REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING DIVISION

ELCEPET NO. E023 OF 2024

IN THE MATTER OF: ARTICLES 3, 19, 20, 21, 22, 23, 150, 162(2)(b) AND 165 OF THE CONSTITUTION OF KENYA, 2010,
SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT
=AND=
IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 24, 27, 28, 29, 40, 47, 48, 50(1) AND 60 OF THE CONSTITUTION OF KENYA, 2010
=AND=
IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND CO-ODINATION ACT, 1999
=AND=
IN THE MATTER OF: THE WATER ACT, CAP 372, LAWS OF KENYA
=AND=
IN THE MATTER OF: THE CONTRAVENTION AND VIOLATION OF SECTIONS 4, 5, AND 6 OF THE FAIR ADMINISTRATIVE ACT OF 2015
BETWEEN

JAGIT SINGH FLORA ……..……..….. 1ST PETITIONER

AJPAL SINGH FLORA ……..….... 2ND PETITIONER

MANJULABEN RAMESHCHANDRA SHAH ….…..…. 3RD PETITIONER

AUGUST AUTO AGENCIES LTD ……..…… 4TH PETITIONER

NISHAPA INVESTMENTS LIMITED …… 5TH PETITIONER

KANTILAL LALJI CHANDARIA …….…. 6TH PETITIONER

ELLA KANTILAL CHANDARIA …….…….. 7TH PETITIONER

LUCKY DISTRIBUTORS LIMITED …….…. 8TH PETITIONER

JAMACHAL (K) LIMITED …….…. 9TH PETITIONER

JUMA HARDWARE STORES LIMITED ……..… 10TH PETITIONER

HIMESHKUMAR JAYANTIBHAI PATEL …….. 11TH PETITIONER

JAMESHKUMAR JAYANTIBHAI PATEL ……..…. 12TH PETITIONER

TEENY FASHIONS LIMITED …….....…… 13TH PETITIONER

SHANTI & PARTNERS LIMITED ……..…… 14TH PETITIONER

LONGONOT AGENCIES LIMITED ……..…..…. 15TH PETITIONER

NILKANTH AGENCIES LIMITED …….…….. 16TH PETITIONER

CHUMA NA MBAO LIMITED ……..…… 17TH PETITIONER

MANJULABEN RAMESHCHANDRA SHAH …..…… 18TH PETITIONER

MEMRAJ SHAH ……...…. 19TH PETITIONER

JAYANTILAL JIVRAJ MEPA SHAH …….….. 20TH PETITIONER

MANZUKHLAL JIVRAJ MEPA SHAH …….….. 21ST PETITIONER

DILPKUMAR JIVRAJ MEPA SHAH ……...…… 22ND PETITIONER

JAYESHKUMAR NEMCHAND DEVRAJ SHAH …… 23RD PETITIONER

AVANI JAYESHKUMAR DEVRAJ SHAH ….…….. 24TH PETITIONER

KIFARU ENTERPRISES LIMITED …….... 25TH PETITIONER

SAWLA ENTERPRISES LIMITED ……...…… 26TH PETITIONER

JAYRAJ ENTERPRISES LIMITED …….……. 27TH PETITIONER

GLORY HARDWARE & ELECTRICAL LIMITED ... 28TH PETITIONER

LALJI RAMJI GAJIPARIA ……..… 29TH PETITIONER

DHANJI NDHINJI PATEL ……..….. 30TH PETITIONER

= VERSUS =

THE HON. CABINET SECRETARY,
MINISTRY OF INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT …….……..…. 1ST RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY ……..…….…….. 2ND RESPONDENT

WATER RESOURCES AUTHORITY ……..…….. 3RD RESPONDENT

NATIONAL LAND COMMISSION ……..….. 4TH RESPONDENT

NAIROBI COUNTY GOVERNMENT ……..……..…. 5TH RESPONDENT

J U D G M E N T

Pleadings:

1. Vide a petition dated 14th June, 2024, the 30 Petitioners described themselves as the owners of each of the parcels of land listed in paragraphs 1 to 18. The parcels of land are as follows: L.R No. 209/9791/9 (I.R. No. 38023/24), L.R. No. 209/9053, L.R. No. 9791/20 (I.R. No. 38023/13), L.R. No. 209/9791/19 (I.R. No. 38023/9), LR. No. 209/9791/18 (I.R. No. 38023/15), L.R. No. 209/9791/18 (I.R. No. 38023/16), L.R. No. 209/12778 (I.R. No. 67503/1), L.R. No. 209/9791/17 (I.R. No. 38023/18), L.R. No.

209/9791/22 (I.R. No. 38023/25), L.R. No. 209/9791/4 (I.R. No. 38023/3), L.R. No. 979113 (I.R. No. 38023/20), L.R. No. 209/9791/7 (I.R. No. 38023/21), L.R. No. 209/9791/23 (I.R. No. 38023/26), L.R. No. 209/9791/21 (I.R. No. 38012/1), L.R. No. 209/9791/13 (I.R. No. 38023/8), L.R. No. 209/9791/8 (I.R. No. 38023/4), L.R. No. 209/10814 (Original No 209/9791/2427), L.R. No. 209/9791/21 (I.R. No. 38023/17), L.R. Number 209/9791/6 (I.R. No. 38023/23), L.R. No. 209/9791/20 (I.R. No. 38023/13), L.R. No. 209/9791/11, L.R. No. 209/9791/12, Title Number Nairobi/BIock 44/264, Title Number Nairobi/Block/441271 situated along Kombo Munyiri road, Nairobi.

2. The Petitioners pleaded that before developing their respective parcels of land, they obtained the necessary and requisite approvals under the Physical Planning Act, 1996 (repealed) from the predecessor of the 5th Respondent. That they heavily invested in their structures and have enjoyed peaceful and quite occupation.

3. It is their case that the peace was interrupted when the 1st Respondent vide an oral press release on 24th May, 2024, announced it would be demolishing structures erected on the riparian reserves and bordering the Nairobi river. The Petitioners state that on or about the 25th May 2024, a day after issuing the press release, the Respondents commenced a demolition exercise targeting structures in the Gikomba area of Nairobi County along the Nairobi River, in implementation of this directive.

4. They further plead that on 11 June 2024, the 2nd and 3rd Respondents earmarked the Petitioners' permanent structures along Kombo Munyiri Road, Gikomba, for demolition, causing the Petitioners to fear that their properties could be arbitrarily demolished at any time. They aver that they have never been served with any improvement notice requiring them to remove any structures allegedly erected on a riparian reserve.

5. The Petitioners contend that the Respondents' failure to avail any written reasons for their implementation of the 1st Respondent's decision which adversely exposes and infringes upon the Petitioners' proprietary rights in the suit properties is inequitable and is in clear violation of Article 10 (2) (a) & (b) and 47 of the Constitution as read with section 4 (2) of the Fair Administrative Action Act.

6. They aver that the 1st Respondent's directive is being coordinated by the Nairobi Regeneration Committee and the multi-agency teams comprised of the 2nd and 3rd Respondents. That it is not clear without an "**improvement notice"** served on them how the Respondents have computed the high water marks of the Nairobi river in their earmarking of the Petitioners/Applicants properties for demolition, considering its downstream meandering and in any event, their permanent structures as erected on the suit properties do not flout the minimum distance imposed by law.

7. They assert this court has jurisdiction to determine the dispute by dint of article 162(2) of the Constitution. The Petitioners proceeded to highlight the contravened constitutional provisions inter alia, the right to fair administrative action under article 47, violation of article 94(5), 50(1), 40, 29(c) and article 60(1) of the Constitution.

8. Wherefore, the Petitioners urged the court to grant them the following reliefs:

a) <u>AN ORDER OF DECLARATION</u> be and is hereby issued that the Petitioner's Fundamental Rights and Freedoms Guaranteed under ARTICLES 270) & (2); 29 (d) & (f); 40; 47; 48; 500); 94(5) and 159(2)(b) & (d) of the Constitution of the Republic of Kenya, 2010 have been and are threatened with further violation and contravention.

b) <u>AN ORDER OF JUDICIAL REVIEW OF CERTIORARI</u> be and is hereby issued calling-up and quashing the decision of the 1st Respondent of 24th May, 2024 directing the demolition of structures erected on riparian reserves.

c) <u>AN ORDER OF JUDICIAL REVIEW OF PROHIBITION</u> be and is hereby issued to restrain the Respondents or anyone claiming under its authority, from applying or in any way howsoever asserting the applicability of the 1st

Respondent's directive of 24th May, 2024 directing the demolition of structures erected on riparian reserves.

d) <u>ABUORDER OF A PERMANENT INJUNCTION</u> be and is hereby issued restraining the Respondents whether by themselves and or through their agents or offices from in any way whatsoever removing and/or demolishing the structures and/or buildings erected on the suit properties and/or in any way howsoever interfering with the Petitioners peaceful enjoyment of the suit properties, being all those properties known as L.R No. 20919791/9 (I.R. No. 38023/24), L.R. No. 209/9053, L.R. No. 9791/20 (I.R. No. 38023/13), L.R. No. 209/9791/19 (I.R. No. 38023/9), L.R. No. 209/9791/18 (I.R. No. 38023/15), L.R. No. 209/9791/18 (I.R. No. 38023/16), L.R. No. 209/12778 (I.R. No. 67503/1), L.R. No. 209/9791/17 (IR. No. 38023/18), L.R. No. 209/9791/22 (I.R. No. 38023/25), L.R. No. 209/9791/4 (I.R. No, 38023/3), L.R. No. 9791/3 (I.R. No. 38023/20), L.R. No. 209/9791/7 (I.R. No. 38023/21), L.R. No. 209/9791/23 (L.R No. 38023/26), L.R. No. 209/9791/21 (I.R. No. 38012/1), L.R. No. 209/9791/13 (I.R. No. 38023/8), L.R. No. 209/9791/8 (I.R. No. 38023/4), L.R. No. 209/10814 (Original No 20919791/24-27), L.R. No. 20919791/21 (I.R. No.

38023/17), L.R. Number 209/9791/6 (I.R. No. 38023/23), L.R. No. 209/9791/20 (I.R. No. 38023/13), L.R. No. 209/9791/11, L.R No. 209/9791/12, Title Number Nairobi/Block 44/264, Title Number Nairobi/Block/44/271 situated al ong Kombo Munyiri road, Nairobi.

e) The costs consequent upon this Petition be borne by the Respondents.

f) The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to give effect to the preceding orders.

9. The Petition was supported by the affidavit of ZAHARA KHANBHAI, sworn on 14th June 2024. It deposed the averments summarised above and annexed copies of certificates of leases for the Petitioners parcels of land listed under paragraph 1 of this judgment. The deponent also annexed photographs evincing the 3rd Respondent's earmarking of their structures.

10. Each of the five Respondents filed a response in opposition to the petition. The 1st Respondent filed a document headed "response to petition" dated 20th June 2025. It consisted of general denials of all the paragraphs of the petition save for the descriptive parts.

11. The 2nd Respondent filed a replying affidavit sworn by Dr. Ayub Macharia, its Director of Environmental Enforcement. He deposed to the mandate of the 2nd Respondent as set out in section 7 of EMCA and avers that although

the EMCA Regulations of 2009 came into force in 2009, the protection of Wetlands had been contemplated in section 42 of EMCA and the Petitioners cannot seek refuge on the allegations of retrospective application of the Regulations.

12. The Deponent asserts that the Petitioners have not denied that their properties border the Nairobi river hence their activities are likely to have an adverse impact on the river. It is on this basis that they aver the Petitioners were required to submit EIA Reports for the respective projects and subsequent audit reports for the monitoring process.

13. The 2nd Respondent stated that it does not peg riparian reserves, which, according to it, falls within the mandate of the 3rd Respondent. It denied involvement in the earmarking of the Petitioners' permanent structures, stating that its role was limited to investigating the illegal discharge of effluent and waste into the Nairobi River after the demolitions. In a nutshell, the 2nd Respondent stated that the Petitioners had not demonstrated to the court that they had not encroached on the riparian reserve.

14. The 3rd Respondent filed the replying affidavit, which was sworn on 29th October 2024 by Robinson Kimari, the coordinator for the Nairobi sub-basin. Besides setting out the 3rd Respondent's mandate, Mr. Kimari deposed that following heavy rainfall experienced in the Country in March-May 2024, the 3rd Respondent identified areas that were worst

affected with floods. That the exercise commenced on 15th May, 2024 and was being undertaken countrywide.

15. He deposed that the 3rd Respondent had not issued any demolition threats to the Petitioners and put them to strict proof. In addition, the 3rd Respondent stated that the 2nd to 10th, 12th to 16th, and 18th and 20th Petitioners were parties to **Judicial Review Misc Civil Application No. 45 of 2018**, where similar orders to those sought in the present case had been sought. Had they intended to demolish, it would have been done long ago.

16. The 3rd Respondent denies issuing the Petitioners with any approvals and or authorization as provided under the **Water Resources Management Rules of 2007**. In regard to the allegation of threatened demolition, the 3rd Respondent stated that the Act and the Water Resources Regulations, 2021, provide a procedure they must follow in seeking compliance from members of the public.

17. It cited the provisions of regulation 130, which it avers require the 3rd Respondent to issue an order in the prescribed form under the Thirteenth Schedule of the Act. In this case, Mr. Kimari deposes that no such order has been issued, and they put the Petitioners to strict proof. Additionally, the 3rd Respondent states that article 66(1) of the Constitution empowers the State to regulate in the interests of public safety, public order, public

health, and land use planning. They urged the court to dismiss the suit for lack of merit.

18. The 4th Respondent filed a replying affidavit, sworn on 2nd July 2025 by Benard Opaa, the deputy director and head of Natural Resources Management. The affidavit sets out the role of the 4th Respondent under Article 67 of the Constitution and the NLC Act No. 5 of 2012. He deposes that the Petitioners have alleged, through the petition and its supporting documents, that they are the lawful owners of the suit properties. However, they have not adduced evidence to prove that they conducted due diligence prior to acquiring ownership of the said properties.

19. Mr. Opaa deposes that by dint of articles 67 (2) and 62 of the Constitution, riparian reserve is public land which falls under the purview of the 4th Respondent. Despite this, the Commission was not invited by the other Respondents to participate in any activities including identifying and marking of properties on the supposedly riparian land.

20. The 4th Respondent asserts that the laws and regulations governing measurements that mark land as riparian must be in line with the Constitution's provisions on riparian land. They further state that the Environment Management and Coordination (Wetlands, Riverbanks, Lakeshores and Sea shore) Regulation 2009 and the Water Resources Management Rules (2007) are unconstitutional because they do not align

with the constitutional dictates on water bodies and land between high and low water marks.

21. That the Constitution does not provide for measuring watercourses using the bank as the standard or point of reference. Instead, the point of reference is clearly provided under Article 62(1) as the high and low water marks. Consequently, the provision in the Water Rules that riparian reserves shall be measured from the edge of the bank is unconstitutional. He deposed that any marking of property and subsequent evictions based on provisions of these two regulations may be flawed.

22. According to the 4th Respondent, because the actions of the 1st, 2nd, 3rd & 5th Respondents were premised on the belief that the suit properties sit on riparian land, they required evidence to support this assertion and assist the Honourable Court in determining this petition. As the custodians of the various records related to the properties and riparian land in the country, it is crucial that they provide evidence showing the measurements of the low and high-water marks in relation to where the suit properties and the developments on them sit. The 4th Respondent contends that its co-Respondents must also prove that these measurements were done in accordance with the constitution.

23. It went on to state that only the 4th Respondent is empowered under Sections 152B & 152C of the Land Act, 2012 to evict persons illegally occupying public land. Thus, if it is confirmed that the suit lands are

indeed riparian land, it falls to the Commission to commence evictions of those occupying them in accordance with the above law. It is contended by the 4th Respondent that it is not legally permissible to evict occupiers of alleged public land without involving the Commission.

24. Despite its assertions herein above, the 4th Respondent contend that the petition doesn't define which of the petitioners' constitutional rights listed were infringed on or were under threat of infringement by the Commission. Additionally, that no evidence has been adduced to show that the Commission acted jointly with the other Respondents to allegedly infringe or threaten the said rights. Hence, it urges the court to dismiss the Petition with costs as against the Commission.

25. Through a replying affidavit indicated to have been sworn on 24th March 2024, the 5th Respondent also denied that the Petitioners rights had been violated. In support of this averment, it cited legal provisions inter alia, the case of **Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR,** where the Court found that:

> ***"A river includes the bed, the banks, the adjacent land as well as the flood plain. The floodplain includes the portion of the river valley that is covered with water when the main river channel overflows during floods. The risk of the river flooding during heavy rains justifies the need for a buffer zone or verge. Rivers are***

of different sizes and widths and the width of a river also varies at different points of its flow. Geographical factors affect the size, shape and course of a river which may also change over time. A river may be narrower upstream while lowland streams which are prone to meandering may have broader valleys. In determining the riparian reserve, one of the factors for consideration is whether the river has a well-defined channel. For the protection and rehabilitation of the riparian ozone, it would be helpful if there was a base map and other cadastral drawings mapping out the river channel and the riparian reserve in respect of Kirichwa River."

26. The 5th Respondent cited the provisions Rule 111 of the Survey Regulations of 1994, which provides for a reservation of not less than 30 metres in width above high-water to be made for Government purposes, but allows the Minister, in this instance the 1st Respondent, to direct that a lower width of the reservation be made in special circumstances.

27. Further, it deposed to the provisions of Rule 6 (c) of the Environmental Management and Coordination (Water Quality) Regulations, 2006 which prohibits any person from cultivating or undertaking any development activity within the full width of a river or stream to a minimum of six meters and maximum of thirty meters on either side based on the highest recorded flood level.

28. The 5th Respondent also contended that riparian reserves are overriding interests owing to the provisions of Section 28 (c) (d) and (h) of the Land Registration Act, No. 3 of 2012. Hence the right to own property is not absolute and is not among the non-derogable human rights provided for in Article 24 of the Constitution.

29. It averred that it is empowered by Section 29 of the Physical Planning Act to prohibit or control the use and development of plots within its area; and the National Director of Physical Planning being the lead advisor on matters of physical planning and urban development, is required to map and document disaster prone areas, riparian areas, wetlands, open spaces, parks and river deltas.

30. Relying also on the provisions of Article 62 of the Constitution, the 5th Respondent denied that their actions were arbitrary, ultra vires or lacking in grounding. That reclaiming of riparian land by the government is meant to fulfil the constitutional obligations of the state and in accordance with the National Land Policy to wit the Government has an obligation to protect the lives and the health by providing a clean and healthy environment to its citizens; and further implementation of reclaiming riparian zones therefore is for the benefit of the public and the public interest overrides private interests.

Submissions:

31. The Petitioners filed submissions dated 3rd November, 2025 and therein raised one main issue, which they submitted on in support of the reliefs sought. Thus:

    i) **Whether the Petitioners have demonstrated a contravention of their fundamental constitutional rights and freedoms by the Respondents.**

    ii) **Who should bear the costs.**

32. The Petitioners contend that the Respondents unlawfully applied the Environment Management and Co-ordination (Wetlands, Riverbanks, Lake Shores and Sea Shore Management) Regulations, 2009 retrospectively to their properties. That they (Respondents) failed to issue mandatory "improvement notices" prior to the threatened demolitions. The Petitioners submit that the impugned actions raise fundamental jurisdictional questions under Section 13 of the Environment and Land Court Act and Article 162(2)(b) of the Constitution, particularly regarding the scope of retroactive application of the 2009 Regulations in delineating riparian reserves and the legal effect of the Respondents' omission to issue improvement notices.

33. According to the Petitioners, the permanent structures on the suit properties were constructed between 1993 and 1999, prior to the enactment of both the Environmental Management and Co-ordination Act (EMCA), which came into force in January 2000, and the 2009 Regulations. Relying

on Section 28 of the Interpretation and General Provisions Act, they argue that subsidiary legislation cannot impose liability or penalties for acts undertaken before its publication. Therefore the EMCA and the 2009 Regulations cannot lawfully apply to developments that pre-date their commencement. They further assert that the EMCA does not expressly provide for retrospective application of the Regulations, rendering the Respondents' reliance on them legally untenable in respect of pre-existing structures.

34. Without prejudice to their primary argument on non-retrospectivity, the Petitioners submit that even if the 2009 Regulations were applicable, Regulation 26 requires the issuance of an improvement notice before any adverse enforcement action is taken. They maintain that the Respondents' failure to issue such notices prior to initiating demolition measures violated due process and, consequently, their constitutional rights and fundamental freedoms.

35. Specifically, Regulation 26 provides thus:-

> "**26. Improvement Notice**
>
> **Where an inspector has reasonable cause to believe that any person is violating the provisions of these Regulations, the inspector may -**
>
> **(a) issue against such person an improvement notice in accordance with the provisions of the Act; or**

(b) take such measures as are provided for under the Act."

36. They submit that the right to property under Article 40 is sacrosanct and any adverse administrative action must be preceded by adequate notice as provided for under Article 47 of the Constitution considering that the permanent structures erected on the Suit Properties are not illegal developments.

37. The Petitioners urged that the Respondents' actions have occasioned them grave prejudice and amount to violations, and threatened violations, of their fundamental rights and freedoms. In particular, they contend that their right to fair administrative action under Article 47 of the Constitution and the Fair Administrative Actions Act was infringed by the oral directive issued on 24th May 2024 and jointly implemented by the Respondents.

38. Additionally, that the directive did not meet the requirements of Sections 4 and 5 of the Act, as they were neither furnished with written reasons nor served with any formal Improvement Notice to enable them to challenge the decision through lawful review and appellate mechanisms. Further, the Petitioners assert that the directive forming the basis of the demolition exercise was unlawful, unreasonable and procedurally unfair.

39. The Petitioners contend that the actions of the Respondents infringed their right to a fair hearing under Article 50(1), as read with Article 25 of the Constitution, by failing to apply the law fairly. In particular, they argue

that the Respondents improperly subjected them to the retrospective application of the Environment Management and Co-ordination (Wetlands, Riverbanks, Lake Shores and Sea Shore Management) Regulations, 2009, despite the absence of any legal basis for retrospectivity under Section 28 of the Interpretation and General Provisions Act.

40. The Petitioners argue that the impugned decision of the 1st Respondent, as implemented by the co-Respondents, effectively usurped legislative authority by retroactively applying riparian reserve computations under the 2009 Regulations, contrary to Article 94(5) of the Constitution, and was therefore ultra vires. They further contend that the Respondents' actions threaten their right to equal protection and benefit of the law under Article 27 and the security of land rights under Article 60(1)(b). Consequently, they maintain that the impugned decisions breach both the statute and the Constitution and urge the Court to allow the Petition.

41. The 1st Respondent raised the following questions for the determination of the dispute vide their submissions dated 11th December, 2025:

    a) Whether the 1st Respondent acted within its mandate.

    b) Whether the Petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions.

    c) *Whether the Petitioner is entitled to the reliefs sought*.

42. The 1st Respondent contend that the alleged violation of the Petitioners' right to property through demolitions has not been substantiated, as no

evidence has been produced to show that the 1st Respondent carried out any demolition. They further argue that Article 66(1) of the Constitution permits the State to regulate the use of land in the interests of public safety, public health, public order, and land use planning.

43. In support, they rely on Section 42(3) of the Environmental Management and Co-ordination Act, which empowers the Cabinet Secretary to issue orders, regulations, and standards for the management and protection of river basins, wetlands, coastal zones and environmentally sensitive areas, including measures for conservation, environmental management planning, pollution control, and sustainable resource use.

44. The 1st Respondent stated that the impugned directive was lawfully issued pursuant to the Preservation of Public Security Act (Cap 57), which mandates the Government to make regulations and take measures necessary for the preservation of public security, including safeguarding persons and property and addressing risks arising from disasters or natural causes.

45. Further, they argue that although the Petitioners allege that a press release threatened demolition of structures on riparian reserves along the Nairobi River, the burden of proof lies with the Petitioners to demonstrate that their property does not fall within a riparian reserve, which they have failed to do by not producing any supporting evidence.

46. They rely on the case of **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] KECA 290 (KLR)** where the Court of Appeal held as follows concerning the burden of proof;

> **"The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential part of his case. There may therefore be separate burdens in a case with separate."**

44. The 1st Respondent also cited the case of **Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] KEELC 1225 (KLR)** the court being faced with an issue whether the Petitioner's Development lay on riparian reserve directed as follows;

> **The court directs the 1st, 2nd and 3rd Respondents to undertake a survey of Kirichwa Kubwa River from its source all the way downstream within 90 days of the date of this judgement to determine the boundary between the river and the adjacent landowners whose land about the riparian reserve and with a view to restoring the riparian reserve for Kirichwa Kubwa River. The measurement of the riparian reserve will be based on**

the high and low watermarks and not the centre of the river in conformity with the definition of the high and low watermarks under the Regulations made under EMCA ….”

45. It is the 1st The Respondent’s further submission that the Petitioners ought to have furnished a survey report or map indicating the proximity of their property to the Nairobi River to enable the Court determine whether or not their parcels of land falls within a riparian reserve. They argue that, in the absence of such evidence in the form of a survey report one cannot conclusively establish whether there is any encroachment onto the riparian reserve. However, they maintain that the 1st Respondent acted lawfully and that the Petitioners are not entitled to any riparian land adjacent to their property.

46. While citing the case of **Manase Guyo & 260 Others v Kenya Forest Services [2016] eKLR,**the 1st Respondent argues that the Petitioners cannot cite Articles of the Constitution and not relate them to the infringement complained of. Hence, they (Petitioners) have failed to discharge the burden of proof to the required standard. They argue that the Petitioners are not entitled to the prayers sought, as the restoration of riparian reserves is of utmost necessity and in compliance with the law to mitigate the problems of the urban environment.

47. Vide written submissions dated 11th December, 2025, the 2nd Respondent asserts that although it has a mandate to ensure a clean and healthy

environment through general supervision and coordination of environmental matters, its powers are circumscribed by the Constitution of Kenya, 2010 and the Environmental Management and Coordination Act (EMCA), which principally guides and limits its decisions and actions as its establishing statute.

48. The 2nd Respondent cited the decision in **Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] KEELC 4040 (KLR),** to reiterate that its statutory mandate under Section 9(2) of EMCA is primarily to coordinate with lead agencies, provide technical support, and ensure sustainable environmental management. It denies any involvement in the pegging of riparian reserves or the demolition of the Petitioners' structures, asserting that such functions fall within the mandate of the 3rd Respondent, a position not disputed.

49. The 2nd Respondent further states that its only involvement was investigating illegal effluent discharge and waste dumping affecting the river after the alleged demolitions, which has also not been controverted. Consequently, it argues that the Petitioners have failed to demonstrate that the 2nd Respondent participated in or caused any demolition or pegging of the suit properties, and therefore, no violation of their rights can be attributed to it.

50. The 2nd Respondent submits that no specific act of infringement has been attributed to it, as it neither issued the impugned directive of 24th May 2024

nor undertook any demolition exercises. It argues that, in the absence of evidence linking it to the alleged pegging or demolition, no declaration of violation of rights can be made against it. Further, it contends that the prayer for a permanent injunction is unwarranted, as such relief can issue only where a party has acted, or is likely to act, in violation of rights.

51. The 4th Respondent contends that the impugned press notice of 24th May 2024 was issued solely by the 1st Respondent without its involvement or consultation, despite its constitutional and statutory mandate to manage public land. It argues that the 1st Respondent thereby usurped its statutory role under the Land Act, 2012 in issuing eviction notices relating to suspected public land. The 4th Respondent further notes the Petitioners' allegation that demolitions in the Gikomba area followed shortly after the press release, with the 2nd and 3rd Respondents identified as the entities that earmarked the structures for demolition.

52. The 5th Respondent submits that private ownership of land does not confer unrestricted rights over riparian areas traversing or adjoining such land. In practical terms, this principal manifests as a regulatory easement over private land. The owner retains title to the land, but certain rights, particularly those that would interfere with the riparian reserve's ecological function, are subject to lawful restrictions imposed by the State.

53. It cited the case of **Njogu and 5 others v Sino Hydro Corporation Ltd and another (Land Case 92 of 2023) [2024] KEELC 6536**, where it was

observed that, riparian land is defined as **"the land in respect of which management obligations are imposed on the owner due to its proximity to a water body."** The regulations, therefore, do not divest ownership but impose an easement in favour of the public and the State for environmental protection.

54. It continued to submit that the law on easements under Part X of the Land Act, 2012 supports the regulation of riparian reserves as regulatory easements, whereby the State retains control for public purposes such as flood mitigation, soil conservation, and sustainable water resource management without transferring ownership. Consequently, private landowners remain subject to statutory obligations and are restricted from interfering with the ecological integrity of the riparian reserve.

55. The constitutional rationale for protection of riparian reserves is anchored in Article 69 of the Constitution which obligates the State to eliminate activities that endanger the environment, ensure sustainable management of natural resources, and protect ecologically sensitive areas. Riparian reserves serve as natural buffers against flooding, allow free flow of water, prevent soil erosion, recharge groundwater and protect downstream communities. In support, the 5th Respondent cited **Watamu Association (Suing through its Elected Officials - Clare Taylor, Bea Anderson & Damian Davies) v Wood & 3 others (Petition E003 of 2023) [2024].**

56. It is the 5th Respondent's position that although the Petitioners may hold private title to their land, any portion within a riparian reserve remains subject to governmental control and regulatory easements, and cannot be developed or occupied in a manner that compromises ecological functions or public safety. They argue that the Petitioners' ownership is therefore subject to overriding statutory and constitutional obligations, and that the 1st Respondent acted within its constitutional and statutory mandate in issuing the impugned directive, given the imminent flood risks in 2024 and the need to protect riparian reserves, downstream communities, and public property.

57. The 5th Respondent concluded by stating that the Petitioners have failed to discharge the burden of proof required to substantiate their claims, and it invited the Court to dismiss the Petition in respect of these assertions.

Analysis and Determination:

58. From the pleadings and the submissions rendered, I adopt the questions already raised by the parties in their submissions, to wit;

a) **Whether the petition as filed meets the Specificity test.**

b) **Whether the Petitioners have proved breach of their constitutional rights.**

c) **If yes, which of the Respondents violated the said Rights.**

d) **Who bears the costs of this petition?**

59. The 1st Respondent averred that the petition failed the specificity test as set out in the case of **Anarita Karimi Njeru versus Republic (1979) eKLR** which they say was emphasized by the court of appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) KECA 445 (KLR)**. The 1st Respondent seemed to have conflated this point with the burden of proof when they stated that the Petitioners cited Articles of the Constitution without relating them to the infringements complained of.

60. In this instance, the Petitioners pleaded that they were aggrieved by the action of the 1st Respondent which by a press release dated 24th May, 2024 announced that it would demolish structures erected on the riparian reserves and bordering the Nairobi River. They also pleaded that following the directive by the 1st Respondent, the 2nd and 3rd Respondents had on 11th June 2024 earmarked for demolition the permanent structures erected on their properties listed in the petition and situated on Kombo Munyiri Road, Gikomba.

61. In the following paragraphs, the Petitioners stated how the impugned actions have violated or threatened to violate their constitutional rights. The Petitioners pleaded with clarity their cause of action and remained is whether they subsequently proved the violations. Thus, they cannot be accused of merely citing articles of the Constitution as submitted by the 1st Respondent.

Alleged violation of article 47:

62. The Petitioners cited several rights guaranteed by the Constitution, which they pleaded had been violated. One of the rights pleaded to have been violated is the right to fair administrative action under Article 47 of the Constitution. The Petitioners contend that the 1st Respondent's press release of 24th May, 12024, the subsequent earmarking of the Petitioners' suit properties, and the ensuing demolitions are marred by glaring improprieties for failing to comply with the mandatory statutory imperatives imposed by law.

63. The Petitioners cite non-compliance of sections 4 and 5 of the Fair Administrative Action Act, as furthered by Article 47 of the Constitution, that require written reasons for the administrative action be provided and that adequate notice and opportunity to make representations thereto be issued by the Respondents.

64. In their defences, the 1st to 3rd Respondents argued that they were acting within their statutory mandates. In a document headed 'response to the petition', the 1st Respondent made general denials, and it was only in the submissions that the 1st Respondent asserted that it was acting within its mandate as provided for under article 66(1) of the Constitution and section 42(3) of EMCA.

65. The 2nd Respondent denied it played any role in earmarking the Petitioners' properties, although it also reiterated that section 42(3) of EMCA empowers the 1st Respondent to issue regulations or standards for the

management of river basins, lake basins, wetlands, et al. The 3rd Respondent deposed that, due to the heavy rains and in line with its mandate, it identified the areas most affected by the floods. The said exercise commenced on 15th May 2024 and continues to be undertaken across the country within the Authority's mandate and scope.

66. The question is whether the Petitioners were entitled to reasons for the 1st Respondent's press release and/or the earmarking of their buildings. On the first point, the Petitioners contended that the press release was oral and targeted buildings encroaching on the riparian reserves. The Petitioners have placed evidence of their ownership of parcels of land before the court in the form of copies of their titles.

67. However, they do not admit that their structures on their respective suit parcels are located within the riparian reserve of the Nairobi River. Hence, it is my considered opinion that if the press release was directed at those encroaching on the reserve, it is those people who were entitled to notice or written reasons, if any.

68. Additionally, the Petitioners pleaded that the on 11th June, 2024, the 2nd and 3rd Respondents proceeded to earmark their structures for demolition and they were now fearful that these Respondents may at any time arbitrarily send a demolition squad. The 3rd Respondent admits its mandate include geo-referencing the coordinates, mapping and marking of the high-level

flood marks and maximum 30 meter prescribed riparian reserve boundary along the riverbanks.

69. It also stated that the notice of identification and marking of point of pollution was published through a notice carried out in the *Standard Newspaper* of 29th May, 2024. It follows, therefore, that their markings of the Petitioners' properties were undertaken not pursuant to the oral press release of the 1st Respondent but on their own motion in accordance with the Statute. The Petitioners did not file any supplementary affidavit to contradict the existence of a publication dated 29th May, 2024.

70. In regard to the exercise of the earmarkings, the 3rd Respondent does not deny that it had not notified the owners of buildings alleged to be on these boundaries. Does the earmarking perse amount to a violation of the Petitioners' right to a fair administrative action? The 3rd Respondent deposed that it had not issued any demolition order as provided under the Regulations, and in the event they require the Petitioners to remedy anything, there is a procedure under Regulation **130 of Water Resources Regulations, 2021**, which they must follow.

71. I did not find the regulation quoted by the 3rd Respondent as relevant as it states as follows:

> **Any individual, corporate entity, non-governmental or charitable organisation, or public body who wilfully and falsely**

takes or uses any name, title or addition implying that he, she or it is a qualified contractor licensed under these Regulations commits an offence.

72. Section 60 of the Water Act Cap 372 allows entry onto any land, with or without notice, depending on the circumstances of each case. It provides that:

"2. An authorised person shall not enter on any land or premises without first giving a reasonable notice in verbal or written form to the landholder or other responsible person in charge of the land or premises, and any such entry shall be at a reasonable hour.

(3)Notwithstanding the provisions of subsection (2), an inspector may enter without giving notice if—(a)he or she has reason to believe that a provision of this Act or of any rule or order made under this Act has been or is about to be contravened;(b)he or she is unable to give notice within a reasonable time having regard to all the circumstances; or(c)he or she has given reasonable grounds for not giving notice."

72. Given that there are other processes which must be followed before the 3rd Respondent can cause the demolitions of the Petitioners' structures and or taking away of any portion of their parcels of land. The Petitioners did not bring any evidence of the actual demolitions undertaken only after the earmarkings. Therefore, the earmarkings remained a question of

"threatened violation" but which threats the 3rd Respondent has explained are not real in paragraph 9 of its Replying affidavit.

73. Under the said paragraph 9, the 3rd Respondent deposed **that the 2nd to 10th the 12th to 16th, the 18th, and the 20th Petitioners** herein are parties in the case **JR No 45 of 2018**, where similar orders are sought. The court was not informed of the status of that case, but the Petitioners do not deny its existence. The participation of half of the Petitioners herein in the former suit implies that they have been aware of the actions and/or mandate of the 3rd Respondent since 2018 regarding the identification and marking of the riparian reserve on the impugned area. They have had the opportunity to challenge the 3rd Respondent's decision. I find that the earmarking in this instance does not amount to a threatened violation of the Petitioners' rights guaranteed under Article 47 and sections 4 and 5 of the Fair Administrative Actions Act.

Violation of articles 50 and 94(5) of the Constitution:

74. The said article provides thus:

> **"No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."**

75. The Petitioners argued that the 1st Respondent usurped Parliament's exclusive legislative authority by making an order whose effect is to make provisions having the force of law, foreign to enacted statute. However, the

said sub-article gives exception to authority conferred by the Constitution and/or legislation. The 2nd Respondent pleaded that section 42(3) of EMCA (which is a legislation) gives powers to issue notices as the impugned one. It states that:

> **"The Minister may, by notice in the Gazette, issue general and specific orders, regulations or standards for the management of river banks, lake shores, wetlands or coastal zones and such orders, regulations or standards may include management, protection, or conservation measures in respect of any area at risk of environmental degradation and shall provide for…"**

76. The impugned press release according to the 1st and 2nd Respondents was made within the law. The Petitioners did not specifically address this question in their submissions instead they only argued on the retrospective application of **Environment Management and Co-ordination (Wetlands, Riverbanks, Lake Shows and Sea Shore Management) Regulations, 2009.** Therefore, it is my finding that the alleged violation of article 94(5) of the Constitution has not been proved by the Petitioners.

Was the Regulations retrospectively applied breaching article 50?

77. Further, the Petitioners argue that the retrospective application of the 2009 Regulation *supra* violates their right under article 50 on the right to a fair hearing. They had pleaded that they had obtained development approvals under the 1996 Physical Planning Act but no evidence of such approvals

were annexed. This evidence was important in determining whether all developments on the stated parcels of land were undertaken before 2009.

78. Despite the absence of such evidence, the preservation of riparian reserves was alive even in the Physical Planning Act Cap 286 (repealed). The Second Schedule of Cap 286 (repealed) refers to matters which may be dealt within Local Physical Development Plan and under paragraph 6 it states thus:

> **"Conservation of the natural beauty of the area, including lakes and other inland waters, banks of rivers, foreshore of harbours, and other parts of the sea, hill slopes and summits and valleys."** (underline for emphasis).

79. The 4th Respondent referred to the Survey Act where in **Rule 111** of the **Survey Regulations of 1994** states thus:

> **"111. Tidal River Reservations,**
>
> **On all tidal rivers, a reservation of not less than 30 metres in width above high-water shall be made for Government purposes:Provided that the Cabinet Secretary may direct that the width of this reservation shall be less than 30 metres in special cases.**
>
> **112. Lake reservations**

For boundaries fronting on lakes, a reservation of not less than 30 metres in width from the water edge at ordinary high-water shall be made for Government purposes:Provided that, if the interests of development require the Cabinet Secretary may direct that the width of this reservation shall be less than 30 metres in special cases."

80. The 4th Respondent also referred to the provisions on overriding rights under the Registered Land Act Cap 300 (repealed), and rightly so, as section 28 provided for restrictions on private land without necessarily requiring registration of such an entry. What I am saying is that there was legislation in place governing ecologically sensitive areas, such as riparian reserves, even before the EMCA was passed, and that the Petitioners' rights as owners of private land were subject to that legislation.

Alleged violation under Articles 29 and 40:

81. The Petitioners also pleaded that their rights under article 29(d) and (f) of the Constitution were violated insofar as they were subjected to psychological torture and being treated in an inhuman or degrading manner. They deposed that they are unable to fully actualise their investment. The burden of proof lay on their shoulders (Petitioners) to demonstrate that they have been denied usage of their properties.

82. However, besides stating that their properties have been earmarked, the Petitioners do not plead when they were denied access to their property,

that they are no longer dealing/using the developments, or that, if commercial, customers no longer use these premises. None of the Petitioners disclosed the type of psychological torture they have suffered. Unfortunately, they left it to the court to imagine.

83. Similarly, the Petitioners argued that their right to property was violated or threatened with violation. From the pleadings filed, the press release complained of did not order for the cancellation of the Petitioners' title. As rightly submitted by the Respondents, the right to own land is not absolute especially when it comes to regulating developments undertaken for the good of the owner and the environment to give life to the right to a clean and healthy environment.

84. The Respondents' impugned actions were aimed at regulating land use as envisaged under Article 66 of the Constitution and nothing more. It is my considered view that the petition may have been filed prematurely.

Disposition:

85. In light of the foregoing analysis, I am persuaded to hold that the Petitioners have not proved that their constitutional rights have been violated. Following this finding, it is unnecessary to proceed with the 2nd limb of the question regarding which respondent is liable for the violations.

86. The last question is whether costs should be awarded. As the Petitioners have lost, they are not entitled to any costs. The Respondents were all government bodies whose actions were necessary to be challenged to uphold good governance, accountability and the rule of law. Therefore, I shall not order the Petitioners to pay costs to the Respondents.

Dated, signed and delivered at Kisii, virtually this 26th day of February, 2026

A. OMOLLO

JUDGE