REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC JUDICIAL REVIEW APPLICATION NO. E001 OF 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010: ARTICLES 47(1) & (2); 42, 69 & 70

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT, 1999

AND

IN THE MATTER OF THE PHYSICAL LAND USE AND PLANNING ACT, 2019

AND

IN THE MATTER OF THE NAIROBI CITY COUNTY DEVELOPMENT CONTROL POLICY, 2022

AND

IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

AND

IN THE MATTER OF THE CONSTRUCTION OF MULTI-DWELLING DEVELOPMENT BY TREEHOUSE FIFTY-EIGHT LIMITED ALONG PEPONI RISE ROAD IN VIOLATION OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010,

THE PHYSICAL AND LAND USE PLANNING ACT 2019, THE PHYSICAL AND LAND USE PLANNING (GENERAL DEVELOPMENT PERMISSION AND CONTROL) REGULATIONS, 2021, THE PHYSICAL AND LAND USE PLANNING (BUILDING) REGULATIONS, 2021, THE NAIROBI CITY COUNTY ZONING GUIDE AND THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003)

BETWEEN

NORTHERN BLOCK RESIDENTS LTD…… APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY …… 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT ……. 2ND RESPONDENT

TREEHOUSE FIFTY-EIGHT LIMITED …… 3RD RESPONDENT

JUDGMENT

Background

1. Vide a Notice of Motion dated 30th September, 2024, the Applicant seeks the following reliefs:

i. An order of Certiorari does issue to remove into this Court and quash forthwith the

Environmental Impact Licence Number NEMA/EIA/PSL/22271 issued on 21st October, 2022 issued by the 1st Respondent to the 3rd Respondent.

ii. ***An order of certiorari does issue to remove into this Court and quash forthwith the Approval of Development Permission with Reference Number PLUPA-COU-000269 and dated 28th July, 2022 granted by the 2nd Respondent.***

iii. ***An order of prohibition does issue against the 3rd Respondent from commencing with, carrying out or continuing with any construction of multi-dwelling residential blocks on Land Reference Number 1870/VIII/112 along Peponi Road.***

iv. ***A declaration does issue that the 3rd Respondent's Environmental Impact Assessment Report with application reference number 35579 and dated 15th September, 2022 and Environmental Impact Assessment Licence Number NEMA/EIA/PSL/22271 issued on 21st October, 2022 by the 1st Respondent violates the provisions of Regulations 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and the provisions of Article***

47 of the Constitution of Kenya 2010 and the Fair Administrative Action Act, 2015.

v. ***A declaration does issue that the 2nd Respondent's decision to issue the Approval of Development Permission dated 28th July, 2022 to the 3rd Respondent for construction of multi-dwelling high density residential blocks violates the 2nd Respondent's Zoning Guide for Nairobi County, the provisions of Article 47 of the Constitution of Kenya, 2010, the Fair Administrative Action Act 2015, Section 58 (7) and (8) of the Physical and Land Use Planning Act 2019 and Regulation 15(2) of the Physical and Land Use Planning (Development Permission and Control) General Regulations.***

vi. ***The costs of this application be provided for.***

2. The application is premised on the grounds on the face of the Motion and supported by averments of Tom Kabuga, the Chairman of the Board of Directors of the Applicant as set out in his Supporting Affidavit of 30th September, 2024 as well as his Verifying Affidavit and Statutory Statement dated 31st January, 2024.

3. He deponed that the Applicant is a company limited by guarantee duly registered under the auspices of the **Companies Act, 2015** and is an umbrella organization

formed by Resident Associations (including Peponi Road Residents' Association, hereinafter Residents' Association) on the half acre zone on the Northern Block.

4. He deposed that its main objective is to represent the collective interests of the residents that own properties in areas that pursuant to the 2nd Respondent's Development Control Policy and Zoning Guide are residential areas that have a required minimum acreage of half an acre comprising Peponi Road, Kitusuru Road, Gigiri Road, Muthaiga, Spring Valley, Thigiri and Kyuna Zones.

5. According to Mr. Kabuga, on or around April 2023, he noticed some activity within a plot near Getathuru River. This, despite the fact that there was no visible board, sign or any other information displayed on the exterior of the property and that as a concerned resident, he made inquiries and was informed that the personnel on the ground were involved in the construction of a multi-dwelling residential block.

6. The Applicant’s Director deposed that on or about 15th May, 2023, a signage was erected outside the 3rd Respondent’s property, which provided details that enabled further inquiry at the offices of the 1st and 2nd Respondents and that on 19th May 2023, Anjarwalla & Khanna LLP (A&K), who were then acting as their Advocates, wrote to the 1st Respondent requesting to peruse the relevant file and to make copies of documents issued in relation to the ongoing developments.

7. It was deposed that NEMA acknowledged receipt of that letter on 23rd May 2023; that thereafter, on 7th June, 2023, Ms. Alice Kamau, an Advocate at A&K, informed him that she had visited NEMA's offices, where she was advised at the Environmental Impact Assessment Desk that, pursuant to Legal Notice No. 31 of 2019, NEMA classifies projects according to their risk factors, and that the project in question had been classified as a medium-risk project and the file was therefore located at the 2nd Respondent's office in Nyayo House.

8. It was deposed that from the contents of the EIA Report, which included the approval of development permission (Form PPA 2), and the building plans, it was evident that the 1st and 3rd Respondents had deliberately failed to comply with the law for several reasons. First, Nairobi County has an applicable Zoning Guide, under which the general area of Peponi Road falls within the Kitisuru Area, classified as Zone 13B; that only low-density residential one-family houses are permitted within this zone and that the construction of a multi-dwelling residential block was in clear violation of the Zoning Guide.

9. Second, it was deposed, the PPA 2 approval was dated 28th July 2022 and expressly stated that it was subject to "compliance with approved zoning policy" and that since the construction contravened the zoning policy, the approval is, in his view, unlawful.

10. Third, it was deposed, under the guise of public participation, the 3rd Respondent's EIA consultants, Messrs. iPlan Consult (Intl) Ltd, submitted sixteen questionnaires labelled "*Stakeholder Consultation Questionnaire*" to sixteen individuals and that there was no consultation with the Applicant, particularly members of the 2nd Applicant whose property lies in close proximity to the suit property, near the Getathuru River, and who stood to be most affected by the proposed development.

11. As advised by Counsel, he urged, **Sections 58(7)** and **(8)** of the **Physical and Land Use Planning Act, 2019 (PLUPA)** and **Regulation 15(2)** of the **Physical and Land Use Planning (Development Permission and Control) (General Regulations), 2021** require the erection of appropriate signage on the exterior of a building prior to commencement of construction, as notice to the public of the details of the development.

12. It is the Applicant's case that the 3rd Respondent deliberately failed to erect any such signage on the suit property until several months after construction had commenced, with the intention of allowing time to lapse and frustrating any challenge to the development.

13. It was further deponed that although the Environmental Impact Assessment Licence (*EIA Licence*) was issued on 21st October 2022, construction, based on observations by

residents he represents, only commenced around April 2023; that further, contrary to **Regulations 17, 21** and **22** of the **Environmental (Impact Assessment and Audit) Regulations,** no public meetings or hearings were conducted by the 1st Respondent and that this omission was deliberate and intended to shield the 3rd Respondent's project from challenge before the Tribunal and from any suspension of the EIA Licence.

14. Also, it was contended by the Applicant, the 3rd Respondent failed to publicize the application for development permission as required under **Sections 58(7)** and **(8)** of the **PLUPA** and **Regulation 15(2)** of the **Physical and Land Use Planning (Development Permission and Control) (General Regulations), 2021** with the result that the approval only came to the Applicant's attention after the statutory fourteen-day period had lapsed.

15. In the circumstances, and with alternative remedies no longer available, he explained, the Applicant approached this court, which has jurisdiction to determine the serious environmental and constitutional issues raised, including alleged violations of the right to fair administrative action and the right to a clean and healthy environment.

16. The Applicant's Director averred that if the construction was allowed to proceed, it would have an adverse impact on Peponi Road and its environs. Peponi Road, he noted, falls within the greater Karura Forest area, a fact which the court

should take judicial notice of and that Karura Forest is one of the few preserved green areas within Nairobi County, and permitting dense developments along Peponi Road would diminish tree cover and replace green spaces with concrete structures.

17. He asserted that **Articles 42** and **69** of the **Constitution** impose a duty on the State to protect the environment and to ensure the maintenance of a minimum tree cover of ten per cent and that allowing the impugned construction to continue would, in his view, violate the Zoning Guide and jeopardize Nairobi County's tree cover to the detriment of future generations.

18. He further observed that the suit property lies in a valley abutting the Getathuru River; that the construction of a multi-dwelling residential block adjacent to a river poses potentially serious environmental consequences and that the court should take judicial notice of the widespread pollution of water bodies, including the Nairobi River, and to consider the adverse impact that the proposed development, likely to attract significant human activity, would have on the Getathuru River.

19. Finally, he stated that the Applicant and other residents of Peponi Road acquired and occupied their properties in reliance on the zoning regime enforced by the 2nd Respondent and that permitting the impugned development

would irreversibly depreciate property values in the area, including that of the Applicant.

20. He added that Peponi Road is a narrow single-lane road with inadequate traffic infrastructure, and that the proposed development would inevitably increase traffic, leading to congestion and heightened risks to both motorists and pedestrians.

The 2nd Respondent's response

21. The 2nd Respondent through its Acting Deputy Director and Enforcement, Mr Wilfred W Masinde swore a Replying Affidavit on the 18th March, 2025. He deponed that pursuant to the Physical and Land Use Planning Act, 2019, and the Nairobi City County Development Control Policy, 2022, the 2nd Respondent is mandated to regulate land use and development within Nairobi County.

22. He explained that the 3rd Respondent, applied for development approval for a multi-dwelling project along Peponi Rise Road; that the 2nd Respondent subjected the application to all requisite statutory processes, including public participation, zoning compliance, and environmental impact assessment and that the development plans were duly reviewed by the relevant departments within the Nairobi City County Government to ensure compliance with the Physical and Land Use Planning (General Development Permission

and Control) Regulations, 2021, and the Nairobi City County Zoning Guide.

23. Further, it was deposed, public participation was conducted in line with **Article 10** of the **Constitution of Kenya, 2010**, and the Physical and Land Use Planning Act, 2019, with adequate notice given to stakeholders, including residents, and their feedback duly considered.

24. Mr. Masinde deponed that **Section 7** of the **Fair Administrative Act** sets out the grounds upon which the court may review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes.

25. He explained that these grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence as stated in ***Council for Civil Services Unions -vs- Minister for Civil Service (1985) AC 374 at 401D***.

26. According to Mr. Masinde, the 3rd Respondent applied for a business permit, change of user, and development

permissions from the County Government of Nairobi under the Physical Land Use and Planning Act from single dwelling residential units to multi dwelling units on Plot No. 1870/VII/112 off Peponi Road, Westland's Sub-County, Nairobi County which they received.

27. He deposed that the aforesaid application for change of user was processed, approved and issued on 28th July 2022 and the statutory obligation placed on the County Government to publish a notice of change of user in at least two newspapers were adhered to and that notices were published in the Daily Standard newspaper and also at the site. Ultimately, he stated, public participation was undertaken and **Section 58(7)** of the **PLUPA** was complied with.

28. Mr. Masinde averred that it is his belief that the 3rd Respondent satisfied all legal and regulatory requirements in undertaking the project; that their assessment met the legal threshold and was in compliance with **Section 61(2)** of the **PLUPA** and that consequently, the Motion is unmerited and should be dismissed.

29. The 3rd Respondent, through its Director, Amjad Abdul Rahim, swore a Replying Affidavit on 18th March 2025. He also intimated his reliance on the earlier Affidavits of 15th April, 2024 and 1oth July, 2024.

30. It was his deposition vide the Affidavits that the 3rd Respondent was incorporated on 18th June 2019 under the

name Treehouse Fifty -Eight Limited and subsequently changed its name to Treehouse Forty-Eight Limited pursuant to a certificate of change of name dated 2nd February 2023 and that the 2nd Respondent is the duly registered owner of Land Reference Number 1870/VIII/112 situated along Peponi Road, Nairobi, upon which it is constructing a development consisting of 48 high-end residential units with ancillary facilities.

31. Mr. Rahim at the outset deponed that this court has no jurisdiction to entertain the matter on account of the doctrine of exhaustion, the Applicant having failed to approach the National Environment Tribunal, and that the Motion is statutorily barred on account of **Section 9(3)** of the **Law Reform Act** and **Order 53 Rule 2** of the **Civil Procedure Rules.**

32. According to an official search obtained on behalf of the 3rd Respondent on 12th February 2024, he stated, the deponent of the Applicant's Verifying Affidavit, Tom Muchiri Kabuga, was at that time the sole director of the Applicant. Consequently, there could not have been any "Board of Directors" of the Applicant, nor could the Applicant have been the "chairman" of such a board at the time the suit was filed, as alleged. Similarly, it was deposed, there is no 2nd Applicant as alluded to in the Motion.

33. It was deposed by the 3rd Defendant's Director that the official search showed that the Applicant is a private limited

liability company owned by two members or shareholders, and that describing it as an “umbrella organisation” was deliberately misleading; that being a private company, it is a separate and distinct legal entity from its shareholders or members and cannot lawfully claim to "represent" its shareholders since this is not a representative suit and that the Applicant is a shell company whose members’ identities have not been revealed.

34. He further averred that no evidence was adduced showing that the Applicant or its members are residents or property owners along Peponi Road or its neighborhood, or that the Applicant represents the majority of residents living in proximity to the property. In any event, he urged, the Motion seeks orders on behalf of one private entity against another private entity, which orders can only be sought or granted in an ordinary suit and not through judicial review proceedings.

35. He deponed that in obtaining the EIA Licence, the 3rd Respondent followed due process under the Environmental Management and Co-ordination Act (EMCA)and the Environmental (Impact Assessment and Audit) Regulations; that an EIA report was prepared by an expert duly authorized by the 1st Respondent, after which the report was published in the Gazette and circulated in a newspaper by the relevant authority and that the 3rd Respondent also undertook public participation as required by law.

36. Immediately upon issuance of the EIA Licence on 21st October 2022, Mr. Rahim noted, the 3rd Respondent commenced works on the property, beginning with excavation, after erecting the requisite signage at the gate. He averred that the 2nd Respondent would not have permitted excavation works to proceed in the absence of such signage, and that excavation commenced in early November 2022. He annexed vouchers, receipts and invoices demonstrating when the excavation works began.

37. The 3rd Respondent's Director denied the allegation that construction commenced in April 2023 or that the signage was erected on or about 15th May 2023. He maintained that the EIA Licence was duly issued following full compliance with the law and regulations. He further asserted that the document relied upon by the Applicant and referred to as the "Zoning Guide", formally titled the Nairobi City County Development Control Policy, has not been approved, passed or adopted by the 2nd Respondent and is therefore neither applicable nor enforceable. He referred to correspondence from the 2nd Respondent confirming that position.

38. The 3rd Respondent's Director explained that the PPA 2 referred to by the Applicant was an approval for change of user issued by the 2nd Respondent, and that the "approved zoning policy" referenced therein could not be the unapproved Zoning Guide relied upon by the Applicant.

Accordingly, the allegation that the development was illegal for violating zoning policy was, in his view, unfounded.

39. He denied the assertion that the 3rd Respondent failed to publicize the application for change of user or that the Applicant was locked out of the statutory fourteen-day window. He stated that the 3rd Respondent duly complied with the Physical and Land Use Planning Act and its Regulations by filing the application with all requisite documents, publishing a notice in a widely circulated newspaper, and erecting a site notice on the property. He added that no objections were lodged within the prescribed period, and that the change of user was therefore lawfully approved.

40. He further deponed that the Applicant was incorporated on 9th September 2022, by which time consultation and public participation for purposes of the EIA had already been completed. He noted that only two of the sixteen sample questionnaires annexed to the EIA Report were dated after the Applicant's incorporation, making it impossible for the Applicant to have been consulted during a process conducted before it came into existence. In any event, he stated, the Applicant is neither a resident nor a property owner near the site, and there was no obligation to consult it.

41. He described as untrue the allegation that the 3rd Respondent deliberately failed to erect signage until months after construction began, stating that works commenced in

early November 2022 after all required signage had been installed. He added that the Applicant's claim to have become aware of construction in April 2023 demonstrated that it was not resident in the area. He further denied any failure to conduct public participation, stating that the scale of the development, 48 residential units did not require public hearings under the applicable regulations, as confirmed by the 3rd Respondent's EIA consultant.

42. It is the 3rd Respondent's case that there had been no breach of any legal or regulatory requirements by any of the Respondents, and that the nature of the development did not require separate publicization of the application for approval to the 2nd Respondent, as confirmed by the project architects.

43. According to Mr. Rahim, Peponi Road is not within Karura Forest, and neither is the suit property; that the Applicant has not produced any evidence to support claims that the development will have adverse environmental impacts on Peponi Road and its environs, has breached **Articles 42** or **69** of the **Constitution**, or will lead to loss of tree cover and that the assertions are exaggerated and unsupported rhetoric.

44. He denied allegations of pollution or adverse impacts on the Getathuru River arising from the development stating that the 3rd Respondent sought and obtained directions from the Water Resources Authority, which inspected the property, demarcated a ten-metre riparian reserve, and directed that

no construction takes place within that area. He confirmed that the development fully complied with those directions and did not encroach on the riparian reserve.

45. He further stated that the development was not the only multi-storey residential project in the area, citing several comparable developments, *to wit* Karura Springs Suites; Tree Top Forest Apartments; Sage Peponi Homes; Oakland Residences; Peponi View Villas; Ivory Apartments; Aum Residency; Athithi High-rise Apartments; 33 Chimes Apartments; Silvermist Residency; and Sherli Court, among others. He questioned why the Applicant had singled out the 3rd Respondent.

46. According to the 3rd Respondent's Director, the neighbouring property owners supported the development and had indicated that they had never heard of the Applicant. He further stated that an independent environmental expert engaged by the 3rd Respondent had conducted a survey confirming that the Applicant had materially exaggerated any potential adverse environmental impact.

47. Finally, he deponed that stopping the development would cause immense prejudice and irreparable loss to the 3rd Respondent, noting that 18 of the 48 units had already been sold and that over Kshs. 450 million had been expended on the project, whose total value exceeds Kshs 3.7 billion. He asserted that the Applicant lacks the capacity to compensate

the 3rd Respondent for such losses being essentially a shell company.

48. The 3rd Respondent filed a Further Affidavit on the 26th March, 2025. Mr. Rahim reiterated the averments contained in his earlier affidavits and clarified that the Environmental Impact Assessment Report relating to the 3rd Respondent's development was not gazetted or published in newspapers because such publication was not legally required. He explained that the project is classified as a medium-risk project under the Second Schedule to the EMCA as it comprises fewer than 100 residential units,

49. As such, he stated, it only required the preparation of a Comprehensive Project Report rather than a full Environmental Impact Assessment study. He deponed that the Comprehensive Project Report was prepared in strict compliance with **Part II** of the **Environmental (Impact Assessment and Audit) Regulations, 2003**, and incorporated appropriate consultation and public participation measures, including engagement with community leaders, questionnaires, and interviews.

50. Mr. Rahim further clarified that the document relied upon by the Applicant and described as the "Zoning Guide," formally titled the Nairobi City County Development Control Policy, has not been approved, adopted, or enforced by the 2nd Respondent and is therefore inapplicable. He emphasized that the approval for change of user (PPA 2) issued by the 2nd

Respondent could not have been based on that unapproved document, rendering the Applicant's assertion that the development violates zoning policy entirely baseless.

51. He added that, as advised by the 3rd Respondent's Physical Planner, the subject property does not fall within any defined zoning category under the Policy; that several buildings within the surrounding area are not residential buildings; that notably, the French embassy is a commercial/office building and that the area is a mixed-use area and there is a regulatory gap with no explicit zoning controls applicable to the plot.

52. The Applicant, through Mr. Kabuga, filed a Further Affidavit on the 26th May, 2025. He pointed out that in the Further Affidavit dated 26th March 2025, the 3rd Respondent expressly admitted that it did not conduct any public hearings and that, in its view, there was no requirement for the publication of the intended development.

53. He contended that this admission confirms the Applicant's position that there was no public participation and/or any meaningful public participation undertaken in respect of the development. He further noted an apparent contradiction in that the 3rd Respondent had earlier deponed, in its affidavit sworn on 18th March 2025, that the intended development had been advertised in the Kenya Gazette and in a daily newspaper.

54. Mr. Kabuga stated that whereas the 3rd Respondent asserted that publication was not required, the 2nd Respondent had, in its Replying Affidavit sworn on 18th March 2025, expressly confirmed that publication was in fact a requirement, thereby contradicting the position taken by the 3rd Respondent.

55. In response to the contention that the Nairobi City County Development Control Policy, 2021 is unapproved and inapplicable, Mr. Kibuga stated that courts have previously relied on the said policy to ensure that justice is served. He referred to the decision in ***Milimani ELCP Case E030 of 2024, Rhapta Road Residents Association v CECM County Government of Nairobi & 20 Others***, and deponed that as at the time of filing the suit, the 2nd Respondent had not denounced the Policy.

56. He further asserted that the Applicant and its members had a legitimate expectation that the 2nd and 3rd Respondents would act in accordance with the standards set out in that policy, and that the alleged draft status thereof did not justify the arbitrary issuance of approvals that adversely affected the right to a clean and healthy environment.

57. He further drew the court's attention to a Replying Affidavit sworn by an officer of the 2nd Respondent in Milimani Petition E012 of 2025, in which the County Government admitted that the Nairobi City County Development Control Policy,

2021 had been approved, was operational, and was not a draft.

58. On the 3rd Respondent's expert report, he asserted that the same does not assist the 3rd Respondent for a number of reasons. First, the development is clearly marked as being adjacent to Karura Forest and touching Peponi Road and despite claims of other similar developments, none have been shown.

59. Second, while the report classified the property as falling within Zone 13B, where only low-density residential developments were permissible, the Application for Development Permission prepared by the 3rd Respondent described the property as being within Zone 8, a discrepancy he characterized as misleading and indicative of bad faith on the part of the 3rd Respondent and a lack of due diligence by the 2nd Respondent.

60. Mr. Kibuga reiterated that the existence of other developments in the area could not justify an otherwise unlawful development or the infringement of the Applicant's right to a clean and healthy environment. He clarified that while the development abutted Peponi Road and the Getathuru River and lay within the greater Karura Forest ecosystem, he had never alleged that it was situated inside Karura Forest itself.

61. He urged the court to disregard allegations by the 3rd Respondent as the same are unsupported by evidence, particularly claims relating to public participation and the erection of signage, noting that no documentary proof had been produced despite such assertions being made in multiple affidavits.

62. He maintained that none of the affidavits filed by the 3rd Respondent demonstrated any purposeful or meaningful public participation involving the Applicant or its members, and that the questionnaires relied upon did not establish that the respondents were residents or property owners adjacent to the development. He rejected the contention that the Applicant lacked *locus standi*, explaining that the Applicant was incorporated and registered before the issuance of the EIA Licence and it was therefore possible to involve them in public participation.

63. In any event, he stated, the Applicant consists of multiple registered member associations as confirmed from the CR 12 and certificates, some of whom have been in existence since January, 2021 and in one case 2001 and that the Applicant and its members have a real and identifiable legal interest in the subject matter of this suit including individual resident members, who live in the immediate properties adjacent and have a direct and identifiable legal interest in the subject matter.

64. In response to the 2nd Respondent, the Applicant asserted that although the 2nd Respondent alleged that public participation had been undertaken, it failed to demonstrate how the Applicant was involved, and that its evidence on that issue was hearsay as it was not the entity responsible for conducting public participation.

65. He further noted that the 2nd Respondent had itself confirmed that publication was required, and that while it alleged that a change-of-user notice had been displayed on the property, no evidence had been produced to rebut the contention that such notice was erected after construction had already commenced. He reiterated that the 3rd Respondent did not place any signage on the property before the construction commenced.

Submissions

66. The Applicant's counsel filed submissions on 4th October, 2025.Counsel submitted at the onset that the court already established its jurisdiction, confirmed that the Applicant has *locus standi*, and that alternative remedies were not available in the circumstances. The court's ruling in this regard having not been aside, the foregoing arguments cannot stand.

67. As regards the applicability of the Nairobi City County Development Control Policy, 2021, it was submitted that the same is applicable as deponed to by Patrick Analo Akivaga on behalf of the Nairobi City County in ***Milimani Petition***

E012 of 2025, Kamalkumar Sanghani & Others (As the officials of Parklands Residents Association) vs Nairobi City County Government & 5 Others.

68. Reference in this regard was also placed on the case of ***Civil Appeal No. E160 OF 2025, Claire Kubochi Anami & Others (Suing as officials of Rhapta Road Residents Association) vs CECM Built Environment and Urban Planning, Nairobi County & Others*** where the court expressed that the policy guides the county in matters planning.

69. Counsel submitted that the Applicant has established a proper basis for the quashing of the EIA Licence issued on 21st October 2022 and the Development Permission granted on 28th July 2022. At the core of this challenge is the alleged failure to comply with the constitutional principle of public participation.

70. Reliance was placed on the case of ***British American Tobacco Kenya PLC vs Cabinet Secretary for the Ministry of Health & 2 others [2019] KESC 15 (KLR),*** where the Supreme Court underscored public participation as a fundamental constitutional value integral to governance. It was contended that no public participation whatsoever was undertaken prior to the issuance of either the EIA licence or the development approval.

71. Counsel stated that the 3rd Respondent has taken a contradictory stance on this issue on one hand alleging that it conducted public participation and later on admitting that it did not do so as it was not a "requirement"; that it is in essence approbating and reprobating and thatthe 1st Respondent has not filed a response to controvert any of the assertions as regards lack of public participation and non-compliance with the law in respect to the issuance of the EIA License.

72. Contrary to the 3rd Respondents assertions, it was submitted, it is only where a proponent is exempted under **Regulation 7 (3)** of **Part II** of **The Environmental (Impact Assessment and Audit) Regulations,** that one is not required to submit a comprehensive report and that **Section 58 (2)** of **EMCA** as read with the **Second Schedule** do not oust the need for public participation.

73. The evidence adduced in an attempt to establish public participation, it was submitted, is irrelevant and immaterial; that the letters allegedly evincing public participation are dated post the filing of the proceedings and post issuance of the EIA license and development approval and that none of the persons who are said to have filled the questionnaires have been proven to be residents of Peponi Road and/or owners or residents of the adjacent properties.

74. Similarly, it was submitted, the 1st Respondent abdicated its duties as expressed under **Regulation 21** of **The**

Environmental (Impact Assessment and Audit) Regulations as read with **Section 59** of **Environmental Management and Co-ordination Act.**

75. With respect to public participation requirements before issuance of the development approval, it was submitted that the same is set out under **Section 58 (7)** and **(8)** of the **PLUPA** as well as **Regulation 15 (2)** of **The Physical and Land Use Planning (General Development Permission and Control) Regulations.**

76. It was contended that the 3rd Respondent, who was legally obligated to erect a notice on the property and publicize the intended development in at least two newspapers to invite public comment, failed to provide any credible evidence of having done so. While the 2nd Respondent attempted to prove compliance by submitting undated photos, this evidence is inadmissible without a supporting Certificate of Electronic Evidence and fails to prove the notice was actually placed on the property.

77. Furthermore, it was submitted, the 2nd Respondent only provided evidence of one newspaper advertisement, falling short of the requirement, and that crucially, the notice was only erected in May 2023, well after the approval had already been granted, a claim the 3rd Respondent has not denied.

78. Similarly, it was urged, the approval for the change of user and development permission is illegal as it directly contravenes the area's official Zoning Guide and that the property is undisputedly located in the Peponi Road Area, which falls under Zone 13B (Kitisuru) designated for low-density residential use, specifically single-family dwelling houses and maisonettes.

79. However, it was submitted, the 2nd Respondent approved the conversion of the property to multi-dwelling units (duplexes) and that this erroneous approval, stemmed from the 2nd Respondent's failure to recognize that the development application incorrectly referenced Zone 8, a classification for a completely different, higher-density areas of Nairobi like Buruburu and Kayole.

80. By overlooking this clear mistake, it was submitted, the 2nd Respondent acted unreasonably and irrationally and in violation of the legitimate expectation of the Applicant and its members. Ultimately, it was urged, the 1st and 2nd Respondents have violated the provisions of **Section 4** of the **Fair Administrative Action Act**, the Applicant's right to a fair administrative action pursuant to **Article 47** of the **Constitution** as well as **Article 10(2)** of the **Constitution.**

81. Counsel averred that in breaching **Articles 10, 47** and **69** of the **Constitution** as submitted above, the Respondents breached the Applicant's right to a clean and healthy environment under **Article 42** of the **Constitution** as read

with **Section 3** of **EMCA.** Reliance in this regard was placed on the case of ***Timber Manufacturers Association vs Kenya Forest Service & 2 others; Kiambu Saw Mills (Interested Party) [2022] KEELC 13820 (KLR)*** in which the court held that the violation of sections of procedural matters in respect of environmental matters violated the right to a clean and healthy environment.

82. Counsel asserted that because the procedure adopted was defective in law and failed to undertake public participation, the entire process was rendered unlawful, defective, null and *void ab initio*. As the entire procedure was a nullity, then the development is based on an illegality and it cannot be allowed to proceed. Counsel cited the case of ***Mcfoy vs United Africa Co. Ltd [1967] 3 ALL ER 1169, quoted in Republic vs Nzai & 2 others; Auto Terminal Japan Limited (Exparte Applicant) [2025] KEHC 4586 (KLR),*** where it was stated that a nullity in law is *void ab initio* and nothing can be done to rectify it.

83. The 2nd Respondent filed submissions on 25th November, 2025. Counsel argued that the Applicant seeks to quash a technical planning decision which falls outside the ambit of this court's judicial review jurisdiction which is concerned with the decision-making process and not the decision itself.

84. Counsel cited the case of ***Civil Services Unions vs Minister for Civil Service (1985) AC 374 at 401*** in which it was explained that the three grounds upon which

administrative action is subject to control by judicial review include illegality, irrationality, and procedural impropriety.

85. It was submitted that the 2nd Respondent invokes the presumption of regularity (*omnia praesumuntur rite esse acta*); that the administrative acts of the County Government regarding the approval are presumed to be regular and valid unless the contrary is proved and that the Applicant has not offered evidence to rebut this presumption.

86. As to whether there was compliance with the statutory threshold for public participation, Counsel submitted in the affirmative, noting that the County fully discharged its statutory obligation for public participation as required by **Section 58(7)** of the **PLUPA** and in line with **Article 10(2)** of the **Constitution.** Specifically, the publication of the notice of change of user in the daily standard newspaper and site.

87. As to whether the approval of change of user violated the applicable zoning policy, Counsel averred in the negative. It was submitted that under the Evidence Act, official acts are presumed to have been done rightly and regularly (*omnia praesumuntur rite esse acta).*

88. It was submitted that the 2nd Respondent, being the custodian of the Zoning Policy, reviewed the application and confirmed the property falls within Zone 8 as detailed in the Planning Brief and the approval is compliant thereto; that the

Applicant has provided no expert evidence to prove the property is in Zone 13B and that the approval was lawful and within the 2nd Respondent's statutory mandate under **Section 61(2)** of **PLUPA.**

89. It was urged that having failed to respond during the requisite notice period, the Applicant slept on its rights and the party's inaction is seen as a waiver or forfeiture of those rights.

90. On costs, it was submitted that the same should be awarded to the successful party guided by **Section 27** of the **Civil Procedure Act** and the case of ***Republic vs Rosemary Wairimu Munene (Ex parte Applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004*** and that the Applicant having failed to discharge its burden of proof, costs should be awarded to the 2nd Respondent.

91. The 3rd Respondent filed submissions on 25th November, 2025. Counsel submitted that the Motion is misconceived and untenable in law; that although it cites constitutional provisions, it does not invoke the court's constitutional jurisdiction, seek constitutional remedies, or allege violation of constitutional rights and that rather, the matter is a purely a judicial review matter confined to the **Fair Administrative Action Act**.

92. Reliance was placed on the decision in ***Wycliffe Khisa Lusaka vs Independent Electoral and Boundaries Commission [2017] KEHC 8950 (KLR)*** where the court explained that judicial review is concerned with the lawfulness of administrative decisions, whether proper procedures were followed, and whether a decision-maker acted within the law.

93. Counsel submitted that prayer 3 of the Application seeking an order of prohibition against the 3rd Respondent to restrain it from the construction is incompetent because judicial review remedies do not lie against private entities. In support of this contention, Counsel cited the case of ***St Patrick Hill School Ltd vs Ps, Ministry OF Foreign Affairs [2008] eKLR*** and ***Kenya National Examination Council vs Republic ex parte Gathenji (CA No. 266/96),*** where the courts held that orders of certiorari and prohibition lie only against public bodies.

94. Also cited were the cases of ***Republic vs Registrar of Societies ex parte [2014] eKLR,*** and ***Republic vs Ponangipalli Venkata Ramana Rao & Anor ex-parte Tumaz & Tumaz Enterprises Ltd [2022] eKLR***.

95. Counsel submitted that the Applicant has not demonstrated any illegality, irrationality, or procedural impropriety on the part of the 1st or 2nd Respondents. He argued that the burden of proof lies on the Applicant, citing ***Claire Kubochi Anami & Others (Rhaptar Road Residents Assoc.) vs CECM***

Built Environment, Nairobi City County (Civil Appeal No. E160 of 2025), where the Court of Appeal held that an applicant must show an environmental licensing process was *ultra vires,* procedurally unfair, or irrational.

96. Counsel also highlighted the court's finding in the same case that developers who obtain approvals in good faith after multi-agency review cannot be penalised retroactively absent demonstrated illegality.

97. On the Environmental Impact Assessment licence, Counsel submitted that the 3rd Respondent fully complied with all statutory and regulatory requirements; that the project was a medium-risk development under EMCA and therefore required only a Comprehensive Project Report (CPR), not a full EIA study and that Medium-risk projects are not subject to gazettement, newspaper publication, or formal public hearings. Nonetheless, it was submitted, public participation was carried out, to be distinguished from public hearings which are not a requirement.

98. On matters zoning, it was submitted that the draft policy being relied upon is only a draft, as held in the case of ***Claire Kubochi Anami (supra***). As such, the Applicant's assertion that the 3rd Respondent's construction is illegal as it "*violates the zoning policy*" is untrue and completely baseless.

99. According to Counsel, it is not true as alleged by the Applicant that the 3rd Respondent did not publicize the

application or that they were shut from the 14 days window period and that all statutory and regulatory provisions under the Physical and Land Use Planning Act were properly followed, including the required public notification through newspaper advertisements and signage at the site.

100. It was submitted that claims regarding adverse environmental impacts and zoning restrictions are unsubstantiated; that the property at issue is not within Karura Forest, nor does it have a specific or restrictive zoning designation which aligns with neighbouring developments that include non-residential and multi-dwelling uses, such as the French Embassy and that the Court of Appeal guidance in ***Anami (Supra)*** underscores the need for reliance on statutory and expert evidence in zoning matters, not on impressionistic or unsupported assertions.

101. Counsel submitted that the 3rd Respondent acted in good faith and obtained all requisite licenses upon compliance with due process. It was contended that the 3rd Respondent would suffer substantial prejudice were the development to be halted in its entirety. In that regard, it was stated that 18 of the 48 residential units have already been sold and that the 3rd Respondent has expended in excess of Kshs. 450,000,000 on the project and upon completion, the total value of the development is estimated to be Kshs. 3,782,130,000.

102. In line with the established legal principle that costs follow the event, as articulated in ***Stanley Kaunga Nkarichia vs Meru Teachers College & Another [2016] eKLR,*** Counsel submitted that costs ought to be awarded against the Applicant since the application is incompetent, frivolous, and without merit.

103. The Applicant filed further submissions on 14th October, 2025. Counsel reiterated his assertions as set out in his earlier submissions stating that the questions of *locus standi* and membership are *res judicata,* having been conclusively determined at the leave stage vide the court's ruling of 26th September 2024.

104. It was submitted that no public participation was undertaken and that the zoning policy in issue, though not a binding legislative instrument, operates as a legitimate administrative guide in the absence of an approved zoning framework. It was also reiterated that the approvals were unlawful having not complied with statutory requirements under EMCA, the EIA Regulations, PLUPA, and the Physical and Land Use Planning Regulations.

Analysis and Determination

105. Having considered the Motion, the Affidavits in support and against and the submissions thereto, the issues that arise for determination are:

i. Whether the Motion is competent?

ii. ***Whether an order of Certiorari should issue quashing the Environmental Impact Licence Number NEMA/EIA/PSL/22271 issued on 21st October, 2022 and the Approval of Development Permission -Reference Number PLUPA-COU-000269 dated 28th July, 2022?***

iii. ***Whether an order of prohibition should issue restraining the 3rd Respondent from continuing with the construction of multi-dwelling residential blocks on Land Reference Number 1870/VIII/112 along Peponi Road?***

iv. ***Whether the EIA Report and Licence and the Development Permission were issued in contravention of Article 47 of the Constitution, the Fair Administrative Action Act, the Physical and Land Use Planning Act, and its regulations, the Environmental (Impact Assessment and Audit) Regulations, 2003, and the applicable Nairobi County zoning framework?***

v. ***What are the appropriate orders to issue?***

Whether the Motion is competent?

106. Vide their responses, the Respondents challenge the competence of the Motion on several fronts. The 2nd Respondent contends that the Applicant bypassed the

statutory dispute-resolution mechanisms provided under the **Physical and Land Use Planning Act, 2019** (PLUPA) thus breaching the doctrine of exhaustion.

107. The 3rd Respondent, on its part, disputes the Applicant's capacity, standing, and consequently this court's jurisdiction, alleging breach of the doctrine of exhaustion and non-compliance with the provisions of **Section 9(3)** of the **Law Reform Act** and **Order 53 Rule 2** of the **Civil Procedure Rules**.

108. It is further contended that the Applicant is a private limited liability company owned by two members/shareholders, and that its description as an "umbrella organisation" is misleading. The 3rd Respondent also maintains that no evidence has been tendered to demonstrate that the Applicant or its members/shareholders are residents of, or property owners along, Peponi Road or its environs.

109. The 3rd Respondent further argues that the Motion is misconceived insofar as it seeks judicial review reliefs on behalf of one private entity against another private entity. In its view, such relief, particularly where it is directed at restraining the 3rd Respondent's construction activities, can only properly be pursued through an ordinary civil suit, and not by way of judicial review proceedings.

110. The court notes, at the outset, that the objections now raised by the Respondents are not novel. They mirror, in material

respects, the Preliminary Objections canvassed at the leave stage. On 26th September 2024, this court rendered a detailed ruling on the Applicant's application for leave to institute the present Motion, together with the Preliminary Objections raised by the 1st, 2nd and 3rd Respondents.

111. At that stage, the Respondents contended, vide the Objections and responses *inter alia*, that this court lacked jurisdiction on account of the doctrine of exhaustion; that the Applicant lacked *locus standi*; that the application was time-barred under **Section 9(3)** of the **Law Reform Act** and **Order 53 Rule 2** of **the Civil Procedure Rules**; and that the judicial review reliefs sought could not lie against the 3rd Respondent, it being a private entity.

112. In its ruling, the court considered and rejected those objections. It expressly found that it had the requisite jurisdiction to entertain the matter, that the doctrine of exhaustion was inapplicable in the circumstances of the case, and that the Applicant had the requisite *locus standi*. The court also found that the challenged decision makers are public bodies exercising their statutory mandates.

113. Save for prayer (iv), which sought to quash the Environmental Impact Assessment Report, the court granted the Applicant leave to institute the present Motion and further directed that such leave operates as a stay. These objections cannot be re-litigated in these proceedings.

114. Turning to the objection founded on the alleged absence of a board of directors, the contention that Mr. Tom Muchiri Kabuga could not properly describe himself as "Chairman," and the assertion that the Applicant is a shell company, the court finds that these complaints concern matters of internal corporate governance and nomenclature. They do not impugn the legal existence of the Applicant as a juristic person, nor do they deprive it of the capacity to institute proceedings before this court.

115. In any event, there is no dispute that the Applicant is a duly incorporated entity under the Companies Act, as evidenced by the CR-12 produced by the 3rd Respondent itself. Indeed, it has not been demonstrated how questions relating to internal titles, or corporate structure would deprive the Applicant of standing or render these proceedings incompetent, particularly in light of the broad standing conferred by **Articles 22, 258** and **70** of the **Constitution** in matters implicating environmental rights.

116. In the end the court finds that the Motion as brought is competent.

Whether an order of Certiorari should issue quashing the Environmental Impact Licence and the Approval of Development Permission

117. Vide the present Motion, the Applicant seeks, *inter-alia*, Judicial Review orders of Certiorari and Prohibition. Judicial

Review has its foundation in **Sections 8** and **9** of the **Law Reform Act,** which constitute the substantive basis for judicial review of administrative actions and **Order 53** of the **Civil Procedure Rules** which deals with the procedural aspects thereof.

118. **Article 47** of the **Constitution of Kenya** provides for the fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Section 4** of the **Fair Administration Action Act, 2015** echoes **Article 47** of the **Constitution** and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

119. At the onset, it must be appreciated that Judicial Review is primarily concerned with the decision -making process and not with the merit of the decision. This was expressed by the Supreme Court in ***Judges and Magistrates Vetting Board vs Centre for Human Rights and Democracy [2014] eKLR*** where it was stated that:

> ***"When Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but***

have taken responsibility for making lawful decisions, in the knowledge that they are reviewable."

120. This doctrinal position has since been refined in the post-2010 constitutional era, particularly following the enactment of **Article 47** and the **Fair Administrative Action Act,** as explained by the Supreme Court in ***John Florence Maritime Services Ltd & another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment),*** thus:

> ***"Article 47 of the Constitution of Kenya, 2010 and subsequent enactment of the Fair Administrative Action Act No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The Court of Appeal in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR attempted to reconcile this expanded context as follows:***
>
> > ***54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of article 47 of Constitution as read with the Fair Administrative Action Actof 2015. The Act establishes statutory***

judicial review with jurisdictional error in section 2(a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision-making process in Articles 47 and 10(2)(c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the

merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in article 24(1) (b) and

(e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

Analysis of article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; section 7(2)(j) identifies abuse of discretion as a ground for review while section 7(2)(k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view,

whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in section 7(2)(i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act…"

121. Even as judicial review has evolved under **Article 47,** the nature, scope and limits of the prerogative remedies remain grounded in settled jurisprudence, classically expounded by the Court of Appeal in ***Kenya National Examination Council vs Republic; Njoroge & 9 others (Ex parte)***

(Civil Appeal 266 of 1996) [1997] KECA 58 (KLR) (21 March 1997) (Judgment) thus:

> ***"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...***

The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of

persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done…

Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

122. The Applicant invites the court to quash the Environmental Impact Assessment Licence No. NEMA/EIA/PSL/22271 issued on 21st October 2022 by the 1st Respondent and the Approval of Development Permission Ref. PLUPA-COU-000269, dated 28th July 2022 granted by the 2nd Respondent.

123. The gravamen of the Applicant's case is that the issuance of the EIA License is vitiated by procedural impropriety, illegality, and unreasonableness, principally on account of the absence of lawful and meaningful public participation prior to the issuance of the license and the development permission and further, with regards to the development permission approval, disregard of the applicable zoning policy framework.

124. In determining whether the Applicant has established its case in this regard, the court is mindful that the burden of proof rests upon the party who asserts a fact. This is a settled principle of law, codified under **Section 107 (1)** and **(2)** of the **Evidence Act**, which provides as follows:

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

125. In light of the foregoing principles, and upon a consideration of the pleadings and evidence on record, the court finds that the question of whether the Applicant has satisfied the threshold for the grant of the judicial review reliefs sought hinges on the determination of the following sub-issues:

Whether there was adequate public participation prior to the issuance of the EIA license and the Development permission?

126. Under **Article 10** of the **Constitution**, public participation is a fundamental principle of governance. **Article 69** specifically references public participation in environmental management by requiring the state to encourage public participation in the management, protection and conservation of the environment.

127. These constitutional dictates are reinforced by the provisions of the Environmental Management and Coordination Act, EMCA, and the Environment and Land Court Act, both of which require the Environment and Land Court to be guided by the principle of public participation in development of policies, plans and processes for the management of the environment.

128. Other than the Constitution and the EMCA, **Principle 10 of the Rio Declaration on Environment and Development**, which is applicable by dint of **Article 2(5) and 2(6)** of the **Constitution**, provides that:

> ***"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is***

held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

129. The High Court in ***Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR*** while referring to the South African decision in ***Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC)*** adopted the following definition of public participation:

"According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and

formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10th Edition defines 'consultation' as follows: - "The act of asking the advice or opinion of someone. A meeting in which parties consult or confer."

130. A five-judge bench of the High Court in the case of ***Mohamed Ali Baadi and others vs Attorney General & 11 others [2018] eKLR***, succinctly explained the rationale of having public participation as a constitutional imperative as follows:

"It may be tempting to ask why the law and indeed the Constitution generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representative and also participate in the appointment of most, if not all public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual. We also have no doubt that our local jurisprudence deals at length with why the Constitution and statute law have

imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation."

131. Setting out the parameters for effective public participation, the Supreme Court of Kenya in ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR*** after consideration of several judicial pronouncements noted:

> *"**From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the***

Supreme Court Act, we would like to delimit the following framework for public participation:

Guiding Principles for public participation (i) As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance. (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation. (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means. (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation (v) Public participation is not an abstract notion; it must be purposive and meaningful. (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis. (vii) Public participation is not necessarily a process consisting of oral

hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process. (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.(ix) Components of meaningful public participation include the following; a. clarity of the subject matter for the public to understand;b. structures and processes (medium of engagement) of participation that are clear and simple; c. opportunity for balanced influence from the public in general; d. commitment to the processes. inclusive and effective representation; f. integrity and transparency of the process; g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

132. The Applicant contends that the Environmental Impact Assessment Licence was issued without lawful and meaningful public participation as required by the law, in particular **Regulations 17** and **21** of the **Environmental (Impact Assessment and Audit) Regulations**, as read

together with **Section 58** and **59** of **EMCA**. This position, it was asserted, was expressly confirmed by the 3rd Respondent, who maintained that public participation was not required in the circumstances.

133. The Applicant, however, contends that any other correspondence relied upon by the 3rd Respondent and purporting to demonstrate public participation is immaterial, as such correspondence is dated after the filing of the present proceedings and subsequent to the issuance of both the EIA Licence and the development permission.

134. The 3rd Respondent disputes this and maintains that adequate public participation was undertaken. The 3rd Respondent clarified that contrary to its earlier assertion that the EIA Report had been gazetted and published in a newspaper, no such publication occurred as that gazettement was not a legal requirement.

135. It explained that the project was a medium-risk development under the Second Schedule to EMCA, involving fewer than one hundred residential units, and therefore required only a Comprehensive Project Report (CPR) rather than a full EIA study, with no obligation for gazettement, national publication, or public hearings.

136. The 3rd Respondent nonetheless asserted that public participation was conducted through alternative means, including engagement with local leadership, questionnaires,

and interviews, which were incorporated into the CPR in accordance with **Part II** of the **Environmental (Impact Assessment and Audit) Regulations, 2003**. It further maintained that the 1st Respondent, upon reviewing the CPR, raised no concerns on public participation and issued the EIA Licence, thereby affirming compliance with the statutory framework.

137. It is common ground that the 3rd Respondent was issued with an **Environmental Impact Assessment Licence No. NEMA/EIA/ PSL/22271** on 21st October 2022, authorizing the construction of a multi-dwelling residential apartment development on the suit property. The approved development comprises thirty-two four-bedroom units on typical floors 1–8**,** three four-bedroom units on the ground floor**,** two four-bedroom units on basement levels 1 and 2**,** and two three-bedroom units on basement levels 3 and 4.

138. The statutory framework governing the environmental approval of such a development is anchored in **Section 58** of the **EMCA** which states as follows:

> ***"58(1). Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out,***

executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee."

139. The Second Schedule to the Act classifies projects into three categories, namely low-risk, medium-risk, and high-risk projects. Having regard to its scale and configuration, the impugned development comprises fewer than one hundred residential units and accordingly falls within the category of medium-risk projects as contemplated under the Schedule.

140. The regulatory framework applicable to medium-risk projects is set out in **Regulations 7-10** of the **Environmental (Impact Assessment and Audit) Regulations**. These provisions collectively prescribe the procedural and substantive thresholds that must be met before an EIA licence may lawfully issue in respect of such projects. Regulation 7 specifically requires a proponent undertaking a medium-risk project to submit a **project report** to the Authority.

141. Pursuant to **Regulations 7-10**, the approval process begins with the preparation and submission of a project report by the proponent, setting out the nature, location, potential environmental impacts of the project and the proposed mitigation measures.

142. Upon receipt, the Authority is required to screen the report for completeness and assess whether the project is likely to have significant adverse environmental effects. Where such impacts are anticipated, the proponent may be directed to prepare a more detailed comprehensive project report or to undertake a full Environmental Impact Assessment study.

143. Where no significant impacts are identified, or adequate mitigation measures are disclosed, the Authority may approve the project and issue an EIA licence. The Regulations further provide for consultation with relevant lead agencies, communication of the Authority's decision within the prescribed timelines, and a right of appeal to the Tribunal where a proponent is aggrieved by a decision requiring a full EIA study.

144. Distinguishing the public participation requirements attendant to EIA project reports as opposed to study reports, the court in ***Communist Party of Kenya vs Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties) [2022] KEELC 967 (KLR)*** stated as follows:

> ***"Regulation 17 only applies to Environmental Impact Assessment reports that have been submitted as 'study reports' and not 'project reports'. The Petitioner totally misapprehended***

the law when they referred to the application of this provision to the 1st Respondent's project herein. In a project report, NEMA is not mandated to conduct a separate public participation. The Court agrees with the submissions made by the 1st Interested Party that there is no law requiring Environmental Impact Assessment (E.I.A) Project Reports to be published in the Kenya Gazette and in at least two newspapers circulating in the area of the project. Project reports are governed by Part II of Legal Notice No. 101 of 2003, while study reports are governed by Part III thereof, as was further demonstrated in the case of Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others [2019] eKLR."

145. Indeed, where a project report is submitted, the law does not impose requirements of gazettement, newspaper publication, or public hearings, provided that reasonable and appropriate consultation mechanisms are undertaken.

146. The court has reviewed the project report exhibited by the 3rd Respondent. Under Section 5.3 thereof, the report identifies the anticipated negative environmental impacts likely to arise during both the construction and operational phases of the project, together with corresponding mitigation measures proposed to address those impacts.

147. Chapter 8 thereof specifically addresses public participation and indicates that consultation was undertaken through the administration of questionnaires to neighbours and stakeholders within the vicinity of the project. The record reflects that approximately sixteen (16) questionnaires were completed and documented.

148. The Applicant contended that it, and its members, whose properties are adjacent to the project site, were not consulted. However, it is not in dispute that the Applicant as an entity was incorporated on 9th September 2022, contemporaneously with, or after, the period during which public participation was undertaken being in September 2022. In those circumstances, the failure to specifically consult the Applicant as an entity cannot, without more, vitiate the entire public participation process.

149. Given that the questionnaires were distributed within the locality most likely to be affected by the proposed development, and that the contents of the Project Report provided sufficient information to enable informed input, the court is satisfied that the public participation undertaken was reasonable, proportionate, and legally sufficient within the framework governing EIA project reports.

150. With respect to submission by NEMA of the project report to the relevant lead agencies for their comments, in the absence of evidence that this was not done, the court is

guided by the presumption of regularity. The Supreme Court in ***Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) vs National Environment Management Authority & 3 others [2024] KESC 75 (KLR),*** articulated the doctrine in the following terms:

> ***"In general, the presumption of regularity presupposes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done. The doctrine provides a degree of deference to the actions or decisions made by government officials or institutions. It is grounded in the assumption that these officials act within the bounds of the law, follow established procedures, and operate in good faith when performing their duties. This presumption also relieves courts or reviewing bodies from conducting a deep, thorough review of every action or decision unless there is specific evidence to suggest wrongdoing, procedural lapses, or irrational behavior. (See The Presumption of Regularity In Judicial Review Of The Executive Branch Harvard Law Review pg. 2432). The idea is that, in the absence of clear***

evidence to the contrary, administrative actions should be presumed to be regular, lawful, and reasonable."

151. Consistent with that position, the Court of Appeal in ***Kibos Distillers Limited & 4 others vs Benson Ambuti Adega & 3 others [2020] eKLR*** held that the burden of rebutting the presumption of regularity lies on the party challenging administrative action and that such presumption can only be displaced by cogent, clear, and uncontroverted evidence, and not by competing or conflicting interpretations of statutory or regulatory provisions.

152. Applying the foregoing principles to the facts of this case, the court finds that the Applicant has not placed before it cogent, clear, and uncontroverted evidence capable of rebutting the presumption that the 1st Respondent duly circulated the project report to the relevant lead agencies in accordance with the law. The challenge mounted rests largely on assertion and inference, rather than demonstrable proof of omission or procedural default.

153. Ultimately, the court finds that the public participation requirements necessary before the grant of the EIA License were duly met.

154. Turning to the issue of development permission, it is the Applicant's contention in this regard that the requirement for public participation prior to the issuance of the development

approval as provided for under **Section 58 (7)** and **(8)** of the **PLUPA** as well as **Regulation 15 (2)** of the **Physical and Land Use Planning (General Development Permission and Control) Regulations** was breached. According to the Applicant, the 3rd Respondent did not erect the notice or publicize the intended development.

155. This is disputed by the 2nd and 3rd Respondents who assert that the intended development was duly publicized both on the site and in a daily newspaper, meeting the public participation requirements.

156. Development is defined under the Physical and Land Use Planning Act (PLUPA) to include the carrying out of any works on land or the making of any material change in the use of any land or structures thereon.

157. The scope of development control, as set out in the Third Schedule to PLUPA, is broad and encompasses, *inter alia*, change of user, extension of user, extension and renewal of leases, subdivision schemes, amalgamation proposals, and the approval of building plans.

158. **Section 57(1)** of **PLUPA** is categorical that no person shall carry out development within a county without development permission granted by the relevant County Executive Committee Member. **Subsection (2)** reinforces this requirement by providing that the undertaking of development without such permission constitutes an offence.

159. The procedural requirements governing the grant of development permission are set out under **Section 58** of **PLUPA**. An applicant is required to submit an application to the County Executive Committee Member in the prescribed form and upon payment of the prescribed fees, following which the application is subjected to statutory evaluation.

160. **Sections 58(7)** and **(8)** of **PLUPA** embed public participation as an integral component of the development permission process. These provisions stipulate as follows:

> ***"(7) A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe.***
> ***(8) The notification referred to under sub-section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration."***

161. Further guidance on the manner of notification is provided under **Regulation 15(g)** and **(h) of the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021**, which stipulate that applications for development permission shall be accompanied by:

"(g) in case of change of user, extension of user, densification of use, extension of lease and renewal of lease, a copy of the notice published in at least one newspaper of nationwide circulation measuring five thousand square millimetres in Forms PLUPA/DC/2 and PLUPA/DC/3 set out in the First Schedule, that has been published for at least fourteen consecutive days prior to the date the application is submitted; and
(h) where the application is for a change of user or extension of user, a caption of an on-site notice inviting comments from the members of the public in accordance with section 58(7) and (8)."

162. Apart from the above general guidance, PLUPA does not prescribe the precise modalities through which public participation is to be undertaken. Nonetheless, as explained in ***Nzomo (Suing on Behalf of Kunde Road Residents Welfare Association) vs Ontime Real Estate Limited & 2 others (Environment & Land Petition E004 of 2023) [2024] KEELC 6011 (KLR) (19 August 2024) (Judgment),*** this does not dilute the requirement for public participation.

163. The court, while acknowledging that **Section 58** of **PLUPA** does not specify the manner of public participation, held, guided by the decision in ***British American Tobacco PLC vs Cabinet Secretary for the Ministry of Health [2019]***

eKLR that respondents bear a positive obligation to ensure that public participation meaningfully takes place. It stated:

> *"**Thus, the applicability of public participation to section 58 of the Physical Land Use and Planning Act which governs the issuance of change of user license limited to advertising and placing of the notice on site was complied with for the general notification of the public. Generally, the decision-making authority/licensing body is not bound by the proposals received during such public participation but they are bound to give reasons/feedback.***

164. In the present case, the 2nd and 3rd Respondents placed before the court a public notice published in the Daily Nation on 14th July 2022, as well as evidence of an on-site notice erected on the suit property, inviting members of the public to submit objections or comments on the proposed change of user and development within the prescribed period.

165. These steps, met the parameters in **Section 58(7)** and **(8)** of **PLUPA** and **Regulation 15** of the **2021 Regulations** and accorded the public a reasonable and meaningful opportunity to participate in the decision-making process.

166. Whereas the Applicant asserts that the on-site notice was erected only after construction had commenced, allegedly around 15th May 2023, it did not support this assertion by

cogent, credible, or contemporaneous evidence. In the absence of such proof, the court is unable to accept the Applicant's allegation as a basis for impugning the legality of the process.

167. Ultimately, the court finds that the notification requirements under PLUPA and the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021 were satisfied, and that adequate public participation preceded the grant of development permission.

Whether the development permission was issued in contravention of the Nairobi City Development Control Policy, 2021?

168. Turning to the question of zoning, the Applicant contends that the suit property, L.R. No. 1870/VIII/112, is situated along Peponi Road, which falls within the Kitisuru Area, designated as Zone 13B under the Nairobi City County Development Control Policy, 2021 (2023). The permitted land use within Zone 13B is restricted to low-density, single-dwelling residential development, including maisonettes and one-family dwelling houses.

169. On this basis, the Applicant submits that the approval of a multi-dwelling, high-density residential development is fundamentally inconsistent with the applicable zoning framework.

170. The 2nd Respondent counters this position by asserting that, according to the planning brief, the suit property falls within Zone 8, and further argues that the Applicant failed to tender expert evidence, such as a surveyor's report, to demonstrate otherwise. The 3rd Respondent aligns itself with this position and additionally maintains that the Nairobi City County Development Control Policy relied upon by the Applicant is unapproved and therefore unenforceable.

171. In his Further Affidavit, the 3rd Respondents Director annexed the expert report of Planner Daniel Kabiru. In the said report, Planner Kabiru concluded that after plotting the suit property against zone 13B as described in the 2021 (2023) Nairobi City County Development Control Policy, he found that there was a regulatory gab where the plot remains without any explicit zoning controls.

172. Planner Daniel Kabiru further stated in his expert report that the strip of land between zone 13B and Karura Forest exhibit different character of developments within itself with a multiplicity of existing and upcoming high-rise developments, including tree-tops forest apartments, Oakland Residences and the France Embassy.

173. The starting point in resolving this issue is the status and propriety of the Nairobi City County Development Control Policy, 2021 (2023). Courts have consistently held that, although the policy is pending formal approval by the County Assembly of Nairobi, it constitutes a clear, coherent, and

operative expression of the County's planning intent, and remains binding on the County pending its formal adoption.

174. In ***Anami & 2 Others (Suing as Officials of Rhapta Road Residents Association) vs County Executive Committee Member (CECM) Built Environment and Urban Planning, Nairobi City County & 20 Others [2025] KEELC 128 (KLR),*** this court held as follows:

> ***"336.Draft policies may also outline a government's intended approach, helping courts understand the policy trajectory and avoid decisions contrary to pending reforms. Discretion exercised by public officials should align with the policy intent, even where the framework is under development.***
>
> ***337.In some cases, reverting to a draft policy ensures***
>
> ***justice is served, especially when ignoring it would result in unfairness or inconsistency. Courts may also use draft policies to align decisions with societal or professional standards, especially in dynamic areas such as technology, health, or environmental law…***
>
> ***341.That being so, the closest and most relevant document that should guide the 2nd Respondent while approving development plans in Nairobi is the unapproved Nairobi City County Development***

Control Policy, 2021 (2022/2023). Indeed, this position has been admitted by the Petitioners impliedly, considering the way some of the prayers have been framed…

347.While the Policy remains in abeyance, pending public participation and approval by the County Assembly, the 2nd Respondent cannot issue approvals that exceed the prospective limit indicated in the Policy, as this would be contrary to the legitimate expectation created by the publication of the Draft Policy in 2021. 348.The un approved Nairobi City County Development Control Policy is a clear, unambiguous, and lawful communication by the County Government of Nairobi on the zonal guidelines and restrictions, and until the contents therein change, the 2nd Respondent is bound by it."

175. In summary, this court held that the 2021 Nairobi County Development Policy is not a mere aspirational document but an authoritative planning instrument which the Nairobi County Government must comply with when exercising development control functions.

176. That position was subsequently affirmed by the Court of Appeal in ***Civil Appeal No. E160 OF 2025, Claire Kobuchi Anami & 2 Others (Suing as officials of Rhapta Road Resident's Association) v County Executive***

Committee Member (CECM) Built Environment and Urban Planning and 20 Others wherein the court held as follows:

> *"**We affirm that the ELC acted within jurisdiction and within its remedial discretion … and [properly] directed compliance with the 2021 Nairobi City County Development Control Policy pending approval."***

177. The effect of that jurisprudence is that the County Government cannot selectively disown or disregard the 2021 Policy while simultaneously relying on it for convenience. Until formally replaced or lawfully varied, the policy remains the operative benchmark against which zoning decisions, development permissions, and land-use classifications must be assessed.

178. The court has keenly considered the policy. It classifies the Peponi Road corridor, including the area bounded by Redhill Road, Westlands Link Road, the Karura Forest boundary, and Lower Kabete Road, as Zone 13B, permitting only low-density, single-dwelling residential development.

179. Conversely, areas designated as Zone 8 under the same policy are identified as high-density estates located in entirely different and geographically distant parts of Nairobi. These include Shauri Moyo, Maringo, Bahati, Kaloleni, Umoja, Komarock, and Kayole.

180. In that context, the County Government's assertion that the suit property falls within Zone 8, without demonstrating any lawful departure from or amendment to the 2021 Policy, is untenable. However, the critical question that arises is whether the Applicant has proved to the required standards if indeed the impugned development falls within zone 13 B as described in the Zoning Policy.

181. In answering this question, the court is alive to the decision of the Court of Appeal in the **Anami case (supra)** where it was held as follows:

> ***"…We are persuaded that the learned Judge erred in his treatment of Rhapta Road's zoning. First the reliance on google maps in the face of contested boundaries, without calling for expert surveyors' evidence was a methodological misstep. Zoning classifications are not a matter of impressionist geography but of statutory instruments and gazetted plans."***

182. The 3rd Respondent filed a report by Planner Daniel Kabiru, a registered Planner, and expert in matters pertaining to land use and planning. In the said report, Planner Daniel Kabiru analysed the zoning classification of LR No. 1870/VIII/112 (the suit property) under the Nairobi City County Development Control Policy.

183. The report of Planner Kabiru shows the coordinates of the plot, the general layout, the major road links and residential and commercial buildings around the plot, together with the satellite image. He states in his report that from the mapped zones, he noted that LR No. 1870/VIII/112 (the suit property), while within the broader scope of zone 13 does not appear within a specific sub zone, including sub zone 13B, and is thus within a gab between Karura Forest and zone 13B.

184. He concluded that after plotting the suit property against zone 13B as described in the 2021 (2023) Nairobi City County Development Control Policy, he found that there was a regulatory gab where the plot remains without any explicit zoning controls. This, he stated, leaves the property without explicit development guidelines. In the report, the Planner exhibits the location of the plot *viz a viz* zone 13B and Karura Forest in a diagram (3-2).

185. Planner Daniel Kabiru further stated in his expert report that the strip of land between zone 13B and Karura Forest, where the suit property is located, exhibit different character of developments within itself with a multiplicity of existing and upcoming high-rise developments, including Tree-tops Forest Apartments, Oakland Residences and the France Embassy. The Planner exhibited the said high rise developments by way of photographs.

186. Planning is an area of land law that requires expertise, especially where there is contestation of the question of boundaries, land use and zoning. The Court of Appeal in the case of ***Anami (Supra)*** underscored the need for reliance on statutory and expert evidence in zoning matters, not on "impressionistic or unsupported assertions."

187. The evidence by the expert to the effect that the suit property was not within zone 13B, but was between zone 13B and Karura Forest, which was not classified, was not rebutted by the Applicant or by another expert.

188. The 3rd Respondent having disputed the allegation that the plot falls within zone 13B, it was incumbent upon the Applicant to file a report by a Planner or a Surveyor to show that indeed the suit property falls with zone 13B and not as explained by Planner Kabiru.

189. Having considered the report and diagrams of Planner David Kabiru, and in the absence of any other expert report to rebut the assertions of Planner Kabiru, I am satisfied that the suit property does not fall within zone 13B. Rather, it falls within a sub zone which was not captured in the development policy, and which has mixed use existing high-rise developments, including the French Embassy, Oaklands Apartments and Tree top Apartments.

190. In the end, the court finds that the approval which was granted by the 2nd Respondent to the 3rd Respondent being

permission Reference No. PLUPA-COU-000269 was not inconsistent with the 2021 Nairobi City County Development Control Policy. The impugned decision of the 2nd Respondent cannot therefore be said to be tainted with illegality.

Conclusion

191. In conclusion, the court is satisfied that the procedural requirements relating to public participation were met in respect of the development permission, and the issuance of an EIA License. The court is also satisfied that the 2nd Respondent did not issue the development permission to the 3rd Respondent in violation of the 2021 Nairobi City County Development Control Policy.

192. Consequently, the Notice of Motion dated 30th September, 2024 is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 12th day of February, 2026.

O. A. Angote

Judge

In the presence of:

Mr. Muriithi for the Plaintiff

Mr Sarvia for the 3rd Respondent

Ms Felsan for 2nd Respondent

Mr. Karoki for the Proposed Interested Parties.

Court Assistant: Tracy