

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
PETITION NO. E059 OF 2024

NORTHERN BLOCK RESIDENTS LIMITED - PETITIONER

VS

SUSAN WANJIRU KAMAU - 1ST RESPONDENT

JIMMY THUO KAMAU -
2NDRESPONDENT

MUTHONI KAMAU - 3RD RESPONDENT

PAULINE WAIRIMU KAMAU - 4TH
RESPONDENT

NAIROBI CITY COUNTY - 5TH RESPONDENT

NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY - 6TH
RESPONDENT

THE WINE & BOTTLE RESTAURANT LIMITED - 7TH
RESPONDENT

DAVID KINYUA GITHOME - 8TH RESPONDENT

-AND-

JUBI AFRICA LIMITED - 1ST INTERESTED
PARTY

FARRAH COFFEE LTD - 2ND
INTERESTED PARTY

KAVNEET KAUR SEHMI - 3RD INTERESTED
PARTY

NAOMI MAGUNYE GAITHO - 4TH
INTERESTED PARTY

MONICAH KABUIYA NYORI - 5TH
INTERESTED PARTY

MAC'S TAVERN BOTTLES & BITES LTD	- 6TH
INTERESTED PARTY	
GEMSTONE AND JEWELLERY CENTRE LTD.	- 7TH
INTERESTED PARTY	
TRINITY ENERGY (KENYA) LTD.	- 8TH
INTERESTED PARTY	
ANDRE EMILE STAUSI & LEWIS KIBE KAMAU	- 9TH
INTERESTED PARTY	
TIRA STUDIO LTD	- 10TH INTERESTED
PARTY	
WASH DRY CLEANING SERVICES LTD	- 11TH
INTERESTED PARTY	
AUTOBLOG MOTORS LTD.	- 12TH
INTERESTED PARTY	
LINA MOHAMED GUBARA	- 13TH INTERESTED
PARTY	
REGIONAL COALITION FOR FARMERS MARKET	- 14TH
INTERESTED PARTY	
BLUE LILAC TOURS AND TRAVELS LTD.	- 15TH
INTERESTED PARTY	

JUDGEMENT

1. The Petitioner is a corporate entity whose members seek to address grievances and protect their Constitutional rights to a clean and healthy environment and fair administrative practices. Vide the Amended Petition dated 22/10/2024, the Petitioner seeks the following reliefs;
 - a. A declaration that the development of the commercial complex on Land Reference Number 30516/33 was undertaken in violation of the Petitioner's constitutional rights, including the right to a clean

and healthy environment, the right to public participation and the right to fair administrative action.

- b.** An order directing the demolition of the commercial complex on Land Reference Number 30516/33 and the restoration of the environment to its original state and the costs of such demolition and restoration be borne jointly and severally by the Respondents.
 - c.** An award of general, exemplary and punitive damages in favour of the Petitioner for the violation of their Constitutional rights.
 - d.** Costs of the Petition
 - e.** Any other relief (s) that this Honourable Court may deem fit and just to grant.
2. The Petition is based on the facts, the various provisions of the Constitution alleged to have been violated, the statutory provisions of the law and supported by the affidavit of even date, sworn by **Eli Habwe**, a resident of Rosslyn Green Estate which forms part of the Petition.
3. The Petitioner avers that Land Reference Number 30516/33 (hereinafter known as 'the suit property') is owned by the 1st to 4th Respondents. That the Petitioner's members own properties in close proximity to the suit property. That the proprietors of the suit property have developed a two-level commercial complex comprising shops, restaurants, and other commercial facilities, all of which are operational.
4. It is alleged that on 30/8/2023, the Petitioner received an email from the lead Environmental Consultant, Roy Lwiki Misiko, requesting a letter of no objection for a proposed commercial development on the suit property. Subsequently, the Petitioner responded to the email on 6/9/2023, informing the Consultant that the matter was to be deliberated by residents at an organised meeting. The Petitioner contends that, despite not receiving a response to its request for the

necessary approvals, it unexpectedly discovered on 19/9/2023 that the proposed development site had been sealed off and that construction equipment had been moved thereon.

5. That upon conducting investigations, the Petitioner learnt that the 6th Respondent had granted the developer, Isaac Kamau Ndirangu, License Number NEMA/EIA/PSL/28160 dated 12/9/2023 for the project. That there was also a letter of no objection from Nyari Residents Welfare Society dated 6/9/2023, subject to specified conditions.
6. The Petitioner alleges that it also obtained a copy of the project plans, which it accuses the 1st to 4th Respondents of non-compliance by; constructing the entrance or exit off Redhill Road instead of off a side of the said road, thus causing traffic implications; having a car wash on a location approved for a garden; constructing an unapproved parking bay on a space between the commercial complex and Redhill Road; and adding a Sports Bar to the restaurant not shown on the approved plans.
7. The Petitioner asserts that its members were not afforded an opportunity to deliberate on the proposed project before its commencement as per its email of 6/9/2023. Further, that its emails of 6/10/2023 and 13/10/2023 to the Lead Consultant raising concerns of public participation, the premature commencement of construction and its request for the Environment Impact Assessment Report and a copy of the Environmental Impact Assessment License, did not elicit any response.
8. The Petitioner contends that despite its efforts to engage the 5th and 6th Respondents to seek their intervention and information regarding the approvals granted for the said project, it has been denied access to crucial documents and records. Despite the complaints, the project was completed, and it is now infringing its members' peaceful

enjoyment of their properties by attracting high-volume traffic and congestion in the area, increasing noise and air pollution, and causing inadequate storm water management.

9. The Petitioner has anchored its case on various provisions of the Constitution. That is; Articles 1,10, 21, 22(1) & (2), 258(2), 23, 35(1), 40, 42, 47, 70, 162 & 184 (1) (c).
- 10.The petition is also based on the following statutory provisions: Sections 58 (1) and 129 of the Environmental Management and Coordination Act (EMCA); Sections 14 (7) (1) and (2) of the Environmental (Impact Assessment and Audit) Regulations, 2003 (Regulations) under EMCA; Sections 56, 61 (b) and (c), and 72 of the Physical and Land Use Planning Act; and Section 4 of the Access to Information Act.
- 11.With regard to the violation of the right to a clean and healthy environment under Article 42 of the Constitution, the Petitioner avers that the 1st to 5th Respondents violated that right by allowing the construction and operation of the commercial complex without undertaking proper public participation and environmental impact assessment. The operations of the commercial complex continue to cause increased pollution, noise and waste management issues that have directly affected members of the Petitioner and their ability to reside peacefully in their homes.
- 12.The Petitioner also took issue with the 5th and 6th Respondents' failure and/or inaction in enforcing applicable laws and regulations to ensure compliance with the relevant requirements. The 5th and 6th Respondents are accused of failing to adhere to the principles of fair administrative action as set out in Article 47 of the Constitution, thereby impeding the Petitioner's right to fair administrative action.
- 13.Under the right to information as provided for under Article 35 of the Constitution, the 5th Respondent is faulted for repeatedly refusing to

provide copies of the relevant documents and records relating to the approvals granted for the development, despite numerous requests.

14.As for the violation of the right to property under Article 40, the Petitioner alleges that its members have suffered significant prejudice to their property, as their right to reside peacefully in their homes has been infringed.

15.The Petitioner further avers that the entire approval and licensing process was marred by irregularities. That the purported proponent of the development, Isaac Kamau Ndirangu, passed away on 22/11/2018, yet the Environmental Impact Assessment (EIA) Report of August 2023 identified him as the proponent, and the NEMA Licence was addressed to him on 12/9/2023. That subsequent correspondence from the 6th Respondent was also addressed to the deceased. That the issuance of approvals and licences to a deceased person is not a mere procedural irregularity but goes to the root of the entire process, thus rendering all subsequent approvals, permits and licences invalid. That consequently, the commercial complex is illegal, as it is anchored on void approvals and licences, hence the basis of the orders sought.

The 1st to 4th Respondents' Case

16.In response to the Petition, the 1st to 4th Respondents opposed the Petition through the Replying Affidavit, sworn by Susan Wanjiru Kamau on 20/3/2025. The deponent avers that she is one of the administrators and a beneficiary of the Estate of the late Isaac Ndirangu Kamau, by virtue of the Letters of Confirmation of the Grant dated 29/3/2023. She further avers that the suit property forms part of the deceased's estate.

17.She averred that the deceased had applied for a Change of User from agricultural land to commercial development before his demise. The approvals were subsequently granted, and, as administrators, they decided to proceed with the project as their deceased father had

envisioned. They obtained the requisite approvals and licences from the relevant authorities, including a licence from the National Construction Authority, issued on 22/9/2023 and valid until 22/9/2025; plan approvals from the Nairobi City County, issued on 31/8/2023; and a licence from NEMA for the Environmental Impact Assessment (EIA).

18. The 1st Respondent states that they deliberated on the project with the Petitioner's members at the meeting on 29/8/2023. Subsequently, the project's lead consultant sent an email to the Petitioner requesting a Letter of No Objection to the proposed development. The Petitioner did not respond to the email. However, residents of Nyari Estate, a constituent of the Petitioner, acknowledged the meeting on 29/8/2023 and issued a Letter of No Objection, subject to the development complying with the requisite approvals. She asserts that the development was undertaken in full compliance with the law.

19. According to the deponent, the alleged Board meeting on 28/6/2024 was a sham, as only two individuals met and passed the resolution to institute these proceedings, yet the actual residents had not registered any objection. She further questions the Petitioner's motive in commencing these proceedings, as it only had to wait for the development to be completed, then seek its demolition on the basis of speculative rights.

20. Regarding the alleged violation of a clean and healthy environment, she maintains that the Respondents undertook an Environmental Impact Assessment before the commencement of the project. In any event, the Petitioner has not particularised how the right has been infringed.

21. Regarding the alleged violation of the right to fair administrative action, the deponent avers that the deceased applied for a change of user, which was duly gazetted and members of the public invited to give their comments. Despite a notice being placed on the suit

property inviting comments, no reservation whatsoever was registered by the Petitioner. This, in addition to the meeting held on 29/8/2023 and the requests for a letter of no objection, in which the plans were attached, confirms that the right was never infringed.

22.As for the assertion of a violation of the right to access information, the deponent avers that there was adequate information relating to the project, and access to it was never denied. The drawings of the proposed development were shared with the Petitioner via the email dated 30/8/2023. Further, upon receipt of the Letter dated 14/11/2023 from Residents of Rosslyn Green and Roselyne Close, who are members of the Petitioner, NEMA responded vide the letter dated 1/12/2023, directing them to where to obtain the requested documents.

23.The 1st to 4th Respondents have also taken issue with the Petitioner's assertion that the right to property of its members has been violated. The deponent argues that the suit property is private property and that the Petitioner has not demonstrated how the use by its legitimate owner has affected or inhibited its members' use of their properties.

24.Turning to the assertion that the entire approval and licensing process was irregular, the Deponent contends that the development received the necessary approvals and licences from the bodies mandated to issue them. The Environmental Impact Assessment Report identifying the deceased as the proponent does not, in any way, negate its authenticity or validity, as the deceased commenced the entire process. She maintains that the administrators of the deceased's estate complied with the law. She urges the court to dismiss the Petition with costs.

Response by the 5th Respondent

25.The 5th Respondent opposed the Petition vide a Replying Affidavit sworn by Philomena Wanjiru Gichuru on 12/9/2025. The deponent

avers that, prior to the development of the commercial complex, Isaac Ndirangu Kamau (now deceased) applied to change the user of the suit property from agricultural to commercial. The application was approved, and the 1st Respondent, through its Architect, subsequently sought approval to develop a mini-mall on the suit property. A Notification of Approval dated 24/7/2023 was issued after the 5th Respondent was satisfied that the applicant had complied with all the requisite planning requirements.

26. She asserts that the Petitioner has not shown how the 5th Respondent has infringed its Constitutional rights. That the Petition does not present any evidence of omission, neglect, or failure on the part of the 5th Respondent in the discharge of its statutory planning functions. That the Change of User, which was applied for by the deceased in 2013, was processed in accordance with the applicable procedures. That the public was invited to submit their views before approval was granted. The deponent avers that the Petitioner did not present any objections to the grant of Change of User. That the claim of infringement of the right to a fair administrative action is therefore baseless.

27. The Deponent avers that the alleged irregularities do not invalidate the legitimacy of the approvals issued. No evidence has been adduced to show how the alleged irregularities have affected the authenticity of the approvals to warrant the demolition of the suit property after one year of its operation.

28. The 5th Respondent further avers that the Estates referred to are situated at varying distances from the suit property. The Petitioner has not demonstrated how its members have been affected by the development. She argues that the Petitioner has not pleaded with a reasonable degree of precision by clearly identifying the specific rights

that have been violated, the manner in which they have been infringed, and how they have been affected.

29. According to the 5th Respondent, the Petition does not meet the requisite standard for a constitutional petition and should therefore be dismissed with costs to the 5th Respondent.

Response by the 6th Respondent

30. The 6th Respondent opposed the Petition vide the Replying Affidavit sworn by its Director General, Dr. Mamo B. Mamo, on 27/8/2025. The deponent contends that the Petition, the subject of these proceedings, lacks clarity and precision and therefore does not meet the threshold set in the case of Anarita Karimi Njeru -vs- Republic (1979) e KLR. The deponent further contends that the Petition fails to set out clearly the manner in which the Petitioner's right to a clean and healthy environment has been infringed.

31. The Deponent contends that the Petition offends the doctrine of exhaustion, as the proper forum to hear and determine the dispute herein is the National Environment Management Authority. The Petitioner's contention is that the process leading to the issuance of the Environmental Impact Assessment License (the EIA License) is a preserve of the Authority. Upon such determination, the Petitioner, if dissatisfied, could have lodged an appeal before the National Environment Tribunal (NET) pursuant to Section 129 (1) of EMCA. He avows that this court only exercises appellate jurisdiction over the decisions made by NET.

32. The deponent further avers that the Petition herein is an abuse of the court process, as it offends the doctrine of Constitutional Avoidance, which bars a court from determining a constitutional issue when a matter could be decided on another basis. Where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. He also argues that

the Petition was instituted to avoid the time limitation under Section 129 (1) (e) of EMCA, which required the Petitioner to lodge the appeal within sixty (60) days of the issuance of the licence. He avers that the Petitioner was well aware of the EIA Licence and had, in fact, intended to appeal against it, as evidenced by its Advocate's email dated 13/10/2023, attached to the Petition.

33. The 6th Respondent states that the 1st to 4th Respondents applied for an EIA Licence for the construction of a 2-level commercial building comprising shops, a restaurant and a car wash for commercial purposes on the parcel of land known as LR 30516/33, located within Nairobi County. The 6th Respondent then published a notice in the Kenya Gazette and in two newspapers of nationwide circulation setting out the impacts and mitigation measures of the proposed development. The Notice invited the public to submit their comments. Subsequently, NEMA requested views from other agencies to enable it to make an informed decision in reviewing the EIA Report.

34. It is averred that thereafter, the 6th Respondent's Officers conducted a site visit to verify the proposed site. Thereafter, it wrote to the 1st to 3rd Respondents requesting proof of public participation from the affected persons. The proponents of the development obtained a Letter of No Objection from Nyari Residents Welfare Society. The deponent avers that it was then that the 6th Respondent issued the proponents with the Environmental Impact Assessment Licence Number NEMA/EIA/PSL/28160 on 12/9/2023 for the development of the project, subject to the conditions stated therein. The Proponent was also under a legal obligation to report and update the Authority on any matters adversely affecting the environment and other ecological services by submitting annual environmental audits.

35. Regarding the assertion of inadequate public participation, the deponent contends that the assertion is baseless, as members of the

Petitioner were granted sufficient opportunity to air their views. In the absence of proof that the letter of no objection from Nyari Residents Association, which is a constituent of the Petitioner, did not represent or consider their interests, this is proof enough that there was adequate public participation for the project. Therefore, the Petitioner's assertion that the licensing process was flawed is baseless and unsubstantiated.

36. The deponent avows that the Petitioner requested documents relating to the project vide the Letter dated 14/11/2023. That the 6th Respondent duly responded to the Petitioner's advocates' letter by the Letter dated 1/12/2023, providing the relevant details concerning the EIA and further inviting the Petitioner to peruse the file. That the Petitioner cannot therefore claim that the 6th Respondent denied it access to crucial documents relating to the project.

37. The Petitioner is further accused of inviting the Court to usurp the Authority's powers by citing the adverse impacts of the commercial complex and seeking the invalidation of the licence. Part VI of EMCA confers upon the Authority the duty to oversee the conduct of environmental impact assessments of projects and the issuance of the EIA licence. Section 67 of the Act empowers the Authority to cancel, revoke or suspend the licence where the licensee contravenes the conditions therein. Therefore, complaints of non-compliance with the approved plans ought to have been raised with the Authority, not with the Court.

38. The deponent deposes that, in any event, the Petitioner has not demonstrated how the commercial complex has adversely affected the environment. The assertion that there is increased noise and waste management issues has not been substantiated by data to show the extent of the alleged pollution. He maintains that the 6th Respondent duly complied with the legal requirements under the Environmental

Management & Coordination Act, 1999 (EMCA), and the Regulations thereunder before issuing the Licence. He further maintains that the concerns raised during the public participation were sufficiently addressed. He further maintains that the potential environmental impacts, including noise pollution and vibration, increased water and energy demands, potential fire outbreaks, and traffic density, were duly addressed. Therefore, the assertion that the licence issued for the development of the project is illegal is baseless.

39. As for the identity of the owner in whose name the licence was issued, the Deponent avers that this is a non-issue, as it is not a requirement for the issuance of the Environmental Impact Assessment Licence. He denies any violation of the Petitioner's rights as alleged and urges the court to dismiss the Petition with costs.

7th and 8th Respondents' Replying Affidavit

40. The 8th Respondent, David Kinyua Githombe, filed a Replying Affidavit, sworn on 25/4/2025, on his own behalf and that of the 7th Respondent, as its Director. The 8th Respondent avers that he holds a Lease for a term of ten (10) years, from 1/7/2023 to 30/6/2033, for the parcel of land known as Block 1 of LR No. 12240 from the 1st Respondent. He avers that the 7th Respondent financed the development of the Rosslyn Square Luxury Mall, which is now fully operational with over Forty (40) Tenants.

41. The deponent states that prior to the said development, the suit land was agricultural land. In 2013, the deceased, Isaac Kamau Ndirangu, applied for a Change of Use to Residential and Commercial. The deceased passed away in 2018, and the 1st to 4th Respondents are Administrators and beneficiaries of his estate. He maintains that they undertook public participation prior to the development, and that the Lead Consultant reached out to the Petitioner for a Letter of no Objection. Following these consultations, Nyari Estate issued a Letter

of no Objection. A subsequent consultative meeting was held on 7/9/2023.

42. He asserts that the developer applied for the requisite approvals, including a licence from NEMA, plan approvals from the Nairobi City dated 31/8/2023, and a licence from the National Construction Authority Certificate of Compliance dated 22/9/2023, which were all issued in accordance with the law.
43. The Deponent avows that the Petitioner has not demonstrated to the Court the proximity of all its members to the suit property, nor how the aid development is affecting them. In any event, the Petitioner has not adduced any complaints presented to it by its members alleging a violation of their rights, other than a resolution signed by the two Directors. He contends that no explanation has been adduced in the form of an Affidavit explaining the infringement. That this offends the requirement that constitutional petitions should be pleaded with particularity, as stated in the case of Anarita Karimi Njeru -vs- Republic (1970) e KLR.
44. The 7th and 8th Respondents further contend that the Petition offends the principle of constitutional avoidance, and that the issues raised in the Petition ought to have been brought through a normal suit.
45. In further response, the Deponent faults the Petitioner for failing to adduce evidence demonstrating how its members have been affected by the development as alleged. He argues that it is insincere and malicious for the Petitioner to wait for the project to be completed and operationalised, only to move the court for its demolition.
46. He asserts that the application for Change of User was made by the late Isaac Kamau Ndirangu in 2013. That the change of user was carried out in accordance with procedure, and the public was invited to lodge objections. That receipt of a Letter of No Objection from Nyari Estate is sufficient proof that public participation was undertaken.

Hence, the right to a fair administrative action was not infringed in any way.

47.As for the availability of documents, the deponent avers that the Petitioner was advised by the 6th Respondent where to obtain the documents in relation to the development. The deponent further avers that the Petitioner has not stated that it acted as advised and failed to obtain the documents sought. The deponent therefore contends that the assertion that their right to information was violated is imaginary. The deponent further contends that the Petitioner has not in any way adduced evidence to prove how the development has affected their right to property under Article 40 of the Constitution.

48.Regarding the change of user in the name of the deceased, the deponent avers that the deceased had applied for a change of user before his demise. Therefore, the approvals were issued in his name, as he was still the registered proprietor. That succession proceedings had not been commenced and the title had not been devolved to the beneficiaries. That the mere fact that the approvals were issued in the name of the deceased does not invalidate them.

49.In addition, the 8th Respondent avers that the 7th Respondent has heavily invested in the said project and created employment for a number of people. Therefore, granting the orders sought is likely to deprive them of their livelihoods.

50.He asserts that, as a matter of caution, the 7th and 8th Respondents conducted an environmental audit of the developments at the Rosslyn Square Luxury Mall. The audit established that the mall conducts its activities in an environmentally sound manner in conformity with the environmental management regulations. In the absence of evidence proving that the Petitioner's rights have been infringed by the project, he urges the court to dismiss the Petition with costs.

7th and 8th Respondent's Further Affidavit

51. The 7th and 8th Respondents filed a Further Affidavit dated 15/9/2025, sworn by the 8th Respondent, David Kinyua Githome, which avers that, following the alleged complaint by the Petitioner about high music, he carried out soundproofing at the 7th Respondent's premises and achieved a noise attenuation of at least 55 dB at 60 metres from the premises and a noise reduction coefficient of at least 0.75.

52. He avers that the 7th Respondent engaged sound experts, and that Sound Masters Company performed the works as contracted. After conducting a sound test, the experts confirmed that the alleged sound issue had been adequately addressed. He attaches the Completion of Works Report dated 30/5/2025. He states that the report authoritatively confirms that the noise level from the suit premises has been effectively moderated to the required standards, and that the activities do not in any way interfere with the quiet and peaceful enjoyment of property by the Petitioner's members.

Interested Parties' Replying Affidavit

53. The Interested Parties opposed the Petition by way of the Replying Affidavit of Hassan Maalim Aftin, the 2nd Interested Party herein, sworn on 26/6/2025. The Interested Parties contend that the Petitioner lacks standing because the minutes relied upon to institute the Petition were signed by only two individuals without disclosing the company's total membership. The Petitioner has further failed to adduce the Certificate of Incorporation and evidence confirming that the resolution passed constituted the requisite quorum.

54. In further response to the Petition, the Interested Parties aver that the Petitioner's claim of a violation of their constitutional rights is unfounded and unsubstantiated. He asserts that the requisite approvals, changes to user applications, requests for approval from residents, environmental compliance with NEMA, and no objection from Nairobi City County were duly obtained.

55. The Deponent avows that this Court lacks the requisite jurisdiction to hear and determine the matter, as it offends the doctrine of exhaustion. Since the Petitioner is challenging the approvals and licensing decisions of the County and NEMA, the Petitioner ought to have lodged its complaint with the National Environmental Tribunal and the County Physical and Land Use Planning Liaison Committee.
56. The interested Parties assert that the development was constructed with proper public participation and adequate environmental impact assessment. They further assert that the concerns raised by the Petitioner were adequately addressed in the EIA Report of August 2023, and that potential mitigation was offered. The deponent further deposes that the 6th Respondent conducted a Noise Survey, and the Reports dated 22nd, 24th and 30th January, 2025, confirm that there are no significant differences in the noise levels when the music in the complex is on or off. The Reports indicate that the noise levels in the residence may have been amplified by other commercial activities surrounding the premises. He attaches the Noise Survey Reports by the 6th Respondent.
57. Regarding the alleged violation of the Petitioner's right to administrative action and the right to access information under Articles 35 and 47 of the Constitution, respectively, the Interested Parties aver that the Petitioner was afforded sufficient opportunity to peruse the file for the development and failed to utilise the opportunity to appeal to the 5th and 6th Respondents' decision-making bodies.
58. The Deponent avers that the Interested Parties are tenants of the subject premises and entered into Tenancy Agreements with the 7th Respondents. He avers that, prior to the execution of the Agreements, they all conducted due diligence. He further avers that, having been provided with certified documentation showing the approvals from the

requisite agencies, this is sufficient proof that the development was carried out with the necessary approvals.

59. The Interested Parties contend that the approval and licensing process cannot be faulted merely by reference to the deceased proponent's name. As the 1st to 4th Respondents had acquired a valid grant, they had the legal capacity to act on behalf of the deceased in the development process. The Interested Parties urge the Court to strike out the Petition.

Petitioner's Further and Supplementary Affidavits

60. In response to the Respondents' and the Interested Parties' responses, the Petitioner filed Affidavits, sworn by **Eli Habwe**, deponed on 5/5/2025, 21/7/2025 and 10/9/2025, respectively.

Petitioner's Further Affidavit dated 5/5/2025

61. The Petitioner asserts that although the Project Consultant sent an email on 30/8/2023 requesting a letter of no objection, to which the Petitioner responded on 30/9/2023, requesting more time to engage its membership, the developer commenced construction on 19/9/2023 before the residents could meet and deliberate on the issue.

62. With reference to the Letter of No Objection from Nyari Residents, the deponent avers that the Letter contained conditions regarding noise and traffic which have not been complied with. He deposes that since the mall's operationalisation, there have been excessive night-time noise and traffic snarl-ups on the Redhill Road. This is despite the project consultant acknowledging the concerns and stating that sound-proofing was being carried out at the 7th Respondent.

63. The Petitioner further contends that a middle plot has been constructed on the suit property without prior consultation with them and without obtaining separate approvals. He claims that there was no public notice and that the EIA was not varied for the second phase of construction.

64.Regarding the right to access information, the deponent avers that the Petitioner wrote to NEMA and Nairobi City County seeking copies of the approvals. NEMA directed them to obtain copies of the documents from its offices vide the Letter dated 1/12/2023 but failed to supply them directly. On the other hand, the County is faulted for not responding to the requests for information. He avers that the non-disclosure by the approval bodies and the proponent has denied the community the ability to verify compliance.

Petitioner's Further Affidavit dated 21/7/2025

65.The Deponent avers that the Noise Survey Reports adduced by the Interested Parties confirm their complaints. The experts therein conclude that the noise levels at all six points were above the maximum permissible noise level of 35 dB (A) within a mixed residential area, which has always been their concern. He argues that the experts' findings constitute an admission, as they confirm that the ambient noise generated by the mall's general operations, including associated traffic, exceeds the legal limit stipulated in the First Schedule of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009.

66.The deponent further argues that, had the Interested Parties conducted the due diligence alleged, they would have noticed that the EIA Licence was unlawful because it was issued to a deceased person. On locus standi, the Petitioner maintains that it has locus standi pursuant to Article 70 of the Constitution, which grants broad and liberalised standing in matters concerning the enforcement of environmental rights.

Petitioner's Supplementary Affidavit of 10/9/2025

67.In response to the 6th Respondent's assertions, the Petitioner states that the alleged copies of the newspaper notices were never served on their Advocates nor uploaded to the eFiling portal. In addition, the 6th

Respondent's own EIA Site Verification Checklist recommended the approval of the project, subject to the proponent obtaining a Letter of No Objection from the area's resident associations.

68. The deponent deposes that although the proponent obtained a Letter of No Objection from Nyari Residents Association, the proponent did not engage other Resident Associations. That Nyari Residents Association is only one of several residents' associations constituting the Petitioner. That in any event, the 6th Respondent has not attached any report or evidence to demonstrate that the conditions stated by Nyari Residents Association regarding traffic management and noise pollution were complied with before the EIA Licence was issued. The deponent therefore prays that the orders in the Petition be granted.

The written Submissions

69. By consent of the parties, the Petition was canvassed by way of written submissions. The parties complied by filing detailed submissions and citing numerous authorities in support of their respective positions. The court has had the opportunity to read the said submissions and considered them in its determination.

Analysis and Determination

70. Having carefully perused the submissions filed by the parties herein, alongside the pleadings filed in this case, the issues for determination in this matter are: -

- a. Whether the petitioner has the locus standi to institute the petition herein;
- b. Whether this court has jurisdiction to hear and determine this Petition;
- c. Whether this Petition meets the threshold of a constitutional petition;
- d. Whether the Petitioner has demonstrated a violation of the rights protected under Articles 10, 35, 42, 47 and 69 of the Constitution;

- e. Whether the issuance of the approvals and licenses in the name of the deceased proprietor other than the 1st to 4th Respondents rendered them invalid?
- f. Whether the Petitioner is entitled to the orders sought.

a. Whether the petitioner has the locus standi to institute the petition herein.

71. 'Locus standi' is the right to bring an action before a court of law or another adjudicatory forum, for that matter. The Court of Appeal in the case of Juletabi African Adventure Ltd. & Another -vs- Christopher Michael Lackley (2017) eKLR in defining Locus Standi referred to its earlier decision in Alfred Njau & 5 Others -vs- City Council of Nairobi (1983) e KLR where the court held that;

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

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

“It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010, by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by or private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act their own

name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to article 22(3), aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of June 28, 2013 (The Mutunga Rules) to inter alia facilitate the application of the right to standing. The rules reiterate any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated, infringed or threatened has a right of standing and can institute proceedings as envisaged under article 22(2) and 258 of the Constitution.”

73.I need not add anything to this elaborate exposition on the issue of locus standi.

74.Further, Article 70 of the Constitution is clear that an applicant need not demonstrate that he/she or any other person has incurred loss or suffered injury. Any person can institute proceedings under Article 70.

75.It has not been disputed that the Petitioner is a duly registered entity. A company acts through its Directors. The Petitioner has adduced a resolution duly signed by its Directors. That is sufficient proof that the Petitioner was duly authorised to commence the proceedings. Article 260 of the Constitution defines a person to include a company, association or other body of persons, whether incorporated or unincorporated. It therefore means that the Petitioner herein, being a corporate entity duly registered, whose members seek to address grievances and protect their Constitutional rights to a clean and healthy environment and fair administrative practices.

76.Pursuant to the above-cited Constitutional provisions, it follows that the Petitioner has locus standi to institute the Petition.

b. Whether this court has jurisdiction to hear and determine this Petition;

77. It is a general principle of law that a Court's jurisdiction flows from the Constitution, statute or both. The centrality of the concept of jurisdiction in Kenya's legal system cannot be gainsaid. Nyarangi JA outlined the significance of jurisdiction in the adjudication of civil disputes in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 in the following words:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction."

78. The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in *Samuel Kamau Macharia & Anor -vs- Kenya Commercial Bank Limited & 2 Others* [2012] eKLR as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Learned Counsel for the first and second Respondents in his submissions that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011. Where the Constitution

exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

79. The broad jurisdiction of this Court is set out in Article 162(2) of the Constitution as follows:

“(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to:

(a) employment and labour relations; and

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

(c)

80. Section 13 of the Environment & Land Court (ELC) Act sets out in details, the extent of the jurisdiction of the Court in the following terms:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes; -

a. relating to environmental planning and protection, climate issues, land use

planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

81. The Act also mandates the Court to make any order and grant any relief as the Court deems fit and just, including (a) interim or permanent preservation orders, including injunctions; (b) prerogative orders; (c) awards of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declarations; or (i) costs

82. It is the Respondents' and the Interested Parties' case that the right forum to adjudicate the Petitioners' grievances would have been the NET and the Liaison Committee, and that the Petitioners have prematurely invoked the constitutional power of this Court.

83. The Petitioners think otherwise. According to them, their dispute is before the right forum, and the Court was urged to so find.

84. As a principle, the doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the Courts. Addressing the ambit and rationale of this doctrine, the Court of Appeal in *Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others* [2015] eKLR observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

85. The Supreme Court of Kenya explained the importance of the doctrine in the case of *Benard Murage -vs- Fine Serve Africa Limited & 3 Others* [2015] eKLR in the following words:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”

86. Most recently, the Supreme Court in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR), made the following pronouncement on the doctrine of exhaustion:

87. This is further firmly rooted in article 159 of the Constitution which requires the Courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a

safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.

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88. The apex court in the case of Benson Ambuti Adegia -vs- Kibos Distillers Ltd & 5 Others [2020] eKLR emphasized that, where appropriate, the superior Courts should remit the dispute to the relevant bodies for adjudication.

89. The doctrine of exhaustion was also addressed by a 5-Judge Bench in William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others, Muslim for Human Rights and 2 Others (Interested Parties) (2020) eKLR as follows;

“The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agencies action seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring

that there is a postponement of judicial consideration of matters to ensure that a party is first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution....”

90. The Court went on to outline the exceptions to the rule as follows:

“As observed above, the first principle is that the High Court (read ELC) may, in exceptional circumstances consider and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Maito J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion...” -

91. In the case of *Nicholas -vs- Attorney General & 7 others; National Environmental Complaints Committee & 5 Others (Interested Parties)*

(Petition E007 of 2023) [2023] KESC 113 (KLR) the Court culled the following principles;

- a. there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer.
- b. that right to access the Court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. The apex Court relied on the reasoning in *William Odhiambo Ramogi & 3 Others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the Court held that where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court (read the ELC Court).
- c. the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the Court is not restrained from providing constitutional relief.
- d. a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional

reliefs, is a necessary prerequisite on the part of any superior Court.

92. In the present case, the Petitioner is aggrieved by the development undertaken on L.R Land Reference Number 30516/33. It opines that its members were not afforded an opportunity to deliberate on the proposed project before its commencement. The Petitioner argues that sufficient public participation was not undertaken before the commencement of the development or at any stage thereafter, contrary to Articles 10 and 69.
93. It further claims a violation of its members' right to a clean and healthy environment, as set out in Article 42, and a breach of their right to access information, as provided for under Article 35 of the Constitution. The 5th and 6th Respondents are accused of failing to adhere to the principles of fair administrative action, as provided for under Article 47 of the Constitution, thereby impeding the Petitioner's right to fair administrative action.
94. The Petitioner has also argued that the entire approval and licensing process was marred by irregularities, including the issuance of approvals and licences in the name of a deceased person, and that the conditions stated in the Letter of No Objection by Residents were not adhered to. The development is therefore illegal, as it is anchored on void approvals and licences. To this end, the 5th and 6th Respondents are accused of breaching their statutory duties.
95. Issues of development control and planning within the County fall under the purview of the Physical Land Use Planning Act, 2019 (PLUPA). Section 76 provides for the County Physical and Land Use Planning Liaison Committee whose mandate as under Section 78 includes to;
- a. hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;

- b. hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
- c. advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- d. hear appeals with respect to enforcement notices.

96. Section 61 (2) of PLUPA empowers the County Executive Committee (CEC) on application to grant development permission and stipulate the conditions necessary, refuse to grant the development permissions with reasons, a party aggrieved by the decision of the CEC regarding an application for development permissions may appeal against the decision of the CEC to the County Physical and Land Use Planning Liaison Committee.

97. Section 61(3) and (4) of the Act establishes an appeal mechanism for any person aggrieved by the decision of a County Executive Committee member in respect of a development permission within 14 days of the said decision. An appeal from the decision of the Committee lies to this Court.

98. As regards claims of breach of access to information, Section 21(i) (f) of the Access to Information Act sets out, as one of the functions of the Commission on Administrative Justice, to:

“hear and determine complaints and review decisions arising from violations of the right to access to information.”

99. The Petitioner is equally concerned with the environmental impacts of the Assessment Licence granted by the 6th Respondent. Section 129 of the EMCA creates the NET with powers to hear and determine appeals arising from NEMA's decisions to grant or refuse to grant or transfer licences, or to impose conditions, limitations and restrictions on licences, or to revoke, suspend or vary licences, or to determine the fees chargeable on licences.

100. Section 3 (3) of EMCA grants any person, who claims that their right to a clean and healthy environment has been violated, the right to apply to the ELC for redress.
101. The Court agrees that the Petitioners had multiple avenues open to them. However, it also seeks redress for constitutional violations, which can be granted only by this Court pursuant to Article 162(2)(b) of the Constitution, Section 13 of the ELC Act, and Section 3 of the EMCA. It is clear that the Petitioner's claim is multifaceted.
102. The Apex Court has had the opportunity to weigh in on the doctrine of exhaustion in light of multi-faceted claims as herein. In *Benson Ambuti Adegwa & 2 others -vs- Kibos Distillers Limited & 5 others* [2020] eKLR, the Court stated as follows:

“51. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court “in the interests of justice.” It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised its discretion to hear and determine the Petition.

52. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or

refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.....

54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the Constitution was protected.”

103. See also the Supreme Court in Nicholas Abidha -vs- AG & 7 Others, (Petition E007 of 2023) (2023) KESC113 (KLR) on multi-faceted claims.
104. From the foregoing binding decisions of the Apex Court, the principles that can be deciphered in dealing with an objection to jurisdiction on the basis of failure to exhaust alternative avenues are that first, disputes must be determined on a case-by-case basis. The Court is also called upon to consider the efficacy of the alternative remedies and must be satisfied that constitutional claims are not a smoke screen to evade the strictures of the alternative process.
105. The 7th and 8th Respondents have also invited the court to consider the efficacy of the alternative remedies and to be satisfied that constitutional claims are not a smoke screen to evade the strictures of the alternative process. This is the doctrine of constitutional avoidance, sometimes referred to as the Constitutional-Avoidance-Rule. See the Supreme Court decision in Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others (2014) Eklr.

106. Black's Law Dictionary, 10th Edition, page 377 defines it as: The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.

107. In my view, the allegations of a violation of constitutional rights and any redress thereof fall within the ambit of this Court, such that none of the aforementioned quasi-judicial forums would be able to adequately and holistically resolve them. This Court therefore has jurisdiction to try this suit. The objections are therefore declined.

c. Whether this petition meets the threshold of a constitutional petition;

108. It was the 7th and 8th Respondents' submission that the Petitioner has not pleaded the alleged contravention of the constitutional right with sufficient precision and/or specificity.

109. It is imperative to review if the Petition satisfies the basic tenets of a constitutional petition. Article 22 (1) of the Constitution provides: -

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

110. Constitutional litigation serves to protect fundamental rights and freedoms under Articles 22 and 258 of the Constitution of Kenya 2010. The filing is regulated by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 10 (1) sets out the content of a petition, which includes the facts relied upon, the constitutional provision violated, and the nature of the injury caused or likely to be caused.

111. The Court in *Anarita Karimi Njeru vs Republic* [1979] eKLR, set out the test in this regard holding as follows:

“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that

he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

112. This principle was affirmed by the Court of Appeal in the case of *Mumo Matemu -vs- Trusted Society for Human Rights Alliance & 5 Others* [2013] eKLR where the Court observed that what is needed is not a formulaic approach to the drafting of the pleadings but that the claim of violation must be discernible from whatever pleadings, that have been placed before the court. The Court observed as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

113. The requirements for a successful Constitutional Petition are as follows: the Petitioner should set out the Constitutional provisions she believes have been violated or threatened, and the manner in which the respondent(s) have violated those provisions. It is not enough for the Petitioner merely to list the Constitutional Provisions without demonstrating how they were infringed.

114. I have reviewed the Petition. It sets out the facts that highlight the events leading to the filing of the Petition. The Petitioner has identified

various constitutional provisions that it alleges have been violated, resulting in adverse effects on the environment, including alleged noise pollution, poor waste management, and traffic implications along Redhill Road, which it alleges have infringed its rights to a clean and healthy environment. The Petitioner has also set out why the 5th and 6th Respondents are sued alongside the 1st to 4th Respondents. The legal foundations of the petition are also set out, including those most proximal to the subject, namely Articles 10, 35(1), 40, 42, 47 and 70, and Sections 58(1) EMCA, 14(7)(1) and (2) of the Environmental (Impact Assessment and Audit) Regulations, 2003 (Regulations) under EMCA, 56, 61(b) and (c), and 72 of the Physical and Land Use Planning Act, as well as Section 4 of the Access to Information Act. The reliefs sought have also been pleaded. It is evident that the petition specifies the provisions of the Constitution that are alleged to have been violated, the particulars of the rights infringed, and by whom, and the remedies sought.

115. It is therefore this court's finding that the petition has met the threshold for a constitutional petition.

d. Whether the Petitioner has demonstrated a violation of the rights protected under Articles 10, 35, 42, 47 and 69 of the Constitution;

116. The dispute herein concerns the use of land and its effects on the environment. The 1st to 4th Respondents are the proponents of the subject development, whereas the 7th and 8th Respondents are the Developers. The Petitioner opposes the development, alleging that it is illegal and cites a host of constitutional violations. In particular, it cites the contravention of Articles 10, 35, 47 and 69(d) of the Constitution, insofar as they set out the participation of the people and the principle of sustainable development as a national value and a principle of governance.

117. Further, the Petitioner alleges that its members' rights to a clean and healthy environment, as protected by Article 42, have been violated. The Court will consider these allegations under the foregoing heads.
118. 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. Article 47 makes reference to fair administrative action.
119. These constitutional dictates are reinforced by the provisions of EMCA and the ELC Act, both of which require the Environment and Land Court to be guided by the requirements for public participation in the development of policies, plans and processes for the management of the environment.
120. Further, 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.”
121. Furthermore, Article 6(2) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters. It states that:

“The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:
 - i) The commencement of the procedure;
 - ii) The opportunities for the public to participate;
 - iii) The time and venue of any envisaged public hearing;
 - iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - vi) An indication of what environmental information relevant to the proposed activity is available; and
- (e) The fact that the activity is subject to a national or trans boundary environmental impact assessment procedure.

122. 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.”

123. 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 representatives 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.”

124. The Supreme Court of Kenya set out the parameters for effective public participation in the case of *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 noted as follows:

“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....
.....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 process (medium of engagement) of participation that are clear and simple;
 - c) opportunity for balance influence from the public in general;
 - d) commitment to the process;
 - e) 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.”

125. From the foregoing, it is not sufficient merely to allege and demonstrate that public participation was conducted. The burden of proof lies with the party alleging that public participation was conducted. One must go further and demonstrate that the views expressed during this exercise were duly considered, and, if not, the reasons why.
126. It is the Petitioner's contention that its members were not afforded an opportunity to deliberate on the proposed project before its commencement, as set out in its email of 6/9/2023. Further, that its emails of 6/10/2023 and 13/10/2023 to the lead consultant, raising concerns about public participation, the premature commencement of construction, and its request for the Environment Impact Assessment Report and a copy of the Environmental Impact Assessment License, did not elicit any response. The Petitioner contends that there was insufficient public participation before the commencement of the development.
127. The Respondents and the Interested Parties, on the other hand, assert that public participation was conducted in accordance with the legally acceptable standards.
128. The evidence before the Court shows that the deceased, Isaac Ndirangu Kamau, made an application for Change of User from agricultural to residential-cum-commercial (comprehensive) in the year 2006. The said application was approved on 29/11/2006. As a first condition of approval, the Applicant was required to submit satisfactory building plans within two years, otherwise the approval would lapse.
129. From the record, it appears that the deceased did not comply, hence he applied for a renewal of the Change of User. The Change of User was in respect of LR Nos. 12239 and 12240. The said parcels were amalgamated and later subdivided. The suit property is one of the

resultant parcels. It is evident that the proposed Change of User was advertised in the Standard Newspaper on 30/4/2013, inviting comments and objections from the public. A public notice sign was also placed on the suit property. Subsequently, the Change of User was issued on 27/5/2013.

130. The Petitioner has not adduced evidence that it raised any objection to the Change of Use. It is my finding that there was sufficient public participation for the Change of Use.

131. Sections 58(7) and (8) of the Physical Land Use Planning Act [PLUPA] are instructive. They provide thus:

“(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.”

132. Section 3(5) of EMCA recognizes the principle of public participation in the development of policies, plans and processes for the management of the environment as one of the key principles of sustainable development.

133. EMCA has established a two-tier requirement for public participation to be undertaken during the process leading up to the grant of the EIA Licence, including during the conduct of the EIA study and upon publication of the EIA Report.

134. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, requires the proponent of a project to seek views of the persons to be affected after approval of the project report and during the process of the study. The Regulation provides as follows:

- “(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
- (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—
- (a) publicize the project and its anticipated effects and benefits by—
 - (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - (ii) publishing a notice on the proposed project for two successive weeks in newspaper that has a nationwide circulation; and
 - (iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;
 - (b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
 - (c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
 - (d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.”

135. On the part of the Proponent, it is evident that the Lead Environment Consultant for the Development, Roy Misiko, sent an email on 30/8/2023 to the Rosslyn Alliance Residents Association requesting a Letter of No Objection. In the said meeting, the Consultant notes that a meeting was held on 29/8/2023 at the Nyari Estate Offices, during which the proposed commercial development was discussed. The drawings for the proposed development were attached for ease of reference.
136. Subsequently, Nyari Residents Welfare Society issued a Letter of No Objection for development on 6/9/2023. The members appreciated the openness in discussing the development. They reminded the developer of its undertaking to ease traffic flow, ensure the safe disposal of both solid and biodegradable waste, and avoid noise pollution. The Letter was also served on the County. Notably, Nyari Residents Welfare Society is a constituent member of the Petitioner.
137. There is also a Letter dated 7/9/2023 from the Consultant addressed to the Commission for University Education, a neighbouring property, seeking comments as a prerequisite for NEMA's issuance of a License for the Project. The Letter was received by the said Commission on 8/9/2023, but no response was received.
138. Although the Petitioner alleges that the concerns raised by Nyari Residents in their Letter of No Objection were not addressed, the Authority argues that the concerns were addressed and that some of the conditions stated in the License were informed by them. It is indeed evident that the concerns raised in the Letter of No Objection formed part of the conditions in the License.
139. As noted earlier, the Lead Environment Consultant wrote on 30/8/2023 requesting a Letter of No Objection. The Petitioner's email dated 6/9/2023 indicated that a meeting was to be arranged to inform all residents and give them the opportunity to respond. The Petitioner's

email did not specify any timeline for the meeting. Given that the License was issued on 12/9/2023, I am of the view that the Petitioner was granted reasonable time in the circumstances to hold the meeting and share its members' views. The process could have been halted indefinitely pending the Petitioner's holding the meeting, given the statutory timelines. The Petitioner ought to have been vigilant in protecting its rights; equity aids the vigilant and not the indolent.

140. Clearly, the Proponent undertook sufficient public participation prior to NEMA's approval, particularly during the Change of User and through the Lead Environment Consultant for the Development

141. Moving now to the propriety of the Environmental Impact Assessment licence, the legal regime for the issuance of EIA licences is anchored in the Constitution of Kenya, which, under Article 69 (f), requires the State to establish systems for environmental impact assessment, environmental audit and monitoring of the environment.

142. Section 58 of the EMCA stipulates the procedure to be followed when applying for an Environmental Impact Assessment license. It provides as follows:

“58(1). Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an 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.”

143. NEMA issued the License on 12/9/2023, bearing License No. NEMA/EIA/PSL/28160. The License refers to the application received

from the deceased, Isaac Kamau Ndirangu. The License was subject to compliance with various conditions listed thereon. The Authority has also adduced the Letter dated 4/9/2023, which required the Proponent to obtain public participation from the persons before the issuance of the License. Further, in the EIA Site Verification Checklist dated 28/8/2023 at Section C, the Authority recommended approval upon obtaining a Letter of No Objection from the Residents' Association of the Area.

144. Further, Regulation 72 of the Environmental (Impact Assessment and Audit) Regulations 2003 stipulate what the project report should identify.
145. In addition, Regulation 9 requires NEMA to submit the project report to each of the relevant lead agencies and to the relevant District Environment Committee for their written comments. These comments shall be submitted to the Authority within twenty-one days of receipt of the project report from the Authority, or such other period as the Authority may prescribe. After analysing the Report, the Authority is mandated to communicate its decision to the Proponent within forty-five days of the submission of the project report.
146. The 6th Respondent, in its Replying Affidavit, sworn by its Director, has attached the Letter Reference No. NEMA/NRB/PR/5/1/18,731(PSR 43,637), which addresses the EIA Project Report and is sent to the relevant lead agencies, including the County Government and the Nairobi City Water and Sewerage Company, among others. In the said Letter, the Authority invited the various agencies to share their views and/or concerns regarding the project's suitability, potential negative environmental impacts and mitigation measures within their jurisdiction.
147. The Authority is also required to publish the Environmental Impact Assessment pursuant to Section 59 (1) of EMCA states that;

“Upon receipt of an environmental impact assessment study report from any proponent under Section 58(2), the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state—

- a) a summary description of the project;
- b) the place where the project is to be carried out;
- c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and
- d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.”

148. In compliance with this requirement, the Authority alleges that it published a notice in the Kenya Gazette and two newspapers with nationwide circulation setting out the proposed impacts and mitigation measures for the development and invited the public to share their comments. The notice was also announced on radio. As noted by the Petitioner’s Counsel, the said newspaper publications and the receipt evidencing radio airtime have not been adduced. In my view, these are public records which can be accessed by members of the public, including the Petitioner, and therefore the presumption of regularity applies in favour of the Authority.

149. Based on the foregoing, it is my finding that there was sufficient public participation. The members of the public likely to be affected by the project were duly informed and/or aware of the development. They were not kept in the dark so as to allege that they were not involved. The participation process met the threshold of legal sufficiency anticipated under the law.

150. The right to access information is one of the rights that underpins the values of good governance, as set out in Article 10 of the Constitution.

In environmental law, it promotes transparency, accountability and sustainable development.

151. The right to information is enshrined under Article 35(1) of the Constitution as follows:

“(1) Every citizen has the right of access to -

- a. information held by the State; and
- b. information held by another person and required for the exercise or protection of any right or fundamental freedom.”

152. In furtherance of this, Parliament enacted the Access to Information Act. Section 4 provides that, subject to the provisions of the Act and any other written law, every citizen has the right of access to information. Section 9(1) of the Act further provides timelines for responding to a request for information. It states that, subject to Section 10, a public officer shall make a decision on an application as soon as possible, but in any event within twenty-one days of receipt of the application.

153. The right to access information is not affected by any reason the person gives for seeking access, or by the public entity's belief as to the person's reasons for seeking access. Additionally, access to information held by a public entity or a private body must be provided expeditiously at a reasonable cost.

154. Section 3A of EMCA equally provides that every person has a right to access any information that relates to the implementation of the Act that is in the possession of the Authority, lead agencies or any other person. Section 3A (2) states that a person desiring information should apply to the National Environmental Management Authority, NEMA, or the relevant lead agency and may be granted access on payment of prescribed fee.

155. The apex Court in the case of Njonjo Mue & Another -vs- Chairperson of the Independent Electoral and Boundaries Commission and 3 Others

(2017) eKLR, where the Supreme Court elaborated in details the application of provisions of Access to Information as follows;

“The right to access information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically, procedures are provided in law on how a person ought to access information held by another person and particularly a state organ or entity. Section 8 of the Access to Information Act in the above context thus provides that a person may apply in writing or where one is unable to write, may apply orally to an information officer who shall then put the request in written form and any such request for information must be processed within 21 days. ...we also recognize that information held by the state or state organs, unless for very exceptional circumstances ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restrictions to access of any such information. Further, a duty has also been imposed upon the citizens, to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from as any such derogation would lead to a breach and or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.”

156. In the instant case, the Petitioner requested access to various documents relating to the project from the Authority on 14/11/2023. The letter was received on 29/11/2023. The Authority, in its letter dated 1/12/2023, responded to the Petitioner’s Advocates, providing the relevant details concerning the environmental impact assessment

and inviting the Petitioner to peruse the file and make copies, if any, subject to payment of the requisite fees.

157. Clearly, the Petitioner cannot allege a violation of its right to information. The Authority promptly responded and gave it the opportunity to access the documents it deemed necessary from the file, subject to payment of the requisite fees. The Petitioner cannot now claim a violation of its constitutional right based on its inaction.

158. As for Article 42 of the Constitution, the supreme law specifies that every person has the right to a clean and healthy environment, including the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70.

159. Article 70 is on enforcement of environmental rights and stipulates; -

“If a person alleges that a right to a clean and healthy environment recognized and Protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.’

160. The Petitioner alleges a violation of its members’ rights under Article 42 of the Constitution. It avers that the construction and operation of the commercial complex continue to cause increased noise pollution and waste management issues that have directly affected members of the Petitioner and their ability to reside peacefully in their homes. It also attributes the Mall's operations to traffic snarl-ups on Redhill Road.

161. Regarding noise pollution, I note that when the Petitioner raised the concern, the 7th and 8th Respondents took measures to control the alleged pollution. However, the Petitioner was not satisfied, as evidenced by the email of 31/12/2024, which states that the noise

control measures were ineffective, as music continued to disturb residents until the early hours of the morning.

162. In response, NEMA, through its Lead Expert, vide the email dated 16/1/2025, indicated that the proponent was properly guided on noise mitigation measures and that soundproofing of the premises was ongoing and expected to be completed by the end of the month. The Authority was further open to conducting a joint survey to evaluate the effectiveness of these measures once finalised. The email also noted that the 7th Respondent remains committed to ensuring that noise levels are controlled and do not disrupt the well-being of the community.
163. The 7th and 8th Respondents aver that they subsequently contracted Sound Masters Company in May 2025 to carry out soundproofing works at the 7th Respondent. The said company soundproofed the premises, and after conducting a sound test, confirmed that the alleged sound issue had been addressed. The 7th and 8th Respondents have adduced the Completion of Works Report dated 30/5/2025 confirming the same.
164. Section 101 of EMCA sets out standards for noise. Pursuant to this provision, the Environment Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 were gazetted, setting out minimum standards for emissions of noise and vibration pollution into the environment, as necessary to preserve and maintain public health and the environment. The regulations also set out procedures and criteria for measuring noise and vibrations.
165. Section 102 of EMCA concerns noise in excess of established standards. It prohibits any person from emitting noise in excess of the noise emission standards established under EMCA, unless exempted, and makes it an offence to do so.

166. Regulation 3(1) sets out general prohibitions against the making or causing of loud unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose or health or safety of others and the environment.

167. Regulation 3(2) further provides several factors for determination of loud and unreasonable noise. These factors include;

“(i) the time of the day;

(ii) the proximity to a residential area;

(iii) whether the noise is recurrent, intermittent or constant;

(iv) the level and intensity of the noise;

(v) whether the noise has been enhanced by any electronic or mechanical means; and

(vi) whether the noise can be controlled without effort or expense to the person making the noise.”

168. Regulation 6 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009 provides thus:

“No person shall cause noise from any source which exceeds any sound level as set out in the applicable column in the First schedule of the Regulations”

169. Sections 107(1) and (2) of the Evidence Act establish that the legal burden of proof lies on the party who asserts the existence of a fact and seeks a judgment based on it. Also, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

170. Complementing this, Section 108 of the Act sets out the burden of proof, stating that the burden in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. Section 109 of the same Act provides that the burden of proof regarding any particular fact rests on the person who wants the court to believe in its

existence, unless the law expressly places that burden on someone else.

171. The Petitioner has not adduced any expert report to substantiate its assertion of alleged noise pollution. Despite being invited to a joint survey to evaluate the mitigation measures, no evidence has been adduced to show that the Petitioner accepted the offer. Further, the Petitioner has not controverted the findings of the Report from Sound Masters dated 30/5/2025.

172. The Court of Appeal in the case of Kibos Distillers Limited & 4 Others -vs- Benson Ambuti Adegga & 3 Others (Civil Appeal 153 of 2019) [2020] KECA 875 (KLR) held as follows regarding proof of environmental pollution:

‘...Proof that a complaint had been raised years before is not proof of environmental degradation. Pollution is primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions.’

173. As for the poor waste management and traffic snarl-ups, the Petitioner has equally not adduced any evidence to substantiate the allegation. As noted elsewhere in this Judgment, the Authority invited other concerned agencies, including the Nairobi County Government and the Nairobi City Water & Sewerage Company, to submit their views, as required by law. The Petitioner has not adduced any evidence to show that the respective agencies disapproved the project or that they raised the said issues with the agencies mandated to do so. In any case, NEMA, by its Lead Expert, confirmed in its email of 16/1/2025 that the Middle Plot (being used as a car wash and allegedly causing traffic along the Redhill Road) is part of the Mall. Nairobi Water & Sewerage Company having not raised any concerns, the presumption is that the sewer line construction works had been done satisfactorily.

174. I also note that the 1st Respondent obtained a Certificate of Compliance from the National Construction Authority for the development valid from 22/9/2023 to 22/9/2025.

175. The National Construction Act No. 41 of 2011 establishes the legal framework for regulating, registering, and overseeing construction projects in Kenya. It authorises the NCA to register and licence contractors, supervise skilled construction workers, and generally regulate the construction sector. Despite the NCA's crucial role in the construction sector in the country, the Petitioner did not consider it appropriate to join it as a party.

176. The 2020 amendments to Section 2 of the NCA Act introduced the definition of "building code" as the building code provided for under regulations made pursuant to Section 42. Section 5(g)(a) empowers the NCA to enforce the National Building Code in the construction industry. These amendments aim to align the construction sector with various provisions of the Constitution, such as Article 43(1)(b) on the right to accessible and adequate housing and reasonable standards of sanitation; Article 46(1)(a) on the right to goods and services of reasonable quality for consumers; and Article 66, which obligates the State to regulate land use or any interests over land in the interest of defence, public safety, public order, public morality, public health, or land use planning. Additionally, there was a need to align the industry with international best practices and principles that promote quality, safety, health, and environmental sustainability.

177. Section 23(2) of the NCA Act states as follows;

“A person shall not carry out any construction work or engage in any construction activity unless such works have been registered with the Authority and all the necessary approvals, licenses, and certificates have been obtained.”

178. It therefore follows that NCA approvals are granted only after all other approvals have been obtained.

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

180. In the event of non-compliance with the law, NCA is empowered to: suspend the works pending compliance; impose fines on the developer; and prosecute the contractor and developer.

181. The Petitioner has not challenged the certificate of compliance issued by NCA. It has adduced no evidence of non-compliance with the National Construction Act.

182. It is a principle of law that a court presumes regularity in respect of documents, such as the approvals and licences adduced in this case.

183. To buttress this point, the court places reliance on the decision by the Supreme Court in the case of 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) thus:

“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.”

184. The Court of Appeal was categorical in the case *Kibos Distillers Limited & 4 others -vs- Benson Ambuti Adegga & 3 Others* (Supra), that the evidence required to rebut the presumption of regularity must be cogent, clear and uncontroverted and that the presumption of regularity cannot be rebutted through conflicting interpretation of a statutory or regulatory provision.

185. No evidence has been adduced rebutting this presumption.

186. It is therefore my finding that Petitioner has failed to prove the alleged violation of the right to a clean and healthy environment.

187. The 5th and 6th Respondents have also been accused of violating the right to a fair administrative action, as provided for under Article 47 of the Constitution. Under Section 4(1) of the Fair Administrative Action Act, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner having failed to adduce evidence faulting the 5th and 6th Respondents’ processes in the issuance of the approvals and Licences, there is no basis to make a finding of a violation of the said right.

188. Article 69 is on obligations in respect of the environment and obligates the state to among others establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

189. In the case of Anami & 2 Others (Suing as Officials of Rhapta Road Residents Association) v County Executive Committee Member (CECM) Built Environment and Urban Planning, Nairobi City County & 20 others [2025] KEELC 128 (KLR), the Learned Judge stated that;

“the key objectives and aspects of EIA monitoring include: ensuring that the project complies with the conditions of approval and adheres to the environmental management plan (EMP) outlined during the EIA process and assesses whether the proposed mitigation measures are effective in minimizing or preventing the identified environmental impacts. EIA monitoring also identifies unforeseen environmental impacts that might arise during project implementation; provide data and insights to adjust mitigation strategies or operational practices in response to monitoring results, and maintains transparency and accountability by keeping stakeholders informed about the project's environmental performance.”

190. On the basis of the documentary evidence adduced by the Respondents, this court is satisfied that the Petitioner failed to provide the court with details of the illegalities and irregularities intended to bypass the law in the development of the project by the Respondents. The Petitioner has thereby not established that the issuance of the approvals and EIA licence was unlawful, or that the Respondents are not complying with the conditions set therein. The development approval and EIA licence therefore remain valid, provided that the Respondents comply with the conditions set out therein.

e. Whether the issuance of the approvals and licenses in the name of the deceased proprietor, other than the 1st to 4th Respondents, rendered them invalid?

191. The Petitioner contends that the development permissions and licences granted were issued in the name of the deceased, Isaac Kamau Ndirangu. It has not been disputed that the deceased applied for a Change of User from agricultural land to commercial development before his demise. It is also evident that the approvals were granted after his demise. His administrators and/or beneficiaries subsequently obtained the requisite approvals and licences from the relevant authorities for the project.
192. There is no dispute as to the ownership of the suit property. The issue arises from NEMA's EIA License, which was issued in the deceased's name. In response, the 6th Respondent acknowledges the irregularity but asserts that it does not invalidate the License.
193. I have considered the impugned License; it refers to the application received from Isaac Kamau Ndirangu. My understanding is that the 6th Respondent was already processing the application before the death of the registered proprietor. Although the License was issued in his name, its effect was to approve the development on the suit property. In the circumstances, it matters not that the License was issued in the deceased's name. Since the deceased's ownership of the suit property has not been impugned, it has also not been alleged that the development was carried out on a parcel other than the one on which the License was issued. Further, no evidence has been adduced before the court to show that the use of the deceased's name in the EIA License misled the public or any other regulatory authorities as to which development was being approved.
194. Further, no evidence has been adduced before the court to show that the use of the deceased's name in the EIA Licence misled the public or

any other regulatory authorities as to which development was being approved.

195. It is my finding that, in the instant circumstances, the issuance of the License in the deceased's name did not invalidate it. The court takes the position that, at most, the procedural irregularity arising therefrom rendered the approval voidable at the discretion of the 6th Respondent. Accordingly, this challenge must fail.

f. Whether the Petitioner is entitled to the orders sought.

196. As noted at the onset of this Judgment, the Petitioner has sought a number of reliefs, which based on the above analysis, are not merited.

197. I, however, wish to comment in particular on the prayer for demolition. Under the preamble to the Constitution, a clean, healthy and sustainable environment takes preeminence in the hearts of Kenyans so much so that the Constitution states;

“respecting of the environment which is their heritage and determined to sustain it for the benefit of future generations.”

198. The Constitution further recognises sustainable development as a national value under Article 10. The EMCA defines sustainable development and promotes public participation in environmental matters, thereby improving access to justice.

199. When applying the principle of sustainable development, the key principles for determining whether a project is sustainable include the Precautionary Principle (which advocates preventive action despite uncertainty), the promotion of Public Participation, equitable resource use (inter- and intra-generational equity), and the valuation of National Heritage and Biodiversity.

200. Sustainable development involves harmonising economic, social, and environmental considerations to meet the needs of both present and future generations while maintaining ecosystem integrity. The Precautionary Principle guides policymaking by advocating preventive

measures against environmental threats in the face of scientific uncertainty. Public Participation empowers citizens to participate in environmental decision-making, with enforcement provided through EMCA.

201. Equity and benefit-sharing involve the fair use of resources for the benefit of all Kenyans while respecting national heritage. The Polluter Pays principle and associated responsibilities emphasise accountability for polluters and uphold the individual duty to conserve.

202. Demolishing a building that is in use is a drastic step that can be ordered only in deserving cases where evidence has been adduced showing non-compliance with the law and raising concerns about the building's structural integrity. In the absence of an expert report establishing non-compliance with the law, the demolition order cannot be issued in these circumstances.

203. Further, I note that the Petitioner has not sought the cancellation of the approvals and/or the licences, including the National Construction Authority licence. In the circumstances, demolition cannot proceed while the licences and approvals authorising the construction of the suit property remain valid. This would be tantamount to approbating and reprobating.

204. Final orders for disposal

a. In conclusion, the Petitioner having failed to discharge its evidential burden under the Evidence Act, I find the Amended Petition unmeritorious and it must fail. Considering that the Amended Petition is in a public interest litigation, I shall not award costs.

b. For those reasons, the Amended Petition dated 22/10/2024 is dismissed with no order as to costs.

205. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY
OF FEBRUARY 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**

Delivered Online in the presence of:

1. Mr Onsare for the Petitioner
2. Mr. Kofuna for 1st, 2nd, 3rd and 4th Respondents
3. N/A for the 5th & 6th Respondents
4. Mr. Simiyu HB for Mr Wasike for the 7th & 8th Respondents
5. N/A for the 1st -15th Interested parties
6. CA - Ms Yvette Njoroge