

**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: MUSINGA (P), NYAMWEYA & ODUNGA,**  
**JJ.A.) CIVIL APPEAL NO. E1010 OF 2024**

**BETWEEN**

**MBAAZI AVENUE RESIDENTS  
ASSOCIATION.....1<sup>ST</sup> APPELLANT**  
**MILLENIUM GARDENS MANAGEMENT  
LIMITED.....2<sup>ND</sup> APPELLANT**

**AND**

**METRICON HOME NAIROBI  
COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**  
**NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY.....2<sup>ND</sup> RESPONDENT**  
**NAIROBI CITY COUNTY.....3<sup>RD</sup>  
RESPONDENT**

*(Being an appeal from the Judgement and Decree of the  
Environment and Land Court at Nairobi (O. Angote, J). delivered  
on 19<sup>th</sup> September 2024*

*in*

***ELC Petition No. E121 of 2023)***

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**JUDGMENT OF THE COURT**

1. This appeal arises from the judgement delivered by the Environment and Land Court (***O. Angote, J***), in **ELC Petition No. E121 of 2023** on 19<sup>th</sup> September 2024. In that petition, the 2<sup>nd</sup> appellant, ***Millennium Gardens Management Limited (Millenium Gardens)***, was the petitioner, while the 1<sup>st</sup> respondent herein, ***Metricon Home Nairobi Company (Metricon)***, was sued as the respondent. The ***Mbaazi Avenue Residents***

**Association (MARA), the**

1<sup>st</sup> appellant herein, together with **National Environment Management Authority (NEMA)** and the **Nairobi City County**, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein, were named as interested parties in the petition.

2. Metricon is the registered owner of L.R No 330/155 located along Mbaazi Avenue in Thompson Area, Nairobi (the suit property). Sometime in 2022, it sought to develop the said property by constructing apartments thereon. Aggrieved by Metricon's development, Millenium Gardens instituted proceedings by way of a petition dated 12<sup>th</sup> October 2024 in which it sought reliefs which we rephrase as follows:

- a) A declaration that the intended development by Metricon on LR No.330/155 (Original No 330/39/8) along Mbaazi Avenue, Thompson area, Nairobi County infringes on the Millenium Garden's members right to a clean and healthy environment.**
- b) A declaration that the development being undertaken by Metricon is contrary to the provisions of Article 10 of the Constitution to the extent that no proper and/or qualitative public participation was undertaken.**
- c) An order of permanent injunction restraining Metricon either by itself, servants, agents and/or employees from carrying on the proposed development on LR No. 330/155 (Original No. 330/39/8) along Mbaazi Avenue, Thompson area, Nairobi**

**County.**

- d) An order directing the officer commanding station (OCS) Kilimani police station to enforce and ensure compliance with the orders issued herein.**
- e) General damages.**
- f) Costs of the Petition.**
- g) Any other or further relief that the Honourable Court may deem just and fit to grant.**

3. Millenium Gardens' case was that: it was managing 28 units, 4 storey residential homes erected on L.R No 330/1211 known as Millennium Gardens, measuring approximately 0.4073 Ha situate along Mbaazi Avenue, Thompson Area, Nairobi County which it described in the petition as "well managed, quiet upmarket units"; that 80% of those living on the property own the units and reside therein with their families; Metricon commenced construction of three 16-storey blocks of apartments comprising 512 units on the suit property entailing 336 one bedroom units, 144 two bedroom units, 32 three bedroom units, a two level underground and one ground parking, all on a one-acre piece of land; Metricon's aforesaid project adjoins and shares a common boundary with the property they manage; the development was irregular, unlawful and contrary to the Nairobi City County's zoning policy which stipulates that developments within the

subject areas should not go beyond four storeys; the proposed development, which is separated from the Millenium Gardens' members' property by one common stone wall and a three 16-storey blocks of apartments which run all the way along the common stone wall with a less than 3-metre distance, between it would render Millenium Garden's members apartments unsafe; due to its high height, the proposed development would cut off all the natural sunlight to Millenium Gardens' members' apartments, affect air circulation and the reception of the TV/DSTV and other ariel communication devices; and that the development would further create a health hazard due to interference with air circulation and round the year incessant exhaust fumes emanating from the cars parked in both the underground and ground level parking lots, bordering the windows of its members' apartments.

4. It was further contended that: as the two properties share an underground rock, and considering their proximity to each other, the 2-level underground and 1 level ground parking would weaken and/or compromise the structural stability and integrity of the its members' buildings during and after construction; Metricon's

underground parking

would contaminate the underground water surface which Millenium Gardens' members relied on having constructed a borehole; Metricon's proposed parking was directly adjacent to some of Millenium Gardens' members living and bedrooms, and the pollution from the exhaust fumes would render their property uninhabitable; as the two properties share the underground rock, the structural integrity of the buildings owned by Millenium Gardens' members would be compromised by the sheer weight of the proposed development, and that the drainage system would be unduly stretched due to increased demands by the occupants; Metricon's intention to cram 512 housing units on a one-acre plot in total disregard of zoning regulations, scarce amenities and resources would infringe on Millenium Gardens' members' rights to a clean and healthy environment; the intended project posed grave environmental, infrastructural, health, sanitation and other socio-economic hazards to Millenium Garden's members; and that Millenium Gardens' members were greatly aggrieved and stood to be seriously affected if the construction of the said residential apartments by Metricon was not halted.

5. Further, that: Millenium Gardens' views were not considered by Metricon in direct violation of **Articles, 10, 47 and 69** of the **Constitution** and **sections 4 and 5** of the **Fair Administrative Action Act** which require transparency and proper public participation in the management, protection and conservation of the environment; while purporting to organize public participation meetings, Metricon did not address the concerns raised therein; Millenium Gardens consequently registered their reservations with NEMA who promised to look into their concerns but nonetheless proceeded to issue a license without doing so; similarly their complaint to the National Construction Authority (NCA) did not yield any results; and that pursuant to complaints by stakeholders, the Nairobi City County issued an Enforcement Notice to Metricon which was ignored, prompting it to write another letter advising Metricon to stop construction for want of public participation.

6. Millenium Gardens therefore argued that if allowed to continue un-abated, Metricon's acts were likely to prejudice, compromise, jeopardize and even paralyze the water, drainage, sanitation, eco-system and infrastructural

and socio-economic setting and amenities enjoyed by Millenium Gardens' members in total disregard of **Articles 10 and 42** of the **Constitution**; that the 1<sup>st</sup> respondent's development was shrouded in secrecy as the same was commenced without putting up a signboard, making it difficult to ascertain whether the necessary approvals were obtained; and that justice dictated that the orders sought be granted.

7. In response to the petition, Metricon's position was that: whereas before any approval is issued, public participation must be undertaken, in this case, an advert was published in the local newspaper on 24<sup>th</sup> March 2022 inviting members of the public to submit their comments or objections to the proposed project; pursuant to the provisions of the **Physical Planning and Land Use Act, 2019 (PLUPA)**, it submitted an application for change of user of the suit property was made on 7<sup>th</sup> March 2022, which was approved by the County Planning Committee and a change of user approval issued by Nairobi City County on 24<sup>th</sup> March 2022; after various meetings with Millenium Gardens' members, Metricon undertook an Environmental Impact Assessment Study Report (EIA

Report) which provided mitigation measures; Millenium Gardens' members' concerns that Metricon's development would interfere with air circulation and occasion pollution by exhaust fume emissions rendering their property inhabitable, were adequately mitigated; Metricon enclothed the site with dust proof nets during construction, ensuring sound conditioning of construction machinery and equipment, prohibited idling of vehicles and controlled speed and operation of construction vehicles to mitigate air and noise pollution concerns; the averments that the project contravened zoning requirements were unsubstantiated as the zoning policy in areas under zone 4 is under review as indicated in the Guide of Nairobi City Development Ordinances and Zones; the approvals in areas falling under zone 4 are guided by the Nairobi Integrated Urban Development Master Plan of December 2014 which currently guides approval and developments by the County; and that Metricon legitimately obtained approvals for the project, having undergone scrutiny and adhered to the established zoning laws and regulations as evinced by the fact that adjacent buildings surrounding the proposed project are higher than four storeys as

indicated in the

***Guide of Nairobi City Development Ordinances and Zones.***

8. It was thus Metricon's case that: Millenium Gardens' allegations that the proposed development's height and density would expose the environment to harsh and destructive effects in the area was unsubstantiated; in compliance with the provisions of **section 58** of the ***Environment Management and Coordination Act (EMCA)***, they made an application for an Environmental Impact Assessment License (EIA) License); in so applying, and in accordance with **section 59(1) and (2)** of the ***EMCA***, they prepared an EIA Study Report and submitted it to NEMA; that the report also included social site assessment forms showing all reservations by Millenium Gardens in respect to the likely environmental impact as a result of the proposed project; that on 24<sup>th</sup> June, 2022, NEMA placed an advert in *The Star* and *The Standard* newspapers requesting the public to submit comments on the EIA Report with respect to the project within 30 days to help it make a decision on the project; NEMA further invited public comments vide the *Kenya Gazette Notice* published on 1<sup>st</sup> July 2022; that on 10<sup>th</sup> August 2022 and 17<sup>th</sup> August 2022,

NEMA placed a 2<sup>nd</sup> and 3<sup>rd</sup> advertisement in *The Star* newspaper calling for comments on the aforesaid report; in addition, Metricon placed three classified adverts per day on Ghetto Radio in respect of their development; further on 24<sup>th</sup> May 2022, Metricon prepared a notice to all stakeholders/members of the public along Mbaazi Avenue inviting them to a public participation meeting which was held at the subject property on the 3<sup>rd</sup> June 2022 which meeting was chaired by the Kilimani Area Chief in line with **section 58** of the **EMCA**; during the said meeting, a majority of Millenium Gardens' members were present and the issues raised were discussed at length as highlighted in the minutes thereof; on 11<sup>th</sup> August 2022, Metricon published a notice in *The Star* newspaper inviting all the stakeholders/members of the public to a public participation meeting to be held on the 20<sup>th</sup> August, 2022 at 9:30am; and that the aforesaid meeting was chaired by a Mr Gitau Muiruri, the lead EIA Consultant for Metricon, in accordance with **section 58** of the **EMCA**.

9. Metricon maintained that a majority of Millenium Gardens' members were also present in the meeting of 20<sup>th</sup> August 2022; that on 25<sup>th</sup> August 2022, they

prepared a notice to

all stakeholders/members of the public for another meeting to be held at the site on 3<sup>rd</sup> September 2022 at 9:30am, which notice was published in *The Star* newspaper on the 26<sup>th</sup> August 2022; the meeting of 3<sup>rd</sup> September 2022 was similarly chaired by the Kilimani Area Chief and that most of Millenium Gardens' members were present in the meeting as well; apart from carrying out the meetings as per the **EMCA**, social site assessment questionnaires were issued in April 2022 and posters put up publishing the project; a traffic impact assessment study was also carried out and submitted to NEMA; a geotechnical investigation for the project site to ascertain the suitability of the land and to provide geotechnical recommendations was also carried out; and that Metricon engaged NEMA whenever they sought clarifications and promptly responded to issues/requests for information.

10. Furthermore, that the borehole on the site had been drilled by the previous owner of the suit property who had obtained the requisite approvals from the Water Resources Authority, and Metricon also received approval from the Nairobi Water and Sewerage & Company stating that the sewer line had adequate

capacity within Mbaazi area and

had no challenges of frequent sewer blockages; that it was evident that Metricon adequately engaged the residents, stakeholders and the general public before commencing the construction; that it also equally adhered to the provisions of the law, both under the **PLUPA** and the **EMCA**, and upon compliance, was issued with an EIA License No NEMA/EIA/PSL/23286 and a Certificate of Compliance by the National Construction Authority dated 27<sup>th</sup> September 2023; and it submitted its Plan Registration PLUPA-BPM- 000252-N on 18<sup>th</sup> July 2023 and received approval on 30<sup>th</sup> August 2023 as well as approval to excavate and transport soil from the project site.

11. While admitting that on 4<sup>th</sup> October 2023, it was issued with an Enforcement Notice by the Nairobi City County alleging that it did not carry out public participation before construction and had initiated construction contrary to approval conditions, Metricon clarified that upon issuance of the notice, they stopped works on the proposed site and its Architect responded vide a letter dated 5<sup>th</sup> October 2023. Subsequently, Nairobi City County vide a letter dated 12<sup>th</sup> October 2023 permitted it to resume works. Further, that the Enforcement Notice

had been issued arbitrarily, without

Metricon being afforded a right to respond, and without any reason; there was public participation for the grant of a development permit in two phases, before the change of user process and during the EIA Report; the public participation processes are conducted by different authorities, which have different mandates and are bound by different statutes; and that although Metricon duly undertook public participation in both phases, the Enforcement Notice and letter dated 9<sup>th</sup> October 2023 did not indicate which phase of the public participation had not been conducted to the satisfaction of Nairobi City County.

12. Lastly, Metricon asserted that whereas on matters concerning violation of constitutional rights the complainant has to satisfy an evidential burden to establish that the specific right existed and has been restricted or violated, the petition did not meet the competence threshold. It urged the ELC to dismiss it.
13. NEMA's position was that prior to the commencement of the proposed project, Metricon submitted copies of terms of reference for EIA Study Report for the proposed development of residential apartments on L.R 330/155

(Orig No 330/39.8) along Mbaazi Avenue in Thompson

Area, Nairobi County; upon receipt and review of the application, it approved the terms of reference and directed Metricon to submit copies of the report, a soft copy of the Environmental and Social Management Plan and an electronic copy of the EIA Report prepared by the registered expert; on 20<sup>th</sup> May 2022, Metricon submitted an EIA Study Report for its review and that in accordance with the applicable law, NEMA identified relevant lead agency/committee/stakeholders with regard to the proposed development and sought their review and submission of comments to aid it arrive at an informed decision; a public notice was issued to the government printer by Metricon vide its letter dated 23<sup>rd</sup> May 2022 and vide two national newspapers on the 24<sup>th</sup> June 2022; and that as directed, Metricon submitted adverts for the proposed project to NEMA.

14. NEMA added that on 18<sup>th</sup> July 2022, it received complaints from Millenium Gardens on Metricon's pending application, and that through its letter of 29<sup>th</sup> July 2022, it directed Metricon to undertake a public meeting and provide minutes and duly signed attendance lists with relevant stakeholders, and to provide a Traffic Impact Assessment

report as well as legible designs for the project. Metricon in response wrote to NEMA attaching photographic evidence of posters around the site publicizing the project, its effects and benefits and posters on the newspapers and radio correspondence relating to the project advert; and also made submissions addressing the issues raised by Millenium Gardens including matters of public consultation and participation, traffic impact assessment report and legible drawing design. NEMA subsequently undertook a site visit on the proposed project site on the 20<sup>th</sup> May 2022 and wrote to Metricon to address a number of issues arising therefrom and received a reply on from Metricon on 13<sup>th</sup> December 2022. Being satisfied that the proposed project was within the law and set standards, NEMA consequently issued an EIA License to Metricon to enable the carrying out of 3 residential blocks of 13 stories, comprising 416 residential apartments, parking, associated facilities and amenities; and that the issuance of the License was after assessment of possible impacts and being satisfied that no likely negative impacts would be caused to the environment.

15. NEMA also stated that on 12<sup>th</sup> October 2023, it responded to a letter by Millenium Gardens dated 27<sup>th</sup> September 2023 and detailed the critical steps undertaken in the review of Metricon's application, and informed Millenium Gardens of its right of appeal to the National Environment Tribunal; it also undertook a site inspection for monitoring purposes on 11<sup>th</sup> March 2023 following reports made to it and recommended remedial measures to safeguard the site, implement mitigation measures and avert any harm to the immediate neighbours; that during the inspection, it was noticed that there were no activities on the project site and a pool of water was accumulating on the north eastern side of the site where excavation had commenced which contained stagnant water hence the need to institute immediate remedial measures; if Millenium Gardens had any concerns regarding the grant of the EIA License, they ought to have used the mechanisms set out under **EMCA**; and that NEMA at all times remained conscious of the statutes and regulations and took every step necessary to ensure compliance with the correct procedures as provided for under **EMCA**.

16. Nairobi City County on its part posited that the Metricon's proposed project had an existing borehole intended to supplement water supply from the Nairobi Water and Sewerage Company; that prior to the commencement of the proposed project, Metricon submitted its application for change of user which was approved by the County Planning Committee on the 24<sup>th</sup> March 2022 subject to compliance with set out conditions; Metricon made an application for development permission and the same was approved and a notification of approval issued on 20<sup>th</sup> July 2022; in addition, Nairobi City County approved Metricon's application for proposed amendments to the initially approved plan resulting in the approval of plan PLUPA-BPM-000252-N (18 levels) in place of the initially approved 13 levels; the notification of approval was issued on 30<sup>th</sup> August 2023 subject to Metricon complying with a number of conditions including an Environmental Impact Assessment approved by NEMA prior to the commencement of works, wayleaves for sewer, water, drainage and riparian land be maintained, and Metricon seeking approval from the Nairobi Water and Sewerage Company and the Water Resources

Authority; and that the issued approvals for

change of user and development have never been challenged at the County Physical and Land Use Planning Liaison Committee as per **section 78** of the **PLUPA**.

17. It was further explained that considering the differing positions between the residents of Mbaazi Avenue and Metricon, Nairobi City County suspended all construction works on the project site on 9<sup>th</sup> October 2023 and directed Metricon to convene a meeting with the residents for purposes of addressing their concerns; in response, Metricon, insisting that it had already conducted public participation, requested for a consultative meeting between itself and the representatives of the Nairobi City County; upon holding the meeting and scrutinizing the approvals by Metricon, it was found that the same were valid and had been legally obtained, Metricon had followed due procedure when making the application for change of user, and NEMA had issued its approval upon Metricon's compliance with the conditions set out after review of its EIA Study Report; it was established that Metricon had satisfactorily conducted public participation and had implemented the desired mitigation measures to address Millenium Gardens' members' concerns; the Traffic

# Impact Assessment Report

submitted was satisfactory; the EIA License was only granted after NEMA had assessed the possible impacts of the project and issued the same upon being satisfied that no likely negative impact would be occasioned to the environment; and that NEMA had been closely monitoring the project to ensure compliance with the set out conditions.

18. The Nairobi City County also noted that NEMA had by the letter dated 12<sup>th</sup> October 2023, written to Millenium Gardens detailing the critical steps taken in reviewing Metricon's application for an EIA License, and that Millenium Gardens had been advised of its right of appeal to the National Environment Tribunal. Based on the foregoing, it recalled the Enforcement Notice issued on 4<sup>th</sup> October 2023 and letter of 9<sup>th</sup> October 2022, and by a letter of 12<sup>th</sup> October 2023 Metricon was given a number of conditions to adhere to once it resumed its construction activities, including the tabling of the Architectural Plan (PLUPA-BPM-002873-N) at the Urban Planning Technical Committee for reinstatement and joint site visit to review development elements of the building that would require corrections in order to comply with the regulations as

provided for in approval conditions in the reinstated building plans.

19. On the contention that the project was against the area zoning policy, the position by Nairobi City County was that the policy is currently under review so as to meet the current rising housing demand; there are other existing developments in the area scaling up to 13 stories; there are old generation developments, mostly single dwelling bungalows and maisonettes which are gradually being replaced with second generation medium density multi-dwelling apartment developments ranging between 3 to 5 storey buildings and third generation high rise developments going up to 12 storeys; it is apparent that the proposed development is not out of place with the already existing developments; and having withdrawn the Enforcement Notice, there was no illegality if Metricon proceeded to carry out construction of the project as the same was compliant with the applicable laws, and in the absence of any challenge against the legality and validity of the approvals, the project should be allowed to proceed.

20. In addition, it was contended that the viability of the

project remained uncontroverted; that having  
excavated the area

before issuance of the injunctive orders, water had accumulated therein, posing a significant health hazard hence Metricon ought to be allowed to proceed with construction to avert any pending environmental hazards; Millenium Gardens' apprehensions in the petition were merely perceived and mistaken and no evidence was adduced in respect thereof; that there are other high rise developments within the same project and none had reported any of the alleged issues; the allegations could not stand in light of the approvals by the different entities; and that the petition was unmerited and should be dismissed.

21. MARA supported the petition and stated that on 26<sup>th</sup> October 2023, it held a public demonstration against the proposed development of the high-rise apartment building. Further, that they were opposed to the Metricon's construction thereon on grounds that the development was contra to the zoning laws of the area; it infringed on the resident's constitutional right to a clean and healthy environment; it would potentially strain the water table, existing roads, sewerage infrastructure and blockage of light to the neighbouring homes; and that the development will cause an eyesore

that degrades the value of the

properties in the area. According to MARA, once the number of blocks/units were built, there would be no green space or playing ground space for children, and they demanded fresh plans that meet the zoning guidelines of ground plus

3 Floors and a Maximum of 35% GC (ground cover of buildings) which were to include a minimum of 20% green space and children's play area. Accordingly, the residents filled in a public participation questionnaire to express their frustration at the development.

22. In a rejoinder to the position taken by Metricon, NEMA and the Nairobi City County, Millenium Gardens insisted that their concerns touching on Metricon's project and its non-compliance with the zoning policy were vindicated. It noted that by contending that the zoning regulations are under review, it was a clear admission that the stipulation therein that development within the area should not go beyond four storeys, was not followed. In its view, the allegation that there was an adjacent building surrounding the proposed project which was higher than four storeys could not be proffered as a justification for Metricon's proposed project. Its position was that ignoring the zoning policy and the

environmental and health issues raised predisposed the

Millenium Gardens' residents to enormous health concerns and safety hazards, which would inevitably lead to poor and miserable living conditions. It was disclosed that Millenium Gardens instructed an environmentalist to do a report pertaining to the impact the proposed development would have on the environment, which report confirmed that the project posed grave environmental, infrastructural, health, sanitation and other social-economic hazards to its members.

23. The learned Judge of the ELC identified the following issues as arising for determination from the petition.

- i. Whether the petition met the specificity test;***
- ii. Whether Millenium Gardens demonstrated the alleged violations and/or threats of violations of its rights protected under Articles 10, 42, 47 and 69 of the Constitution;***
- iii. Whether Metricon's proposed project violated the area zoning policy.***
- iv. What the appropriate remedies, if any, were.***

24. In determining the first issue, the learned Judge cited the decisions of **Anarita Karimi Njeru v Republic [1979] eKLR** and **Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR** and the Supreme Court decision in **Communications**

**Commission**

**of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR**, to highlight that a person seeking redress on a matter involving a reference to the Constitution ought to set out, with a reasonable degree of precision, that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed. However, what is needed is not a formulaic approach to the drafting of the pleadings but discernible claim of violation from the pleadings placed before the court. He found that the allegations were specific enough to meet the test espoused in the said cases and dismissed the challenge in that regard.

- 25.** On the second issue, the learned Judge, in dealing with the contention of whether there was contravention of **Articles 10, 42, 47 and 69(d)** of the **Constitution** in as far they set out the participation of the people and sustainable development as national values and principles of governance as well as Article 42 of the Constitution as regards the rights to a clean and healthy environment, cited the definition of “public” in **Article 2, sub-section 4** of the **Aarhus Convention on Access to Information, Public Participation in Decision-**

## ***Making and Access to Justice***

**in Environmental Matters (Aarhus Convention), 1998.** He also referred to the provisions the **EMCA** and the **Environment and Land Court Act**, as reinforcing the constitutional dictates by requiring the Environment and Land Court to be guided by the requirements for public participation in development of policies, plans and processes for the management of the environment.

- 26.** In addition, the learned Judge cited **Principle 10 of the Rio Declaration on Environment and Development**, which applies by dint of **Article 2(5) and 2(6)** of the **Constitution**, and stresses that environmental issues are best handled with the participation of all concerned citizens, at the relevant level as well as the duty on the States to facilitate and encourage public awareness and participation by making information widely available. Reference was made to the case of **Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR**, in which the South African decision in **Doctors for Life International v Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)** and **Mohamed Ali Baadi and Others v Attorney General & 11 Others [2018]**

**eKLR**, was cited to highlight the rationale and importance of public participation in decision making. The Supreme Court decision 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** was similarly cited to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. The decision of this Court in **National Assembly & another v Okoiti & 55 others Civil Appeal E003 of 2023 [2024] KECA 876 (KLR) (31 July 2024) (Judgment)** was alluded to, which affirms that the constitutional requirement for transparency and accountability imposes an obligation upon State organs to inform the general public and stakeholders why the views of some of the stakeholders were preferred over theirs. On the strength of those decisions, the learned Judge held that it is not enough to simply allege and demonstrate that public participation was conducted.

One must go further and

demonstrate that the views expressed during this exercise were duly considered and if not, the reasons for failure to do so. He noted that the aspect of public participation for the change of user of the suit property was not challenged and the Court would not venture into an academic exercise in this regard.

27. Regarding the principle of public participation in the development of policies, plans and processes for the management of the environment as one of the key principles of sustainable development, the learned Judge made reference to **section 3(5)** of the **EMCA** which puts in place a two-tier requirement for public participation to be undertaken during the process leading up to the grant of the EIA License, being during the conduct of the EIA study as well as upon publication of the EIA Report. The learned Judge considered the steps taken by the respondents and found that there was substantial compliance with the public participation requirements of **sections 59 and 60** of the **EMCA** and **Regulation 21**, with the only exception being the public hearing anticipated under **Regulation 22** by NEMA. It was however noted that the Millenium Gardens did not allege that its members were in the dark about the

project, as they conceded to not only having filled in the site questionnaires, but attended the various meetings as published and made their views known. The ELC therefore found that the Millenium Gardens members were given adequate opportunity to air their views. Regarding the issue whether their views were considered, the learned Judge

**referred to the decisions in Mui Coal Basin Case(supra)**  
and **Merafong Demarcation Forum and Others vs President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008**

**(10) BCLR 968 (CC)** and opined that public participation, as enshrined in law, does not require that every individual's views must prevail or dictate the outcome but instead, ensures that all views are considered in good faith. He found that the chronology of events demonstrated that the public participation that was undertaken was substantive, respecting the right to be heard, while balancing the broader interests at stake, including environmental concerns that were raised by the Millenium Gardens' members and disagreed with the contention that the Millenium Gardens' views were not

taken into consideration.

**28.** On whether there was a violation of the right to a clean and healthy environment in Article 42 of the Constitution, the learned Judge appreciated that the right to a clean and healthy environment has been recognized to be indispensable for the survival of humanity. After setting out the global steps taken in this direction, the learned Judge referred to an article by **Azadeh Chalabi, “A New Theoretical Model of the Right to Environment and its Practical Advantages” (2023) Human Rights Law Review, Articles 42 and 69 of the Constitution**, the cases of **Peter K. Waweru v Republic [2006] eKLR** and **Adrian Kamotho Njenga vs Council of Governors & 3 Others [2020] eKLR**, for the proposition that the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. He highlighted the precautionary principle as one of the principles that guide courts in determining disputes regarding allegations of the right and referred to **section 2** of the **EMCA** as well as the cases of **Odando & Another (Suing on their Own Behalf and as the Registered**

**Officials of Ufanisi Centre) v National**

**Environmental Management Authority & 2 Others;  
County Government of Nairobi & 5 Others  
(Interested Parties) (Constitutional Petition 43 of  
2019) [2021]**

**KEELC 2235 (KLR) (15 July 2021) (Judgment) and  
National Environment Management Authority &  
another vs KM (Minor suing through Mother and  
Best friend SKS) & 17 Others (Civil Appeal E004 of  
2020 & E032 of 2021 (Consolidated)) [2023] KECA  
775 (KLR).**

29. After considering the material placed before him, the learned Judge found that although the EIA study report and the EIA license differed on the number of units, there was a concession by Metricon to scale down the development which accounted for the difference in the Report vide the EIA License. The learned Judge, however, found that the contention that it was impossible to appreciate the size of the proposed project lacking in substance since Metricon is and will be bound by the size as contained in the EIA license.
30. Dealing with the allegation that the development by Metricon is a threat to the integrity of the neighbouring

buildings, and by extension, a threat to the right to a clean and healthy environment, the learned Judge found that,

whereas the complaint that the sharing of the bedrock was likely to affect the integrity of the neighbouring houses was not dealt with, Metricon nonetheless provided a geotechnical report which provided guidelines on how excavation should be undertaken to ensure preservation of the structural integrity of the neighbouring buildings. The EIA License further provided for a geotechnical site investigation and report detailing, among others, the method of excavation and the support systems to be applied thereon. According to the learned Judge, it was not demonstrated that these measures would not adequately mitigate or address the concerns in this regard. He found that whereas Millenium Gardens averred that its buildings had cracks, this was not demonstrated. In the end, the learned Judge held that the violation under this head was not established.

31. On the allegations that the proposed development would lead to blockage of light, the learned Judge noted that Metricon's position was that the building was designed in accordance with the County by-laws and would neither hinder light penetration nor affect the natural air circulation. He found that this position was not

contradicted, hence the plea that the building design aforesaid would lead to blockage of light or affect natural air circulation was unsubstantiated.

32. The learned Judge found that the concern by Millenium Gardens with regard to sewerage and sanitation as a threat to the right to a clean and healthy environment was dealt with through the EIA report, which demonstrated that adequate measures would be put in place to ensure the proposed development was connected to the national sewerage system, hence there is adequate drainage. The claim of violation under this head was, therefore, not established. The learned Judge then dealt with the allegation of the effect of the proposed development on the quality of air due to the exhaust fumes to be occasioned by the motor vehicles in the parking facing the Millenium Gardens' members' houses and that of pollution of the Millenium Gardens' borehole by the exhaust fumes of the cars in the basement parking. He noted that whereas Millenium Gardens was entitled to clean air as an aspect of the right to clean and healthy environment, nothing was placed before the court to demonstrate the potential air and water pollution. He, however, noted that condition

2.16 of

the EIA License mandated Metricon to strictly adhere to the **EMCA (Air Quality) Regulations**. Similarly claims of interference of ariel communication were found to have not been established.

33. Regarding the concerns that the proposed development could not be sustained and would cause undue strain on the existing infrastructure, the learned Judge found that Metricon undertook a Traffic Impact Assessment which set out a traffic management plan, while condition 2.6 of the EIA Licence also mandates the establishment of a concise traffic management plan duly approved by the relevant authorities. On matters water, it was noted that condition

2.22 mandates Metricon to put in place a comprehensive water harvesting and storage scheme to augment the NSWSC supply. In this regard, the learned Judge pointed out that the issuance of the EIA License report is not the end of the process, and held that as regards allegations of instances of violations of building codes and conditions of the EIA License, Millenium Gardens had due recourse under the **EMCA** and the relevant statutes. It was the learned Judge's finding that Millenium Gardens failed to

establish a viable threat to the enjoyment of its rights to a clean and healthy environment.

34. Dealing with the allegation of violation by the proposed project of the area zoning law as set out in the **Guide of Nairobi City Development Ordinances and Zones**, it was found by the learned Judge that this allegation was unsubstantiated since the zoning policy in areas under zone 4 were under review as indicated in the **Guide of Nairobi City Development Ordinances and Zones**, and that further approvals for areas falling under zone 4 are guided by the **Nairobi Integrated Urban Development Master Plan, 2014 (NIUPLAN)**. The learned Judge made reference to various pieces of legislation governing land use planning in Kenya, including **Urban Areas and Cities Act, 2011**, which stipulate that urban areas must have a physical development plan guiding land use, infrastructure development, and zoning, and the **County Government Act, 2012** which provides for County Integrated Development Plan as the instrument for development facilitation and control within the respective city or municipality. He noted that the **Integrated County Development Plans (ICDPs)** in Kenya are strategic

frameworks developed by county governments to guide development initiatives within their regions and that these plans are crucial tools for the devolved governance system established under Kenya's 2010 Constitution, hence are intended to address the unique developmental needs of each county, while aligning with national goals. He also identified the **Physical and Land Use Planning Act, 2019** which provides a framework for planning and regulating land use and development. He found that the suit property is situated within Thompson Area, which as per the policy falls within zone 4. The learned Judge noted that the “**Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones (City Council of Nairobi, 2004)**, was developed in 2004 by the now defunct City Council of Nairobi and it indicated in this respect the types of development allowed in the area under review as: *Residential apartments allowed on sewer only-Four Storeys Max.* Under remarks/policy issues, it is indicated: *Policy under review.* Reference was also made to the **NIUPLAN**, a broad spatial framework to guide urban planning and development within the Nairobi City County for the period 2014-2030 which was enacted by the

# County Government

of Nairobi pursuant to the provisions of **section 108** of the **County Government Act**. According to the learned Judge, it therefore supersedes the “**Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones (City Council of Nairobi, 2004)**”, which Millenium Gardens was relying on. It was noted that **NIUPLAN** makes reference to the 2004 **Nairobi City Development Ordinances and Zones** and indicated that the last zoning review was carried out in 2004 and resulted in subdividing 20 zones into smaller zones and prescribed ground coverage ratios (GC) and plot ratios (PR), and definition of the minimum plot size for each zone.

- 35.** The learned Judge further referred to **Sessional Paper No. 1 of 2023 on the Kenya National Population Policy for Sustainable Development**, developed and launched by the National Council for Population and Development, in which it is conceded that due to lack of an updated zoning policy, the Nairobi Government County has processed applications using discretion, practice, precedence, and planning justifications advanced by developers, architects and engineers. Also

referred to was the ***Nairobi City County Development Control Policy, December 2021*** (the

**Development Policy 2021**), which provides parameters upon which development applications for land use and development will be evaluated and approval granted with a view of promoting sustainable urban development. The Development Policy, 2021, the learned Judge found, recognizes the **NIUPLAN** and the fact that the development control guidelines were last reviewed in the year 2006, and were to last for ten years (until 2016).

36. The zonal maps annexed to the policy indicates that under “zone 4 B”, where the suit property falls, are a skyline/levels of 16 floors, which is within Metricon’s proposed development. The learned Judge found that the 2004 Zoning Guidelines had long been superseded by events that were unforeseen at the time of their formulation, and had failed to account for the dynamic and evolving nature of urban and environmental planning, a phenomenon recognized by the **NIUPLAN** and the **Development Policy 2021**. It was the learned Judge’s view that the application of these outdated guidelines (2004) without consideration of the current realities, the operative Master Plan (2014- 2030) and the **Development Policy 2021** may result in unjust

outcomes that do not reflect the needs and contexts

of contemporary society. According to the learned Judge, Millenium Gardens failed to show that the impugned development runs afoul the **NIUPLAN** and the **Development Policy 2021**. Considering that the project had undergone public participation, and the concerns of Millenium Gardens having been addressed within the existing legal and policy framework, the learned Judge found that the project was not invalid on account of the outdated 2004 Zoning Policy, provided that it continues to comply with the conditions set forth in the EIA License and other relevant Regulations. In his view, the **NIUPLAN**, made pursuant to the provisions of the **County Governments Act**, and **Nairobi City County Development Control Policy, 2021** is the operational planning document, which must guide the Nairobi City County in all the approvals it makes in respect of developments in the County. He, however, emphasised the urgent need for the Nairobi City County to put in place the **Nairobi County Physical and Land Use Development Plan**, envisioned under the **PLUPA**, to ensure that development decisions are made in accordance with the development plan, which would have been agreed upon by the residents of the County.

37. In conclusion the learned Judge dismissed the petition, with no order as to costs.
38. Aggrieved, MARA and Millenium Gardens are now before us, and have challenged the said decision on the grounds that the ELC:

**(1) erred in ignoring the admitted position of all parties that the 2006 Zoning Policy was under review. Instead, the ELC decided the case on the unpleaded Nairobi City County Development Control Policy, 2021; outside the Odd Jobs exceptions and without inviting parties to comment on the applicability of that policy. In turn, the court mistakenly applied a draft policy which all parties agreed was under review and which was long overtaken by Sessional Paper No 1 of 2023—Nairobi City County Development Control Policy, 2023 laid before the County Assembly on 6<sup>th</sup> June 2023 (before the case was filed on 12<sup>th</sup> October 2023;**

**(2) erred in fact and law by ‘translocating’ the MARA and Millenium Gardens from Mbaazi Avenue (Benard Estate, Lavington) in Zone 5, to the far away Muthangari, in Zone 4B. By this error, the court misjudged the applicable height restriction from a 0.1 (single dwelling house) to a 16-floor skyline - even if the Nairobi City County Development Control Policy, 2021, were applicable;**

**(3) erred in failing to find from the facts on record that Metricon had exceeded the plot ratio of 50 by planning to pile up three blocks of 16-floor apartments with 512 units on a one-acre plot;**

**(4) erred in finding that Millenium and**

***MARA had failed to establish a viable***

**threat to a clean and healthy environment. Further, the ELC's analysis glossed over the significant environmental and health hazards evidenced by Millenium's expert Environmental Impact Assessment report (MZ1) placed on record;**

**(5) misdirected itself on the public participation law in finding that Metricon conducted sufficient public participation before embarking on the development project. The court ignored the parameters of adequate public involvement, which must include, inter alia, considering and acting in good faith on all the views received;**

**(6) erred in law by validating public participation despite finding that NEMA never conducted the session under Regulation 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003;**

**(7) erred in law by overlooking the pleadings, evidence, and submissions that the planned construction would forever shade out MARA and Millenium Gardens' access to natural sunlight.**

**(8) erred by disregarding the pleadings, evidence, and submissions that since the project was not preceded by an expansion in the supporting infrastructure, the construction would cause adverse environmental impacts in the locality, such as the bursting of overstretched sewers; and that the ELC's approach, in this case, contradicts the precautionary principle, which requires precautionary measures to avoid harm in the face of uncertainty regarding potential environmental impacts. The Court thus failed to evaluate the project's threats to MARA and Millenium Gardens' rights and fundamental freedoms.**

39. It was sought that the appeal be allowed, the judgment of the ELC court be set aside, the petition dated 12 October 2023 be allowed, and MARA and Millenium Gardens be awarded the costs of this appeal. In, the alternative, considering the public interest issues each party bears its own costs.
40. We heard the appeal on the Court's virtual platform on 1<sup>st</sup> July 2025. Learned counsel, **Mr Ochieng Dudley**, appeared with **Ms Njeru** for MARA and Millenium Gardens; learned counsel, **Mr Chebon**, appeared with **Mr Otieno** and **Ms Bella Mose** for Metricon; and learned counsel, **Ms Irine Odhiambo** held brief for **Mr Bake** for Nairobi City County. Despite due service, there was no representation for NEMA. Learned counsel relied on their written submissions which they highlighted.
41. In their submissions, MARA and Millenium Gardens identified the issues for determination as: whether the ELC applied the unpleaded **Nairobi City County Development Control Policy, 2021** draft policy which had since been replaced by another draft policy, **Nairobi City County Development Control Policy, 2023**; whether the ELC overlooked the pleadings, evidence,

and submissions on the

Metricon project's adverse environmental impact; whether the ELC's approach contradicts the precautionary principle, requiring precautionary measures to avoid harm in the face of uncertainty regarding potential environmental impacts; and whether the ELC erred in failing to find any threat to or violation of the right to a clean and healthy environment by the project.

42. The Supreme Court decision in **Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] KESC 31 (KLR)** and this Court's decision in **Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR)** were cited by MARA and Millenium Gardens to emphasise the role of pleadings in a suit. The learned Judge was faulted for relying on the unpleaded draft policy, ***Nairobi City County Development Control Policy, 2021***, outside the ***Odd Jobs*** exception and without inviting the parties' comments and ultimately applying it to the dispute instead of the 2006 Zoning Policy. According to the said appellants, no party had pleaded the 2021 draft policy precisely because it was a draft. The 2006 Zoning Guidelines remained

applicable but were under review. Instead, all

parties acknowledged that the 2006 Zoning Policy was applicable but under review. It was further contended that the 2021 draft policy had become obsolete on 6 June 2023 and was succeeded by the draft **Nairobi City County Development Control Policy, 2023**, which was presented to the County Assembly on 6<sup>th</sup> June 2023 (the petition was filed on 12<sup>th</sup> October 2023). According to MARA and Millenium Gardens, it is judicially noticeable that on February 7, 2025, Nairobi City County announced public participation in the daily newspapers on the **Nairobi City County Development Control Policy, 2023** and the sessions were scheduled from 18<sup>th</sup> to 20<sup>th</sup> February 2025, and written submissions were due by 21<sup>st</sup> February 2025. Thus, the ELC imported into the dispute a draft policy that had ceased on 6<sup>th</sup> June 2023. In the alternative, even if the **Nairobi City County Development Control Policy, 2021**, was applicable, the ELC misjudged the applicable height restriction from 0.1 (single-dwelling house) for Zone 5 areas to a 16-floor skyline for Zone 4B areas. Under the draft policy, the applicable height restriction for areas classified as Zone 5, such as Benard Estate, Lavington, where Mbaazi Avenue is located, is 0.1 (single-dwelling houses). The

ELC,

therefore, 'translocated' Mbaazi Avenue Residents Association from Mbaazi Avenue (Benard Estate, Lavington) in Zone 5 to the faraway Muthangari in Zone 4B.

43. On the second issue on the contention that the ELC overlooked the MARA and Millenium Gardens' pleadings, evidence, and submissions, reliance was placed on the Supreme Court's decision in **Munya and Cyprian Awiti & Another v IEBC & 2 Others [2019] KLR**, which affirmed that an appellate court has jurisdiction to correct matters of law involving ignoring evidence, making conclusions unsupported by the evidence on record and reaching unreasonable or perverse findings. According to MARA and Millenium Gardens, the ELC first overlooked the pleadings, evidence, and submissions that the planned construction would permanently shade their access to natural sunlight. Furthermore, it was contended, the ELC ignored the claim that the Metricon project would devalue the MARA and Millennium Gardens properties, affect the water supply, overwhelm the road, and overstretch the sewerage. The ELC then disregarded the pleadings, evidence, and submissions that since an expansion in the supporting infrastructure did not

precede the project, the construction would cause

adverse environmental impacts in the locality, such as the bursting of overstretched sewers. Further, although Millenium Gardens produced an expert report on the environmental impact of the project and project alternatives, the ELC did not accord the issue of project alternatives due weight. Instead, the ELC glossed over this report and failed to consider the project alternatives to determine the allegations made in the petition. Ultimately, the ELC wrongly found that Millennium Gardens and MARA had failed to establish “a viable threat to the enjoyment of its rights to a clean and healthy environment”.

- 44.** It was submitted: that the ELC’s approach in this case, contradicts the precautionary principle which is defined in **section 2** of the **EMCA** as the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason to postpone cost-effective measures to prevent environmental degradation; that in exercising the jurisdiction conferred upon regarding sustainable development, what guides the High Court, as stipulated in **section 3(5)(f)**, is the precautionary principle; that **Principle 15** of the **Rio**

## ***Declaration on Environment and***

***Development*** states that States shall widely apply the precautionary approach to protect the environment according to their capabilities, and that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used to postpone cost-effective measures to prevent environmental degradation; that the Supreme Court in ***Export Processing Zone Authority & 10 others (suing on their own behalf and on behalf of all residents of Owino-Uhuru village in Makindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others (2024) KESC 75 KLR***, held that in addition to the polluter pays principle, there is also the precautionary principle which directly impacts on environmental liability; that the precautionary principle marks a shift from post-damage control (civil liability as a curative tool) to the level of pre-damage control (anticipatory measures of risks); that the ELC's approach, in this case, however, contradicts the precautionary principle, which requires precautionary measures to avoid harm in the face of uncertainty regarding potential environmental impacts; and that the court thus

failed to evaluate the project's threats to MARA and Millenium Gardens' rights and fundamental freedoms.

45. On whether the ELC's wrongly found that the project posed no significant environmental and health hazards, reference was made to **Articles 24, 42**, and the Supreme Court decision in **Kandie v Alassane BA & another (Petition 2 of 2015) [2017] KESC 13 (KLR)**, in which it was held that "not only must the law limiting a right or fundamental freedom pass constitutional muster, but also how the law is effected or proposed"; that in **Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017]eKLR** this Court outlined the three-part test for limitation of rights: (i) by law, (ii) for a legitimate aim, and (iii) as the least restrictive means; that in this case, however, the ELC relied on a draft policy (not a law) to limit MARA and Millenium Gardens' right to a clean and healthy environment; that the ELC having erred in finding that MARA had not proved a viable threat to a clean and healthy environment, and failed to explore the project alternatives for the least restrictive alternative.

46. Consequently, MARA and Millenium Gardens urged the

Court to allow the appeal, set aside the impugned

judgment, and the subsequent decree, allow the petition dated 12<sup>th</sup> October 2023 and award the costs to the appellants. In the alternative, considering the public interest issues raised, each party be directed to bear its own costs.

47. On behalf of Metricon, the issues identified for determination in this appeal were: whether the trial court erred in law and in fact by relying on the **Nairobi City County Development Control Policy, 2021**; whether the trial court erred in law by finding that Metricon conducted adequate public participation before embarking on the development of the project; whether the trial court erred in finding that MARA and Millenium Gardens had failed to establish a viable threat to a clean and healthy environment; and whether the trial court misapplied the precautionary principle which requires the court to avoid harm in the face of uncertainty regarding potential environmental impacts.

48. It was submitted: that the issue of whether Metricon's project contravened the area zoning policy was extensively canvassed by both parties before the trial court and ultimately the court found that the 2004

## zoning Guidelines

to have been superseded by events that were unforeseen at the time of their formulation; that the question as to which is the applicable document in relation to zoning was left for the determination of the court and as such the court in its analysis of the applicable zoning policy took judicial notice of all the draft policies and guidelines that are in place in Nairobi County; that MARA and Millenium Gardens failed to show that Metricon's project runs afoul of the ***Nairobi Integrated Urban Development Master Plan, 2014*** and the ***Nairobi City County Development Control Policy, 2021***; that on the authority of the case of ***Rawal v Judicial Service Commission & Others, [2016] KECA 534***, this Court held that where evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the issue; that the ***Nairobi City County Development Control Policy, 2021*** was published by the defunct Nairobi Metropolitan Services to provide parameters upon which development applications for land use and development would be evaluated and approvals granted, and the same was submitted to the County Assembly for approval and

therefore became part of the

general proceedings of Assembly that the court could properly take judicial notice of pursuant to section 60 of the ***Evidence Act*** as appreciated in this Court's decision in ***Raphael Kahindi Kawala v Mount Elgon Beach Properties Limited - Malindi Civil Appeal No. 8 of 2018*** and ***Mtana Lewa v Kahindi Ngala Civil Appeal No. 56 of 2014***; that the policy was approved by the County Assembly on 10<sup>th</sup> February 2022 as evidenced by the stamp of approval signed by the Speaker; that the ***Nairobi City County Development Policy, 2021*** is one of the documents uploaded in the County's website, a clear indication that it is a duly approved and operational zoning policy in the County; that the policy is a public document which has public notoriety, hence the court rightly took judicial notice of it and was well within its powers to rely on it based on the decision of this Court in ***Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 Others [2013] KECA 118***; that Metricon's project is in conformity with the character of the area which is currently symbolised by high rise buildings of over four floors; that while MARA and Millenium Gardens contend that the area in question falls within zone 5 which allegedly imposes a

height restriction of 0.1 (single dwelling), it is an undisputed fact that the Millenium Garden's own building, which is adjacent to Metricon's development, exceeds three floors.

49. On the second issue, regarding the conduct of public participation, it was submitted that Metricon conducted a sufficient and adequate public participation during the change of user process and EIA report stage.
50. On the issue whether the trial court erred in finding that MARA and Millenium Gardens failed to establish a viable threat to a clean and healthy environment, it was submitted: that Metricon conducted various public participation meetings prior to the preparation of the EIA study report which provided mitigation measures to address the negative impacts that had been identified by complying with all the requirements, and was lawfully issued with the Environment Impact Assessment Licence No. NEMA/EIA/PSL/23286; MARA and Millenium Gardens failed to substantiate the extent or the manner in which the property grossly interfered with and negatively affected the subject property and its surrounding; MARA and Millenium Gardens did not establish that the

construction activities by Metricon violated their rights to  
clean and healthy

environment as enshrined in Article 42 of the Constitution; that MARA and Millenium Gardens' concerns that the development would interfere with air circulation and occasion pollution by exhaust fume emission emanating from the cars parked in both underground and ground level parking lots bordering the windows of the apartments belonging to their members was found to be mere apprehension without scientific finding of the effect of the development to the environment for the area.

51. On the allegation of misapplication of the precautionary principle, it was submitted: that the learned Judge fully appreciated the precautionary principle and acknowledged its application in environmental conservation and pronounced a judgement that reflects a deliberate approach towards preventing environmental harm; that the trial court addressed MARA and Millenium Gardens' claims and found the same unmerited; that in arriving at its finding, the court relied on the EIA report and EIA licence as the key sources of information regarding potential environmental impact of the proposed development and Metricon, NEMA and Nairobi City County were directed to adhere to the building size

specified in the EIA licence; that the court

evaluated whether the mitigation measures set out in the EIA licence adequately addressed the projected risk, which illustrates the court's effort to strike a balance between environmental protection and development needs; that the court emphasised that the grant of an EIA licence does not mark the end of environmental monitoring and affirmed that compliance with license conditions is subject to scrutiny and enforcement mechanisms under EMCA; that this shows the court's inclination for taking early action to prevent harm and adjust measures as needed, in line with the precautionary principle; and that MARA and Millenium Gardens' objection to the proposed development is not founded on any evidence and is based on anecdotes hence the appeal ought to be dismissed with costs to Metricon.

52. On behalf of Nairobi City County, the issues identified for determination were whether: the learned Judge erred in law in relying on and applying the **Nairobi City County Development Control Policy 2021** as the operative document on zoning guidelines in Nairobi County; in finding that Metricon had obtained all the requisite approvals and conducted adequate/sufficient public

participation on the proposed development; in  
considering

the potentially harmful environmental impacts of the proposed development alleged by MARA and Millenium Gardens; and in ultimately dismissing the petition upon finding that MARA and Millenium Gardens had not established violations of their members' rights to a clean and healthy environment.

53. It was submitted that: the learned Judge did not err in relying on the **NIUPLAN** and **Nairobi City County Development Control Policy, 2021**, which was formulated in response to the gap left after the expiry of the previous 2004 Zoning Guidelines (**A Guide of Nairobi City Development Ordinances & Zones**); the 2004 Zoning Guidelines were last reviewed in 2006 and were supposed to last for ten years from 2006 to 2016 and were therefore outdated at the time of filing of the petition; the **Nairobi City County Development Control Policy, 2021**, was approved by the County Assembly on 10<sup>th</sup> February 2022 and was, as such, fully operational and was not a proposal or draft; the said document bears the County Assembly stamp of approval signed by the Speaker in line with **section 30(2)(f)** of the **County Governments Act, 2012**; the formulation of county physical and land use planning

policies, guidelines and standards are provided for under section 17(a) and 20(b) of the **PLUPA**, hence the said policy was properly formulated as mandated under **PLUPA**; the policy operationalised the new Zoning Guidelines as prescribed therein, and the said Guidelines, on height, plot ratio, ground coverage as well as user of the land, are the currently applicable guidelines as opposed to the 2004 ones; the said policy was formulated and approved under the auspices of the Nairobi Metropolitan Services (NMS) prior to the transfer of functions back to the Nairobi City County Government; upon the transfer of functions back to the County, **Sessional Paper No. 1 of 2023, Nairobi City County Development Control Policy, 2023** was formulated, in a bid to encourage a more robust public engagement; the said Sessional Paper which is currently pending approval by the County Assembly is one and the same things, word for word, with the **Nairobi City County Development Control Policy, 2021**; once approved, the Sessional Paper will simply replace the currently operational 2021 Development Control Policy; as the **Nairobi City County Development Control Policy, 2021** was a legally formulated and approved policy, the

court *suo*

*moto* took judicial notice of the same as provided for under section 60 of the **Evidence Act** and on the authority of the decisions in **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] KECA 39**, **Nasra Ibrahim Ibren v Independent Electoral & Boundaries Commission & 2 Others [2018] KECA 500**, **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 Others [2013] KECA 118**, and the definition of “policy” in **Black’s Law Dictionary, 4<sup>th</sup> Ed**; the policy therefore forms part of what is judicially noticeable under section 60 of the **Evidence Act**; the court properly observed that under the said Policy Zoning Guidelines, the proposed development fell under the zone whose maximum floor limit was 16 and the permitted user was mixed development; it is therefore incorrect to contend that the learned Judge translocated MARA and Millenium Gardens; since one of issues for consideration by the court was the Zoning Guidelines applicable to the subject area, a proper determination of the permitted height limit within the subject area was an essential aspect of the case o enable a finding on whether the size of the proposed development was permissible or not, in line

with the decision in **Attorney**

**General v Halal Meat Products Limited [2016]**

**KECA 306 (KLR)**; and that the mere fact that the said Policy was not pleaded by the parties due to inadvertence does not make it non-existent, inapplicable or irrelevant to the dispute.

54. On whether the learned Judge erred in finding that Metricon had obtained all the requisite approvals and conducted adequate/sufficient public participation on the proposed development, it was submitted, on behalf Nairobi City County that: the wording of **Regulation 22** of **the EMCA Environmental (Impact Assessment and Audit) Regulations 2003** is clear that NEMA is not under a mandatory obligation to conduct the stated hearing; t the trial court noted that the public hearings took place anyway, even though they were conducted by Metricon and not NEMA; that the learned Judge did not disregard this issue but addressed it and found that the slight deviation therefrom could not invalidate the fact that substantive hearings had been conducted; that Metricon secured the necessary Development Permission dated 23<sup>rd</sup> August 2023 from Nairobi City County as well as a NEMA EIA Licence No. NEMA/EIA/PSL/23286 from NEMA; that none of these

approvals were challenged before the trial court or any other forum; and that the learned Judge was right in holding that public participation was adequately conducted in accordance with the prescribed standards.

55. On whether the learned Judge considered the potentially harmful environmental impacts of the proposed development, Nairobi City County submitted that the learned Judge exhaustively and extensively addressed each and every concern raised; the trial court meticulously and exhaustively considered the applicability of the precautionary principle in the issues raised in the petitions; while the court found that Metricon discharged the burden of showing that the proposed development is environmentally sound, it noted that the issuance of the EIA Licence is not the end of the process, and that any affected person, including MARA and Millenium Gardens, have due recourse under the **EMCA** and the relevant statutes in respect of any contraventions of the conditions contained in the EIA Licence; that the learned Judge laid factual and legal basis for every finding he reached; and MARA and Millenium Gardens have not demonstrated that these findings were erroneous and on what basis they

should be set aside and the case of **Mbogua Kiruga v Mugecha Kiruga & Another [1988] eKLR** was cited to expound on the circumstances when an appellate court may interfere with findings of fact by the trial court.

56. We have considered the material placed before us. This Court's mandate on a first appeal as set out in **rule 31(1)(a)** of the Rules of this Court is to reappraise the evidence and draw our own conclusions. In determining this first appeal from the decision of the trial court, we are alive to our mandate as espoused in the case of **Ng'ati Farmers' Co- operative Society Ltd v Ledidi & 15 Others [2009] KLR 331, Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR and Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212**, which we summarise as follows:

- (1) A first appeal to this Court from a trial by the High Court is by way of re-trial.**
- (2) This Court must re-evaluate, re-assess and re-analyze the extracts on the record and determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.**
- (3) In carrying out its mandate of reconsideration of the evidence, its**

***evaluation and drawing its own conclusions, this Court must always***

***bear in mind that it neither saw nor heard the witnesses and is not in a position to gauge their demeanour and should make due allowance in that respect.***

***(4) However, this Court is not bound necessarily to follow the trial court's findings of fact if it appears either that it clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.***

***(5) The responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.***

57. While we are keenly aware that the hearing before the trial court was on the basis of affidavit evidence as opposed to a *viva voce* hearing, the principles applicable to a first appeal apply with equal force save that the usual benefit that accrues to the trial court based on the advantage of hearing and seeing the witness, does not apply. In other words, since evidence can either be oral or on affidavit, the duty largely remains the same.

58. While we appreciate that we have jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand and may, in appropriate cases, reverse or affirm the findings of the trial court,

this jurisdiction is

exercised with caution. However, if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so hold.

59. It is important to note that MARA and Millenium Gardens did not challenge, before the trial court or any other tribunal, the approvals that had been issued to Metricon by NEMA and Nairobi City County. Accordingly, the issue whether or not the same were properly granted does not arise, and this Court must, in this appeal, proceed on the basis that the same were validly issued. We say so because there are clear provisions prescribed in law for challenging such approvals.

60. It is clear in this appeal that the challenge to the decision appealed against is, substantially, focussed on the findings by the learned trial Judge. With the above principles in mind, we now embark on the determination of this appeal.

**61.** The issues that MARA and Millenium Gardens have placed before us for determination, as already set out

above are: whether the ELC applied the unpleaded

***Nairobi City***

**County Development Control Policy, 2021** which had since been replaced by another draft policy, **Nairobi City County Development Control Policy, 2023**; whether the ELC overlooked the pleadings, evidence, and submissions on the Metricon project's adverse environmental impact; whether the ELC's approach contradicts the precautionary principle, requiring precautionary measures to avoid harm in the face of uncertainty regarding potential environmental impacts; and whether the ELC erred in failing to find any threat to or violation of the right to a clean and healthy environment by the project.

62. Regarding the first issue, we are called upon to determine whether it was proper for the learned Judge to have relied on **Nairobi City County Development Control Policy, 2021**. The first objection taken against the policy was that it was not pleaded, and in any case was just a draft. In relying on the said policy, MARA and Millenium Gardens contended that the learned Judge imported the **Odd Jobs** exception without inviting the parties' comments. It was their view that the learned Judge improperly applied the said policy to the dispute instead of the 2006 Zoning Policy which was under

review. Further, it was contended that the

2021 draft policy had become obsolete on 6 June 2023, and was succeeded by the draft **Nairobi City County Development Control Policy, 2023** which was presented to the County Assembly on 6 June 2023 and was undergoing public participation.

63. It is not contested that the **Nairobi City County Development Policy, 2021** was not expressly pleaded. The learned Judge in fact appreciated this in his judgement when he stated that the court “came across the **Nairobi City County Development Policy, December 2021**”. That a court is not entitled to determine a case based on an

**Odinga & another v**  
**Independent Electoral and Boundaries Commission**  
**& 2 others (supra)** and **Independent Electoral and**  
**Boundaries Commission & another v Mule & 3**  
**others (supra)**.

64. However, there are exceptions to this rule and as this Court appreciated in **Rawal v Judicial Service Commission & another (supra)**:

***“The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on***

***unpleaded issues. Where however,***

**evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] 476, D.E.N. *v. P.N.N. (supra)*, *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v. Kenya Railways Corporation* (2005) 2 KLR 410.”**

65. In this case what is in contention is a policy of the Nairobi City County Government. A “policy”, is defined by ***Black’s***

***Law Dictionary, 4<sup>th</sup> Ed,***

**“The general principles by which a government is guided in its management of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community.”**

66. This Court in ***Eunice Cecilia Mwikali Maema*** **v Council**

**of Legal Education & 2 Others (supra), held that:**

**“To disregard Legal Notice 170 of 2009, which was operational at the material time, would be to act in disregard of existing Regulations. Yes, the respondents may not have pleaded Legal Notice 170 of 2009 but being a**

***matter of law it could in our view be raised.”***

67. It is therefore our view that government policies that are  
in operation cannot be disregarded  
by the court even if

unpleaded, once their existence comes to the knowledge of the court, one way or the other, notwithstanding the fact that they may not have been pleaded, and particularly, as in this case, the status of that policy is brought into question.

68. The position by MARA and Millenium Gardens, however, is that the 2021 policy was a draft policy which had not come into effect. Metricon's position is that the policy was approved by the County Assembly on 10<sup>th</sup> February 2022 as evidenced by the stamp of approval signed by the Speaker, and is therefore a duly approved and operational zoning policy in the County. Being a public document, which has public notoriety, the court rightly took judicial notice of it and was well within its powers to rely on it. We have ourselves looked at the said policy which has the stamp of the Speaker and bears the words "NCCA APPROVED 10 FEB 2022". Without any evidence to the contrary, what we deduce from the document is that it was approved by the National Assembly on 10<sup>th</sup> February 2022. The learned Judge was therefore within his rights to rely on the same in his determination. Although MARA and Millenium Gardens have made reference to the draft

**Nairobi City County Development Control Policy, 2023**, as substituting the **Nairobi City County Development Policy, 2021**, it is clear from MARA and Millenium Gardens' submissions that the same is still undergoing public participation. It cannot, therefore, be relied upon by this Court and this Court cannot deem it to have substituted the **Nairobi City County Development Policy, 2021**.

69. Related to the above issue is whether the ELC misjudged the applicable height restriction from 0.1 (single-dwelling house) for Zone 5 areas to a 16-floor skyline for Zone 4B areas. According to MARA and Millenium Gardens, under the said policy, the applicable height restriction for areas classified as Zone 5, such as Benard Estate, Lavington, where Mbaazi Avenue is located, is 0.1 (single-dwelling houses). The ELC, therefore, 'translocated' Mbaazi Avenue Residents Association from Mbaazi Avenue (Benard Estate, Lavington) in Zone 5 to the faraway Muthangari in Zone 4B.

70. In his judgement, the learned Judge found that:

***“According to the development policy, 2021, the development control guidelines were considered based on the following planning variables:***

***population growth trends; legal, policy  
and institutional***

**framework; land is inelastic; land market value; advanced construction technology; provision of infrastructure; internal urbanization trends and urban dynamics. The development control guidelines in the policy have been annexed as “zonal maps”, annexure 2. The suit property falls under “zone 4 B” which provides a skyline/levels of 16 floors, which is within the Respondent’s proposed development. It is abundantly clear from the foregoing that the 2004 Zoning Guidelines in question have long been superseded by events that were unforeseen at the time of their formulation. These guidelines, once relevant, fail to account for the dynamic and evolving nature of urban and environmental planning, a phenomenon recognized by the NIUPLAN and Nairobi City County Development Control Policy, 2021.”**

71. From the foregoing, the learned Judge found, as a fact, that the suit property falls under “zone 4 B” which provides a skyline/levels of 16 floors. This was a finding of fact and the legal position in such findings is as stated in the oft-cited case of ***Peters v Sunday Post [1958] EA 424*** in which this Court (*per Sir O’Connor, P*) accepted the principle laid down by the House of Lords in ***Watt v Thomas [1947] 1 All ER 582*** that:

***“It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the***

***evidence in order to determine  
whether the conclusion reached upon  
that evidence***

***should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”***

72. The learned President, in that decision cited the speech of

**Lord Macmillan** in **Watt v Thomas** (supra) who said:-

***“So far as this case stands on paper it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”***

73. We cannot fault the finding by the learned Judge simply because MARA and Millenium Gardens contend that it was wrongly arrived at. It was based on the evidence as presented before the court. The learned Judge’s finding has not been “*demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies*” or that he “*failed to appreciate the weight*

*or bearing of circumstances admitted*". We are not satisfied that he was plainly wrong in his findings.

74. On the second issue, it was contended that the learned Judge overlooked MARA and Millenium Gardens' pleadings, evidence and submissions that the planned construction would permanently shade their access to natural sunlight, affect the water supply, overwhelm the road and overstretch the sewerage. According to MARA and Millenium Gardens, although Millenium Gardens produced an expert report on the environmental impact of the project and project alternatives, the ELC did not accord the issue of project alternatives due weight.
75. With due respect to MARA and Millenium Gardens, the complaints against the learned Judge are not warranted. The learned Judge, after considering the complaints that were made against Metricon by Millenium Gardens, the steps taken by NEMA and the response received thereto from Metricon, found as hereunder:

***“As can be seen above, the geotechnical report provides guidelines on how excavation should be undertaken to ensure preservation of the structural integrity of the neighbouring buildings. The EIA License further provides under condition 2.2 a geotechnical site investigation and report detailing among others the method of excavation and the support systems to be applied thereon. It has not been demonstrated that these measures will***

***not adequately/mitigate***

***address the concerns in this regard...It has not been demonstrated that the building design aforesaid will lead to blockage of light nor affect natural air circulation...The Respondent, through the EIA report, has demonstrated that adequate measures will be put in place to ensure the proposed development is connected to the national sewerage system and there is adequate drainage in this regard...Whereas the Petitioner is entitled to clean air as an aspect of the right to clean and healthy environment, nothing has been placed before the Court to demonstrate the potential air and water pollution...the Respondent undertook a Traffic Impact Assessment which set out a traffic management plan...On matters water, Condition 2.22 mandates the Respondent to put in place a comprehensive water harvesting and storage scheme to augment the NSWSC supply.”***

76. The learned Judge concluded that:

***“the issuance of the EIA License report is not the end of the process. The Court notes that the Report by the Petitioner also alleges instances of violations of building codes et al and even conditions of the EIA License. The Petitioner has due recourse under the EMCA and the relevant statutes in respect of these alleged contraventions.”***

77. We have ourselves considered the evidence on record and we are satisfied that the findings by the learned Judge were informed by the evidence placed before the court particularly the EIA License and its stipulations. Whereas MARA and Millenium Gardens complained that

the learned Judge did not consider the report of its expert, Daniel

Wanjuki, dated 17<sup>th</sup> May 2024, it is clear from the record that the said report was considered. Whereas, the learned Judge did not expressly state his views on the said report, it is clear that the contents of the said report were juxtaposed with those in the EIA Report and EIA License and the learned Judge, as he was entitled to, believed the EIA report and the EIA License. We find no reason to fault him for that.

**78.** MARA and Millenium Gardens also fault the learned Judge for contradicting the precautionary principle which requires that measures be taken to avoid harm in the face of uncertainty regarding potential environmental impacts. The gist of the said principle, from the authorities cited, is that, firstly, the State government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation; secondly, where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; and lastly, the 'onus of proof' is on the actor or developer or industrialist to show that the actions are environmentally benign. See

**Vellore Citizen**

**Welfare Forum v Union of India (1996) 5 SCC 647 at 658.**

79. One of the decisions cited by the learned Judge was that of **Odando & Another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 Others; County Government of Nairobi & 5 Others (Interested Parties)** (supra) where it was held that:

***“In the court’s view, the onus lay on NEMA to prove that it had anticipated, prevented and addressed the causes of environmental degradation. Its contention that the Petitioners should provide a solution and specify which measures the Respondents should have carried out under the precautionary principle is in this court’s view misplaced. EMCA is replete with measures and actions which the Respondents are to implement in order to address air and water pollution.***

***What the precautionary principle implies is that the State has a duty to prevent environmental harm and health risks as well as conduct that may be harmful even where conclusive scientific evidence regarding the harmfulness is not available. The Respondents must take precautionary actions aimed at reducing exposure to potentially harmful substances, activities and conditions to minimise significant adverse effects to health and the environment.***

***One way of implementing the***

***precautionary principle is by shifting the burden of proof to the polluters and exploring alternatives to the harmful actions such as the Dandora dumpsite.***

**The precautionary approach to be adopted by the State should focus on how much harm can be avoided rather than consider how much can be tolerated.**

**Under this principle, the State would rather be wrong in acting instead of failing to act at all because the damage the pollution is likely to cause to human health and the environment may take years to be ascertained scientifically. The Respondents should minimise the future costs of being wrong about environmental and health risks posed by air and water pollution in the country. Applying the precautionary principle in stopping air and water pollution will prevent the actual causes of respiratory and other diseases as well as other underlying risks to health. This would entail examining the evidence of risk and uncertainty to determine the possibility of a significant health threat and the need to take precautionary action..."**

80. We agree with that persuasive statement.
81. In arriving at its decision, the court, in the above matter, made reference to the **Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874 [1992]** which states that in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities, and that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective

measures to prevent environmental degradation. It is clear that the

precautionary principle is a very useful tool which the court and the relevant tribunals applies in cases where allegation of threat of environmental degradation is alleged. In this case, for example, pursuant to complaints by stakeholders, Nairobi City County issued an Enforcement Notice to Metricon to stop construction for want of public participation. It was however, found that the complaint was unmerited and the Enforcement Notification lifted.

82. It is, however, clear from the authorities cited above that for the invocation of the precautionary principle, the court must find that there are threats of serious or irreversible damage. The court need not require full scientific certainty in doing so, but a case ought to be made out justifying the steps sought to be taken pursuant to the said principles.

83. In his judgement, the learned Judge was keenly aware of the precautionary principle. He delved at length on the same and cited authorities, both local and international, as well as various international instruments regarding the same. In his judgement:

***“What is clear from the foregoing is that at the first instance, the***

***obligation to show that a project is environmentally sound falls on the proponent of the development. This burden can be***

***discharged by satisfactorily going through the EIA process and obtaining an EIA license.”***

84. After considering the complaints made by the appellants, the learned Judge concluded that:

***“the Court is unable to find the Petitioner has established a viable threat to the enjoyment of its rights to a clean and healthy environment.”***

85. What the learned Judge was saying, in other words, was that based on the EIA processes and License, there were no threats of serious or irreversible damage shown by MARA and Millenium Gardens to warrant the invocation of the precautionary principle in order to grant the reliefs sought. That does not mean that the project may not be stopped in future if the conditions spelt out in the EIA License are not adhered to. The EIA License is not a blank cheque for Metricon to undertake whatever it wishes to do. It is a guiding map which Metricon must follow in order to reach its destination. Accordingly, we do not find any merit in this complaint.

86. The last issue, according to the issues identified by MARA and Millenium Gardens was whether the ELC’s wrongly found that the project posed no significant environmental and health hazards. It was contended that the ELC relied

on a draft policy (not a law) to limit the appellants' right to a clean and healthy environment, and that the ELC having erred in finding that MARA had not proved a viable threat to a clean and healthy environment, failed to explore the project alternatives for the least restrictive alternative. We have already dealt with the place of the **Nairobi City County Development Control Policy, 2021** and its significance in the proceedings. On the issue of the failure to explore the project alternatives for the least restrictive alternatives, the learned Judge found that: Metricon is and will be bound by the size as contained in the EIA license; the geotechnical report provides guidelines on how excavation should be undertaken to ensure preservation of the structural integrity of the neighbouring buildings, while the EIA License further provides a geotechnical site investigation and report detailing among others, the method of excavation and the support systems to be applied thereon; that Metricon, through the EIA report, demonstrated that adequate measures will be put in place to ensure the proposed development is connected to the national sewerage system and there is adequate drainage in this regard; condition 2.16 of the EIA

## License mandates

Metricon to strict adherence to the **EMCA (Air Quality) Regulations**; Metricon undertook a Traffic Impact Assessment which set out a traffic management plan, while condition 2.6 of the EIA Licence also mandates the establishment of a concise traffic management plan duly approved by the relevant authorities; and that condition

2.22 mandates Metricon to put in place a comprehensive water harvesting and storage scheme to augment the NSWSC supply.

87. Whereas the court found some of the complaints wholly unmerited, in cases where further steps were required, it found that necessary mitigating measures had been put in place and which if implemented, would adequately to address MARA and Millenium Gardens' grievances.
- 88.** Although MARA and Millenium Gardens did not expressly raise the issue of adequate public participation as one of the issues for determination in this appeal, notwithstanding it being one of the grounds of appeal. Ordinarily, where a party fails to urge a ground of appeal, it is deemed to have been abandoned. Since Metricon, NEMA and Nairobi City County nevertheless

addressed it, we shall briefly deal with it. It is important to state, as was held in **National**

**Assembly & another v Okoiti & 55 others (supra),**

that for public participation to be considered effective, it does not mean that all proposals and views presented during public participation must be accepted. What is required is that a reasonable opportunity be afforded to the members of the public to present their views and that those views be considered.

89. We have, on our part considered the material on record and agree with the learned Judge that public participation was adequately undertaken at two phases as required. It is, partly, the views gathered from the stakeholders in forums at which MARA and Millenium Gardens were represented that informed the conditions stipulated in the EIA License. It has not been demonstrated that the mitigating measures addressed therein will not adequately address the appellants' concerns in this regard.

90. It was however contended that **Regulation 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003** was not complied with by NEMA. The said regulation provides that:

***Upon receipt of both oral and written comments as specified by section 59***

***and***

**section 60 of the Act, the Authority may hold a public hearing.**

91. It is clear that the decision whether to hold public hearing by NEMA is discretionary. It depends on the circumstances. Where a clear public hearing is likely to serve no useful purposes, it would not be necessary to hold it simply because it is fashionable to do so. It may be conducted in any other suitable way. In this case, however, there is evidence that Metricon undertook a comprehensive public engagement exercise and part of the outcome of that exercise informed the contents of the EIA License and its conditions.
92. It is premature to determine at this stage whether or not the conditions set out in the License will be complied with by Metricon. We must also point out that where the law establishes specialised forums to deal with specific matters, courts of law ought to defer to those forums and ought not to readily and unduly impose its own views on such forums. We adopt, *mutatis mutandis*, the opinion of the Supreme Court of India in **Maharashtra State Board of Secondary and Higher Secondary Education & Anor v Kurmasheth and others [1985] CLR 1083** in where it stated at page 1105 that:

***“As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice.”***

93. A court of law is not an expert in management of the environment. The Constitution has bestowed the mandate on Parliament to enact statutes to create bodies to manage and regulate land use and planning and pursuant to that mandate, various pieces of legislation governing land use planning in Kenya have been enacted. These include: ***Urban Areas and Cities Act, 2011***, which stipulate that urban areas must have a physical development plan guiding land use, infrastructure development, and zoning; the ***County***

**Government Act, 2012** which provides for

County Integrated Development Plan as the instrument for development facilitation and control within the respective city or municipality; and the **Physical and Land Use Planning Act, 2019** which provides a framework for planning and regulating land use and development. Also in place is the **Environment Management and Coordination Act** which is:

***An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.***

94. Section 7 of the said Act establishes the **National Environment Management Authority**, the 2<sup>nd</sup> respondent in this appeal, and the general object and purpose for which NEMA is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. Whereas the court may well within its jurisdiction entertain matters relating to the manner in which NEMA has determined matters, such determination should not amount to substitution of decisions made by the authority in its special area of expertise.

95. We find no justification for interfering with the learned Judge's decision which was well founded, based on the expert conclusions arrived at by NEMA after duly considering the objections made by MARA and Millenium Gardens and the responses received from Metricon.
96. We note that the learned Judge found, rightly so in our view, that:

***“While the Nairobi Integrated Urban Development Master Plan of December, 2014 and Nairobi City County Development Control Policy, 2021 are the operative documents in guiding the approvals of developments in the county, the Court emphasizes the urgent need for the Nairobi City County to put in place the Nairobi County Physical and Land Use Development plan, envisioned under the Physical and Land Use Planning Act, to ensure that development decisions are made in accordance with the development plan, which would have been agreed upon by the residents of the County.”***

97. We have considered this appeal and find it unmerited. While we dismiss it with no order as to costs, the matter being a public interest litigation, we, pursuant to Article 23 of the Constitution, are empowered to grant appropriate relief. As was held by the Constitutional Court of South Africa in ***Fose v Minister of Safety & Security [1997] ZACC 6:***

***“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.”***

- 98.** We agree with the trial Judge of the ELC that while the Nairobi City County Development Control Policy, 2021 is the operational planning document, it is necessary for the Nairobi City County to be fully compliant with the law as regards development and planning processes, so as to forestall future related disputes. In addition to the structural interdicts issued by this Court in Civil Appeal No. E160 of 2025 - **Claire Kubochi Anami & Others suing as Officials of Raphta Road Residents Association v** **County Executive Committee Member, Built Environment & Urban Planning, Nairobi City County and 19 Others,** we direct Nairobi City County to ensure that the Nairobi County Physical and Land Use Development Plan or its equivalent is in place within 12 months from the date of the delivery of this decision. At the lapse of the said period MARA and Millenium Gardens

shall be at liberty to move the ELC for appropriate orders  
towards

compliance with this direction. Lastly, we also discharge the conservatory orders granted herein by this Court on 4<sup>th</sup> April 2025.

99. Orders accordingly.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of October 2025.**

**D. K. MUSINGA (PRESIDENT)**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

*Signed*

**DEPUTY REGISTRAR.**