REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC LC PETITION E052 OF 2025

OKIYA OMTATAH

OKOITI .....PETITIONER

VERSUS

MINISTRY OF LANDS, PUBLIC WORKS,

HOUSING AND URBAN DEVELOPMENT 1ST

RESPONDENT

STATE DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT 2ND

RESPONDENT DIRECTOR, SLUM UPGRADING

DEPARTMENT.....3RD

RESPONDENT AFFORDABLE HOUSING BOARD.....

.....4TH RESPONDENT MINISTRY OF ENVIRONMENT

AND NATURAL RESOURCES.....5TH

RESPONDENT MINISTRY OF ROADS AND

TRANSPORT.....6TH

RESPONDENT HON. ATTORNEY-GENERAL.....

.....7TH RESPONDENT

COUNTY GOVERNMENT OF

NAIROBI CITY.....8TH

RESPONDENT

NATIONAL LAND COMMISSION.....9TH

RESPONDENT NATIONAL ENVIRONMENT

MANAGEMENTAUTHORITY.....10TH RESPONDENT

RAYSMAGAN & SONS LIMITED.....11TH RESPONDENT LANDMARK HOLDINGS LTD..... .....12TH RESPONDENT

AND

LANGATA REJECT AHP COMMITTEE...1ST INTERESTED PARTY

LANGATA SOUTH AND ESTATE RESIDENTS ASSOCIATION (LASERA).....2ND INTERESTED PARTY

KENYA INSTITUTE OF PLANNERS.....3RD INTERESTED PARTY

INSTITUTE OF SURVEYORS OF KENYA (ISK).....4TH INTERESTED PARTY

ARCHITECTURAL ASSOCIATION OF KENYA (AAK).....5TH INTERESTED PARTY

KENYA PRIVATE SECTOR ALLIANCE..6TH INTERESTED PARTY

KENYA ALLIANCE OF RESIDENTS ASSOCIATION (KARA).....7TH INTERESTED PARTY

KENYA AIRPORTS AUTHORITY .....8TH INTERESTED PARTY NATIONAL CONSTRUCTION

AUTHORITY.....9TH INTERESTED PARTY

WATER RESOURCES AUTHORITY..... 10TH INTERESTED PARTY

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED.....11TH INTERESTED PARTY

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA).....12TH INTERESTED PARTY

KENYA URBAN ROADS AUTHORITY..13TH INTERESTED PARTY

KENYA WILDLIFE SERVICE (KWS)....14TH INTERESTED PARTY

MINISTRY OF DEFENCE.....15TH INTERESTED PARTY

MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION..... 16TH INTERESTED PARTY KENYA POWER AND LIGHTING CO....17TH INTERESTED PARTY

KENYA CIVIL AVIATION AUTHORITY.....18TH INTERESTED PARTY

KENYA ASSOCIATION OF AIR OPERATORS..... 19TH INTERESTED PART

RULING

Background

1. Before this Court for determination are two applications. The Petitioner's Notice of Motion dated 4th July, 2025 seeking conservatory orders; and the Attorney General's Notice of Motion dated 17th December, 2025 seeking the setting aside and/or variation of the interim conservatory orders issued on 11th December 2025.

2. The Attorney General's Motion is grounded on the same factual and legal foundation as the Petitioner's Notice of Motion dated 4th July, 2025 and does not raise any separate or independent questions for determination. Its grounds are therefore subsumed within the earlier Motion for conservatory orders, and will be determined within the same analytical framework applicable to that application.

The Petitioner's Notice of Motion dated the 4th July, 2025.

3. The Notice of Motion dated 4th July, 2025 has been brought pursuant to the provisions of **Articles (1), 2(1) 3(1), 10, 19, 21, 22 (1) & (2) (c), 23, 28, 31, 40, 42, 47, 48, 50(1), 60, 62, 64, 69, 70(1), 159, 160(1), 162(2)(b), 165(3) & (5)(b), and 258 (1) & (2) (c)** of the Constitution, as well as Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Petitioner seeks the following reliefs:

i. Spent

ii. Pending the hearing and determination of this Application and/or Petition, this Honourable Court be pleased to issue a conservatory order staying the ongoing construction of social housing and associated infrastructure in Southlands, Langata Constituency, Nairobi County under Contract No. MLPWHUD/SDHUD/SUD/382/2023-2024-LOT NUMBERS 1, 2, 3, 4 & 5 which is popularly known as the Southlands Affordable Housing Project.

iii. Pending the hearing and determination of this Application and/or the Petition, this Honourable Court be pleased to issue a temporary prohibitory injunction restraining the Respondents, their agents, servants, developers, contractors and/or any other persons acting on their instructions from proceeding with the development of social housing and associated infrastructure in Southlands, Langata Constituency, Nairobi County under Contract No. MLPWHUD/ SDHUD/ SUD/382/2023-2024-LOT NUMBERS 1, 2, 3, 4 & 5 which is popularly known as the Southlands Affordable Housing Project.

iv. Pending the hearing and determination of this Application and/or Petition, a temporary injunction do issue restraining the Respondents, their agents, servants, developers, contractors, assigns or any other persons acting under their authority, or howsoever acting, from continuing with the excavation, development and construction of social housing and associated infrastructure in Southlands, Langata Constituency, Nairobi County under Contract No. MLPWHUD/ SDHUD/ SUD/382/2023-2024-LOT NUMBERS 1, 2, 3, 4 & 5 which is popularly known as the Southlands Affordable Housing Project.

v. This Honourable Court be pleased to issue such further conservatory orders as may be necessary to preserve the subject matter of the Petition and uphold the rule of law and public interest.

vi. Consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

vii. The Officer Commanding Station (OCS), Langata Police Station provides all the necessary support required in execution the orders granted.

viii. Costs of this application be in the cause.

4. The Motion is supported by the affidavit of Okiya Omtata Okoiti, the Petitioner herein, of an even date. He deposed that the Motion, and by extension the Petition, concern the implementation of the Constitution 2010 including the enjoyment of fundamental rights and freedoms secured and guaranteed therein.

5. He averred that the matter is extremely urgent, as it concerns an ongoing environmental crisis arising from the unlawful encroachment onto public land reserved as a transport corridor forming part of the 120-metre-wide Trans-African Transport Corridor Road and Rail Reserve, sections of which host the Southern Bypass.

6. This urgency, he explained, is further heightened by the Government's ongoing construction of social housing and associated infrastructure in Southlands, Lang'ata Constituency, Nairobi County, commonly referred to as the Southlands Affordable Housing Project; that the project is being undertaken without public participation and without an environmental and social impact assessment, in violation of constitutional and statutory requirements and that the project site, is a road reserve and buffer zone, thereby rendering the development unlawful from inception.

7. According to the Petitioner, no public participation was conducted as required under the Constitution and the Environmental Management and Coordination Act, 1999. He maintained that residents of Lang'ata who stood to be directly affected by the development were neither informed nor consulted, and that the project was being imposed upon the community in disregard to the principles of transparency, accountability, and good governance.

8. He stated that excavation works had already commenced and were generating vibrations that had begun causing damage to adjacent residential houses in Southlands, Park 1, Civil Servants, Uhuru Gardens, and Maasai Estates. With respect to Lot 3 of the project, he explained that the buffer zone adjacent to the Southern Bypass has been breached, with excavated debris dumped against backyard walls, resulting in excessive dust, noise pollution, compromised security, and loss of residential amenity.

9. The Petitioner deposed that efforts to engage public authorities had proved futile. Further, that on 8th March 2025, Lang'ata South and Estate Residents' Association wrote to the Deputy County Commissioner, the Member of Parliament for Lang'ata, and the Member of the County Assembly for Mugumoini Ward, but no responses were received and that similar correspondence addressed to the County Executive Committee Member for Built Environment

and Urban Planning and the Principal Secretary for Housing and Urban Development likewise elicited no response.

10. He explained that vide a letter dated 21st March, 2025, he sought clarification from the National Environment Management Authority (NEMA) on whether the project had been subjected to an environmental and social impact assessment. Further, that NEMA confirmed in writing that no such assessment had been undertaken but despite this confirmation, the Regulator failed to halt the project and instead merely advised the proponent to comply with the law.

11. He stated that on the 8th May, 2025, the Kenya Civil Aviation Authority convened a stakeholders' engagement involving Chief Executive Officers of forty-eight aviation operators to deliberate on the project's implications in proximity to Wilson Airport, and that the engagement confirmed that the development raised aviation safety concerns, notwithstanding the earlier exclusion of affected residents and stakeholders from consultation.

12. According to the Petitioner, the project site constitutes public land within the meaning of **Article 62** of the **Constitution,** being a designated road reserve and buffer zone. He maintained that its conversion into high-rise residential apartments amounts to unlawful alienation of public land and demonstrated a reckless abuse of power warranting judicial scrutiny.

13. Turning to infrastructure, he averred that Lang'ata was already experiencing chronic water scarcity and that the introduction of tens of thousands of additional residents, without any water provision plan, would exacerbate the crisis. He insisted that the existing sewer infrastructure was similarly overstretched, thereby posing serious public health risks.

14. He asserted that the scale and height of the proposed seventeen-storey buildings will tower over surrounding maisonette homes infringing upon residents' right to privacy, and that no mitigation measures had been put in place to address air and noise pollution, loss of green spaces, congestion including environmental degradation. In his view, the project is inconsistent with the principles of sustainable development.

15. He reiterated that the excavation had already commenced and unless restrained, continued construction will result in irreversible environmental and social harm.

16. The Petitioner asserted that the balance of convenience favours urgent judicial intervention, as failure to halt the project at that stage would permanently prejudice the residents' rights and undermine lawful urban planning. He stated that documentary evidence had been annexed in support of his averments.

The Respondents' responses

17. The 1st -7th Respondents responded vide affidavits sworn by Mr Charles M. Hinga, the 2nd Respondent's Principal Secretary and Accounting officer. He deposed that the State Department for Housing and Urban Development was tasked with the mandate to construct social infrastructure together with the Affordable Housing Programme (AHP) in a move to improve the livelihoods of citizens at the grassroots level in line with the Bottom-Up Economic Transformation Agenda (BETA).

18. He explained that under **Article 43(1)(b)** of the **Constitution,** the State is under a duty to take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the right to accessible and adequate housing. He was emphatic that the Southlands project is a government project that was reserved for slum upgrading, which is consistent with the Government's AHP, designed to bridge Kenya's housing deficit by leveraging private sector capital and expertise.

19. Mr Hinga deponed that as a government initiative, the project's ownership and/or lease structure is anchored in the Constitution of Kenya, 2010 and is subject to the **Land Act, 2012**, the **Sectional Properties Act, 2020**, the **Affordable Housing Act, 2024**, and other applicable statutes. He

maintained that the planning and implementation of the project has been undertaken in full compliance with the processes and procedures prescribed by law.

20. He explained that a contract agreement was entered into between the State Department for Housing and Urban Development and the 11th and 12th Respondents for the construction of social housing and associated infrastructure under Tender No. MLPWHUD/SDHUD/SUD/382/2023–2024 in Kibra Constituency, Nairobi County. He asserted that the land in question is not a noise buffer zone, noting that the surrounding area already comprised of residential developments, including houses constructed by the government.

21. According to Mr. Hinga, the 1st Respondent submitted a comprehensive Environmental and Social Impact Assessment (ESIA) report on 21st September, 2025 detailing the nature of the project, its anticipated environmental and social impacts, proposed mitigation measures, and compliance mechanisms. He reaffirmed that meaningful public participation was undertaken on 7th and 11th June, 2025.

22. He explained that upon submission of the ESIA Project Report, the 1st Respondent promptly initiated payment of the requisite license fees through the National Environment Management Authority's online system as required. However, the processing of the payment was materially

delayed due to persistent technical challenges within NEMA's online platform, which failed to process and confirm the payment despite it having been initiated and pending from as early as 21st September, 2025.

23. He insisted that the delay was therefore wholly administrative and system-related, beyond the control of the 1st Respondent, and did not arise from any omission, default, or non-compliance on its part. Further, that as at 21st September, 2025, the 1st Respondent had fully complied with all statutory, procedural, and substantive requirements for the issuance of the Environmental Impact Assessment Licence and was merely awaiting completion of internal system processing by the 10th Respondent.

24. Mr. Hinga stated that on 16th December, 2025, the National Environment Management Authority reviewed the Environmental Impact Assessment Project Report submitted by the State Department for Housing and Urban Development and issued Environmental Impact Assessment Licence No. NEMA/EIA/PSL/0001425 and Application Reference No. NEMA/ENVIS/SR/00096, thereby authorizing implementation of the proposed Southlands Social Housing Project (Kibra Lots 1, 2, 3, 4 and 5), subject to the conditions set out therein.

25. He maintained that the subsequent issuance of the Environmental Impact Assessment Licence merely formalised

a process that had been substantively completed by the 1st Respondent several months earlier and confirmed continuous compliance with the applicable environmental regulatory framework.

26. On the issue of compliance and public interest, Mr. Hinga averred that the Respondents categorically deny the allegations raised by the Petitioner and asserted that all construction works were undertaken only after ensuring compliance with all relevant laws, rules, and regulations.

27. He was emphatic that public interest warrants the continuation of the project. Further, that the said project is funded through public resources and any stoppage of construction works will expose the State Department to substantial contractual penalties and interest arising from idle plant including labour, as provided under the contract. He deposed that such financial consequences would ultimately be borne by taxpayers.

28. Mr. Hinga, for the 1st Respondent, asserted that the livelihoods of approximately 723 workers have been directly affected, causing socio-economic distress with adverse implications for the economy and social stability. Further, that the halt in construction activities has, in addition, exposed the Government to substantial financial losses totaling Kshs 1,949,862,719.36 across Lots 2 to 5, weekly costs for idle plant and personnel, and loss of profit

estimated at Kshs 10,000,000 for Lot 5 alone, with similar escalating expenses across the other lots, as well as demobilization and remobilization costs of Kshs 50,000,000 and Kshs 25,000,000 respectively.

29. Further, he deposed that Kenya's housing crisis is being aggravated by delays in the delivery of over 5,302 urgently needed affordable and social housing units across the project lots, 1,584 units in Lot 2, 2,332 units in Lot 3, and 1,386 units in Lot 4, with additional units in Lot 5 thereby frustrating the State's constitutional mandate under **Article 43(1)(b)** to provide accessible and adequate housing, particularly for low-income families in the Kibra and Lang'ata areas.

30. It was his deposition that the prolonged stoppage heightens safety risks at unoccupied sites, including trespassing by children and accidents arising from open excavations, and further compels the Government to incur additional procurement processes including costs, thereby occasioning irreparable prejudice to the public.

31. The 8th Respondent responded vide Grounds of Opposition premised on the grounds that:

i. The Applicant/Petitioner's Notice of Motion and Petition has failed to comply with Rule 9 of the Oaths and Statutory Declaration Rules. As the

annexures by the Applicant/Petitioner are unsealed thus do not constitute evidence.

ii. As per the Supreme Court decision of Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent) (Civil Appeal E144 of 2021) [2021] KECA 97 (KLR) (Constitutional and Human Rights) (22 October 2021) (Ruling), unmarked and unsealed annexures are of no value to an Application.

iii. The provisions of Rule 9 of the Oaths and Statutory Declaration Rules are couched in mandatory terms and non-adherence to them renders any affidavit and the application it supports fatally defective.

iv. Some of the annexures which constitute pictures, offend the provisions of Section 106(B)(4) as they lack a certificate of electronic evidence.

v. Accordingly, such pictures purportedly submitted as evidence, are inadmissible, as Section 106(B)(4) is couched in mandatory terms.

vi. As a consequence, the only paragraphs that the Court can rely are those that did not purport to be based on documentary evidence.

vii. As a consequence, there is no documentary evidence to corroborate the averments made by the Applicant/Petitioner.

viii. As a further consequence of the foregoing, and in the absence of any supporting documentary evidence, the Applicant/Petitioner has failed to demonstrate a prima facie case with a likelihood of success.

ix. In the same vein, the Applicant/Petitioner has failed to demonstrate that they will suffer irreparable harm incapable of a remedy by way of an award of damages of any other appropriate relief should the Petition succeed.

x. The Application is unmeritorious and should therefore be dismissed with costs.

32. The 9th Respondent, through its Director of Legal Affairs and Dispute Resolution, Brian Ikol, swore a Replying Affidavit in which he asserted that no public land has been illegally or unlawfully alienated or applied to any use other than that for which it was lawfully reserved. He further asserted that the allegations advanced by the Petitioner are unsupported in fact or in law. The Motion, he explained, is misconceived, unnecessary, unwarranted, and an abuse of the process of the court.

33. On the question of public interest, he averred that public projects take precedence over personal or individual interests and that the Southlands project ought not to be derailed on the basis of unsubstantiated allegations. He maintained that it is in the public interest that the project is not impeded, as any stoppage would be detrimental to the public good, and urged the Court to dismiss the application with costs to the Respondents.

34. The 10th Respondent, through affidavits sworn by its Director General, Dr Mamo B. Mamo, EBS averred that NEMA is the principal government institution established under **Section 7** of the Environmental Management and Co-ordination Act (EMCA) to exercise general supervision and coordination over all matters relating to the environment, and to perform the functions set out under Section 9 of the Act.

35. He explained that the Authority is responsible for issuing Environmental Impact Assessment (EIA) licenses for development projects after review of submitted EIA reports. Further, that the purpose of an EIA is to identify potential environmental and social impacts of proposed activities and prescribe appropriate mitigation measures.

36. He contended that the 1st Respondent proposes social housing developments in Kibra (Lots 1, 2, 3, 4 and 5) along the Southern Bypass in Mugumo-ini Ward, Lang'ata

Constituency, Nairobi County, involving the construction of over 10,000 housing units comprising one-room, two-room and three-room units, together with commercial stalls, boundary walls, and supporting infrastructure, including roads, parking, water storage, sewer systems, storm-water drainage, and electrical and mechanical installations. Further, that each lot comprises between 14 and 16 blocks with varying floor heights.

37. Dr. Mamo averred that the project is classified as a high-risk project under **paragraph 3(3)(g)** of the **Second Schedule to EMCA**, as amended by Legal Notice No. 31 of 2019, which classifies new housing developments exceeding one hundred units as high-risk. He explained that the project is required to undergo a full Environmental Impact Assessment study in accordance with Part III of the Environmental (Impact Assessment and Audit) Regulations, 2003, as amended by Legal Notice No. 32 of 2019.

38. It was deposed by Dr. Mamo, on behalf of NEMA, that on 21st July 2025, the Authority received from the 1st Respondent the Terms of Reference for consultancy services for the conduct of an Environmental and Social Impact Assessment for the proposed social housing and associated infrastructure in Lang'ata Constituency, Nairobi County, covering Lots 1 to 5; that the Authority undertook a technical review of the submitted TOR's and that vide a letter dated 28th July, 2025

raised issues to be addressed by the 1st Respondent to enable informed decision making.

39. He was emphatic that the issues raised were addressed vide a letter dated 4th August, 2024 and a further TOR report received by the Authority on 4th August, 2025. He further claimed that the Authority undertook a technical review of the further TOR report and issued an approval with conditions vide the letter dated 6th August, 2025.

40. He deponed that the 1st Respondent was yet to submit an Environmental and Social Impact Assessment (ESIA) report, as required by the letter dated 6th August 2025. He clarified that in the absence of the ESIA for the 1st Respondent's project, the Authority is impaired from assessing the environmental impacts of the project.

41. It was his deposition that the 10th Respondent could not make any response to paragraphs 65 to 71 of the Petition, as the conversion of public land to private land did not fall within its mandate. He reiterated that proof of land ownership is however mandatory by a project proponent applying for an Environmental Impact Assessment (EIA) License under EMCA.

42. He denied that the 10th Respondent violated the doctrine of legitimate expectation and further stated that as correctly indicated at paragraph 73 of the Petition, the Authority

required the 1st Respondent to undertake an EIA study so as to safeguard the right to a clean and healthy environment.

43. Dr. Mamo explained that as early as 2021, the 10th Respondent had advised the 1st Respondent that the Kenya Affordable Housing Project would be subjected to the Strategic Environmental and Social Assessment (SESA) process to enable incorporation of environmental and social considerations in the Affordable Housing Program.

44. In response to the Petitioner's averments that the project would expose residents to irreversible environmental harm, Mr. Mamo stated that the environmental impact assessment (EIA) process is specifically designed to identify potential environmental effects of a proposed project and prescribe mitigation measures. He explained that EIA licenses are issued subject to mandatory conditions aimed at safeguarding the environment and enabling compliance monitoring.

45. He further stated that the EIA process places public participation at its core by affording neighbours and other affected persons an opportunity to express their views on a proposed project. According to him, such views are taken into account by the Authority when evaluating applications for EIA licenses.

46. He added that as earlier communicated by the Authority in its letter dated 6th August 2025, the 1st Respondent was expected to consult neighbouring residents and other affected stakeholders, whose views would inform the Authority's decision-making in the licensing process.

47. Dr. Mamo was emphatic that in the absence of an Environmental and Social Impact Assessment for the 1st Respondent's project, the Authority was unable to effectively address the concerns raised by the Petitioner regarding environmental and social impacts. He concluded by denying the alleged violations of the Constitution and statutes attributed to the 10th Respondent in the Petition and put the Petitioner to strict proof thereof.

48. Vide a further response, Dr. Mamo denied having deposed to the earlier affidavit sworn on 10th December 2025, which we have summarised in the preceding paragraphs. He further stated that the signature appearing on the said affidavit had been appended by way of an electronic signature, and was not personally affixed by him. He denied expressly authorising the swearing or filing of the said affidavit in the form presented to the court.

49. He averred that, to the extent that the affidavit dated 10th December 2025 was expressed as having been sworn by him, it did not represent his personal deposition, and that he does not adopt it as his affidavit before this Court. Without

prejudice to the foregoing, and for the avoidance of doubt, he proceeded to clarify and correct the factual position on two specific issues addressed in the impugned affidavit.

50. First, he asserted that contrary to earlier depositions, the 1st Respondent had in fact submitted the Environmental and Social Impact Assessment (ESIA) Report for the Southlands project in Lang'ata Constituency, Nairobi County. He stated that the ESIA Report, relating to Contract No. MLPWHUD/SDHUD/SUD/ 382/2023–2024 covering Lot Numbers 1, 2, 3, 4 and 5, popularly known as the Southlands Affordable Housing Project, was submitted on 21st September 2025.

51. Further, that contrary to earlier assertions, public participation had already been undertaken in respect of the project. He stated that public participation exercises were conducted between 7th and 11th June 2025, during which members of the public were afforded an opportunity to participate, express their views, and submit comments on the project. He insisted that the suggestion that public participation had not been undertaken, or was merely prospective, did not represent the true factual position, and the averments contained in paragraph 20 of the said affidavit were accordingly retracted and disowned.

52. He concluded by stating that the supplementary affidavit was sworn by him solely for the purpose of placing the correct

factual position before the Court and ensuring that the Court record accurately reflects the true status of the ESIA process and the public participation undertaken in respect of the impugned project. He further affirmed that the National Environment Management Authority remains committed to the discharge of its statutory mandate under the Environmental Management and Coordination framework.

The Interested Parties' responses

53. The 12th Interested Party filed Grounds of Opposition premised on the grounds that:

i. The Government's Constitutional and statutory mandate to provide access to adequate affordable housing as envisaged under Article 43(1)(b) of the Constitution and the Affordable Housing Programme is a key national development priority under Article 21(2) of the Constitution.

ii. From a proportionate standpoint, the benefit of allowing construction of the social housing and associated infrastructure in Southlands, Langata Constituency, Nairobi County under Contract No. MLPWHUD/SDHUD/SUD/382/2023-2024-LOT NUMBERS 1,2,3,4 & 5 [Southlands Affordable Housing Project] significantly outweighs the

risks that the Applicant alleges in the Application.

iii. The Southlands Affordable Housing Project will create wide-ranging social and economic benefits including provision of dignified and decent housing to ordinary citizens who would otherwise be unable to afford market-rate housing, stimulation of job creation through construction, engineering, supply chain thereby benefitting thousands of Kenyans, while promoting the inclusive urban development and reduction of informal settlement and slums.

iv. In accordance with the jurisprudence of the Court of Appeal in the Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR), [Civil Appeal No. 290 of 2012-Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR] and the Supreme Court in the 2023 Finance Act judgment [SC Petition Nos. E031, E032 & E033 of 2024, The Cabinet Secretary for the National Treasury and Planning and Four Others v. Okiya Omtatah Okoiti and 52 Others] constitutional adjudication must be guided by the public

interest. Judges should apply the rational basis test to adjudicate disputes while promoting public interest.

v. The balance of convenience does not favour grant of conservatory orders because the alleged concerns and grievances by the Petitioner can be adequately addressed through legal and administrative mechanisms without halting the entire project, which has a wide reaching social and economic implications.

vi. The Petitioner has not demonstrated a prima facie case with a likelihood of success, nor shown that they will suffer irreparable harm that cannot be remedied by an award of damages or other appropriate relief, should the Petition ultimately succeed.

vii. Granting the conservatory orders in the circumstances would amount to pre-empting the merits of the Petition and would result in the suspension of a critical national infrastructure project with adverse socio-economic consequences to the public.

viii. The Applicant has not met the threshold for grant of conservatory orders as outlined in the

case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR:

a. ***The underlying case should be arguable and not frivolous.***
b. ***Unless the orders sought are granted, the case, were it to eventually succeed, would be rendered nugatory; and***
c. ***The orders should be granted only when public interest tilts in favour of the Petitioners.***

ix. The application is frivolous and an abuse of the court process and should be dismissed with cost.

54. The 18th Interested Party responded through its Manager, Air Navigation Services, Meteorology and Aerodromes Regulation, Mr David Ondieki. He deposed that the 18th Interested Party is a State Corporation established under **Section 4** of the **Civil Aviation Act, Cap 394**, mandated to provide aviation regulatory oversight, air navigation services, and aviation training in Kenya.

55. Further, that in undertaking regulatory oversight, it is mandated under the Civil Aviation Act and the Civil Aviation (Aerodromes) Regulations, 2013 to control developments within, and in the vicinity of aerodromes in order to ensure safe aircraft operations and to prevent aerodromes from becoming unusable due to obstacles.

56. He contended that persons intending to construct near aerodromes are required to obtain clearances from the 18th Interested Party and to comply with prescribed specifications and conditions, guided by national law and the Standards and Recommended Practices issued by the International Civil Aviation Organization.

57. He stated that the 2nd Respondent wrote to the 18th Interested Party on 18th February, 2025, notifying it of its intention to develop housing units at the Kibera Southlands site and seeking guidance on applicable height restrictions and aviation safety considerations in relation to Wilson Airport and that the 2nd Respondent thereafter submitted a formal height application through the 18th Interested Party's online portal, which, upon consideration, resulted in the grant of an initial height approval of 15 metres on 13th March, 2025.

58. He explained that the 2nd Respondent subsequently applied for a review of the approved height, whereupon the 18th Interested Party commissioned an aeronautical study to assess the potential aviation safety impacts, the feasibility of the proposed height, and the concerns raised by stakeholders.

59. Mr David Ondieki for the 18th Interested Party confirmed that the aeronautical study adopted a consultative approach and considered written and oral views from aviation operators,

relevant government institutions, security and meteorological sectors, and the project proponents. Further, that the study concluded that a maximum height of 29 metres is allowable, subject to mitigation measures, without compromising aviation safety and communicated its decision in this regard to the 2nd Respondent by a letter dated 15th August 2025.

60. He contended that adequate consultations and stakeholder engagements were undertaken in relation to aviation safety and the operations of Wilson Airport, and appropriate mitigation measures were communicated to both the project proponent and relevant stakeholders. He maintained that the 18th Interested Party remains committed to safeguarding aviation safety and continues to monitor implementation of the approved measures to ensure compliance with applicable aviation safety standards.

The Petitioner's Further Affidavit

61. Vide a further response, Mr Omtatah, the Petitioner, reiterated that Southlands Affordable Housing Project commenced without a valid ESIA licence, without meaningful public participation, and on land reserved for public utility and environmental buffer purposes, in violation of the Constitution, EMCA, and planning laws.

62. He asserted that the ESIA reports relied upon by the Respondents are fatally defective, having been prepared

after construction had already commenced, rendering them retrospective and legally impotent. He further challenged their authenticity on the basis that they are unsigned, anonymous, vaguely dated, and not prepared or certified in accordance with the Environmental (Impact Assessment and Audit) Regulations, 2003. In addition, he asserted, the engagement of the ESIA consultant was unlawful for failure to comply with public procurement requirements, thereby tainting the reports as products of an illegal process.

63. Mr Omtatah also disputed the Respondents' claim that public participation was undertaken, arguing that the alleged consultations were conducted after works had begun, were inadequately documented, and failed to involve or address the concerns of directly affected residents. He maintained that the participation process was therefore a sham and did not meet constitutional or statutory standards.

64. On substance, he averred that the ESIA reports failed to address critical issues, including displacement without a Resettlement Action Plan, implausible baseline environmental findings, unsubstantiated mitigation measures, and the absence of a credible demonstration that the proposed housing would be affordable to the affected community.

65. He reiterated that the land in question constitutes public land reserved for transport and environmental purposes, and

that no lawful process has been shown for its conversion. He argued that any losses are self-inflicted and cannot outweigh the public interest in environmental protection and constitutional compliance.

The 1st and 2nd Interested Parties' response

66. Supporting this, the 1st and 2nd Interested Parties vide Grounds of Opposition affirmed that the Respondents have not established a case against the grant of conservatory orders noting that in any event, it is upon the State to mitigate its losses.

67. They contended that greater harm to the public will occur if the Court finds that the construction was illegal and should be demolished. They argued that environmental concerns are by their nature of public interest.

The 10th Respondent's Supplementary Affidavit

68. In response to the Petitioner's assertions herein above, the 10th Respondent through Dr. Mamo B. Mamo disputed the assertion that the licence was invalid because works had allegedly commenced prior to licensing. He maintained that EMCA does not deprive the Authority of jurisdiction to review an ESIA study report submitted after preliminary works have begun. He asserted that suspension of a licensed project, undermines environmental oversight by disabling regulatory supervision.

69. On public participation, he stated that the same was undertaken through stakeholder forums, consultations and receipt of views from affected persons and institutions. Further, that public participation under **Articles 10** and **69** of the **Constitution** and **EMCA** requires a reasonable opportunity for engagement rather than universal approval or consensus. He explained that the Authority evaluated the participation process and found it sufficient in light of the project's scale, location and mitigation framework. Further, that objection to the outcome of the process is not a basis for invalidating public participation.

70. With respect to **Section 59** of **EMCA,** he stated, that the provision confers discretion regarding the mode of publication. Further, that the absence of Gazette publication cannot invalidate an ESIA Licence where stakeholder consultation has taken place and submissions have been considered, and that the Petitioner's interpretation is characterised as elevating procedural preference over statutory discretion and environmental substance.

71. He denied the allegations that the ESIA reports were unsigned and unauthenticated, stating that NEMA reviewed certified submissions lodged through its official systems, including expert declarations, lead expert credentials and compliance documentation and that verification is said to have been undertaken internally through the Authority's

registry of licensed experts, and reliance placed on complete regulatory records rather than selectively extracted annexures.

72. He asserted that the procurement of ESIA consultants by a project proponent does not fall within NEMA's statutory mandate. He explained that environmental licensing is concerned with environmental compliance and not with the procurement processes of other state organs. Further, that any alleged procurement irregularities are said to fall under distinct legal regimes and oversight bodies and do not invalidate an environmental licence lawfully issued.

73. On the alleged misrepresentation of the project as "proposed", it is explained that such terminology relates to the scope of environmental assessment and impacts rather than construction chronology; that Environmental Impact Assessment is concerned with environmental risk management irrespective of the stage of the project, and the licence governs implementation going forward while binding the proponent to enforceable compliance obligations.

74. Concerning the alleged environmental harm, he stated that the licence contains detailed conditions addressing tree protection, soil stability, watercourse protection, waste management, noise control, dust suppression and rehabilitation. The Authority, he explained retains enforcement powers including inspection, compliance orders,

suspension and revocation. No evidence of irreversible environmental harm attributable to licensed activity is said to have been demonstrated.

75. On the conservatory orders and public interest, it is contended that the orders were issued before completion of the regulatory process and that the subsequent issuance of the ESIA licence altered the factual and legal landscape.

76. Dr. Mamo argued that continued suspension of the project will undermine statutory regulation, public housing objectives and environmental oversight. Further, that Public interest, in the Authority's view, lies in lawful regulation through enforceable conditions rather than regulatory paralysis, and that NEMA remains capable of protecting the environment through supervision, audits and enforcement.

77. The two applications were canvassed by way of written submissions.

Submissions

78. Vide its submissions, the Petitioner stated that the ongoing construction of the Southlands Affordable Housing Project (Contract No. MLPWHUD/SDHUD/SUD/382/2023–2024, Lots 1 to 5) raises substantial constitutional and legal questions requiring full adjudication by the Court.

79. He submitted that the Petition implicates among others, the legality of project approvals and the conversion of public

land reserved as a road/rail/transport corridor and buffer zone; compliance with environmental and land-use laws, transparency and fairness in the allocation and utilization of public land and in procurement processes; and the protection of constitutional rights and values, including those under **Articles 10, 42** and **69** of the **Constitution,** alongside related provisions on governance and environmental protection. In support, the case of ***Hoffmann vs South African Airways (CCT17/00) [2000] ZACC 17,*** was cited.

80. The Petitioner further submitted that the subject land is already undergoing active excavation and construction. Further, that if works continue unchecked, the physical and legal character of the land will be irreversibly altered, with the result that public land reserved for transport and environmental buffering will be permanently transformed, and the features defining its status would be erased. He contended that, once completed, the development will practically foreclose restoration of the *status quo* even if the Petition ultimately succeeds. On that basis, it was asserted that conservatory orders are necessary to preserve the substratum of the dispute and prevent the proceedings from being rendered academic. Reliance in this regard was placed on the case of ***Satrose Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others [2011] eKLR***.

81. Further reliance was placed on the case of ***Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General [2011] eKLR***, where the Court held that at the interlocutory stage, it need not reach definitive conclusions on the merits, but must be satisfied that an arguable case with real prospects of success exists and that there is a real danger of prejudice in absence of interim relief.

82. The Petitioner also relied on ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR,*** where the Supreme Court underscored the public law character of conservatory orders and emphasized that such relief is directed towards facilitating orderly functioning of public agencies and upholding constitutional values and the authority of the Court.

83. On that basis, he submitted that the Petitioner had met the threshold of an arguable *prima facie* case and demonstrated a likelihood of success at the final hearing, thereby justifying conservatory intervention to preserve the subject matter pending full adjudication.

84. On irreparable harm, he submitted that the ongoing construction, if undertaken without compliance with constitutional, statutory, and procedural requirements, poses a real and imminent risk of irreparable harm to the environment, public land, and residents of Lang'ata. He

asserted that the continued construction will permanently alter the land, increase density within what was described as a controlled zone, strain infrastructure, and expose residents to environmental degradation through dust, noise, and traffic hazards. Such harm, it was submitted, is not readily compensable by damages, and that if the Petition succeeds after the project has substantially progressed, the relief will be rendered nugatory.

85. The Petitioner further submitted that the project threatens broader public interest by undermining public participation, transparency, and due process in public land management, and by setting a precedent that could encourage similar breaches elsewhere.

86. In support, the Petitioner cited the case of ***Kenya Association of Manufacturers & 2 Others vs Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others [2017] eKLR*** for the proposition that conservatory orders may issue to prevent irreversible harm and to ensure that constitutional questions are determined meaningfully on the merits. He argued that the risk of irreparable harm strongly supports the grant of interim and conservatory relief.

87. On the balance of convenience and public interest, he submitted that the Court ought to weigh the potential harm to the affected residents, and the public if construction

continued, against the inconvenience to the Respondents if works were temporarily halted. He contended that the harm to him and the public will be substantial and irreversible, given the alleged permanent alteration of public land, environmental degradation, and violation of constitutional rights, including the right to a clean and healthy environment, property rights, and public participation.

88. The Petitioner argued that any delay occasioned by conservatory orders will be temporary and will not prevent the Respondents from resuming the project if it were ultimately found lawful, or after compliance with legal requirements.

89. He further submitted that interim restraint will protect public interest by upholding the rule of law and preventing a precedent whereby public land and constitutional safeguards can be disregarded with impunity.

90. Reliance was placed on ***Sakwa vs Chief Justice and President of the Supreme Court of Kenya & 6 others (Petition 167 of 2016) [2016] KEHC 8374 (KLR)*** for the proposition that Courts may grant interim relief to protect matters of public interest pending full adjudication. It was therefore contended that both the balance of convenience and the overarching public interest favored the grant of conservatory orders.

91. On whether further conservatory directions were justified, he submitted that the circumstances warranted additional protective directions to preserve the status quo. The Petitioner argued that the ongoing excavation and development poses an immediate risk of irreversible alteration of the land and associated infrastructure which forms the subject matter of the Petition, such that the Court's final determination will be rendered ineffective if works continued unabated.

92. Reliance was placed on ***Satrose Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others [2011] eKLR*** for the principle that interim relief safeguards the subject matter to ensure that justice is not defeated.

93. Vide their submissions, the 1st - 7th Respondents submitted that the construction of social infrastructure under the Affordable Housing Programme, is part of the Government's policy to improve livelihoods at the grassroots, in line with the Bottom-Up Economic Transformation Agenda (BETA).

94. Further, that as a government project, it is guided by the Constitution and carried out in compliance with the processes and procedures under the **Land Act, 2012**, **Sectional Properties Act, 2020**, **Affordable Housing Act, 2024** and other relevant statues.

95. They termed as baseless allegations by the Petitioner that the land is a noise buffer zone asserting that there are residential developments in the vicinity, including a substantial National Housing Corporation complex directly opposite the project site, as well as several neighbouring private high-rise apartments. They insisted that the project is funded by public coffers, and that any stoppage will expose the state to heavy penalties and interest arising from idle plant and labour under the contractual terms, which ultimate burden will fall upon the public.

96. The 1st - 7th Respondents submitted that the Applicant must demonstrate exhaustion of available statutory mechanisms for resolving the dispute. Reliance was placed on ***William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR,*** where the Court explained that the exhaustion doctrine requires an aggrieved party to first utilize available mechanisms before resorting to Court, thereby promoting alternative dispute resolution and giving effect to **Article 159** of the **Constitution.** Reliance in this regard was also placed on the case of ***National Assembly v Karume [1992] KLR 21*** and ***Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR.***

97. The Petition, it was contended, ought to succumb to the doctrine of constitutional avoidance. As explained in ***Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, Petitions Nos. 14A, 14B & 14C of 2014 [2014] eKLR,*** this doctrine is based on the principle that a dispute should not be resolved by determining a constitutional question where it can be resolved through other legal avenues.

98. Counsel also cited ***Wanjiru Gikonyo & 2 Others vs National Assembly of Kenya & 4 Others Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR,*** for the proposition that the Court should not entertain matters that are premature, hypothetical, or lacking a ripe factual matrix.

99. In that context, the 1st - 7th Respondents contended that allegations regarding the absence of an EIA licence are matters that properly fell within the jurisdiction of the National Environment Tribunal and where the Tribunal declined jurisdiction as alleged, the Petitioner should have appealed to this Court.

100. They argued that the Motion seeks to inflame public sentiment by introducing collateral and unproven allegations, including claims of theft of public land, conversion of public land to private use, and assertions that the land was planned as a transport corridor and noise buffer zone.

101. As to whether the Petition will be rendered nugatory, they submitted that the matter is not competently before the Court in the first place, and that in any event, there was no basis for interim conservatory relief because the Court retained the power, after hearing the parties, to issue appropriate final orders, including orders reversing what had been done. They argued that granting conservatory orders at this stage will be pre-emptive.

102. On irreparable loss and public interest, the 1st - 7th Respondents submitted that the public, not the Petitioner, stands to suffer prejudice if conservatory orders are granted. Further, that the Petitioner will, save for the pursuit of narrow political interests, suffer no loss if the orders are declined. They insisted that the Government will be hindered from delivering on its constitutional mandate under **Article 43(1)(b)** of the Constitution.

103. Further, it was submitted, a contractor is already on site and resources have been mobilized and that halting the project will cause the works to grind to a halt while contractual payments, penalties, including interest continued to accrue, ultimately burdening the taxpayer.

104. They reiterated that the environmental concerns raised can be addressed at the substantive hearing. Further, that issues such as traffic congestion would be addressed through a

traffic management plan. On sewerage capacity, they stated that, it is publicly known that the Government secured funding to modernize and upscale the Nairobi Metropolitan sewerage system, and that this ought not to be used to stop Government development projects.

105. They noted that the complaint by the 1st and 2nd Interested Parties should be dismissed on the basis that they are beneficiaries of social housing, Southlands Estate having been constructed by the Government, and argued that it is ironic and improper for them to seek to prevent other Kenyans from benefiting from social housing. They sought for the Motion to be dismissed as it was unmerited.

106. The 8th Respondent submitted that the Applicant's Notice of Motion is fundamentally defective for failure to comply with mandatory procedural and evidentiary requirements and is therefore incapable of sustaining the reliefs sought.

107. On non-compliance with **Rule 9** of the **Oaths and Statutory Declarations Rules,** it was contended that the Petitioner's Supporting Affidavit refers to numerous documents which were neither properly marked nor sealed by the Commissioner for Oaths. It was urged that as explained by the Court of Appeal in ***Pharmacy and Poisons Board & another vs Mwiti & 21 others (Civil Appeal No. E144 of 2021) [2021] KECA 97 (KLR***), this is a mandatory requirement. Also cited was ***Francis A. Mbalanya vs***

Cecilia N. Waema [2017] eKLR, and ***Abraham Mwangi vs S. O. Omboo & Others, HCCC No. 1511 of 2002***.

108. Further, it was argued, the photographs annexed by the Petitioner are inadmissible for want of certification under Section 106B (4) of the Evidence Act. Consequently, the affidavit was said to be hollow and unsupported, with most of its depositions remaining unproven. In support, Counsel cited the case of ***Awil Ogle Abdullahi & Kinsi Salat vs School Management Committee, St John's Lokichoggio Primary School & 2 others (ELC No. 50 of 2021) [2022] KEELC 3030 (KLR).***

109. On the merits, the 8th Respondent submitted that the Petitioner failed to establish a prima facie case. The applicable test was drawn from ***Kevin K. Mwiti & Others vs Kenya School of Law & Others [2015] eKLR***, which held that a prima facie case is one that raises arguable constitutional issues and is not frivolous. Given that the Petitioner's documentary material was inadmissible, it was argued that no arguable case had been demonstrated.

110. It was further submitted that the Petitioner had failed to exhaust alternative remedies. Having previously approached the National Environment Tribunal in Tribunal Case No. 6 of 2025, which declined jurisdiction, he should have appealed or sought judicial review of that decision. The filing of this

Petition was characterized as forum shopping and an abuse of process.

111. On irreparable harm, the 8th Respondent argued that the Petitioner had not demonstrated injury incapable of compensation by damages as anticipated by ***Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR***. The claims of environmental degradation, infrastructure strain and property devaluation were said to be speculative and unsupported by any expert reports or valuation evidence.

112. As to the balance of convenience, the 8th Respondent, relying on ***Giella vs Cassman Brown & Co. Ltd [1973] EA 358,*** submitted that halting the Southlands Affordable Housing Project would disrupt a flagship government housing programme, cause substantial financial loss, delay housing delivery, and undermine investor confidence. Public interest was said to lie in the continuation of the project, economic development and efficient utilization of public resources. Reliance was also placed on ***Satrose Ayuma & 11 others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others [2011] eKLR***, where the Court held that conservatory orders are meant to preserve the status quo pending determination and not to halt development merely because litigation has been filed. None of the cases by the Petitioner, it was argued justifies

the grant of interlocutory conservatory orders halting a development project.

113. Finally, Counsel urged the Court to be guided by the exposition in ***Trusted Society of Human Rights Alliance vs Attorney General & 2 others, Petition No. 229 of 2012 [2012] eKLR***, where the Court warned that public interest litigation must not be used to harass or delay legitimate governmental processes.

114. Vide its submissions, the 9th Respondent submitted that in ***Invesco Assurance Co. vs M N (Minor suing through next friend and Mother [2016] eKLR,*** the conservatory orders were described as orders of *status quo* intended to preserve the subject matter until the suit is heard.

115. It further submitted that the applicable principles were settled by the Supreme Court in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR,*** where it was held that conservatory orders are granted on the basis of public interest, constitutional values, and the inherent merits of a case, rather than private law considerations such as irreparable harm or probability of success.

116. The 9th Respondent submitted that the burden of proof lay with the Petitioner under **Section 107** of the **Evidence Act**, which burden he had failed to discharge having not demonstrated that the acts complained of threatened,

violated, or continue to violate any constitutional values or principles. In its view, the Motion is founded on suspicion and speculation, and the Court cannot on the basis thereof issue conservatory orders.

117. Vide its submissions, the 10th Respondent asserted that the National Environment Management Authority (NEMA) is a creature of statute and can only act within powers expressly conferred by Parliament. Further, that it is the Government's principal instrument in implementing environmental policies as affirmed by the court in ***Gidoomal & another vs NEMA & 3 others [2023] eKLR***

118. With respect to environmental impact assessment, it argued that **Section 58(1),** obligates a project proponent, before financing or commencing any undertaking listed in the Second Schedule to submit a project report to the Authority in the prescribed form and that upon receipt of that report, **Section 58(2)** mandates NEMA to evaluate it and determine whether the project should be subjected to a full environmental impact assessment study.

119. According to the 10th Respondent, **Section 59** of the **EMCA** vests it with responsibility for public consultation and the reception and consideration of views once an environmental impact assessment study report is submitted, while **Section 63(1)** empowers it, after considering the study report, to

issue an environmental impact assessment licence on such terms and conditions as it deems appropriate.

120. Read together, it was submitted, these provisions are said to confer exclusive statutory authority upon NEMA to receive and assess EIA documentation, determine the level of assessment required, supervise or conduct public participation, and issue licenses with enforceable conditions geared toward environmental protection, monitoring, and mitigation.

121. On that basis, it was submitted that the Court ought not to re-evaluate technical environmental data or substitute its own views for the expert Regulator's judgment. Accordingly, judicial intervention should be limited to situations where illegality, procedural impropriety, irrationality, or bad faith is established.

122. Applying these principles, it was submitted that the Petitioner has not shown any illegality, bad faith, improper motive, fraud, or abuse of power as pleaded or proved; and no irrationality is established.

123. The 10th Respondent submitted that the decision to issue the licence followed the statutory process under **Sections 58, 59** and **63** of **EMCA.** Further, that the project proponent submitted an Environmental and Social Impact Assessment Project Report in accordance with EMCA and the

Environmental Impact Assessment and Audit Regulations, 2003.

124. It insisted that the Authority then subjected the report to technical evaluation, internal review, and regulatory scrutiny to assess environmental risks and mitigation measures upon being satisfied that the risks were identified and could be mitigated through binding and enforceable conditions, and that NEMA then issued the ESIA license on 16th December 2025.

125. According to the 10th Respondent, the license preserves NEMA's enforcement powers, including inspection, compliance directives, suspension, and revocation, and therefore represents a lawful exercise of statutory power.

126. It contended that the Petitioner places undue emphasis on chronology, yet EMCA does not strip the Authority of jurisdiction merely because oversight is invoked at a particular stage of a project. Further, that environmental law is purposive, aimed at prevention, mitigation, and control of harm and relies on ***Kwanza Estates Limited v Kenya Wildlife Services (2013) eKLR*** to underscore that EIA is a decision-making tool anchored on knowledge of likely impacts and mitigation, rather than rigid procedural sequencing divorced from outcomes.

127. In NEMA's view, it was submitted, invalidating regulatory action purely on timing would leave projects unregulated and

undermine environmental protection and that once a licence is issued, environmental protection is enhanced through supervision and enforcement.

128. It was submitted that the Petitioner failed to show any breach of EMCA, improper motive, abuse of power, or irrationality in the decision to issue the licence, and that undue emphasis had been placed on chronology and that EMCA does not deprive NEMA of jurisdiction to regulate a project merely because preliminary works may have commenced. Environmental law was described as purposive, aimed at prevention, mitigation and control of harm. Reliance was placed on ***Kwanza Estates Limited vs Kenya Wildlife Service [2013]eKLR***.

129. On public participation, it was submitted that as explained in ***Mui Coal Basin Local Community & 15 others vs Permanent Secretary, Ministry of Energy & 17 others (Constitutional Petition No. 305 of 2012)***, the minimum elements of adequate public participation in environmental governance, including reasonable opportunity to be heard, flexibility in methods, access to relevant information, inclusivity of affected stakeholders, and good-faith consideration of views were received.

130. It was submitted that public participation does not require unanimity. Also cited were the decisions of ***Republic v Attorney General & another ex parte Hon. Francis***

Chachu Ganya (JR Misc. App. No. 374 of 2012), and ***Baadi & others v Attorney General & 7 others; National Land Commission & 2 others (Interested Parties); Global Initiative for Economic, Social and Cultural Rights & another (Amicus Curiae) [2018] eKLR***, and ***National Association for the Financial Inclusion of the Informal Sector v Minister for Finance & another [2012] eKLR***.

131. The 10th Respondent rejected allegations that the ESIA reports were unsigned or anonymous, asserting that NEMA relied on official regulatory submissions prepared by licensed experts and verified through its registry, and that such verification attracts judicial deference absent proof of fraud or bad faith.

132. It was also submitted that procurement of ESIA consultants falls outside NEMA's statutory mandate and does not invalidate an environmental licence, and that questions of land ownership and planning approvals fall within separate constitutional and statutory regimes and do not determine the validity of environmental licensing.

133. Finally, it was submitted that conservatory orders are preservatory and not punitive, and upon the issuance of the ESIA licence, the factual and legal landscape was said to have changed materially. It was argued that maintaining the orders now disables environmental supervision and

enforcement, whereas the public interest lies in effective environmental regulation through enforceable licence conditions and continuous oversight. On that basis, the Court was urged to lift the conservatory orders.

134. In support of the plea for conservatory orders, the 1st and 2nd Interested Parties submitted that the Court ought to urgently intervene to prevent an egregious violation of the Constitution, the rule of law, and environmental governance arising from the reckless and unlawful implementation of the Southlands Affordable Housing Project in Lang'ata, Nairobi County.

135. The project, it was submitted, epitomizes impunity, having been initiated on public utility land without the requisite statutory approvals, and being advanced in blatant disregard of environmental safeguards, public participation requirements, and lawful planning processes.

136. It was submitted by the 1st and 2nd Interested Parties that unless conservatory orders are granted, the substratum of the Petition will be irreparably compromised. Reliance was placed on ***Martin Nyaga Wambora vs Speaker of the County Assembly of Embu & 3 Others*** ***CP No. 7 of 2014*** for the proposition that Courts must ensure that transitional motions before them do not render nugatory the ultimate ends of justice.

137. It was contended that physical development on the project site has already commenced, with land clearing and excavation works underway, and that continued construction would make it practically impossible to reverse the alleged violations.

138. Finally, the 1st and 2nd Interested Parties submitted that the public interest overwhelmingly favours the grant of conservatory orders. Further, that the project poses a serious threat to the environment, including the fragile ecosystem of Nairobi National Park, the surrounding residential neighborhoods, and the already strained public infrastructure and social amenities in Lang'ata.

139. Public interest, it was urged, would be gravely undermined if public land was unlawfully alienated and privatized in a manner that facilitated land grabbing and eroded the integrity of planning and environmental laws.

Analysis and Determination

140. Upon consideration of the Motions, responses and submissions, the following issues arise for determination:

i. Whether the Motion of 4th July, 2025 is competent?

ii. What is the consequence of the 10th Respondent recanting its Affidavit?

iii. Whether the Petitioner has met the threshold for the grant of conservatory orders?

I. Whether the Motion of 4th July, 2025 is competent

141. Vide their responses to the present Motion, the Respondents seek to impugn the propriety of the said Motion. The 8th Respondent, contends that the Motion is fatally defective for non-compliance with **Rule 9** of the **Oaths and Statutory Declarations Rules,** on account of unsealed and unmarked annexures which, it is argued, do not constitute admissible evidence.

142. In this regard, the 8th Respondent relied on the Court of Appeal decision in ***Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent) (Civil Appeal E144 of 2021) [2021] KECA 97 (KLR) (Constitutional and Human Rights) (22 October 2021) (Ruling).***

143. Further, the 8th Respondent states that certain annexures, being photographic and electronic material, offend **Section 106B(4**) of the **Evidence Act** for want of a certificate of electronic evidence, rendering them inadmissible. On that basis, it is contended that, in the absence of any competent documentary evidence, the Petitioner has failed at the threshold to lay a factual foundation capable of sustaining the Motion**.**

144. On the other hand, the 1st to 7th Respondents, in their submissions, asserted that the Petition and, by extension, the Motion offended the doctrines of exhaustion and

constitutional avoidance. At the outset, however, it must be observed that these objections are raised for the first time in submissions and do not form part of the averments by any of the Respondents in their respective replying affidavits and Grounds of Opposition.

145. **Rules 9** and **10 of** the **Oaths and Statutory Declarations Rules, Cap 15** Laws of Kenya stipulates that:

> ***"All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification."The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule."***

146. An examination of the Petitioner's Exhibit '0001' shows that, although the annexure is marked, it is neither attested to nor signed and sealed by the Commissioner for Oaths. The question that therefore arises is the legal effect of that omission.In resolving that issue, the Court must first consider whether the strict requirements of **Rules 9** and **10** of the **Oaths and Statutory Declarations Rules** apply with equal force to constitutional litigation.

147. The Petition is brought under **Article 22** of the **Constitution** among other provisions. **Article 22** contemplates that formalities in filing petitions under the

provision are to be kept at minimum. It provides as follows in **Article 22(3):**

> ***"Enforcement of Bill of Rights.(1)...The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—(a)the rights of standing provided for in clause (2) are fully facilitated;(b)formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation"***

148. The Rules anticipated herein are the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 also known as the ***Mutunga Rules.*** **Rule 11** thereof provides as follows:

> ***"11. Documents to be annexed to affidavit or petition***
>
> ***(1)The petition filed under these rules may be supported by an affidavit.(2)If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."***

149. While interpreting the aforementioned rule, the High Court in ***JAK vs SWW [2025] KEHC 5232 (KLR)*** opined that it is not mandatory for a Petitioner to file any affidavit in support of a Petition and that if he or she wishes to rely on any documents or evidence to support his Petition, then it is expected that they would be annexed either to the petition itself directly or to an affidavit duly sworn.

150. In this case, the Petitioner in his affidavit in support of the Motion, adopted the documents annexed to the Petition and as clearly demonstrated, documents annexed to a Petition would be accepted even if they were informal.

151. Recently, the Supreme Court stated as follows in ***Likowa vs Aluochier & 2 others (Petition E008 of 2024) [2025] KESC 25 (KLR) (Election Petitions) (16 May 2025) (Judgment)***;

> ***"15...Rule 11 further presented a scenario where an oral application, a letter or any other informal documentation which disclosed denial, violation, infringement or threat to a right or fundamental freedom may be deemed as a competent petition. A petition may therefore be supported by such documents attached to the petition. 16. The instant court could not fault the superior courts' consideration of the***

documents filed by the 1st Respondent and the reason was obvious; vindication of constitutional rights needed not be formalistic nor technical under the Constitution. That did not in any way reduce the necessity for or remove the often quoted rule that constitutional petitions should not be vague and must be precise and enable ethe court to understand the grievance submitted and proof thereof. Only then could any court fashion a remedy under article 23 of the Constitution."

152. While noting the authority of the Court of Appeal in ***Pharmacy and Poisons Board & another vs Mwiti & 21 others (Civil Appeal E144 of 2021) [2021] KECA 97 (KLR),*** as relied upon by the 8th Respondent, this Court is equally guided by the Supreme Court's pronouncement in ***Likowa vs Aluochier & 2 others (supra),*** which underscores a preference for a less formalistic and more purposive approach to constitutional litigation, provided that the pleadings are sufficiently precise to disclose the alleged violation and enable the Court to fashion an appropriate remedy under **Article 23** of the **Constitution.**

153. In light of the foregoing, the Court is satisfied that the impugned documents, having been adopted by the Petitioner and forming part of the Petition within the

meaning of **Rule 11** of the Mutunga Rules, cannot be invalidated solely on account of non-compliance with **Rule 9** and **10** of the Oaths and Statutory Declarations Rules.

154. Further, it is settled law that submissions do not constitute pleadings and cannot be used to introduce new issues not founded on the pleadings or evidence. Any plea so introduced is therefore procedurally improper and cannot be entertained by the court.

155. On the objection raised concerning the admissibility of photographic and electronic material on the ground that it offends **Section 106B(4)** of the **Evidence Act**, it is necessary to first consider the scope of the Evidence Act itself. **Section 2** of the **Evidence Act** provides as follows:

> "**2. Application**
>
> **(1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.**
>
> **(*2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.*"**

156. The import of this provision is that the application of the Evidence Act to affidavits and Court proceedings is expressly made subject to the provisions of other statutes and to the applicable rules of Court. In constitutional

litigation, those rules are the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules). As already observed, the Mutunga Rules are designed to minimize procedural formalities and do not contemplate the strict evidentiary requirements characteristic of ordinary civil proceedings. Accordingly, the operation of **Section 106B(4)** of the **Evidence Act** in constitutional petitions must be understood within that more flexible procedural framework.

157. In the circumstances, the Court is persuaded that the constitutional regime under **Article 22(3),** as interpreted by the superior courts, favours a more substantive rather than a formalistic approach to evidentiary material. Expunging the impugned annexures at this stage would elevate procedural form over constitutional substance and would undermine the Court's duty to facilitate, rather than hinder, access to justice. Accordingly, the Court declines the invitation to strike out or expunge the said annexures.

158. In the foregoing, we find that the Notice of Motion dated 4th July 2025 competent.

II. What is the consequence of the 10th Respondent's Director General recanting his Affidavit?

159. The record has two affidavits sworn by the Director General of the 10th Respondent, Mamo B. Mamo. In his first affidavit

sworn on 10th December 2025, he expressly admitted that the subject project had not been subjected to an Environmental Impact Assessment (EIA) as required under section 58 of the Environmental Management and Co-ordination Act (EMCA). Subsequently, by a Supplementary Affidavit sworn on 16th December 2025, he sought to retract that position, asserting that the earlier affidavit bore an electronic signature which he did not personally affix.

160. In the said Supplementary Affidavit, Mr. Mamo adopted a wholly contradictory position, now stating that the 1st Respondent had submitted an Environmental and Social Impact Assessment (ESIA) report on 21st September 2025 and that meaningful public participation had been conducted between 7th and 11th June 2025. He urged the Court to adopt this latter position as representing the stance of the 10th Respondent.

161. It is trite that an affidavit, once sworn and filed, constitutes evidence before the Court. Evidence is the lifeblood of adjudication and must be presented with clarity, consistency, and credibility. Whereas herein, a deponent swears two affidavits containing mutually inconsistent averments on material facts, they become self-contradictory and undermines their own probative value.

162. As explained in the Nigerian case of ***Atoshi & Others vs Agbu & Others (2018) LPELR-44477 (CA),*** **Omoleye JCA** :

> ***"It is also the law that an affidavit is self-contradictory if information contained in it states inconsistent facts thereon. Hence, once an affidavit is self-contradictory, it needs not be challenged by the other party, as whatever facts the affidavit intends to establish would have been destroyed by the contradictions."***

163. Further still, by electing to file a "supplementary affidavit", the 10th Respondent implicitly acknowledged the validity of the earlier affidavit. Had the first affidavit truly been unauthorized or a nullity, the proper course would have been to disown it formally and replace it with a fresh Replying Affidavit. Instead, the deponent merely sought to "*clarify and correct*" what he now termed the factual position.

164. As explained by the Court of Appeal of Tanzania in ***the Registered Trustees of St. Anita's Greenland Schools (T) & Others v Azania Bank Limited, Civil Application No. 168 of 2020 [2022] TZCA 334,*** :

> ***"It is our considered view that, like its name, a supplementary affidavit can only be filed to supplement a proper existing affidavit…"***

165. While the Court cannot speculate as to the motivation behind this turn around, an affidavit cannot be casually recanted on tenuous grounds. The allegation that an electronic signature was appended on an affidavit without the deponent's authority within an institution of the stature of the 10th Respondent is, without more, implausible.

166. No evidence was tendered to show that any complaint was lodged with investigative authorities regarding the alleged misuse of the deponent's signature and/or any internal disciplinary process as a consequence thereof.

167. Even assuming, for argument's sake, that the Supplementary Affidavit was to be accepted, it does not displace the evidential weight of the 10th Respondent's own letter dated 26th March 2025, in which it expressly acknowledged that its EIA register confirmed that the subject project had not been subjected to an EIA in accordance with **Section 58** of **EMCA.** That contemporaneous documentary admission remains uncontroverted.

168. In light of the foregoing, this Court finds that the affidavits sworn by the Director General of the 10th Respondent are materially self-contradictory and therefore unreliable on the central issue of EIA compliance. The attempted retraction through a supplementary affidavit does not cure the inconsistency, nor does it displace the 10th Respondent's own written admission of non-compliance.

III. Whether the Petitioner has met the threshold for the grant of conservatory orders?

169. A conservatory order is a vital constitutional tool in the enforcement of the Bill of Rights. It is an equitable and interlocutory remedy, but one that is distinct from an ordinary civil injunction, as it is grounded in public law and is directed at preserving constitutional values and forestalling the violation of fundamental rights pending the final determination of a matter.

170. The principles governing the grant of conservatory orders have been consistently developed and articulated in the jurisprudence of our superior courts. In ***Munya vs Kithinji & 2 others (Application 5 of 2014) [2014] KESC 30 (KLR) (2 April 2014) (Ruling),*** the Supreme Court noted as follows:

> *"**Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory stay orders therefore are not, unlike interlocutory injunctions, linked to such private party issues as "the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the Applicant's case for***

orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

171. The conditions for consideration in granting conservatory orders were persuasively set out in ***Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others (2015) eKLR*** as follows:

> ***"a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.***
>
> ***b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.***
>
> ***c) Thirdly, the Court should consider whether, if an interim conservatory orders is not granted, the Petition or its substratum will be rendered nugatory.***
>
> ***d) The final principle for consideration is whether the public interest will be served or prejudiced by***

the decision to exercise discretion to grant or deny a conservatory order."

172. The Court is also alive to the fact that in determining whether or not to grant conservatory orders, it must be careful not to make a final determination so as not to prejudice the main Petition. As explained in ***Association of Manufacturers & 2 others vs Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR***:

> ***"In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered***

functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."

173. The starting point is to determine whether the Petitioner has established a *prima facie* case with a likelihood of success. The parameters of what constitutes a prima facie case were aptly expressed in the case of ***Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others (supra)*** thus:

> ***"It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis…"***

174. Further still, the Court in ***Amir Lodges Ltd & another v Mohammed Omar Shariff & another [2022] KEHC 26896 (KLR)*** cited the case of ***Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43*** where it was explained that a decision as to whether a prima facie case has been met is not arrived at by tossing a coin or waving a magic hand or raising a green flag. A Court must undertake an intellectual exercise and consider without

making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

175. The Petitioner challenges the Government's ongoing development of social housing and associated infrastructure in Southlands, Lang'ata Constituency (the Southlands Affordable Housing Project). He contends that the project commenced and continues without prior compliance with constitutional and statutory requirements relating to environmental protection and public participation.

176. In particular, he asserts that the development was initiated without a valid EIA license, Environmental and Social Impact Assessment (ESIA) and without meaningful public participation. He further avers that the project site constitutes public land reserved as a transport corridor and buffer zone, rendering the development unlawful *ab initio.*

177. The Petitioner alleges that excavation works have already commenced and are causing vibrations affecting neighbouring residential estates, namely Southlands, Park 1, Civil Servants, Uhuru Gardens and Maasai Estates. With respect to Lot 3, he contends that the Southern Bypass buffer zone has been encroached upon and that excavated material has been piled against boundary walls, resulting in excessive dust and noise, compromised security, and diminished residential amenity.

178. He further maintains that the proposed development will overburden the already inadequate water and sewerage infrastructure in Lang'ata, thereby posing public health risks. The envisaged high-rise buildings are said to be incompatible with the surrounding low-density neighbourhoods, to intrude on the residents' privacy, and to lack sufficient mitigation measures against air and noise pollution, loss of green spaces, traffic congestion, and broader environmental degradation.

179. In his view, the project is incompatible with the principle of sustainable development and, unless restrained, will result in irreversible environmental and social harm. These concerns are echoed by the 1st and 2nd Interested Parties, who support the position that the Petition discloses sufficient grounds for conservatory relief.

180. In support of his case, the Petitioner relied on correspondence addressed to NEMA dated 21st March 2025 and NEMA's response of 26th March 2025 confirming that no EIA had been undertaken at that time; project signboards for Lots 3 and 5; the Southlands Development Plan indicating the transport corridor and buffer zone; a Master Plan for the project; a letter by LASERA dated 8th March 2025; correspondence from the Kenya Civil Aviation Authority dated 8th May 2025 raising aviation safety concerns; and

proceedings before the National Environment Tribunal in Tribunal Case No. 6 of 2025.

181. The 1st to 7th Respondents, on their part, assert that the project is being undertaken in furtherance of the State's obligation under **Article 43(1)(b)** of the Constitution to progressively realise the right to accessible and adequate housing. They contend that, as a government initiative, the project is governed by the Constitution and relevant statutes including the Land Act, the Sectional Properties Act and the Affordable Housing Act.

182. They deny that the land constitutes a noise buffer zone, maintaining that the surrounding area already comprises residential developments, including government-constructed housing. They further state that the project is publicly funded and that any stoppage would expose the State to substantial contractual penalties and interest arising from idle plant and labour, with the attendant burden ultimately falling upon taxpayers.

183. According to the 1st to 7th Respondents, and as supported by the 10th Respondent, an Environmental and Social Impact Assessment was undertaken and the requisite documentation submitted to NEMA on 21st September 2025.

184. It is the 1st – 7th Respondents' case that prior to the foregoing, public participation had been undertaken on 7th and 11th June, 2025. They state that following review of the

Environmental Impact Assessment Project Report, NEMA issued Environmental Impact Assessment Licence No. NEMA/EIA/PSL/0001425 (Application Reference No. NEMA/ENVIS/SR/00096) on 16th December 2025 authorising implementation of the project subject to conditions. They further attribute the delay between submission and issuance of the licence to administrative and technical challenges within NEMA's online payment system.

185. The 1st – 7th Respondents maintain that all construction works were undertaken in compliance with the law and that public interest demands that the project proceed. They rely on a Gazette Notice reserving the land for slum upgrading. They adduced into evidence online ESIA submissions, ESIA reports for lots 2, 3, 4 and 5, NEMA license-NEMA/EIA/PSL/0001425 and public participation records.

186. On their part, the 8th and 9th Respondents contend that the Petitioner has not demonstrated any factual or legal basis for the alleged violations and that public projects ought not to be impeded on the basis of unsubstantiated claims. The 18th Respondent (Civil Aviation Authority) confirms that height approvals were granted following aeronautical studies and stakeholder consultations. The 12th Interested Party invokes the State's housing mandate under **Article 43(1)(b)** and asserts that the socio-economic benefits of the project outweigh the risks alleged.

187. The right to a clean and healthy environment under **Article 42** of the **Constitution** is a justiciable and enforceable right. It is closely linked with the State's obligations under **Article 69** and the precautionary and preventive principles of environmental governance. As held in ***Peter K Waweru vs Republic [2006] eKLR,*** environmental protection is integral to the enjoyment of other fundamental rights and freedoms.

188. In this context, the Petitioner's grievance implicates not only **Article 42,** but also the constitutional imperatives of public participation under **Article 10** and sustainable development under **Article 69** as well as statutory breach of EMCA and attendant regulations. He alleges that the cumulative effects of excavation and construction, undertaken without prior environmental assessment or consultation, have resulted in dust, noise, vibration damage, encroachment into a transport corridor, strain on water and sewer infrastructure, and aviation safety concerns.

189. The evidence placed before the Court shows that activities on the project were already underway by March 2025. NEMA's own correspondence of 26th March 2025 confirmed that, as at that date, the project had not been subjected to an environmental impact assessment.

190. The ESIA Reports relied upon by the Respondents are dated August 2025, and the licence was issued on 16th December

2025, after construction had already commenced. Indeed, affirming this position, the 10th Respondent contended that the EMCA does not deprive the Authority of jurisdiction to review an ESIA study report submitted after *preliminary works* have begun.

191. Further, upon examination of the ESIA Reports for Lots 2, 3, 4 and 5 prepared by REDSSED Company Limited, the record discloses material inconsistencies. To begin with, the reports are not signed by either the lead expert of the project or the proponent. There are equally gaps in the documentation of public participation.

192. For Lot 3, the stakeholder engagement section refers to meetings held at "XXX", without identifiable venues or verifiable minutes. For Lot 2, public barazas are alleged to have been conducted, yet no supporting evidence of notices, attendance or proceedings is annexed.

193. Lot 4 similarly lacks documentary proof of consultations, while the attendance list produced for Lot 5 refers to *"Mathare Constituency Lots 1 and 2"*, raising doubts as to its relevance to the Southlands project, which is situated in Lang'ata Constituency. No report has been attached with respect to Lot 1.

194. **Regulation 17** of the **Environmental (Impact Assessment and Audit) Regulations, 2003** prescribes mandatory steps for public participation in an EIA study,

including publication of notices, holding of at least three public meetings, and proper recording of views received. **Section 58 of EMCA** further requires that an environmental impact assessment study be undertaken and approved prior to commencement of any project listed in the Second Schedule.

195. **Regulation 18(2)** of the **Environmental (Impact Assessment and Audit) Regulations, 2003** additionally requires that an ESIA study report be signed by both the proponent and the environmental impact assessment experts involved in its preparation. Compliance with these provisions is not a matter of technical formality but a substantive safeguard intended to prevent environmental harm before it occurs.

196. While the Respondents place considerable emphasis on the public funding of the project, the contractual exposure said to arise from delay, and the broader social value of delivering affordable housing, those considerations, however weighty, do not displace the threshold question whether the project was commenced and is being implemented in accordance with the Constitution and the environmental governance framework.

197. At this stage, the material placed before the Court, including the uncontested fact that construction activities were underway by March 2025, NEMA's own correspondence

confirming that as at 26th March 2025, no EIA had been undertaken, the subsequent issuance of the licence on 16th December 2025, and the apparent gaps and inconsistencies in the ESIA documentation and public participation record discloses a prima facie case of non-compliance with statutory and constitutional environmental safeguards.

198. Further still, the EIA licence describes the project as comprising "*over 10,000 units*," without specifying the precise number of housing units to be constructed. Such indeterminacy undermines the very purpose of an environmental impact assessment, as the scale of development is a fundamental parameter against which potential impacts are identified and mitigation measures calibrated. Without a defined project size, it is not possible to meaningfully assess the adequacy of proposed mitigation measures or to evaluate the proportionality of environmental safeguards.

199. In the Court's view, these matters go beyond mere suspicion or political contestation and disclose an arguable case of constitutional and statutory breach touching on **Articles 10, 42** and **69** of the **Constitution** and as well as EMCA and the attendant regulations.

200. Without making final findings, the Court is satisfied that the Petitioner has demonstrated, on the face of the record, a *prima facie* case with a likelihood of success sufficient to

warrant further interrogation at the substantive hearing of the Petition.

201. Turning to the question whether the Petitioner will suffer damage or detriment if conservatory orders are not granted, the Court is guided by the principle that such prejudice must be real, imminent and demonstrable, and not speculative or conjectural. As stated in ***Okiya Omtatah Okoiti vs Parliamentary Service Commission; National Assembly & 4 others (Interested Parties) [2021] eKLR***, the threatened violation must be so apparent that the Court can unmistakably arrive at an interim finding that rights are in jeopardy.

202. Similarly, in ***Centre for Rights Education and Awareness (CREAW) & Another vs Speaker of the National Assembly & 2 Others [2017] eKLR,*** it was held:

> ***"...a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

203. In the present case, the Southlands Affordable Housing Project entails the construction of *over 10,000* units as set

out in the EIA License and attendant infrastructure on land alleged to form part of a transport corridor and buffer zone. By its very nature, such a large-scale project is transformative and, once substantially executed, would be incapable of being reversed without enormous financial, social, and environmental cost.

204. In those circumstances, the Court is satisfied that the risk of prejudice is not merely speculative but inherent in the magnitude of the project itself, and that the continuation of construction pending full compliance with the environmental and constitutional framework carries the real possibility of rendering the Petition nugatory.

205. The final aspect regards Public Interest which is defined by the **Black's Law Dictionary 10th Edition** at page 1425 as:

> ***"The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation."***

206. In the present case, two competing dimensions of public interest arise. On the one hand, the Respondents emphasise the importance of the Affordable Housing Programme in advancing the constitutional imperative under **Article 43(1)(b)** to progressively realise the right to accessible and

adequate housing, and the socio-economic benefits attendant to the project, including job creation and urban development.

207. On the other hand, the Petitioner invokes the equally weighty public interest in safeguarding public land, transport corridors, aviation safety, and the right to a clean and healthy environment under **Article 42,** together with the need for strict adherence to the Environmental Management and Coordination Act (EMCA) and the principles of public participation and sustainable development.

208. Having regard to the material on record, the Court is persuaded that public interest is not served merely by the continuation of construction at all costs, but by ensuring that development proceeds strictly within the confines of the Constitution and the law. A project of the magnitude of the Southlands Affordable Housing Project, if undertaken without demonstrable prior compliance with the mandatory environmental licensing regime and without resolving serious questions concerning the character of the land and the attendant public safety considerations, risks undermining the very constitutional order it purports to advance.

209. Public interest therefore tilts in favour of upholding the rule of law, environmental protection, and accountable governance, rather than permitting the entrenchment of a potentially unlawful status quo. In those circumstances, the Court finds that the broader and enduring public interest lies

in ensuring that any large-scale public housing initiative is implemented in a manner that respects constitutional safeguards on land use, environmental protection, and public participation. Such an approach preserves the integrity of public institutions, protects communal resources, and secures the long-term welfare of the populace.

210. In the end, the Court makes the following final finding:

a. The Notice of Motion dated 17th December, 2025 is hereby dismissed.

b. The Notice of Motion dated 4th July, 2025 succeeds in the following manner:

i. A conservatory order does hereby issue restraining the Respondents, their agents, servants, developers, contractors, assigns or any other persons acting under their authority, or howsoever acting, from continuing with the excavation, development and construction of social housing and associated infrastructure in Southlands, Langata Constituency, Nairobi County under Contract No. MLPWHUD/SDHUD/SUD/382/2023-2024- LOT NUMBERS 1, 2, 3, 4 & 5 which is popularly known as the Southlands

Affordable Housing Project pending the hearing and determination of the Petition.

c. The Officer Commanding Station (OCS), Langata Police Station to provide all the necessary support required in execution of the orders granted.

d. The hearing of the Petition shall be expedited.

e. Costs of the two applications shall be in the cause.

Dated, signed and delivered virtually at Nairobi this 5th day of February, 2026

.....

O. A. Angote

Principal Judge

.....

C. A. Ochieng

Judge

.....

C. G. Mbogo

Judge

In the presence of:

Mr. Okiya Omtatah, Petitioner

Mr. Issa, Nura and Allan Kamau for 1st – 7th Respondents

Mr. Atalo for 8th Respondent

Mr. Karimu for 10th Respondent

Ms. Jelegat for 9th Respondent

Mr. Ochiel for 1st and 2nd Interested Parties

Ms Getugi for 9th Interested Party

Mr. Otieno for 11th Interested Party

Mr. Najojo for Peter Wanyama for 12th Interested Party

Mr. Ododa for 17th Interested Party

Mr. Tallam for Mogaka for 18th Interested Party