

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC EPCC NO. E013 OF 2025

ANTONY MZEE (Suing on behalf of

JACARANDA AVENUE RESIDENTS' ASSOCIATION)PLAINTIFF

-VERSUS-

MULTI AUTO PARKHAUS LIMITED.....1ST DEFENDANT

AFRICA WASTE AND ENVIRONMENT

MANAGEMENT CENTRE.....2ND DEFENDANT

CEC MEMBER, BUILT ENVIRONMENT AND

URBAN PLANNING.....1ST INTERESTED PARTY

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND INTERESTED PARTY

D. G., KENYA URBAN ROADS AUTHORITY.....3RD INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY4TH INTERESTED PARTY

RULING

1. The Plaintiff filed a Notice of motion dated 23rd July 2025 amended on 22nd September 2025 supported by an affidavit sworn on the same date by Antony Mzee, seeking for the following orders;

- i. Spent

- ii. Spent
- iii. Spent
- iv. Spent
- v. That an order be issued that the change of use issued on 7/3/2018 granted to the 1st Defendant for development purposes with respect to the proposed development in plot L.R No.3734/1459, off James Gichuru Road, Lavington, Nairobi County Adjacent to Jacaranda Avenue Resident Association is expired and without an application of extension for the change of use, the court orders that the intended construction is unlawful, irregular, null and void and should be stopped.
- vi. That subsequently upon the Court granting prayer 4,5, the Court to order the 1st and 2nd Interested party to supervise the 1st & 2nd Defendants, to restore plot L.R No.3734/1459, off James Gichuru Road, Lavington, Nairobi County Adjacent to Jacaranda Avenue Resident Association to the former ordinary state with flora and fauna before any development permissions were granted, and before the demolition, construction and or other building activities were undertaken.
- vii. That incase prayer number 5 will not be granted, and if the construction will continue, the Court to order consistency of the license objectives which are meant to be met by this construction.

- viii. That an order be issued that an advertisement and a gazette notice published in a daily newspaper of wide circulation in 2018 which necessitated the change of use, and evidence of public participation be availed before this Honourable Court.
- ix. The Officer Commanding Muthangari Police Station and the Sub-County Administrator Dagoretti North and Kilimani Ward be Directed to enforce the said order.
- x. That in case the Defendants cannot comply with number 8 ,this Honourable Court be pleased to issue a Permanent Injunction restraining the Defendants and each of them by themselves, their servants, agents, appointed attorneys, contractors or by any other person acting on their behalf howsoever from constructing or continuing with any construction of a commercial office block and or otherwise continuing with the construction or otherwise howsoever constructing on the properties known as plot L.R No.3734/1459, off James Gichuru Road, Lavington ,Nairobi County Adjacent to Jacaranda Avenue Resident Association.
- xi. Any other reliefs this honourable court may wish to grant.
- xii. The costs of this application be borne by the Defendants

2. The motion is based on the grounds inter alia that the Applicant and the residents initially attempted to resolve the dispute with the Defendants out of court but returned to court after discovering irregularities in the approvals for the proposed commercial development on L.R. No. 3734/1459, off James Gichuru Road, Lavington *herein after referred to as “the suit property”*.
3. They assert that the Defendants, when compelled to produce the relevant documents/permits, provided a lapsed change of user approval dated 7th March 2018, which expired in 2020. The Applicant argues that the Defendants’ reliance on this expired document renders all subsequent development permissions and construction activities illegal and contrary to the “clean hands” doctrine and the legal maxim *ex turpi causa non oritur action*, that no action arises from an unlawful act.
4. Further, the Applicant contends that the Defendants commenced construction and excavation works on 24th July, 2025 before obtaining valid National Construction Authority (NCA) approval, which authority was issued on 2nd September 2025. That their action, contravenes **Section 57** of **PLUPA**, which prohibits development without prior permission and makes such conduct an offence.
5. They also point out inconsistencies between the approvals issued by the 1st and 2nd Interested Parties, one authorizing an office block and the other a mixed-use commercial development. It is their contention that such conflicting objectives

evidence illegality and procedural impropriety. Consequently, they assert that all approvals relied upon by the Defendants are null and void ab initio and cannot justify the ongoing construction.

6. The Applicant also assert that the process of public participation was flawed. The 2nd Defendant convened a meeting on 24th April 2025 with only one day’s notice, on a weekday, which limited attendance by residents. That despite promises to furnish minutes, approvals, and reports, including the Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP), these documents were never shared. Several residents submitted objection questionnaires, but no feedback or engagement followed.
7. The Applicant also notes that the Nairobi City County failed to make the statutory register of development permissions available for public scrutiny as required under **Regulation 62** of **PLUPA**, leaving the court’s intervention as the only available recourse, especially since the County Physical Planning Liaison Committee ceased operations in November 2024.
8. The Applicant maintains that the Defendants’ actions violate environmental and constitutional principles, particularly public participation, the right to information under **Article 35**, and the right to a clean and quiet environment under **Articles 31** and **42**. They seek the court’s intervention to halt the ongoing construction, compel the Defendants to furnish all requisite approvals and reports, and ensure proper and

lawful public participation. They express concern that the continued development without compliance will irreparably infringe upon the residents' constitutional and environmental rights, justifying for the court to issue injunctive orders to prevent further illegality.

9. The 1st Defendant filed a replying affidavit sworn by Elijah Mbugua Karana on 29th July 2025 asserting that indeed he is the owner of the suit property and the same is designated for office use. That he intends to develop an office complex consisting of basement floors, multiple upper levels, and a rooftop terrace.
10. Mr. Mbugua - Karana stated that the project fully complies with all the legal and regulatory requirements under the **Environmental Management and Coordination Act (EMCA)**, the **Physical and Land Use Planning Act (PLUPA)**, and their respective regulations. He deposes to obtaining all necessary approvals, including development permission from Nairobi City County, 20th September 2024, demolition and tree-cutting permits on July 2024, and an Environmental Impact Assessment licence issued by NEMA in November 2024 later varied in June 2025.
11. Further, that a Traffic Impact Assessment Report concluded that the project would have minimal impact on local traffic. The 1st Defendant also maintains that public participation was duly conducted, with residents served seven days' notice before the meeting of 24th April 2025 which was attended by 35 participants, including

local authorities and residents, contrary to the Plaintiff's claim of inadequate consultation.

12. The 1st Defendant argues that the Plaintiff's suit is baseless, speculative, and a gross abuse of the court process. That the Plaintiff has not demonstrated any legal breach, actual or potential harm, or a prima facie case warranting an injunction and granting the same would unfairly prejudice him. He avers that he has already invested significant resources in the project, and issuing an order of injunction would violate its constitutional right to property under Article 40 of the Constitution.

13. The Plaintiff filed supplementary affidavit dated 14th August, 2025 to counter the facts deposed to in the replying affidavit. He reiterated that the Defendants commenced demolition and construction works without furnishing the residents with necessary approvals, documentation, or conducting proper public participation as required.

14. The Applicant deposes that despite assurances given during a meeting held on 24th April 2025 to supply the relevant development approvals and engage the residents further, the Defendants failed to do so. This prompting the Plaintiff and residents to seek redress in court. The Plaintiff asserts that the purported public participation was neither transparent, inclusive, nor adequately communicated especially given the last-minute change of venue and limited attendance by actual residents.

15. The 1st and 2nd Defendants also filed a Preliminary Objection dated 22nd September 2025 on the stating that the entire suit and the applications thereof filed by the Plaintiff is incompetent, contra statute, fatally defective and an abuse of the court process. as this Court lacks original jurisdiction to entertain and determine the dispute as, the suit challenges the process and grant of development permission and an Environmental Impact Assessment (EIA) Licence issued to the 1st Defendant by the 1st and 2nd Interested Parties under the **Physical and Land Use Planning Act, 2019 (PLUPA)** and **the Environmental Management and Co-ordination Act, 1999 (EMCA)**.

16. They rely on the provisions of **Sections 125, 129, and 130 of the EMCA** which provide such disputes fall within the original jurisdiction of the National Environment Tribunal (NET). That similarly, under **sections 76, 78, and 80 of the PLUPA**, issues relating to development permissions and planning authority decisions should first be raised with the Physical and Land Use Planning Liaison Committee. Therefore, since the Plaintiff has not exhausted these statutory dispute resolution mechanisms, the Court lacks jurisdiction to hear the matter in light of the **EMCA, PLUPA, Article 47(3) of the Constitution, and section 9(2) of the Fair Administrative Action Act, 2015**.

17. The Plaintiff filed a response dated 24th September 2025 stating that they only challenged the expired change of use license and that the County Physical Planning

and Land Use Liaison committee no longer operates, hence this court has jurisdiction as the doctrine of exhaustion does not apply.

Submissions:

18. The Plaintiff filed submissions dated 14th August 2025 in support of their Application and the 1st and 2nd Defendants filed submissions dated 24th September 2025 in opposition of the application and in support of their P.O.
19. The Plaintiff submits that no proper public participation was held as required under **Article 10(2)(a) of the Constitution, 2010** and **section 3(5) of the Environmental Management and Co-ordination Act (EMCA)**. They cited the case of *Aura v Cabinet Secretary (E473 of 2023) (KLR)*, where the court set out the key principles of public participation, emphasizing adequate notice, access to information, inclusivity, transparency, and meaningful engagement.
20. That in the present case, the Defendants changed the meeting venue from Convent International Hotel to L.R No. 3734/1459 without notifying the residents, effectively locking them out of the process. Further, attendance records reveal only 35 participants, mostly officials and developers, with merely six residents present. This, coupled with a lack of information sharing and exclusion of directly affected parties, renders the process superficial and in support cited the case of *Mugo & 14 others v Matiang'i & another [2022] KLR*, where it was held that a mere attendance list does not satisfy the constitutional threshold for public participation.

21. On the issue of locus standi and jurisdiction, the Plaintiff rightfully brings this matter before the Court under **Article 70(1)-(3) and Article 165(3)(b) of the Constitution, 2010**, as their rights to public participation, access to information (**Article 35**), quiet enjoyment of property (**Article 40**), and privacy (**Article 31**) are threatened. That the cessation of the Physical Liaison Committee’s operations further justifies invoking the Court’s jurisdiction to enforce fundamental rights.
22. The 1st and 2nd Defendants submitted that the 1st Defendant obtained a valid change of user approval for office use, development permission from the Nairobi City County pursuant to **PLUPA**, and an Environmental Impact Assessment (EIA) Licence issued and later varied by **NEMA** under **EMCA**. That the **Plaintiff**, representing Jacaranda Avenue Estate residents, challenged the approvals, alleging inadequate public participation and procedural irregularities, yet did not utilize the appeal mechanisms under the **Liaison Committee (PLUPA)** or **National Environment Tribunal (NET) (EMCA)** within statutory timelines.
23. The **Defendant’s Preliminary Objection** asserts that the suit is incompetent and that the **Environment and Land Court (ELC)** lacks original jurisdiction because the Plaintiff failed to exhaust the specialized statutory mechanisms under **sections 76-80 PLUPA** and **sections 125–130 EMCA**. In support, the Defendants cited the case of *Republic v Kibos Distillers Ltd & 4 Others [2020] eKLR, Wambua & Others v County Government of Machakos & 3 Others [2023] KEELC 786*

(KLR), Raymond Cheruiyot & Others v Erick Kibara Nderitu [2015] eKLR, and *Khadiija Mire v NEMA & 2 Others*, where courts held that disputes over development approvals and EIA licences must first be addressed through the relevant tribunals before escalating to the ELC on appeal.

24. On the issue whether not to grant the **injunctive relief**, the Defendant contends that the Plaintiff has not met the *Giella v Cassman Brown [1973] EA 358* threshold for an interlocutory injunction, as no prima facie case exists, given that all the approvals and the public participation were duly conducted. Further, any harm alleged is speculative and compensable in damages, as stated in *Nguruman Ltd v Jan Bonde Nielsen [2014] KECA 606 (KLR)*. The Defendant maintains that the balance of convenience favours allowing the lawfully approved development to proceed, emphasizing that halting it would unjustly infringe on their constitutional property rights and result in significant financial loss.

25. The Defendants and the Plaintiff further submitted on the P.O orally in open court, Mr Njoroge learned for the Defendant stated that the P.O raises issues of law. The Approvals which are at stake were given by the 1st and 2nd Interested Parties and under PLUPA, any dispute must be filed with Liaison Committee under **Section 78 of PLUPA** and the NET under Section 129 of EMCA.

26. That any approvals given by 2nd Interested Party should be challenged as provided under **section 129 of EMCA** and referred the court to the authorities in their

submissions file. He further stated that NET has jurisdiction to vary status quo and this court can only be approached by way of appeal. They also relied on **Section 9(2) of the FAA Act** stating that what is before this court is not a constitutional petition but an ordinary suit hence it should be struck out.

27.Mr. Washika for the Plaintiff submitted that he relies on the response dated 24th September 2025. Counsel stated that **Section 13 of ELC Act** gives this court jurisdiction as the application touches on the change of user. That Liaison committee stopped sitting since 26th November 2024, as per the uploaded Memo, thus the only available avenue for recourse is the court. He relied on the case of E030 of 2024 Raphta road case P286-292 where it was held that the doctrine of exhaustion is not appropriate the same can be exempted. That under **Article 159(2) (d) of the Constitution** abhors procedural technicalities. Submits that the Plaintiff is not challenging any decision from NEMA thus the P.O should be dismissed.

28.Mr. Achola for the 1st Interested Party stated that he can confirm that the Liaison Committee has not been sitting since Nov 2024 for non-payment of remuneration of the committee members and they have been sued with the case pending in court.

29.Counsel Njoroge for the Defendants responded in light of the information that they abandon the P.O under **PLUPA** in regard to NEMA sued as the 2nd Interested Party, Paragraphs 11 and 21 refers to public participation. The cases referred to by

the Plaintiff are distinguishable. They submit that the suit offends the provision of **EMCA** under **section 126-130** thus the same should be struck out.

Analysis and determination:

30. I have read and considered the amended notice of motion filed by the Plaintiff together with the supporting affidavits and supplementary affidavit thereof, the Defendants' replying affidavit and the Preliminary Objection filed against the entire suit. I have also considered the submissions filed by the respective parties and the oral submissions made with regard to the preliminary objection. Therefore, I will determine

- a. **Whether or not there is merit in the P.O.**
- b. **Whether or not the application succeeds**

Preliminary Objection:

31. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** at page 701, Sir Charles Newbold, P stated the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion....”

32. The P.O filed is based on the ground that this court lacks original jurisdiction to entertain this suit which challenges the process and grant of development permission and an Environmental Impact Assessment (EIA) Licence issued to the 1st Defendant. They argue that under **Sections 125, 129, and 130** of the **EMCA**, such disputes fall within the original jurisdiction of the National Environment Tribunal (NET) and the Nairobi City County Government Liaison Committee.

33. The question arising is whether the preliminary objection should be upheld. The jurisdiction of the Environment and Land Court is provided in **Articles 162 (2) (b) of the Constitution** and **Section 13 of the Environment and Land Court Act, No. 19 of 2011**. Article 162 (1) of the Constitution provides that;

“The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a)

(b) the environment and the use and occupation of, and title to, land.

34. Mr. Njoroge for the Defendants asserted this suit is not a constitutional petition but an ordinary suit and should be struck out. The argument was rebutted by Ms. Washika who submitted that the Liaison Committee stopped sitting since 26th November 2024, as per the uploaded Memo. Thus, the only available avenue to

challenge the 1st Defendant’s change of user is the court. She submitted that where the doctrine of exhaustion is not appropriate the same can be exempted citing **article 159(2)(d) of the Constitution** which discourages procedural technicalities.

35.Mr. Achola for the 1st Interested Party confirmed that Liaison Committee has suspended its sitting since 26th November 2024.It is on this fact, that the Defendants abandoned their ground of preliminary objection that this dispute ought to have been filed with Liaison Committee under **Section 78 of PLUPA**. However, they maintained the preliminary objection raised under **Sections 125, 129, and 130 of the EMCA**.

36.In the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR*, the Court of Appeal stated that it is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the court is invoked. That courts ought to be fora of last resort and not the first port of call the moment a storm brews.

37. Despite the above holding, there are exceptions to the exhaustion rule as discussed in the case of **Mutiso v Commissioner of Domestic Taxes (Constitutional Petition E424 of 2020) [2023] KEHC 22421 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)** as follows;

“In R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after

exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before

the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.”

38. This case, though commenced by way of a plaint, but under paragraph 16 pleaded alleged violations of their constitutional rights under articles 10(2) (a), 31, 35, 40 and 42 of the Constitution. Thus, it is an ordinary suit pleading constitutional violations. Secondly, the original jurisdiction of this court as given under Article 162 of the Constitution, is not limited to constitutional petitions only, but also for land and environmental disputes.

39. Are the exceptions to the doctrine of exhaustion applicable in this application/suit to warrant the dismissal of the preliminary objection? Mr Achola, learned counsel for the 1st Interested Party has confirmed that the Liaison Committee suspended its sittings. Therefore, it means the Applicant was left with only this court to seek justice. This means the first limb of the preliminary objection is dismissed.

40. The Defendants further pointed that the Plaintiff ought to have approached the NET to challenge the EIA Licence rather than approaching the ELC Court first. However, this court observes that this suit raises mixed grill issues; i.e. challenging

the change of uses license, challenge of grant of development permission and an environmental impact assessment (EIA) licence.

41. On account of the fact that this court does have original jurisdiction that cannot be ousted by Statute and on the basis of the claim being mixed grill, it is my view and I so hold that exhaustion doctrine would not offer adequate remedy to the Applicants. Accordingly, the preliminary objection fails and is dismissed.

On the merit of the application:

42. I have observed that the Applicants are seeking both temporary and mandatory orders of injunction. The plaintiff urges the stoppage of the construction on the impugned premises because the change of use licences issued on 7th March, 2018 lapsed in March of the year 2020.

43. The Defendants averred that they have the requisite development approvals hence the orders sought ought not to be granted. Amongst the documents relied on by the defendants were; approval for development permission dated 8th April, 2024 from the County Government for the construction of 6-level office block. They also annexed a letter from NEMA requiring them to re-do public participation.

44. Additionally, the Defendants annexed an EIA, report which contained filed questionnaires and minutes of a meeting held as a form of public consultation. The plaintiff admits this meeting took place but denies it was representative of the residents, that the venue was changed, and the notice served was not adequate.

45. In order for a party to be granted temporary injunctive relief, they must demonstrate the existence of the three principles of prima facie case, irreparable loss and the balance of convenience.
46. Although the plaintiff argues that the change of user given to the Defendants having expired in 2020, all the subsequent development permissions were null and void. Whether, that is the implication of the expiry of the change of use, the answer can only be found when considering all the evidence presented in support of the suit but not at the interlocutory stage.
47. The Plaintiff has pleaded that the area is still purely residential which then required the Defendants to re-apply for change of user. However, he did not refer the court to any document to support this assertion. This information was necessary to debunk the averment that the subsequent approvals granted on 20th September, 2024 are null and void.
48. On whether the licenses granted by the 1st and 2nd Interested parties are conflicting, the 1st Defendant has deposed under paragraph 3 of the Replying Affidavit that it intends to erect upon the suit property an office development comprised 2 basement floors, 1st – 4th floors and a roof terrace.
49. Thus, the facts pointed by the Plaintiffs raises triable issues but they are not prima facie sufficient to warrant the grant of injunction. There is necessity for this court to consider the application under the heading of irreparable loss.

50. The loss is pleaded in ground 20 of the amended motion include breach of clean and healthy environment such as noise levels, supply of water, sewer, electricity and destruction of fauna & flora. The Applicant does not highlight how the development will violate these rights and that the damage cannot be undone. It is not sufficient to list the alleged violations without stating some basis/facts to support the arguments.

51. Further, the Applicant also sought mandatory orders of injunction under paragraph 5 and 6 of the motion. The interested parties are mandated by law to supervise all ongoing development in their jurisdictions to ensure they are undertaken in accordance with the law and the regulations.

52. This court does not have to issue an order to compel the Interested Parties to do their work. Unless there is glaring evidence of their refusal/negligence to act and in this instance, the Applicant has not pleaded any such negligence. The said prayer is premature and is so declined.

53. With regard to prayer No. 5, the Applicant has set several grounds arguing this point under grounds 4 – 7 stated on the face of the motion. I reiterate that the import of the expiry of a change of use license on the subsequent approvals is a substantive legal question that requires determination on merits, not through an interlocutory application as the court is being invited to.

54. The issues raised in this application are not clear as the Defendants contest the facts. The Applicants have also not explained any special circumstances that warrant the grant of the mandatory injunction. In light of the foregoing analysis, I conclude that the applicant has failed to persuade court to grant both the orders of the temporary and mandatory order of injunction.

55. In conclusion, I hold that both the preliminary point of law and the application are meritless. Both are dismissed with an order that each party bear their respective costs.

Dated, Signed and Delivered at Nairobi this 6th day of November, 2025.

A. OMOLLO
JUDGE