

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
PETITION NO. E032 OF 2023

FRANCIS AWINO	-	PETITIONER
VS		
AMEEY HOMES LIMITED	-	RESPONDENT
AND		
STEPHEN GATHUITA MWANGI	-	1ST INTERESTED
PARTY		
NATIONAL CONSTRUCTION AUTHORITY	-	2ND INTERESTED
PARTY		

JUDGMENT

The Petitioner's case

1. Vide the amended Petition dated the 8/4/24 moved this court and urged the following prayers;
 - a. An order of declaration declaring that the Respondent's actions are in breach of the law and he should therefore be sanctioned for the same.
 - b. An order of permanent injunction compelling the Respondent, his agents, appointees, proxies or any one acting under the Respondent's instructions to stop forthwith any further construction of all that property on Plot No. 209/7549 situate along Taza Lane Off City Park Drive, Parklands Area.
 - c. An order of mandamus directed to the Interested Party to forthwith demolish all that building on Plot No. 209/7549 situate along Taza Lane Off City Park Drive, Parklands Area.
 - d. An order of mandamus compelling the Interested Party to criminally investigate and, if culpable, instruct the Director of

Public Prosecutions (DPP), to criminally prosecute the Respondent for his flagrant breach of the law.

- e. This Honourable Court gives any other orders required to advance the cause of justice and the rule of law in this case.
 - f. The Costs of this Petition be borne jointly and severally by the Respondents.
2. The Petition is based on the provisions of Articles 2 (1), 3(1), 10(2) (b), 27(1) & (2), 232 (1) & (2), 258, and 259(1) of the Constitution of Kenya.
 3. Alongside the facts outlined, therein, Francis Awino [the Petitioner herein], in his supporting affidavit sworn on the same date, deposed that the Respondent is the registered owner of L R Nos 209/5665/2 and 209/7549 [suit land] situated in Parklands.
 4. He stated that he observed illegalities, irregularities, and the circumvention of the law by the Respondent in the ongoing construction of the commercial property on the suit land.
 5. That the Respondent commenced construction of apartments on the land on the strength of disputed building plans, drawings, and architectural designs which the City Engineer approved.
 6. As the construction was ongoing, the National Construction Authority [NCA] earmarked the construction as not fit for construction for non-compliance with the requisite construction laws.
 7. Vide the Letter dated 10/9/2020 NCA approved the demolition of the impugned constructions on the suit land. Despite the express terms of the said letter, the Respondent continued with the construction.
 8. Subsequently, NCA conducted an inspection of the site and observed that the Respondent had not complied with certain regulations. The non-compliance mainly involved the absence of: an NCA Compliance Certificate, an NCA-registered contractor with a valid licence, NCA-accredited skilled workers and site supervisors, a site board displaying all necessary approvals and engaged professionals, personal protective equipment, and a safety signage.

9. As a result, the construction was suspended for the second time on 16/1/2023 pending the Respondent's compliance. The Petitioner stated that to date there has been no compliance, despite construction continuing and posing a significant risk to members of the public.
10. The Petitioner added that, although other government officials disapproved of the construction, the Respondent continued with it irregularly. He argues that the construction should be halted until the Respondent complies with the NCA's directives. If not, the construction should be demolished.
11. The petitioner faulted the NCA for not taking action to stop the illegal construction, despite being authorised by law to do so, which led to the filing of this petition.
12. It was averred that clearly, the illegal and unlawful construction aforestated violates the provisions of Section 23 (2) of the National Construction Act [NCA Act].
13. Additionally, the Petitioner averred that the Respondent has breached the provisions of Article 232 (e) and (f) of the Constitution by failing to respond to questions regarding the disputed approvals raised by concerned citizens, the petitioner included.
14. The Petitioner further accuses the Respondent of violating the constitutional principles of good governance under Article 10 (2) by willfully disregarding advice from the relevant stakeholders, including the NCA. It is on that basis that any further construction of the building should be stopped and demolished for noncompliance.

The responses to the Petition

15. The Petition is opposed by both the Respondent and the Interested Parties herein.

The Respondent's Replying Affidavit

16. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 11/6/2024 by Yussuf Askar, its Director. The deponent states that the Respondent is the bona fide registered proprietor of the suit land.

He states that prior to commencing construction on the suit property, the Respondent complied with the necessary procedures by obtaining approvals from NCA, the National Environmental Management Authority [NEMA], and the Nairobi City County Government [NCCG].

17. He avers that in compliance with Section 58 of the Physical and Land Use Planning Act (PLUPA) 2019, he obtained a development license for the construction.
18. Subsequently, the Respondent was issued with a Notification of approval of Development Permission dated 18/9/2020 by the then Nairobi Metropolitan Services [annexed and marked YA-2].
19. Upon review of the required documents for the proposed development, the NCCG authorised the construction works under Construction Permit dated 24/9/2020 [marked YA-1a].
20. He deposed that the suspension by NCA was lifted through a 'Lifting of Suspension of Works Order' serial No 1007-04 ref 121009, dated 17/12/2021. It was then that they commenced construction, and subsequently, NCA has not issued any demolition orders.
21. The Respondent claims that the Petitioner is guilty of excessive delay in challenging the construction permission, as the Petition was lodged more than two years after its issuance. He asserts that the Petition was filed in bad faith, with the aim of obstructing the development of the apartment blocks for ulterior motives. The court was urged to dismiss the petition with costs.

The 1st Interested Party's Replying Affidavit [Stephen Gathuita Mwangi]

22. The 1st Interested Party, Stephen Gathuita Mwangi, opposed the Petition via the Replying Affidavit dated 18/10/2023. The deponent states that he has no relationship whatsoever with the Respondent or the suit properties, as he is not the registered proprietor. He argues that he has been wrongly sued. Furthermore, he states that the Petition is vague

since no evidence has been presented to support the assertions made therein.

23. He further states that the allegation that the construction is being carried out without the required building plans, drawings, and architectural designs has also not been substantiated. He asserted that there is no cause of action raised against him and, therefore, he ought to be removed from these proceedings.

The 2nd Interested Party's [NCA]Replying Affidavit

24. The 2nd Interested Party filed a Replying Affidavit dated 21/11/2023, sworn by Stephen Mwilu, its Compliance Manager. The deponent states that the mandate and functions of NCA include the registration of contractors and projects as required under section 5(2) of the National Construction Authority Act and the Regulations thereunder. The said provisions require a developer to make an application for registration in writing to NCA within 30 days of the award of the tender for construction to a contractor registered under the Act.
25. Upon receipt of the application form from the developer, NCA is required to issue a compliance certificate within 30 days of receipt of the application.
26. It was averred that NCA is empowered under Sections 5(2)(g), 23A, and 23(2) of the NCA Act to conduct mandatory inspections and enter any construction site where construction works are being carried out. It can make such enquiries or inspections to determine whether the provisions of the Act or any regulations are being complied with. The deponent outlined the process as follows;
- a. At the construction site, NCA verifies key checklist items as evidence of the NCA compliance certificate; NCA-registered contractors with valid licences; NCA-accredited skilled workers and site supervisors; site boards displaying all approvals and the professionals engaged in the project; personal protective

equipment on site; and areas with hoarding, fencing, netting, and safety signs.

- b. Where the construction site does not comply with the above checklist, NCA issues a suspension of works order to the developer, and all construction works are halted until compliance is achieved, and a red NCA x mark is placed on the construction site to show that the site is non-compliant.
- c. If, upon completion of the investigation, an offence is disclosed, the NCA officer is supposed to lodge criminal charges at the police station for the arrest of the offender.
- d. That once NCA establishes that the site is compliant, a lifting order of suspension works order must be obtained from the NCA by the developer before the construction resumes.

27. With respect to the matter at hand, the deponent avers that NCA received a complaint vide email from Dun Jungle, regarding the ongoing demolition and construction works on the suit land

28. Upon inspection, the following observations were noted: the demolition works had been completed; the developer had displayed a change of use notice at the gate; the works were not ongoing at the time of inspection; the developer held demolition approvals from NCCG; it was observed that the developer was constructing 91 residential apartments; and there were no workers present on site.

29. Subsequently, NCA issued a works suspension order dated 1/10/2020, subject to compliance. [marked as SM1].

30. That on 29/12/2020, the complainant reported that the developer had continued with excavation without obtaining the relevant approvals. He states that the complaint was communicated to the developer on 4/1/2021.

31. On 1/5/2021, NCA's compliance officers further visited and inspected the project, issuing a suspension notice on the same day and another on 18/12/2021. Subsequently, the developer, Mr Yussuf Askar Mohammed, was

arrested and booked at City Park Police Post under OB No. 07/18/01/2021. Construction works were suspended on both occasions.

32. The deponent further states that on 1/2/2021, the Authority received a letter addressed to NEMA and copied to NCA by the residents through their lawyers, expressing their reservations about the project and NEMA's licence issuance, citing fraud in the entire process. On the same day, the developer re-submitted the application, but on 2/2/2021, it was again returned to the developer and directed to address the residents' concerns. After resolving the issues raised and obtaining the necessary documentation, NCA carried out due diligence on 17/3/2021, and subsequently issued a Certificate of Compliance on 18/3/2021.
33. It was further stated that NCA has been served with several suits from Wageni & Co Advocates regarding the construction on the suit land, namely;
 - a. ELC NO E115 of 2021 - David Alfred Njeru Ndambiri & Anor vs NCA & 3 others. Where the Plaintiff withdrew the suit on 20/5/2021
 - b. PET No E026 of 2022 - David Alfred Njeru Ndambiri & Anor Vs NCA & 18 others. This petition concerns all properties along Taza Lane where approvals were not granted for the developments, and it alleges that the rights of residents along Taza Road have been infringed.
34. It was further reiterated that NCA issues the certificate of compliance to the developer after completing the project registration in accordance with the NCA Act and the National Construction Authority Regulations [NCAR].
35. That on 11/4/23, NCA received pleadings from the Petitioner alleging that the construction on the suit land was in breach of and in violation of Articles 42 and 70 of the Constitution, the Physical & Land Use Planning Act, the Environmental Management Coordination Act, and the National Construction Act.

36. That upon receipt of the pleadings[sic] herein, the Authority conducted a site inspection on 16/1/2023[sic] and observed that; no construction works were ongoing at the site, the developer had not obtained a Certificate of Compliance from it, lack of NCA registered contractor with valid license, lack of NCA accredited skilled workers and site supervisors, no site board showing all approvals and the professional engaged in the project and that no shoring had been done to protect the neighboring property from imminent dangers.
37. Consequently, the Authority then issued a suspension of works dated 16/1/2023 subject to compliance.
38. The deponent asserted that the Authority operates independently and alongside other agencies and regulators, including NEMA and County Governments, as is relevant in this case. Its role is to ensure compliance with construction standards and that development approvals, which are the responsibility of the respective County Governments, have been obtained. NCA only registers construction works after the relevant County Government has approved the project.
39. That once the Developer furnished the Authority with the requisite documents, it issued a Certificate of Compliance dated 2/2/2023 for excavation works on the suit property. That the compliance was only applicable to the excavation works.
40. Furthermore, it is asserted that the Authority subsequently issued the developer with a notice to lift the suspension of works dated 3/2/2023, thereby allowing the developer to proceed with excavation works. Some conditions for lifting the suspension included: compliance with the National Construction Authority Certificate; registration of the project with the NCA before commencing the main works; and lifting the suspension order solely for excavation works.
41. After receiving the pleadings [sic] in this case, NCA's officers visited the site and observed that: the excavation works had stalled; the site had been issued with an NCA compliance certificate; the developer for the

project was Ugbad Consult Limited; the contractor on site was Turin Construction Enterprises; the engineer of the project was Eng Kagwi George Mwangi; and an excavation methodology report and safety management plan had been prepared for safe excavation.

42. In conclusion, NCA asserted that it fulfilled its mandate under the NCA Act and the National Construction Authority Regulations, 2014. The deponent contends that the Petition does not reveal any violations of the Petitioner's alleged rights. Furthermore, the Petitioner lacks the precision and particularity required for an infringement claim and does not disclose any breaches of the fundamental rights and freedoms in question. Having fulfilled its mandate, the Petition does not establish any reasonable cause of action against it and should, therefore, be dismissed with costs.

The Respondent's Supplementary Affidavit

43. The Respondent filed a Supplementary Affidavit sworn on 24/7/2025 by Mr. Yussuf Askar Mohammed, its Director. The deponent states that the development has been completed, as evidenced by the Certificate of Completion issued by the Project's Architect. Subsequently, the Respondent was issued with a Certificate of Occupation on 7/2/2025, confirming that the building complies with all applicable standards and approvals. The Respondent has since handed over possession of the completed apartments to the respective purchasers, who are now residing there.
44. The Respondent asserts that the project was constructed with all necessary approvals from various authorities, in accordance with Section 58 of EMCA and Section 58 of the Physical and Land Use Planning Act (PLUPA) 2019; specifically, the required licences and approvals where the court examined the approvals obtained for the development; including development permission, NCA registration, NEMA licensing and related compliance documents from NCA, NMS, and NEMA, as well as a privately developed sewer connection from Nairobi Water & Sewerage Company [NWSC].

45. The deponent avers that the same development was subject to ELC PET. E026 of 2022 where the court dismissed the Petition on the basis that it failed to demonstrate any illegality or basis for interfering with the project. That the Petition herein is therefore res judicata under Section 7 of the Civil Procedure Act.
46. That notwithstanding, the construction works were carried out in strict compliance with the law, the requisite approvals issued, and the applicable standards met. Since the Petitioner has failed to produce a single document, expert report, statutory notice, or any regulatory finding demonstrating that the approvals were unlawful or that the development causes environmental or infrastructural harm, the Petition is without merit. The declaratory orders sought are unjustified; therefore, the Petition should be dismissed with costs.

The written Submissions

47. By consent of the parties, the petition was canvassed through written submissions. The Petitioner filed his submissions dated 7/11/2025, while the Respondent's submissions are dated 29/7/2025. The Interested Parties did not comply despite the extended time granted. The court has had the opportunity to read the submissions and has taken them into account in its decision.

Analysis and determination

48. Having carefully perused the submissions filed by the parties herein, alongside the pleadings filed in this case, the issues for determination in this matter are: -
- a. Whether the petitioner has the locus standi to institute the petition herein.
 - b. Whether the 1st Interested Party was wrongly sued
 - c. Whether NCA failed to discharge its statutory mandate?
 - d. Whether the construction undertaken by the Respondent contravened statutory and constitutional provisions of the law.
 - e. Whether the Petition is res judicata

f. Costs of the petition

Whether the Petitioner has the locus standi to institute the petition herein.

49. 'Locus standi' is the right to bring an action before a court of law or another adjudicatory forum, for that matter.

50. The Court of Appeal in the case of **Juletabi African Adventure LTD & Another -vs- Christopher Michael Lackley (2017) eKLR** in defining Locus Standi referred to its earlier decision in **Alfred Njau & 5 Others - vs- City Council of Nairobi (1983) e KLR** where the court held that;

“the term ‘locus standi’ means a right to appear in court and conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding....”

51. In deciding whether the petitioner has the locus standi, this court will make reference to the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, where the court noted the historical transformation of constitutional litigation in this country in the following immortal words: -

“It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010, by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by or private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to article 22(3), aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of June 28, 2013 (The Mutunga Rules) to inter

alia facilitate the application of the right to standing. The rules reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated, infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of the Constitution.”

52. From the foregoing the court finds that the Petitioner in this matter has described himself as a human rights defender and, therefore, he has the locus standi to institute the Petition, whether on his own behalf or on behalf of any Kenyan citizen, as is the case here. The objection is rejected.

Whether the 1st Interested Party should be removed from the proceedings.

53. The 1st Interested Party has argued that he was wrongly sued and urged the court to remove him from the proceedings. In the amended Petition, the 1st Interested Party is described under paragraph 4(a) as a planner and contractor involved in the construction of the Respondents' Properties. The 1st Interested Party has not presented any evidence before the court to show that he has ceased the role attributed to him. Although the main Petition does not attribute much to this party, the court, having been invited to peruse PET E026 of 2022, notes that this party was sued as the 3rd Respondent and, through its Ruling of 25/1/24, the court held him in contempt of court along with others. For that reason, the court is hesitant to order his removal from these proceedings. In any event, the 1st Interested Party has not disclosed the prejudice he stands to suffer if he is not removed from the proceedings.

Whether NCA failed to discharge its statutory mandate.

54. It is the Petitioners' case that the Respondent began construction of the project based on disputed building plans drawings and architectural designs which the City Engineer approved.
55. The Respondent has provided a detailed list of approvals and permits obtained from the respective offices that, by law, are mandated to issue such approvals; including the National Environment Management Approval issued on 23/12/2020, the construction permit issued by Nairobi Metropolitan Services (now Nairobi City County) on 24/9/2020, and a change of user dated 18/9/2020; NCA compliance certificates issued on 18/3/21 and 2/2/23.
56. Under Section 107-109 of the Evidence Act, the burden of proof rests on he who alleges. The burden of proof applies in constitutional petitions just like in civil cases. Equally, an allegation of a violation of a constitutional provision must necessarily be proven by presenting clear, cogent, and credible evidence or proof.
57. It is a principle of law that a court presumes regularity in respect of documents such as in this case the approvals that have been presented before the court.
58. To buttress this point, the court places reliance on the decision of Court of Appeal in **Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR** where the court stated;
- “In the instant case, applying the presumption of regularity, the starting point is that the 4th respondent acted lawfully and procedurally in issuing the various EIA Licences to the three appellants. The burden of proof to rebut the presumption of regularity is upon the respondents. The evidence required to rebut the presumption of regularity must be cogent, clear and uncontroverted. In the instant case, the respondents seek to rebut the presumption of irregularity through interpretation of Section 58 (2) of EMCA and Regulation 10

(2) and (3). Both the appellants and respondents have submitted their versions of conflicting interpretation and application of Section 58 (2) of EMCA and Regulation 10 (2) and (3) aforesaid. I make a finding that the presumption of regularity cannot be rebutted through conflicting interpretation of a statutory or regulatory provision. Liability for any action cannot be founded on conflicting interpretation of statute.”

59. In this case, the Petitioner has averred that the respondent commenced the construction on the strength of disputed building plans, drawings, and architectural designs.

60. A simple English explanation of the word “disputed” is something that is disagreed, contested, or challenged. The Petitioner bore the burden of providing clear, cogent, and uncontested evidence to challenge the said documents in the form of expert or technical reports or audits, as the case may be. In this case, no evidence has been presented to the court to contest the documents submitted by the respondent and NCA. Without any rebuttal evidence, the court is unable to find that the approvals are in dispute.

61. A multidisciplinary regulatory system governs the built environment in Kenya. County Governments are responsible for planning, development control, issuing construction permits, and ensuring compliance with zoning regulations. NEMA’s role is to enforce environmental compliance; before a project begins, environmental audits and studies must be carried out to NEMA's satisfaction, which then grants the necessary approvals. Professional bodies that register and supervise professionals such as architects, quantity surveyors, and engineers are also crucial, as only qualified professionals should be involved in the planning, design, and supervision of projects. The NCA’s role is to register projects, contractors, and skilled staff, and to ensure that the developer has obtained all required approvals.

62. The National Construction Act No. 41 of 2011 establishes the legal framework for regulating, registering, and overseeing construction projects in Kenya. It authorises the NCA to register and licence contractors, supervise skilled construction workers, and generally regulate the construction sector.
63. The recent 2020 amendments to Section 2 of the NCA Act, introduced the definition of "building code" as the building code provided for under regulations made pursuant to Section 42. Section 5(g)(a) empowers the NCA to enforce the National Building Code in the construction industry. These amendments aim to align the construction sector with various provisions of the Constitution, such as Art 43(1)(b) on the right to accessible and adequate housing and reasonable standards of sanitation; Article 46(1)(a) on the right to goods and services of reasonable quality for consumers; and Article 66, which obligates the State to regulate land use or any interests over land in the interest of defence, public safety, public order, public morality, public health, or land use planning. Additionally, there was a need to align the industry with international best practices and principles that promote quality, safety, health, and environmental sustainability.
64. A person planning to carry out any construction works in Kenya must obtain the following: a development permit in accordance with the Physical and Land Use Planning Act, 2019; an environmental impact assessment licence issued in line with the Environmental Management and Coordination Act, 1999; a compliance certificate issued under the NCA Act, including the Building Code, 2024, and any other necessary approvals. It therefore follows that NCA approvals are granted only after all other approvals have been secured.
65. Section 23(2) of the NCA Act states as follows;
- “A person shall not carry out any construction work or engage in any construction activity unless such works have been registered

with the Authority and all the necessary approvals, licences, and certificates have been obtained”

66. Regulation 17 (6) and (7) of the National Construction Authority Regulations provides as follows:

“(6)The Authority shall, within thirty days from receipt of the duly completed application form in terms of paragraphs 10(2) and (3) register the construction works contract or project and issue a compliance certificate.

(7)The owner shall in relation to construction works registered in accordance with this regulation submit to the Authority in a prescribed form, within thirty days of such registration, information relating to—

(a)the issuance of a completion certificate;

(b)whether the contract is renewed or the contract period extended;

(c)whether the contract is cancelled or terminated; and

(d)whether all payments owing to the contractor have been settled.”

67. It is trite that the developer must register the project and obtain a compliance certificate from NCA within 30 days of the application date; other requirements include having a licensed or registered contractor, employing accredited skilled workers or supervisors, displaying a board showing all the necessary approvals on site and with professional engagement, providing personal protective equipment and safety signage, and ensuring proper hoarding and fencing for the safety of the public.

68. Section 23 of the Act empowers NCA to appoint an investigating officer with the power to inspect the construction sites on its own motion and or on receiving a complaint from a third party. It states as follows;

“An investigating officer shall, for the purpose of ascertaining whether the provisions of this Act or any regulations made

thereunder are being complied with, have power at all reasonable times to enter into any construction site where construction works are being carried out and make such enquiry or inspection as may be necessary for the purposes of the functions of the investigating officer.

69. Section 23 (3) & 3A of the Act provides the activities that the investigating officer may carry out; it states

3). In the course of an investigation or inspection under this section, an investigating officer may—

- a. put questions concerning the registration of any contract, the accreditation and certification of the skilled construction workers and construction site supervisors or the payment of levy, and all the persons to whom the questions are addressed shall be legally bound to answer such questions truthfully to the best of their ability;
- b. require any person to produce any records required to be kept under this Act, and may seize them or take copies of them, or
- c. by notice in writing order the suspension of all or any part of the works in respect of which the provisions of this Act have not been complied with until the time of such compliance.

3A) . A person who willfully fails to comply with an order of an investigating officer under subsection (3) commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or to both.

70. If the investigating officer is satisfied that an offence has been committed, he may file criminal charges before a police station. The section is couched in mandatory terms as follows;

“Upon completion of an investigation, the investigating officer shall, where the investigation reveals an offence under this Act or any Regulations made thereunder, immediately give all information relating to the offence to an officer in charge of a

police station, and that officer may, by warrant, arrest any person who may have committed such offence

71. In the event of non-compliance with the law, NCA may take the following steps: suspend the works pending compliance; impose fines on the developer; and proffer criminal charges against the contractor and developer.
72. The Petitioner states that through a letter dated 10/9/2020, NCA explicitly approved the demolition works on the land in question. However, the petitioner is displeased that, despite this order, the works continued even after several inspections by NCA.
73. The Respondent states that after NCA raised concerns about non-compliance, it responded promptly and complied, resulting in the issuance of a compliance certificate from NCA for the excavation and the main works for the construction of the building.
74. NCA demonstrated that upon receiving complaints about the project, they took several actions: visited the site on 1/10/2020, observed that the site was non-compliant, and issued a suspension order on the same day; a later complaint about excavation resulted in further suspension of work orders on 5/1/2021 and 18/1/2021; complaints from residents and members of the public were taken into account before lifting the suspension. Evidence was presented that criminal charges were brought against the director of the Respondent for non-compliance with the construction on the suit land.
75. Clearly, it is not disputed that this project experienced several non-compliance issues; however, there is no evidence to challenge the actions or interventions of the 2nd Interested Party as being inadequate or legally deficient.
76. The certificates of compliance dated 18/3/21 and 2/2/23 were presented in evidence and have not been challenged either. Likewise, suspension orders were lifted on 17/2/21 and 3/2/23 following the Respondent's full compliance.

77. The court notes that the letter dated 10/9/2020, which is subject to dispute, has not been submitted before the court for its consideration. The claim that a demolition order was issued has not been corroborated by any evidence, and therefore, this court is unable to determine its validity or invalidity.
78. It is further noted that the National Construction Authority (NCA) and the Respondent have remained silent on this issue. As a result, several pertinent questions remain unanswered, including whether the notice was issued before the demolition letter. The court observes that the suspension letter was first issued on 01/10/2020 and questions whether the demolition order came before the suspension order. In 2020, ongoing activities involved excavation works, and the court wonders if there were any existing structures that required demolition, besides the old structure on the land. Recognizing that unchallenged evidence shows construction began at the end of 2021, the role of Nairobi Metropolitan Services (NMS) in the alleged demolition has not been explained. Furthermore, as demolition is generally regarded as a last resort, the petitioner has not provided details of any alternative measures taken by the NCA or any other approving authority before the demolition was carried out.
79. Furthermore, the court notes that the Petitioner failed to provide the court with details of the illegalities and irregularities aimed at bypassing the law in the development of the project by the Respondent and the 2nd Interested Party. This could have been demonstrated through an expert report.
80. It has also been alleged that other Government officials disapproved of the project, which the Respondent did not heed. This allegation has not been supported by evidence and remains unproven.
81. In the foregoing, therefore, the Court is unable to hold that the 2nd Interested Party derogated from its statutory role or failed to discharge its mandate.

Whether the construction undertaken by the Respondent contravened statutory and constitutional provisions of the law

82. In answer to this issue, I have already found that the Respondent obtained the requisite permits for the construction of the project. I have also held that the Petitioner has failed to place clear, cogent, and uncontroverted evidence to show otherwise.

83. The issue is determined in the negative. It is also noted that the construction is complete, and the respondent has been issued with completion and occupation certificates. In my view, the orders of injunction and mandamus remain moot/spent at this point and cannot be issued, as events have overtaken them.

Whether the court should order criminal prosecution

84. The petitioner has urged the court to direct the prosecution of the Respondent for a blatant breach of the law. The Director of Public Prosecution operates independently under Article 157 of the Constitution. Therefore, this Court cannot issue an order requiring him to carry out his duties. The law sets out procedures through which the Petitioner can seek such a remedy, which are beyond this Court's jurisdiction. I say no more.

Whether the Petition is res judicata

85. The Court was addressed on the issue of res judicata. Even if the court were to be wrong on the preceding findings, and for completeness of the record, the court will, in addition, determine the objection as it goes to the root of the Petition.

86. The doctrine of res judicata is provided in Section 7 of the Civil Procedure Act as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit

or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

87. The Supreme Court of Kenya in the case of **Commercial Bank Limited vs. Muiri Coffee Estate Limited & another (2016) eKLR** explained the doctrine of res judicata as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

88. The Civil Procedure Act also provides explanations with respect to the application of the res judicata rule. Explanations 1-6 are in the following terms:

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. [emphasis mine]

89. In the dicta **in re Estate of Riungu Nkuuri (Deceased) [2021] eKLR** the court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any

given case is spelt out under Section 7 of the Civil Procedure Act. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR*, the Court of Appeal while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

" (a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

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

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

(e) The court that formerly heard and determined the issue was competent

to try the subsequent suit or the suit in which the issue is raised.”

90. Regarding the applicability of the doctrine of res judicata in constitutional petitions,

Mumbi Ngugi, J. (as she then was) in the case of **Tassia Plot Owners Association - vs- Managing Trustees of NSSF & Another (2015) eKLR**, referred with approval to the decisions of Lenaola J (as he then

was) in the case of **Okiya Omtata Okuiti & Another -vs- The A.G. 7 & Anor -Petition No. 593 of 2013** , where he stated that;

“While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”

91. In the case of **Wycliffe Gisebe Nyakina -vs- AG & Anor-Petition No. 403 of 2014** , the Learned Judge had stated that;

“While the courts in constitutional litigation must apply the principle of res judicata sparingly they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same court.”

92. The upshot of the above holdings by Lenaola J (as he then was) is that the principle of

res judicata is applicable in constitutional petitions just like in civil suits.

93. The Supreme Court in the case of **John Florence Maritime Services Ltd & Another - vs- Cabinet Secretary for Transport & Infrastructure & 3 others (2021) eKLR**, affirmed the issue of res judicata in reference to constitutional Petitioners and stated that;

“We reaffirm our position as in the **Muri Coffee case** that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets

permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.”

94. The Respondent has argued that the same development was subject to ELC PET. E026 of 2022, where the court examined the approvals obtained for the development, including development permission, NCA registration, NEMA licensing and related compliance documents. That the court dismissed the Petition on the basis that it failed to demonstrate any illegality or basis for interfering with the project. It is therefore the Respondent's case that this petition is barred by the doctrine of res judicata by dint of Section 7 of the Civil Procedure Act and the decision of the court [differently constituted] in ELC Pet No E026 of 2022.
95. The Respondent also contended that development on the suit land has been fully completed; the relevant authorities have issued a certificate of completion and a certificate of occupancy; apartments have been occupied by innocent homeowners, thereby establishing third-party vested rights protected by law. It was further contended that given the state of the development, the petition is at best moot and/or overtaken by events.
96. In answer to the above issue, the Petitioner, relied on the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 others [2017] EKLK** where the court held that for resjudicata to apply, the matter directly and substantially in issue must have been directly and substantially in issuer in the former suit between the parties or those claiming under them.

97. Furthermore, the Petitioner stated that in PET E026 of 2022, the parties were different; the Petitioner herein was not a party in that case; the causes of action varied significantly; the petition dealt with general challenges to planning and approval processes, whereas the present petition centres on the ongoing construction and occupation of a condemned structure after specific demolition and suspension orders were issued; a continuing wrong that was neither litigated nor resolved in the earlier case; illegalities still persist;
98. Regarding the question that events have overtaken the petition, it was succinctly argued by the Petitioner that the completion of construction does not extinguish illegality, as a completed unlawful act remains unlawful. **See Macfoy v United Africa Co Limited [1961] 3 All ER 1169**, where the court stated that if an act is void, then it is in law a nullity; you cannot put something on nothing and expect it to stay there.
99. I have had occasion to peruse the Judgment delivered in ELC Petition E026 of 2022, which was delivered by Justice Oscar Angote on 10/12/2024. Although the said Judgement has been appealed by the Petitioners, the decision has not been varied and or set aside. It is therefore still a valid judgment of this court which was competent to address the issues therein.
100. In PET E026 of 2022 [previous petition], the Petitioners therein filed the petition on their own behalf, on behalf of members of an informal residential association known as Taza Lane Residents Association whose members are owners, occupiers and residents of properties along Taza Lane City Park Drive developed on parcels 209-7544, 7545, 7546, 7547, 7548 and 7550, and on behalf of the general public. Specifically, the main grievance of the said petition was the development on LR. No. 209/7549 [the suit property herein]
101. Sameness of the subject matter; Clearly, it is undisputed that the subject matter in this petition and the previous one was the same; the development on LR. No. 209/7549.

102. Sameness of the Parties; The Respondent herein was the 16th Respondent in the previous case, whereas the Interested Parties herein were the 4th and 9th Respondents, respectively. Indeed, the Petitioner herein was not a party to the previous petition.
103. That said, the petitioner in the present petition describes himself as a public-spirited individual and a renowned advocate for public interest litigation. The supporting affidavit refers to the residents and property owners along Taza Lane off City Park Drive as members of the public whom the Petitioner represents.
104. It is these same persons—members of an informal residential association known as Taza Lane Residents Association—comprising owners, occupiers, and residents of properties along Taza Lane and City Park Drive, as well as the general public, on whose behalf both sets of Petitioners have petitioned for.
105. In Conclusion, therefore, Explanation. — (6) which states that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating has been satisfied.
106. What is the issue? The grievance in both petitions concerned the alleged violations of the Constitution and construction law by the Respondent, NEMA, NCA, the Nairobi Metropolitan Services [NMS] and other players not in this suit. Although the petitioner has tried to isolate the cause of action herein as distinctly separate, the court is not persuaded.
107. The reliefs, including declarations that the Respondent and NCA are in breach of the law, also encompassed a permanent injunction to halt the construction and orders for the demolition of the building. These are similar to the previous petition, although the reliefs in that case were more extensive.

108. Further, the Learned Judge extensively analyzed the evidence adduced before the court and held that the Petitioners therein failed to prove that the construction had been undertaken contrary to the approved plans and that the respective statutory bodies dealing with such developments, including NCA, had failed in their mandate. In particular, the Learned Judge gave an in-depth examination of the legality of the certificate of compliance, the suspension and lifting orders issued by NCA under para 186-200 of the Judgement and was satisfied that NCA complied with statutory requirements, leading to the ultimate dismissal of the Petition.

109. In the case of **ET vs Attorney General & another (2012) eKLR** where it was held that;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.

110. Similarly, in that case the court quoted Kuloba J, (as he then was) in the case of **Njanju vs Wambugu and Anor Nairobi HCC No. 2340 of 1991 (unreported)** where he stated:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata”.

111. It is therefore my finding that this suit is res judicata in view of the decision of the court in ELC Pet. E026/2022. The fact that the Petitioner herein was not a party in the other Petition does not exclude the

applicability of the doctrine. In any case, the Petitioner seeks to protect the rights of residents of Taza Lane in Parklands, which the Petitioners in the other suit also sought to protect. The cause of action in both Petitions is the same, involving the same property and the same parties.

112. Based on the foregoing, it is my finding that the instant Petition contravenes the doctrine of res judicata. The issues intended to be resolved have already been decided in ELC Petition E026 of 2022. It is, therefore, an abuse of the court process and is consequently fit for dismissal.

Who meets the costs of the Petition?

113. The Court has discretion under Section 27 of the Civil Procedure Act to award costs. Clearly, costs generally follow the event unless special circumstances arise.

114. This being a public interest litigation and considering that the Respondent and the Interested Parties failed to bring to the attention of the court of the existence of the other Petition, they cannot be granted costs.

115. Final orders for disposal

- a. Overall, the Petition is res judicata and therefore none of the prayers are available for granting.
- b. It is hereby dismissed
- c. I make no orders as to costs.

116. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF
DECEMBER 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI
JUDGE**

Delivered online in the presence of;

1. N/A for the Petitioner
2. Ms Njenga HB for Mr Bashir for the Respondent
3. Ms Amutabi HB for Mr Okatch for the 1st Interested Party
4. N/A for the 2nd Interested party
5. C/A - Ms Yvette Njoroge