponents of high risk projects, which pose significant environmental risk require the submission of an Environmental Impact Assessment Study Report, which must comply with the public participation requirements under Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations.

116. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations prescribes the nature of public participation that ought to be undertaken while conducting an environmental impact assessment study. It provides as follows:

> "(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
>
> (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall-
>
> (a) publicize the project and its anticipated effects and benefits by-
>
> (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
>
> (ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
>
> (iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;
>
> (b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
>
> (c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
>
> (d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority."

117. The project in question involved the construction of an initial 250 units, which according to the 1st Respondent was later expanded by an additional 28 units.

118. Under the Second Schedule of EMCA, such a housing estate development exceeding 100 units is categorised as a high-risk project. Accordingly, the proponent was required to prepare an Environmental Impact Assessment Study Report and to conduct public participation in compliance with Regulation 17.

119. The Respondents, however, have not produced any evidence of having submitted an EIA Study Report or of having conducted public participation in line with these requirements, prior to obtaining either of the two EIA Licenses.

120. The Court in Moffat Kamau & 9 Others vs A.G. of Kenya Ltd [2016] eKLR was categorical that where statutory procedures for environmental protection are disregarded, a presumption arises that the right to a clean and healthy environment is threatened. That presumption, in the present matter, has not been discharged.

121. In the circumstances of this case, this court finds that the 1st Respondent, having been under a statutory duty to show that there was public participation in accordance with Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, failed to discharge that duty.

122. No evidence has been placed before this Court to demonstrate that the affected community, including the Petitioner, as the most proximate neighbour, was notified of the project, invited to meetings, or otherwise accorded an opportunity to present there views.

123. The process through which the impugned EIA licenses were obtained was therefore contrary to the constitutional principles enshrined in Articles 10 and 69 of *the Constitution*, as well as the statutory requirements under EMCA and the Regulations thereunder. A licence issued in violation of these mandatory provisions cannot stand.

Whether the development was constructed contrary to the EIA Licenses issued to the 1st Respondent

124. The Petitioner's second allegation was that the 1st Respondent contravened the terms of the Environmental Impact Assessment (EIA) Licence issued on 16th June 2016 by constructing six additional floors without obtaining prior approval from the 2nd Respondent, the National Environment Management Authority (NEMA).

125. In support of this allegation, the Petitioner produced a copy of the initial EIA Licence issued to Nirbhau Gulshan Ventures Limited on 16th June 2016. According to the said licence, the 1st Respondent was authorized to construct two blocks comprising sixteen floors each, including basement levels.

126. However, beyond producing the licence, the Petitioner did not place before this Court any photographic evidence, expert reports, or documentary material demonstrating that the 1st Respondent had, in fact, constructed six floors in excess of what was permitted under the licence. In the absence of such evidence, the Court is left with a bare allegation unsupported by evidence.

127. However, in response to this allegation, the 1st Respondent, through the Replying Affidavit of Chetan Singh Hayier, acknowledged that it sought to vary the scope of the initial project and was subsequently granted approval to add two additional floors, comprising 28 residential units and two (2) penthouses.

128. The 1st Respondent annexed to the said affidavit a subsequent EIA Licence issued by NEMA on 28th October 2019, authorising the addition of the two floors comprising twenty-eight residential units and two penthouses to the development on Plot L.R. No. 209/9674.

129. In further support of its position, the 1st Respondent also produced the following documents: a Notification of Approval of Change of Use from single-dwelling to multi-dwelling residential apartments dated 27th April 2016; a receipt of Kshs. 17,895,900/- issued by Nairobi City County on 27th July 2016 in respect of building plan approvals; a separate receipt of Kshs. 35,000/- in respect of construction site board fees; and a building approval from Nairobi City County dated 3rd May 2019. The 1st Respondent also annexed a project status report indicating the almost complete development status as at August 2021.

130. While these documents demonstrate that the 1st Respondent regularized its development before the County Government, they do not establish that there was an Environmental Impact Assessment Study Report in respect to the initial development before the license was issued.

131. There is then the question of the legality of the second EIA license which sought to vary the construction by addition of floors and units.

132. Section 64(1) of the EMCA provides that after an EIA license is issued, NEMA may direct the holder to submit a fresh EIA study or evaluation or review if there is a substantial change or modification in the project or the manner it is operated; if unforeseen environmental threats arise; or if prior information was false or inaccurate.

133. The court in Moffat Kamau & 9 others vs Aelous Kenya Limited & 9 others [2016] KEELC 565 (KLR) explained that NEMA's discretion to vary an EIA licence under Regulation 25(3) is not unfettered. It held that NEMA must require a new EIA where the situation that has arisen may lead to a suspension, revocation, or cancelation of the licence issued, as set out in Regulation 28 of the EIA Regulations, including, inter alia, where there is a substantial change or modification of the project or in the manner in which the project is being implemented. The court stated:

> "It will be observed that the law does accept instances where a variation of an EIA licence may be made. Under Regulation 25 (3) a variation can only be allowed without the necessity of a fresh EIA, if NEMA is satisfied that the project, as varied, would comply with the terms of the original licence. Now the regulations above do not give any criteria of when a variation will not be accepted without the need to do a fresh EIA. It appears as if this is left for the discretion of NEMA. However, like all discretions, NEMA has a duty to exercise its discretion in a reasonable and justiciable manner. If it is clear that the character of a project has changed, NEMA cannot shield behind regulation 25, to say that in its opinion, there is no need of a fresh EIA report and a mere variation is good enough...Where on assessment, the project is deemed to be a totally different project, then NEMA must cancel the existing licence and require a completely new EIA for the new project. Where NEMA feels that this is only a variation, but the pith and core of the project remains the same, it may vary the licence, but at the very least, where the above scenarios exist, such variation needs to be issued only after a fresh EIA is conducted and proper mitigation measures taken into account.

134. As stated above, Section 64(1) of the EMCA empowers NEMA to require a fresh EIA where there is a substantial change or modification in the project or in the manner in which the project is being operated. The Act itself does not define "substantial change."

135. In my view, a change will be substantial if it alters the scale, nature, or technology of the project such that new or different environmental impacts may arise; introduces risks not assessed in the original EIA Project or Study Report; significantly modifies location, design, or scope; or renders the original EIA report materially incomplete or misleading, so that decision-makers and the public lack accurate information on the environmental impacts.

136. The addition of two new floors comprising 28 units and a pent house to a high-density residential development amounts to a substantial modification as it inevitably alters the intensity of land use. In my view, the addition of the two floors amounted to a change in scale and intensity of the project, which amounts to substantial change.

137. In this matter, the 1st Respondent purported to obtain a further EIA licence dated 28th October 2019. However, no evidence was adduced to show that the licence was preceded by a fresh EIA Study Report or that public participation was undertaken as required under Regulation 17.

138. This Court has already found that the process through which the said first licence was obtained was procedurally flawed. The construction of the additional floors, which also required a fresh EIA Report, was therefore undertaken on the strength of an irregular licence, the legality of which must now be addressed through appropriate remedial orders given that the development has since been completed, and if not, the building to be demolished.

Whether the 1st Respondent constructed the development negligently and caused air pollution in the Petitioner's house

139. The Petitioner alleged that the construction of the development was undertaken in such a manner that occasioned physical damage to her property. In particular, she claimed that waste materials and runoff water from the construction site flowed onto her roof and seeped into the walls of her house, thereby causing dampness which led to the peeling of interior paint.

140. The Petitioner further alleged, in broad terms, that the persistent dampness within the premises facilitated the release of chemical contaminants from the degraded paint, which in turn compromised the quality of indoor air, ultimately rendering the house unfit for occupation by her and future generations.

141. It is a well settled principle that he who alleges must prove. Despite the gravity of the allegations raised, the Petitioner did not place before this court any photographic evidence, expert or technical evidence to demonstrate that the 1st Respondent's construction activities caused damage to her roof or walls or that such damage rendered the premises uninhabitable.

142. The court further notes that no scientific report or environmental assessment was adduced to substantiate the alleged deterioration in air quality or the presence of chemical contaminants within her house arising from the said construction.

143. In the absence of such evidence, the Court finds that the Petitioner failed to establish on a balance of probabilities, a causal nexus between the acts of omissions of the 1st Respondent and the alleged damage to her property.

144. Indeed, the right to property encompasses not only the entitlement to own and enjoy property without arbitrary deprivation, but also the right to use such property in a manner that preserves its utility and value.

145. However, where, as in this case, there is no cogent evidence demonstrating that the Petitioner's property was rendered uninhabitable, either temporarily or permanently, by the Respondents' actions, the assertion that her constitutional right to property was violated cannot be sustained.

146. The mere apprehension of harm, unsupported by empirical proof or expert testimony, does not meet the threshold required to establish a constitutional violation. Consequently, it is the finding of the court that the claim that the Respondents' conduct infringed upon her right to property under Article 40 of *the Constitution* is without evidentiary foundation.

147. The Petitioner further contended that the activities of the 1st Respondent occasioned her psychological distress, including depression, and adversely affected the well-being of her family.

148. In support of this contention, the Petitioner made reference to what she termed as "Sick Building Syndrome", which, according to the United States Environmental Protection Agency, refers to circumstances where occupants of a building experience acute health and comfort-related symptoms that appear to be associated with time spent within a building, but for which no specific illness or identifiable cause can be ascertained.

149. However, save for the bare reference to this syndrome, the Petitioner did not provide any medical reports, expert testimony, or other material evidence elucidating the specific nature of the alleged impact on her or her family, or the causal nexus between the 1st Respondent's activities and the claimed condition.

150. Further, there was no empirical data, toxicological report, or professional opinion adduced to establish that the alleged air pollution emanating from the 1st Respondent's activities caused or contributed to the onset of such symptoms.

151. In similar fashion, the claim that the Respondents' actions or omissions led to the Petitioner suffering from depression was unsupported by any medical documentation or expert psychiatric evidence.

152. The Petitioner did not place before the Court any material to establish a causal nexus between the Respondents' conduct and the alleged psychological injury. In the absence of such proof, the alleged violation of the Petitioner's right to life under Article 26 of *the Constitution* is not sustainable.

Whether the reliefs sought by the Petitioner should be granted

153. This court has found that the EIA Licenses through which the 1st Respondent undertook construction of the development on Land Parcel No. 209/9674 were obtained unprocedurally, having breached his duty to undertake an EIA Study and to conduct public participation in accordance with the law.

154. The Court further takes judicial notice that at the time of this judgment, the construction of the impugned development had been completed. This factual reality inevitably bears on the nature of remedies that may appropriately be granted.

155. Article 23(3) of *the Constitution* and Section 13(5) of the *Environment and Land Court Act* clothe this Court with wide remedial discretion to craft orders that are just and effective for purposes of enforcing *the Constitution* and securing environmental rights.

156. It is trite that an appropriate relief should be an effective remedy for purposes of enforcing *the Constitution*, human rights and the rule of law. In Fose vs Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851 Ackermann, J, writing for the court, stated that:

> "(19)Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

157. In Hoffmann vs South African Airways (CCT17/00) [2000] ZACC 17; Ngcobo, J put the position thus:

> "(45)The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be

guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source."

158. Guided by these principles, and having regard to the fact that the development is already complete, this Court issues the following orders (structural interdicts):

a. It is hereby declared that the EIA Licenses issued to the 1st Respondent in respect of the development on Land Parcel No. 209/9674 were obtained un procedurally, and are thus unlawful.

b. A fresh Environmental Impact Assessment process to be undertaken by the 1st Respondent in full compliance with the Environmental Management and Conservation Act and the Environmental (Impact Assessment and Audit) Regulations within 60 days from the date of this Judgment.

c. The fresh Environmental Impact Assessment shall incorporate meaningful public participation pursuant to Regulation 17 and shall be submitted to the National Environment Management Authority (NEMA).

d. The decision of NEMA in respect of the said Report (s) shall be filed in this court within 120 days from the date hereof.

e. The costs of undertaking the fresh Environmental Impact Assessment and implementing any mitigation measures shall be borne solely by the 1st Respondent.

f. The final decision/judgment of the court on the suitability of the development on the suit report shall be delivered on a date to be agreed upon by the parties, and after the lapse of the said 120 days enumerated above.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Masika for 1st Respondent

Ms Nyakundi for Koceyo for 3rd Respondent

Mr. Rukwaro for Petitioner

Court Assistant - Tracy