

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
EP PETITION NO E022 OF 2025

**IN THE MATTER OF: ARTICLES 10,22,23,31,35,40,42,46
AND 47 OF THE CONSTITUTION OF KENYA ,2010**

AND

**IN THE MATTER OF: VIOLATION OF THE PETITIONER'S
RIGHT TO PROPERTY, PROTECTION OF RIGHT TO
PROPERTY, RIGHT TO CLEAN AND HEALTHY
ENVIRONMENT, ECONOMIC AND SOCIAL RIGHTS AND
RIGHTS TO FAIR ADMINISTRATIVE ACTION**

AND

**IN THE MATTER OF SECTION 3(5) OF THE
ENVIRONMENTAL MANAGEMENT AND COORDINATION
ACT**

AND

**IN THE MATTER OF CONTRAVENTION OF SECTION 4 OF
THE FAIR ADMINISTRATIVE ACTION ACT, NO.4 OF 2015**

AND

**IN THE MATTER OF RULE 3 AND 4 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES,2013**

AND

**IN THE MATTER OF THE ONGOING AND FURTHER
INTENDED CONTRAVENTIONS OF SECTIONS**

**20(J),56(A),57(1),57(3),58(4),61(1)(B),62 & 72 RULE 3
AND 4 OF THE PHYSICAL AND LAND USE PLANNING**

ACT,2019

BETWEEN

AMAL GROUP OF COMPANIES

LIMITED.....PETITIONER

VERSUS

BIRRE HUSSEIN MIRE.....1ST

RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....2ND

RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY3RD

RESPONDENT

NATIONAL CONSTRUCTION

AUTHORITY.....4TH

RESPONDENT

JUDGMENT

Background

1. Vide the Petition dated 9th June, 2025, the Petitioner seeks the following reliefs:

- i. A declaration that the Respondents have violated the Petitioner's right to a clean and healthy environment as enshrined under Article 42 of the Constitution.*

- ii. A declaration that the 2nd and 3rd Respondents have violated the Petitioner's right to fair administrative action as enshrined under Article 47 of the Constitution.**
- iii. A declaration that the Respondents have violated the Petitioner's right to privacy as enshrined under Article 31 of the Constitution.**
- iv. A declaration that the Respondents have violated the Petitioner's right to property as enshrined under Article 40 of the Constitution.**
- v. A declaration that the Respondents have violated the Petitioner's consumer rights as enshrined under Article 46 of the Constitution.**
- vi. An order demolishing any structure, encroaching on L.R. No. 36/VII/457 by the 1st Respondent.**
- vii. An order compelling the 1st Respondent to build/fix the Petitioner's retaining wall, sewer system and any other structure, that he has since destroyed.**
- viii. General damages for encroachment and trespass, and costs for any damage to the properties of the Petitioner, by the 1st Respondent, following and/or linked to the encroachment.**

- ix. An order of permanent injunction restraining the 1st Respondent, its agents, servants and/or employees or any other person claiming through him, from encroaching, interfering, trespassing, altering the boundaries of, alienating and/or in any way howsoever dealing with all that parcel of land known as L.R. No. 36/VII/457;**
- x. An order setting aside the decision by the 2nd Respondent to issue the 1st Respondent with a permit approval, if any.**
- xi. An order setting aside the decision by the 3rd Respondent to issue the 1st Respondent with a permit approval, if any.**
- xii. The costs of this Petition be provided for.**
- xiii. Any further or other orders that this Honourable Court deems just and fit to grant.**
2. In the Petition, it was averred that the Petitioner is a real estate and property management company and the lawful registered proprietor of all that parcel of land known as L.R. No. 36/VII/457 measuring approximately 47.55m by 20.36m upon which lies Amal Shopping Mall.
3. The Petitioner's case, as deponed by Mohamed Yusuf Ahmed, its manager, is that the 1st Respondent, together with other co-owners whose identities remain unknown to them, own the neighbouring property known as L.R. No. 36/VII/456.

4. The Petitioner contends that, because there is no signboard erected at the construction site, in violation of the National Building Code, 2024 and the Physical and Land Use Planning Act, 2019(PLUPA), they have been unable to ascertain the identities of the other co-owners of the property and that the construction being undertaken by the 1st Respondent has caused damage to its property and resulted in encroachment onto its land, as confirmed by a commissioned survey.
5. The Petitioner's Manager explained that the initial encroachment measured approximately 0.11 metres; that although it seems small, it constitutes a significant intrusion capable of affecting the Petitioner's building plans and diminishing the value of the property; that the encroachment has since worsened, with the 1st Respondent extending its activities onto the Petitioner's land by storing waste materials and construction items thereon and that as a result, the structural integrity of the Petitioner's property has been compromised, including the collapse of the retaining wall, thereby occasioning continuing encroachment and trespass.
6. Worse still, it was deposed, there are no safety nets to stop debris and dust from falling on the property which constitutes not only a health and safety hazard, but contravenes building and planning regulations. Despite communication to the 1st Respondent and its advocates, the

1st Respondent has failed to remove the offending wall or desist from the continued encroachment. As a consequence, the Petitioner avers that it has been denied quiet and peaceful possession of the suit property.

7. According to Mr. Ahmed, despite complaints, the 2nd, 3rd and 4th Respondents have failed to stop the ongoing construction despite the 1st Respondent's non-compliance with the conditions attached to the development approvals, contrary to the law and applicable statutory requirements necessitating the present petition.

The 1st Respondent's response

8. In response to the Petition, the 1st Respondent filed grounds of opposition as well as a replying affidavit both dated 16th June, 2025 in which it was averred that this court lacks jurisdiction to entertain the matter on account of the doctrine of exhaustion, as the issues raised in the Petition ought, in the first instance, to have been presented before the relevant statutory bodies and tribunals, namely the National Environment Tribunal, the National Construction Authority, and the Nairobi County Physical and Land Use Planning Liaison Committee, pursuant to the Environmental Management and Coordination Act(EMCA), 1999, the Physical and Land Use Planning Act(PLUPA), and the **National Construction Authority Act**, No. 41 of 2011(NCA).

- 9.** Further, that the Petition contravenes **Sections 107 and 109** of the **Evidence Act** for failure to substantiate the allegations made and to place sufficient evidence before the court and that it is founded on allegations, innuendos and assumptions rendering it misconceived, scandalous, vexatious and an abuse of the court process and warranting its dismissal.
- 10.** The replying affidavit was sworn by Mr Birre Hussein Mire. He denied the Petitioner's allegations noting that he, Ibrahim Roble Farah, Amina Hashi Farah and Dakane Abdullahi Ali are the sole registered owners of the parcel of land known as L.R. No. 36/VII/456 measuring 20.36m × 43.89m (Nought decimal Two Nought Eight (0.2208) which neighbours the Petitioner's property L.R. No. 36/VII/457.
- 11.** He deponed that before the filing of the instant Petition, no joint survey had ever been undertaken and/or initiated by the Petitioner as the complainant, to address any issue of boundary and/or alleged encroachment of their property; that they commenced construction of Garat Shopping Mall strictly within their property having obtained all the requisite approvals, licences, permits, compliances et.al from the Nairobi City County, National Environment Management Authority, and the National Construction Authority and that the construction has already progressed to the third floor.

- 12.** According to Mr. Birre, the present Petition is intended to stifle business competition, given that the Petitioner has already developed Amal Shopping Mall on its parcel, while the Respondents are in the process of developing Garat Shopping Mall on their own property.
- 13.** Contrary to the Petitioner's contention, he stated, there is a signboard on their property indicating the nature of the ongoing development/construction, the approvals reference number, the developer, and the professionals involved in the construction in accordance with the National Building Code 2024 and PLUPA 2019.
- 14.** Similarly, it was deposed that their property and the ongoing construction on the said property has not encroached, trespassed and/or in anyway affected the Petitioner's property as affirmed by the survey report dated 11th December 2024. Mr. Birre averred that they have, at all material times, complied with the requisite safety measures during construction, as demonstrated by the National Construction Authority Certificates of Compliance issued in respect of the project.
- 15.** He further pointed out that the Petitioner has never lodged any complaint before the relevant authorities, including the National Construction Authority, NEMA, Nairobi City County Physical Planning Department, Eastleigh Business

Community Organization, or the Nairobi County Physical and Land Use Planning Liaison Committee, as required by law.

- 16.** It was contended, on the advice of counsel, that the Petition falsely raises issues relating to health hazards, planning approvals, environmental pollution and construction compliance, all of which ought, in the first instance, to be addressed before the relevant statutory bodies, including the National Environment Tribunal, the National Construction Authority, and the Nairobi County Physical and Land Use Planning Liaison Committee under the Environmental Management and Coordination Act, the Physical and Land Use Planning Act, and the National Construction Authority Act.
- 17.** Accordingly, it was argued that the Petition offends the doctrine of exhaustion, this court being one of last resort and exercising only appellate jurisdiction in such matters. In conclusion, Mr. Birre submitted that the Petitioner had failed to demonstrate any violation of the constitutional rights alleged and, on that basis, the Petition was ripe for dismissal.

The 2nd Respondent's response

- 18.** In response to the Petition, the 2nd Respondent, through its County Solicitor Wesonga Ogola, swore a replying affidavit on 20th November, 2025. He deponed that the allegations raised by the Petitioner are directed primarily against the acts and omissions of the 1st Respondent and not those of the

2nd Respondent and that the Petitioner has neither pleaded nor substantiated any specific act or omission attributable to the 2nd Respondent in relation to the impugned development.

- 19.** Solicitor Ogola stated that whereas the Petition repeatedly alleges encroachment and structural interference by the 1st Respondent, it does not demonstrate how the 2nd Respondent facilitated, permitted, endorsed, ratified, or failed to act in respect of the alleged conduct.
- 20.** According to him, the Petitioner has failed to meet the threshold of precision mandated for constitutional Petitions; that the allegation that the 2nd Respondent failed to stop the construction is speculative and unsupported by evidence and that the Petition discloses no reasonable cause of action against the 2nd Respondent, who is effectively a stranger to the alleged infringement of the Petitioner's rights.
- 21.** According to the 2nd Respondent, the dispute is, in essence, a private boundary and trespass dispute between the Petitioner and the 1st Respondent, which cannot properly be converted into a constitutional claim against the 2nd Respondent and that the Petitioner has not exhibited any approval allegedly granted by the 2nd Respondent, nor any refusal, revocation, enforcement notice, or decision by the planning authority capable of challenge under the PLUPA.
- 22.** The deponent stated that whereas constitutional rights are protected, they are not absolute and are subject to lawful

and reasonable limitation. More still, that not every alleged violation of the law should be elevated into a constitutional issue where there exists an alternative statutory mechanism for redress.

23. In this regard, he maintained that the Petitioner failed to exhaust the dispute resolution mechanisms provided under the PLUPA which provides that any person aggrieved by a decision of the planning authority is first required to lodge a complaint before the relevant County Physical and Land Use Planning Liaison Committee under **Sections 79, 80, 81, 82** and **83** of the **Act**, with a further right of appeal to the Environment and Land Court under **Section 61(4)**

24. He contended that the present Petition is premature, amounts to an abuse of the court process, and is intended to frustrate a legitimate and lawfully approved development project, and should accordingly be dismissed with costs.

The 3rd Respondent's response

25. The 3rd Respondent responded through the affidavit of Mr. Samuel Lopokoiyit, the County Director of Environment, Nairobi County, who deposed that the 3rd Respondent is the Principal institution of government established under **Section 7** of the **Environmental Management and Co-ordination (hereinafter 'EMCA')** to exercise general supervision and coordination over all matters relating to the

environment and other functions as provided for in **Section 9 of EMCA**.

- 26.** He noted that prior to issuance with an Environmental Impact Assessment (EIA) License, a project proponent is, pursuant to **Section 58 of EMCA**, required to undertake environmental impact assessment and submit a report to the Authority and that the purpose of carrying out an Environmental Impact Assessment before undertaking any project is to identify the possible environmental effects of a proposed activity and how adverse impacts can be mitigated.
- 27.** Mr Lopokoiyit stated that the 1st Respondent's project for the proposed construction of 14 levels of a commercial cum residential development with parking spaces, commercial lettable spaces with shops and 99 residential units on L.R 36/VII/456 in Eastleigh Nairobi is classified as 'Medium Risk' under the second schedule of EMCA.
- 28.** It was deposed that the project proponent was therefore required to submit to the Authority an Environmental Impact Assessment Project Report in accordance with Part II of the Environmental (Impact Assessment and Audit) Regulations, 2003, as amended by Legal Notice No. 32 of 2019, particularly Regulations 7, 8, 9 and 10 (hereinafter “the Regulations”).
- 29.** In compliance with those requirements, the 1st Respondent, through a registered Environmental Impact Assessment Lead

Expert, submitted an Environmental Impact Assessment Comprehensive Project Report on 24th April 2025 and that in accordance with **Regulation 9(1)** of the **Regulations**, the Authority forwarded copies of the report to the relevant lead agencies for their comments within fourteen (14) days, so as to assist the Authority in making an informed decision on the submitted EIA report.

- 30.** He explained that, in considering an application for an EIA licence, the Authority is guided by the project design, the environmental management plan, physical inspection of the proposed site, comments from lead agencies, and views received during the public participation process and that in making its determination, the Authority applies EIA technical decision-making principles to assess whether the proposed project poses any risk to the environment, promotes sustainable development, and whether an EIA licence ought to be issued, including any conditions to be attached thereto.
- 31.** He explained that upon reviewing the report, the Authority, through a letter dated 15th May 2025, required the project proponent to provide clear and legible architectural drawings, including details relating to the building elevators; that a site visit was conducted on 16th July 2025 to verify the suitability of the proposed project site and to assist the Authority in making an informed decision and that during the visit, it was observed, among other things, that there were

developments of a similar nature within the neighbourhood of the proposed site.

- 32.** According to the County Government of Nairobi, the Authority, after following due process in the review of the 1st Respondent's EIA Project Report in compliance with the legal provisions of EMCA and its subsidiary legislations, it issued the 1st Respondent with an EIA License number on 16th July 2025, for the construction of a 17 level 3 (basement, ground plus 1st -16th floor) residential cum commercial building comprising 90 No. residential units and stalls with associated amenities.
- 33.** The County Director of Environment, Nairobi County, stated that the EIA Licence issued by the 3rd Respondent contains various conditions to be complied with by the project proponent during the construction, operational and decommissioning phases of the project.
- 34.** He further explained that the responsibility of a project proponent towards the environment does not end with the issuance of an EIA Licence. Rather, the EIA process remains ongoing through the licence conditions, which provides the basis upon which the Authority and other lead agencies monitor compliance and issue improvement orders where necessary.
- 35.** He maintained that due process was followed in the issuance of the EIA Licence and denied that the 3rd Respondent

violated the Petitioner's rights as alleged in the Petition. He stated that, if the complaints raised by the Petitioner were indeed true, they had not been brought to the attention of the 3rd Respondent prior to the filing of the petition so as to enable it take the necessary action.

- 36.** Mr. Lopokoiyit further referred to some of the conditions attached to the EIA Licence, including the requirement that the project should not encroach upon any wayleaves for sewer lines, water pipes, power lines, drainage systems, road reserves or other public utilities before commencement of construction. He also noted that the project proponent was required to install protective buffers, including hoarding and dust screens, to safeguard the public from falling objects and to implement adequate measures to mitigate air and dust pollution.
- 37.** Other conditions included the requirement that all excavated material and debris be collected, reused where possible, or disposed of in accordance with the Environmental Management and Coordination (Waste Management) Regulations, 2006.
- 38.** It was deposed that the proponent was also required to ensure that all solid waste was handled in accordance with the aforesaid waste management regulations and to comply with all relevant laws, by-laws and guidelines applicable to the project, including those issued by the Ministry of Health,

Directorate of Occupational Safety and Health Services, Architectural Association of Kenya, Departments of Lands and Housing, National Construction Authority, Kenya Urban Roads Authority, Nairobi City Water and Sewerage Company, Nairobi City County Government and other relevant authorities.

- 39.** Notwithstanding the foregoing, he stated, and upon being served with the Petition, the 3rd Respondent carried out an inspection of the site on 23rd July 2025; that during the inspection, among other things, the site was properly scaffolded; that there was no evidence of debris falling onto neighbouring property, and that the project proponent had erected a signboard displaying the approvals obtained for the development.
- 40.** He further stated that, in compliance with the court orders issued on 21st August 2025, a further inspection was undertaken on 15th September 2025 to ascertain whether the 1st Respondent had cleared any debris or construction waste from the Petitioner's land and repaired any damage to the sewerage system. It was observed, among other things, that the area separating the Petitioner's and the 1st Respondent's properties was clear and free from debris at the time of inspection.
- 41.** He added that there are waste pipes lying on the surface between the walls separating the Petitioner and the 1st

Respondent's properties. As regards allegations of trespass and encroachment, he stated that the 3rd Respondent cannot respond to the same as they fall outside its statutory mandate. He added that, under **Section 129(1)** of **EMCA**, any party aggrieved by the issuance of a licence by the Authority is required to lodge an appeal before the National Environment Tribunal.

- 42.** He noted that the EIA Licence issued by the Authority has not been challenged before the Tribunal as contemplated under **Section 129** of **EMCA**. He maintained that the Authority has at all times remained conscious of its mandate to protect the environment and has acted in good faith to ensure compliance with EMCA.
- 43.** The County Director of Environment, Nairobi County urged that the Petitioner has failed to demonstrate that the 3rd Respondent violated any of its constitutional rights or breached any statutory duty. It was further maintained that the Petitioner had not shown that the EIA licensing process was flawed in the manner alleged.

Submissions

- 44.** The Petitioner filed submissions on 11th February 2026. Counsel submitted that the 1st Respondent's development is unlawful because it was commenced without the mandatory approvals required under the PLUPA, EMCA and the NCA. According to the Petitioner, retrospective approvals cannot

sanitize an illegality because statutory compliance must precede development.

45. Counsel submitted that the failure to comply with planning, environmental and consultative requirements gives rise to a presumption that the right to a clean and healthy environment has been violated. Reliance was placed on authorities such as **Moffat Kamau & 9 Others vs Aelous Kenya Ltd & 9 Others [2016] eKLR**, **Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others [2019] eKLR**, **John Muthui & 19 Others vs County Government of Kitui & 7 Others [2020] eKLR**, **National Environment Management Authority & 3 Others vs Maraba Watinau Residents Association & 605 Others [2020] eKLR**, for the propositions that environmental rights are enforceable by any person, extend to future generations, override private interests, and must be guided by precaution, public participation and sustainable development.
46. It was also argued that the alleged encroachment, trespass, structural damage, dust, sewer interference, reduced ventilation and lack of setbacks have interfered with the Petitioner's rights to property, a clean and healthy environment, fair administrative action, and the privacy and safety of occupants. In support, the cases of **Azzuri Ltd vs Pink Properties Ltd [2018] eKLR**, **Joseph Leboo vs Director Kenya Forest Services [2013] eKLR**, **Dry Associates Ltd vs Capital Markets Authority [2012]**

eKLR and **Mitu-Bell Welfare Society vs Kenya Airports Authority [2021] eKLR (SC)** were cited.

47. Counsel urged that that this court has jurisdiction under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act** to intervene through injunctive, preservative, demolition and restoration orders. He cited the cases of **Save Lamu & 5 Others vs National Environment Management Authority & Another [2019] eKLR**, **Republic vs County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya [2014] eKLR (CA)**, **Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016] eKLR (CA)**, and **Republic vs National Environment Tribunal Ex parte Silverstein [2016] eKLR**, to argue that courts must act decisively to stop unlawful developments, enforce statutory setbacks, protect property rights, and prevent irreversible environmental harm.
48. Counsel submitted that the Petitioner has satisfied the test in **Giella v Cassman Brown [1973] EA 358** by establishing a prima facie case. Guided by the decisions in **Kindisi vs Christian Foundation Fellowship Church Mpeone, through its Registered Trustees & 5 Others [2024] KEELC 8063 (KLR)**, **Kibos Distillers Limited & 4 Others vs Benson Ambuti Adegga & 3 Others [2020] KECA** and **Centre for Human Rights and Democracy & Another vs**

The Judges and Magistrates Vetting Board & 2 Others [2012] eKLR, it was urged that where constitutional and environmental rights are threatened, courts must fashion effective remedies.

49. The 1st Respondent filed submissions on 8th December 2025. It was submitted that the Petitioner's claim of encroachment is unsubstantiated and contradicted by the joint survey report undertaken pursuant to the court's directions, which confirmed that there was no encroachment. Reliance was placed on **Kirui v Kipchirchir [2025] KEELC 372 (KLR)** for the proposition that survey evidence is determinative in boundary disputes.
50. On the alleged safety concerns, it was stated that the construction is fully compliant with statutory requirements, including approvals from relevant authorities and an EIA license issued under **Section 58** of the **EMCA** and that no evidence of actual risk or harm has been demonstrated.
51. It was further argued that the petition falls short of the precision threshold set out in **Anarita Karimi Njeru v Republic [1979] KLR**, as the alleged constitutional violations are not specifically linked to any demonstrable infringement.
52. Finally, on the prayer for injunction, counsel relied on **Giella v Cassman Brown & Co. Ltd [1973] EA 358** and **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited**

[2006] eKLR to submit that no prima facie case or irreparable harm has been established, and that the balance of convenience favors allowing the development to proceed.

53. The 2nd Respondent filed submissions on 11th February 2026. Counsel submitted that the Petition fails to meet the threshold of a constitutional Petition, as set out in **Anarita Karimi Njeru v Republic (1979) KLR** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.
54. Counsel further submitted that the dispute, properly construed, is a private boundary and trespass dispute between the Petitioner and the 1st Respondent, which has been improperly elevated into a constitutional Petition; that the Petition offends the doctrine of exhaustion, as the Petitioner failed to invoke the dispute resolution mechanisms provided under the PLUPA, including recourse to the relevant liaison committees, contrary to the principles set out in **Mutanga Tea & Coffee Company Ltd vs Shikara Ltd & Another [2015] eKLR** and **Nyaoga vs Chairman Kisii County Assembly & 3 Others [2023] KECA 1540 (KLR)**.
55. On the merits, it was contended that the Petitioner has not discharged the burden of proof under **Sections 107** and **109** of the **Evidence Act**, having failed to demonstrate any act or omission attributable to the 2nd Respondent that would ground constitutional liability. Reliance was placed on

Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR

to emphasize the need for a clear causal link between the alleged violation and the respondent's conduct.

- 56.** Accordingly, it was submitted that the petition discloses no reasonable cause of action against the 2nd Respondent, is premature and incompetent, and ought to be dismissed with costs.
- 57.** The 3rd Respondent filed submissions on 2nd February 2026. It was submitted that although the Petition alleges infringement of rights under **Articles 31, 36, 40, 42, and 47** of the **Constitution**, no specific act or omission has been attributed to the 3rd Respondent to ground such claims.
- 58.** It was submitted by Counsel for the 3rd Respondent that the EIA licence issued in respect of the 1st Respondent's project was processed in full compliance with the Environmental Management and Co-ordination Act and its attendant regulations and that the Petitioner's assertions of procedural unfairness are speculative, being based merely on observations and projections, without identifying any breach of statutory procedure.
- 59.** Further, it was submitted that the EIA regime, by its nature, imposes conditions designed to safeguard environmental rights, with ongoing monitoring and enforcement

mechanisms to ensure compliance. A site inspection, it was noted, did not reveal any breach of the licence conditions.

60. Accordingly, counsel submitted that the right to a clean and healthy environment under **Article 42** has not been infringed, and that the Petitioner had failed to demonstrate any actionable wrongdoing on the part of the 3rd Respondent. On that basis, it was urged that no declaratory or injunctive relief can issue against the 3rd Respondent, and that there are no valid grounds to warrant the setting aside of the EIA licence.

Analysis and Determination

61. Having considered the pleadings and submissions, the issues that arise for determination are:

- i. Whether the Petition is competent?*
- ii. Whether the Petitioner has demonstrated violations of its constitutional rights?*
- iii. What are the appropriate reliefs, if any?*

82. The Petitioner seeks a host of reliefs arising from what they contend to be breaches arising from and occasioned by the 1st Respondent's development. It asserts that the development was commenced without the requisite statutory approvals and has resulted in encroachment, structural damage, trespass, environmental degradation and infringement of its constitutional rights. It also faults the 2nd

and 3rd Respondents for failing to enforce compliance with the law.

- 83.** The Respondents, apart from disputing the allegations, challenge the competence of the Petition, arguing that the dispute ought first to have been pursued before the relevant statutory bodies under the EMCA, PLUPA and the NCA. They further contend that the Petition does not meet the threshold of a constitutional Petition and that the dispute is, in essence, a private boundary and trespass dispute between neighbouring landowners.
- 84.** Beginning with doctrine of exhaustion, the same requires a party to exhaust any alternative dispute resolution mechanism provided by the statute before resorting to courts. Speaking to the ambit and rationale for this doctrine, the Court of Appeal in **Geoffrey Muthinja and Another v 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. In the case of **William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR**, a five-judge bench held as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's 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...”

86. 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 the Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo 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...”

- 62.** It is common ground that part of the Petitioner’s grievance concerns the approvals and permissions issued in favour of the 1st Respondent in respect of the impugned development.
- 63. Section 61(3) and (4)** of the **PLUPA** provides that an applicant or interested party aggrieved by a decision of the County Executive Committee Member regarding an application for development permission may appeal to the County Physical and Land Use Planning Liaison Committee within fourteen days, with a further right of appeal to the Environment and Land Court.
- 64.** Similarly, **Section 78** of **PLUPA** sets out the functions of the Liaison Committee to include hearing complaints and claims relating to applications submitted to the planning authority, hearing appeals against decisions of the planning authority, and determining disputes relating to enforcement notices. Indeed, to the extent that the Petitioner challenges the propriety of the development approvals, planning permissions or compliance with planning conditions, those are matters that ordinarily fall within the mandate of the Liaison Committee in the first instance.

- 65.** Likewise, any challenge to the issuance of an EIA License falls within the jurisdiction of the National Environment Tribunal under **Sections 129 and 130** of the **EMCA**. **Section 129(1) and (2)** of the **EMCA** grants any person aggrieved by the grant of a licence, the conditions attached thereto, or any decision made by the Authority, the right to appeal to the Tribunal, with a further right of appeal to this court under **Section 130**.
- 66.** Also, the National Construction Authority Act provides for the establishment of the National Construction Authority whose mandate includes the enforcement of the building code in the construction industry.
- 67.** However, the present Petition goes beyond a mere challenge to planning approvals or the issuance of an EIA licence or breaches of the building code. The Petitioner seeks declarations that its rights under **Articles 31, 40, 42, 46 and 47** of the **Constitution** have been violated, together with orders for demolition, injunction, restoration of the retaining wall and sewer system, damages for trespass and encroachment.
- 68.** Such grievances cannot be wholly or adequately addressed by any of the referenced bodies. The plea that the Petition is fatal for failure to exhaust alternative mechanisms therefore fails. Moving to the aspect of specificity, it is trite law that a party seeking redress for an alleged violation of

constitutional rights must plead the alleged violation with clarity, specificity and particularity.

- 69.** A Petitioner must identify the constitutional provision said to have been infringed, describe the manner of infringement, and demonstrate the nexus between the impugned conduct and the alleged violation. This principle was well captured in the oft-cited case of **Anarita Karimi Njeru vs Republic (No. 1) [1979] KLR 154.**
- 70.** Reiterating this, the Supreme Court in **Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR,** emphasized that although **Article 22(1)** of the **Constitution** grants every person the right to institute proceedings for violation or threatened violation of rights, a party must clearly identify the specific rights alleged to have been infringed, the basis of the grievance, and the manner in which the infringement is said to have occurred. The court reaffirmed the principle in **Anarita Karimi(supra)** that there must be a clear link between the aggrieved party, the constitutional provisions invoked, and the alleged violation.
- 71.** The Petitioner has instituted this suit seeking, *inter alia*, declarations that the Respondents have violated its rights under **Articles 31, 40, 42, 46 and 47** of the **Constitution**, together with orders for demolition, injunction, restoration of

the retaining wall and sewer system, and damages for alleged trespass and encroachment.

- 72.** The gravamen of the Petition is that the 1st Respondent's development on L.R. No. 36/VII/456 has encroached onto the Petitioner's property L.R. No. 36/VII/457, caused structural damage, interfered with its quiet possession, and was undertaken without compliance with planning, environmental and construction requirements.
- 73.** The Petitioner has identified the constitutional rights said to have been infringed, the acts complained of, including alleged encroachment, structural damage, failure to enforce planning requirements, issuance of approvals, and environmental concerns, and the specific Respondents against whom those complaints are directed. The Petition therefore discloses, with sufficient clarity, the nature of the grievances and the reliefs sought.
- 74.** Whether the Petitioner will ultimately prove the alleged encroachment, trespass, environmental harm, or unlawful approvals is a different question altogether and goes to the merits of the Petition rather than its competency. Accordingly, the court is satisfied that the Petition meets the minimum threshold of specificity required for a constitutional Petition.

75. The Petitioner alleges that its rights under **Articles 31, 40, 42, 46, and 47** of the **Constitution** have been violated as a result of the 1st Respondent's development on L.R. No. 36/VII/456. The alleged violations are founded on claims of encroachment, structural damage, interference with quiet possession, environmental degradation, infringement of privacy, and failure by the 2nd and 3rd Respondents to properly regulate the development.
76. The court shall begin with the issue of encroachment, as it forms the foundation upon which much of the Petition rests. The Petitioner pleaded that the 1st Respondent had encroached onto L.R. No. 36/VII/457 by approximately 0.11 metres and had further extended its activities onto the Petitioner's property by storing waste materials and construction debris thereon. In support of that allegation, the Petitioner produced a survey report dated 19th February 2025.
77. The 1st Respondent disputes those allegations and produced its own survey report dated 11th December 2024 indicating that the boundary walls and beacons were correctly positioned and that there was no encroachment onto the Petitioner's property.
78. Given the conflicting survey evidence, the court directed that a joint survey be undertaken. The resultant report dated 25th

July 2025 prepared by Washington Okeyo Abuto noted inter-alia;

We conclude that the boundary lines for L.R No Nairobi/Block 49/303 (formerly L.R No 36/VII/456) and L.R No 36/VII/457 conformed to the relative positions of buildings and structures on the ground and we have not identified any potential overlaps or encroachments of L.R Nairobi/Block 49/303 formerly L.R No 36/VII/456 into L.R No 36/VII/457.

- 79.** In light of the joint survey report, which was undertaken pursuant to the court's directions and with the participation of the parties, the court is unable to find that the Petitioner has proved encroachment or trespass onto its property.
- 80.** The Petitioner has also alleged that the 1st Respondent's construction caused structural damage to its property, including the collapse of the retaining wall, damage to the sewer system, and the deposition of debris, dust and waste materials onto its land. It complained that there were no adequate safety measures to prevent falling objects and dust from affecting its property, and in support produced photographs.
- 81.** However, beyond the photographs and the general assertions contained in the supporting affidavit, no structural engineer's report, valuation report, expert assessment or

other independent evidence was tendered to establish that the retaining wall collapsed or that the sewer system was damaged as a direct consequence of the 1st Respondent's construction activities.

- 82.** On the contrary, the 3rd Respondent's inspections conducted on 23rd July 2025 and 15th September 2025 did not reveal any debris falling onto the Petitioner's property or any waste materials having been deposited thereon. The inspection showed that the site was properly scaffolded, the separation between the two properties was clear, and there was no evidence of non-compliance with the safety measures required under the licence conditions.
- 83.** Similarly, although the Petitioner alleges that the development reduced ventilation and light, interfered with sewer lines, and created health and safety risks, no environmental assessment, public health report, technical study or other expert evidence was produced to demonstrate pollution, environmental degradation, sewer contamination or any actual threat as alleged.
- 84.** The evidence before the court instead shows that the 3rd Respondent imposed conditions requiring the installation of hoarding and dust screens, proper disposal of debris, compliance with waste management regulations, and protection of sewer lines and wayleaves. There is no evidence that those conditions were breached. Consequently,

the alleged violations of **Articles 40** and **42** of the **Constitution** have not been proved.

- 85.** The Petitioner further pleaded that its right to fair administrative action under **Article 47** of the **Constitution** was violated by the 2nd and 3rd Respondents. Its contention in this regard is that the 2nd and 3rd Respondents either unlawfully approved the project or failed to enforce statutory compliance, constituting administrative inaction and illegality.
- 86.** The evidence placed before the court shows that the 1st Respondent obtained development approval from Nairobi City County dated 19th March, 2025, change of user permission dated 2nd May, 2025, authorities to set up temporary site offices and toilets dated 10th April, 2025, hoarding and scaffolding licenses' dated 8th April, 2025.
- 87.** Also adduced was the acknowledgment of the EIA project report by NEMA dated 24th April, 2025, National Construction Authority compliance certificates, and an EIA License issued by NEMA on 16th July 2025. The Petitioner did not produce evidence showing that the approvals were procured fraudulently, unlawfully, or in breach of the prescribed statutory procedure and its plea under this head fails.
- 88.** The claims under **Articles 31** and **46** were similarly not substantiated. The Petitioner alleges that the proximity of the

1st Respondent's building would interfere with the privacy of occupants of Amal Shopping Mall and expose consumers and prospective purchasers to health and safety risks. However, no evidence was tendered to show that the building contravened any prescribed setback requirements or that the alleged proximity was outside the permissible planning parameters. Similarly, the alleged infringement of consumer rights was unsupported by evidence.

89. For those reasons, the court finds that the Petitioner has failed to establish its case to the requisite standard. As a consequence, the Petition is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

O. A. Angote
Judge

In the presence of;

Ms Muyeyi for 3rd Respondent

Ms Mwangi holding brief for Abdulahi for 1st Respondent

Mr. Mohammed for Petitioner

Ms Nafula for Mr. Dida for 2nd Respondent

Court Assistant: Tracy