

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCPET NO. E003 OF 2023**

WATAMU ASSOCIATION
PETITIONER

VERSUS

TARA WOOD & 3 OTHERS
RESPONDENTS

JUDGMENT

The Petition

1. The following are the orders sought in the petition dated 30th January 2023 in this case:
 - a. **A declaration that the Land created and lying between LR Number 8594/13 and the shores of the Indian ocean is riparian zone is public land by virtue of Article 62(2)1 of the Constitution;**
 - b. **A declaration that construction or development of multi-storey and permanent concrete structures in riparian zones is inconsistent with sustainable utilization, management and conservation of the environment and a threat to the right to a clean and healthy environment;**
 - c. **A declaration that the construction of the multi-storey building by the 1st respondent is being undertaken outside LR Number 8594/13 on the riparian zone and therefore illegal;**
 - d. **A declaration that the approval number NEMA/SPA/10439 by the 2nd respondent and CGK/P/WTM/192/2022 by the 3rd respondent were obtained in a manner inconsistent with the requirement of the Constitution and the resultant construction is therefore illegal;**
 - e. **An order of permanent injunction be and is hereby issued restraining the 1st respondent whether by herself, agents, servants and whomsoever acting under her authority or instructions stopping construction or further construction of the permanent**

multi-storey building on property LR Number 8594/ 13 and the adjacent land;

- f. An order be and is hereby issued requiring the 1st respondent at her own cost to demolish the multi-storey building under construction and take such necessary steps to restore the land and environment on LR Number 8594/13 and adjacent riparian land as near as a they may be to the state in which the walls before the construction;**
- g. An order be and is hereby issued compelling the 2nd respondent to take such necessary steps to audit the environmental impact that the construction by the 1st respondent has caused on the environment and take such necessary measures to protect the environment;**
- h. An order for compensation by the 1st respondent for violation of the members of the petitioner's rights to a clean and healthy environment;**
- i. The costs of this petition be borne by the respondents;**
- j. Any other or further order or relief that this court deems fit to grant.**

2. The petitioner is a homeowners and residents association in the Watamu Area within Kilifi County, founded and registered on 3rd August 1994 under the Societies Act and having about 160 members, and according to the petition, it brings action on behalf of its members who are residents in Watamu area and on behalf of the general public and in the public interest to protect the environment and in defence of the rule of law and the Constitution. It is pleaded in the petition that its objectives include protection and promotion of the interests of its members and the residents of the Watamu area, protection of the biodiversity and ecology of the area, and its sustainable use for the benefit of Kenyans generally and local communities.

3. The 1st respondent is resident in the area on property known as LR Number 8594/13 upon which she is constructing a permanent multi-storey building whose construction the petitioners challenge on the basis that it is a threat to the environment, and whose construction is said to be carried out in violation of the Constitution and statutes.

The 2nd respondent is a State Corporation established under the Environmental Management and Coordination Act 1999 to coordinate environmental activities while the 4th respondent is the County Government of Kilifi.

4. On 16th January 2023, the respondents noticed that the 1st respondent was carrying out construction of a multi-storey permanent building on LR Number 8594/13 hereinafter referred to as "*the suit property*" and the adjacent land which according to the petitioner is a riparian zone.
5. It is stated that the structure being constructed by the 1st respondent is not only a threat to the biodiversity and ecosystem of the area but is also located outside the boundaries of the suit property and most likely on the riparian zone; that the survey reports, videos and photographs of the construction and satellite survey images of the suit property which were acquired by the petitioner showed that the development being carried out by the 1st respondent was indeed a multi-storey building in an area close to the beach which has endangered species of plants and possibly animals. The development also lies outside the boundaries of the suit property and encroaches onto the riparian zone.
6. Other members of the public besides the petitioner and the residents of the Watamu area also raised similar concerns and complaints on the nature of development by the 1st respondent.
7. Upon inquiry by the petitioner, the 1st respondent indicated that she had sought and obtained all the requisite approvals which were attached to the responding electronic mail, but failed to state on which property the development was taking place. The 1st respondent also gave the petitioner a copy of the Environmental Impact Assessment Report signed by Cherry Rosanne Wood on 9th November 2022 as the project proponent; that the report supported an application to construct a swimming pool with television room, a

kitchen and a terrace; however, in that EIA Assessment Report, the construction of a multi-storey building was not included. Despite that omission, a multi-storey building is being constructed on site currently. There were questionnaires purportedly filled by members of the local community. The questionnaire was only limited to construction of a swimming pool and nothing else. It is alleged that the names of the signatories to those questionnaires show they are not members of the petitioner or residents of Watamu. Also, the immediate neighbors were never invited or informed to give their views on the project; the EIA Report was purportedly submitted **9th November 2022** to the 2nd respondent and approval was issued the following day on **10th November 2022**. In contrast with the EIA report, the approval given by the 2nd respondent authorized construction of a swimming pool and a residential development on both the suit property and the adjacent riparian zone. The petitioner posits that is contrary to law.

8. It is also stated that approval by the County Government of Kilifi was purportedly sought on **8th June 2022** and the approval was granted the following day on **9th of June 2022**, and was granted for a residential development and it is inconsistent with the EIA Report which was limited to the construction of a swimming pool.
9. The petitioner avers that all the applications purported to have been made by Rosanne Cherry Woods were made after her demise and are therefore invalid; that the 2nd and 3rd respondents have given approvals to the 1st respondent for developments on the suit property and riparian land without the conduct of an Environmental Impact Assessment which is contrary to law. By their action, they have effectively and in violation of the Constitution allocated the riparian land to the 1st respondent and allowed her to carry out residential development on the it without an EIA report contrary the provisions of **Article 62 2(1)** of the Constitution which designates

riparian and as public Land. Among the effects of the development lamented by the petitioner is the potential of the permanent multi-storey build to deny the petitioners' members a view of the sea, free air flow and breeze from the ocean, and consequent increase of temperature hence violating the petitioners' members' rights to a clean and healthy environment.

10. The 1st, 2nd and 3rd respondents are said to have violated Articles 42 Article 70 and Article 69 of the Constitution of Kenya.
11. The 2nd respondent is blamed for having failed to carry out its duties under the law and acting in contravention of EMCA and the Regulations made thereunder and the Article 69 of the Constitution. It is alleged that the construction of a permanent multi-storey building in the area will deny the petitioners' members free flow of sea breeze, increase temperature, and infringe on the petitioners' right to a clean and healthy environment as provided for under **Article 42**, besides interfering with endangered and sensitive biodiversity which is inconsistent with unsustainable utilization and management of the environment and a threat to genetic resources and biological diversity in the area and a violation of the provisions of Article 69(1)(a) as read together with sub Articles (e) and (f). It is also alleged to amount to irregular appropriation of public land in violation of Article 63(2)(2)(I) of the Constitution of Kenya. It is argued that the dereliction of duty by the 2nd and 3rd respondents was willful and their actions have allowed the 1st respondent to proceed with construction on a riparian Land in a manner that presents a great threat to the environment.
12. The petitioners also state that the issues raised are multifaceted and go beyond issuance of EIA License by the 2nd respondent and include issues related to threat to the right to a clean and healthy environment, enforcement of the state obligations under Article 9 of the Constitution and allocation and use of riparian land which

matters are beyond limited jurisdiction of the National Environment Tribunal. The verifying affidavit of Damien Davies the 3rd petitioner, is attached to the petition.

1st Respondent's Response

13. The 1st respondent filed a reply to the petition on 11th December 2023. She stated that she is the personal representative of the deceased proprietor of LR Number 8594/13. She denied that the 2nd respondent has jurisdiction to require an Environmental Impact Assessment Study Report in the circumstances of this dispute and addressed in **paragraph 10** of her reply the “3 types” of reports envisaged by the EIA Regulations, stating that the petitioners have failed to specify which part of the EIA Regulations among **Parts II, III and IV** have been violated by the respondent, if at all. She denies that she was constructing the multi-storey permanent building. She denied that the construction was taking place on LR 8594/13 or on the riparian zone. She faulted the petitioners for having not provided a statutory or regulatory definition of the term “*riparian zone*”, or even evidence that the development is occurring on a riparian zone. She denied that the suit property is registered in the name of Cherry Rosanne Wood but admitted holding a confirmed grant of representation to her estate. The land on which she, through her limited liability company, Mjukuu Beach Front Watamu Limited, is attempting to build a semi-permanent structure, is owned by the National Land Commission as per **Article 67 (2)**. She averred that the petitioner has not provided evidentiary expert opinion on the threat to the biodiversity and the ecosystem of the area, or any Surveyor’ s opinion on whether the location of the construction is within riparian zone. She denied that the development is between the high water and low water marks as alleged by the petitioners at **paragraph 55**. She however expressly

denied that the structure she is constructing is on riparian land, but on the land between LR Number 8594/13 and the high-water mark of the Indian Ocean as government Land lawfully designated as “*coastal foreshore reservation*” which is under the control and management of the National Land Commission, and stated her structure is being developed on that area; that no statute describes the Land as riparian. She admitted that since the development is on government Land, in the future, development thereon would have to be undertaken in conformity with the written permission and conditionalities of the National Land Commission. She stated that as at the time of receipt of the petitioners’ letter dated 21st January 2023, she did not know that her development was built outside the boundary of LR 8594/13, and that she was in England by then. While in England, she had instructed and paid construction professionals to undertake the building for her. It was only after she had instructed a Kenyan Surveyor to visit the site of the development that she came to know that it was being built outside the boundary limits of 8594/13; that she and her company were misadvised by two licensed NEMA consultant that Mjukuu Development needed EIA reports under EIA license; that a single dwelling unit is not provided for in Section 58(2) of EMCA and the EMCA Regulations 2003; that allegations of a “*multi-dwelling building*” are hearsay; that there was no need to publish the EIA report in the Kenya gazette or two newspapers as set out by the regulations made under EMCA. It is stated that the petition has not been pleaded with specificity as required; that no specific Parts of the EIA Regulations have been identified as having been breached by the 1st respondent or any of the other respondents, which allegedly makes it difficult for the 1st respondent to respond to the petition.

14. The Petitioner denied allocating riparian land to herself and reiterated that without any evidentiary support, she is unable to

respond to claims that he has allocated riparian land to herself. She avers that no reasonable person would build within the confines of the sea in the space between the high and low water marks which is prone to flooding with tidal water twice in a day. She stated that the report Commissioned by the petitioners' letter/report dated 20th February 2023 as well as her own report, corroborate the fact that the impugned structure is about 49 metres from the current high-water mark, In addition, she denied that the development she is carrying on is a permanent multi-storey building and asserted that it is lower than the existing trees in the immediate area, which trees she intends to maintain. She referred to photographs in her list of documents as proof that the structure that she is building will not have the effect of interfering with a view of the sea, or the air flow. She asserted that she and her company are operating on government land or public Land as conditional licensees of the National Land Commission. She denied that NEMA has any jurisdiction to issue approvals for the project in the light of the actual type of single residential unit being constructed by her and her company. She added that the wall-less structure being constructed cannot interfere with any air flow.

15. She alleged that the petitioners are not registered with a Registrar of Societies and they have no capacity to bring the petition on behalf of the neighbors around the project.
16. She dismissed the petition as premised on assumptions about the riparian zone, about the height of her development, the registration of the petitioners' organization with the Registrar Of Societies and the height of the trees in the immediately neighbourhood; consequently, she asserted that no orders can issue as prayed by the petitioners. In particular, she denies that there is any evidence of interference with biodiversity, pointing out that a certain NGO dealing with botanical issues has even given

recommendations on what should be planted on her treehouse (the top roof of the structure being constructed by her.) She added that the NGO identifies only one species of plants as vulnerable. Later on in her response she asserted that the approval from the 2nd to the 1st respondent was obtained out of abundance of caution, but is not legally necessary. She opposed the demolition of her structure on the basis that it would directly infringe on her right to earn a living and also drain her finances as she applies them to the demolition, yet the same was constructed on government property with NLC permission.

Response Of NEMA (2nd Respondent)

17. The National Environment Management Authority filed the Replying Affidavit of **George Peter Oyoo**, its County Director Of Environment, Kilifi, dated 12th September 2023, in which the deponent stated as follows: that the 2nd respondent was furnished with an **Environmental Impact Assessment Project Report** titled Summary Project Report (SPR) for a proposed residential development and swimming pool on plot number CR 27362/3 and LR Number 8594/13-Malindi Municipality, by the project proponent for purposes of consideration for issuance of an EIA License. An acknowledgement of receipt of that report is dated 10th November 2022. Prior approvals submitted with the said SPR included a letter from the County Government of Kilifi in approval of the proposed development on Plot Number 8594/13 Watamu Kilifi County. A Record of decision of the Authority was made on 11th October 2022 and communicated online to the project proponent and copied to the EIA Expert. The approval by NEMA was subject to conditions to be observed throughout the project cycle. The deponent stated that the NEMA supports the present petition only to the extent that the 1st respondent has contravened the license issued for carrying on

development outside the property, and it is willing to implement any court orders that will lead to compliance with EMCA 1999.

Petitioner's Submissions

18. The petitioners' counsel framed four issues for determination as follows

- a. **Whether the 1st respondent is carrying out construction beyond the boundaries of LR number 8594/13;**
- b. **Whether the approvals granted by the second and third respondents are legal;**
- c. **Whether the actions by the respondents amount to a violation of the petitioners' right to a clean and healthy environment;**
- d. **Whether the petitioner is entitled to the prayers sought.**

19. On the first issue, it was submitted that pursuant to the orders of this court given on 13th February 2023, Mr. Luke Omondi, Malindi Subcounty Surveyor, visited the site on 18th February 2023, carried out a survey in the presence of the petitioner and the first respondent's agents, and made a report which confirmed that the building under construction by the first respondent is outside the boundaries of the property known as LR 8594/13.

20. Regarding the approval by the second and third respondent, counsel for the petitioner submitted that EMCA is the primary law providing for institutional management of matters related to environment in Kenya; that **Section 58(1)** of the Act provides that the proponent of a project shall undertake or cause to be undertaken at his own expense an Environmental Impact Assessment Study and prepare a report thereof and the 2nd respondent shall determine that the intended project may, or is likely to have, or will have significant impact on the environment; that the documents before Court show that the applications for

approval from the 2nd and 3rd respondent were made in June and November 2022 by Cherry Rosanne Wood who was named as project proponent long after her demise. The case of *Re Estate Of Alihadi Dafilla Ali (Deceased) 2021 ECLR* was cited for the proposition that the approvals granted by the second and third respondents are invalid and unenforceable as they were based on an application made in the names of Cherry Rosanne Wood more than **18** months after her death which occurred 5th May 2021 as per the death certificate exhibited by Damian Davies in his supporting affidavit as “DD3”.

21. In addition, **Section 59** of the Act requires publication of an EIA Report prepared by the project proponent for two successive weeks in the gazette and in a newspaper circulating in the area proposed for the project.
22. That Regulation 7(1) of the Environmental Impact Assessment and Audit Regulations 2003 provides that during the process of conducting an environmental impact assessment study, the proponent in consultation with the Authority shall seek the views of persons who may be affected by the project; that in so seeking the views of the public the project opponent shall publicize the project and its anticipated effects by posting posters in strategic public places in the vicinity of the sign of the proposed project and publishing a notice on the proposed project for two successive weeks in in a newspaper that has a nationwide circulation and making an announcement of the notice in both official local languages in a radio with nationwide coverage for at least once a week for two consecutive weeks, and so on. Counsel set out the provisions of **regulation 7** to and **regulation 21** verbatim in the submissions and submitted that the first respondent has not applied to this court any evidence of publication of the ongoing project and its anticipated effects and benefits prior to the commencement of

the project in compliance with **regulation 7**. Further, that the EIA Report relied on by the first respondent is dated 9th November 2022, was presented on the same day to the second respondent NEMA, and their approval was granted on the following day 10th November 2022, a clear indication that no publication or public hearing was carried out as required by the law; that the persons who filled in the questionnaires attached to the EIA Report were not residents of Watamu area

23. *Mui Coal Basin Local Community And 15 Others Versus Permanent Secretary Ministry Of Energy And 17 Others 2015 eKLR and KAPS Parking Limited And Another Versus County Government Of Nairobi And Another 2021 eKLR* were cited on the principle of public participation. It was further submitted that even perchance the said questionnaires were valid, they were restricted to the construction of a swimming pool and not a multi-storey building or residential development which is now being undertaken by the 1st respondent. That's the approvals granted by the second and third respondents are invalid and unenforceable.
24. On the 4th issue, it was submitted that the statutory procedures in EMCA 1999 were not followed by the first and second respondents, that the project has affected and continues to affect the flora and fauna in the protected riparian zone that plays a key role in maintaining a healthy biodiversity necessary for the health of the entire Watamu population. It was submitted that the prayer sought are deserved as well as costs.

First Respondent's Submissions

25. The first respondent's counsel framed the following issues for determination
- a. What is the nature of the first respondent's development;**

- b. Whether the first respondent's development is being carried out on riparian land;**
- c. Whether there is breach of the petitioner's Constitution rights;**
- d. Whether the petitioner is entitled to the prayers sought in the petition;**
- e. Who should bear the cost of this petition;**

26. Regarding the first issue, it was the first respondent's counsel's submission that parties are bound by their pleadings; that the petitioners pleading is that a "*permanent multi-storey building*" is being built, but the truth of the matter is that the first respondent is constructing a single storey semi-permanent structure and not a multi-storey building. Counsel referred to **pages 109, 110, 145, 146, and 147** of the first respondent's the list of documents (*the architectural drawings of the first respondents house*) to show that the building is not a multi-storey but a single floor semi-permanent building. Those documents refer to the first respondent's development as a "*temporary green beach house.*"
27. Counsel referred to **pages 24 to 25** of the first respondent's list of documents are later dated for 14th July 2023 by the National Land Commission stating that the National Land Commission conducted a site visit of the first respondent's development on 10th July 2023 and established a few facts therein stated, including the fact that the area is occupied and developed by the first respondent with a semi-permanent and unfinished house.
28. On the 2nd issue, it was submitted that the survey report dated 20th February 2023 by Luke Omondi, Surveyor in Charge, Malindi Magarini Subcounties, is erroneous and is not proof that the first respondent's development is being undertaken on riparian Land; that what are cited by Mr Omondi are not regulations but "*draft regulations*" which cannot be used to identify or define riparian reserve; that also, Section 110 of the Survey Act which is referred to

by Mr. Omondi does not exist; that the only provision setting **60m** in relation to riparian Land is the Survey Regulations 1994 at Rule 110. Counsel however submitted that that rule applies only where government Land is being surveyed for alienation which was not the case herein. Omondi's conclusion that the structure is on riparian Land was consequently erroneous.

29. Counsel submitted that the conflicting legal provisions on the measurement of the riparian reserves in Kenya as seen in the case of *Milimani Splendor Management Limited Versus National Environment Management Authority And 4 Others 2019 KEELC 1225 KLR*; that all other regulations except the **Survey Regulations 1994** refer to “30m and below” as riparian reserve, and that is the only measurement that should be applied to determine the extent of riparian land from the high watermark. Counsel submitted that since the respondent’s development is 51m from the high watermark, using that yard stick, the construction is 21m outside the riparian reserve.

30. As to whether there has been breach of the petitioner’s Constitutional rights, it was submitted that the petitioners’ case revolves around the following allegations:

- a.** *Construction of a multi-storey building without an appropriate EIA Report and without holding public hearings in violation of Article 69 of the Constitution;*
- b.** *The granting of an approval for the impugned construction based on force and invalid report;*
- c.** *Issuance of approval for construction for a residential development when EIA report was limited to construction of a swimming pool also in violation of Article 69;*
- d.** *Denial of view of the sea, blockage of flow of the breeze from the ocean, and rise of temperature due to the multi-storey building in breach of Article 42 of the Constitution;*
- e.** *Construction of a multi-storey building permanent on riparian Land in violation of Article 69(1)(a) as read with sub-Articles (e) and (f) of the Constitution as well as Article 62 (2)1 of the Constitution.*

31. As regards violation of Article 69, it was submitted that the first respondent's development did not require an Environmental Impact Assessment Study or submission of EIA Report under the law as it was not a multi-storey building; that the first test is in Section 58(1) of EMCA which refers to undertakings specified in the Second Schedule of the Act as liable to submit a project report and undertake a full Environmental Impact Assessment Study and submit an Environmental Impact Assessment Study Report.
32. It was submitted that Section 58(1) requires a proponent to submit *either of the 2 reports*: a Project Report or an EIA Study Report. The first respondent's project, being a single dwelling unit, is not among those projects specified in the Second Schedule of EMCA.
33. In addition, it was submitted that Rule 4 of the Environmental Impact Assessment and Audit Regulations requires an Environmental Impact Assessment only in case of a project that is likely to have a negative environmental impact or for which an environmental impact assessment is required under EMCA. Therefore, the first respondent was not required to undertake an Environmental Impact Assessment Study and submit an EIA Report.
34. Counsel for the 1st respondent made efforts to distinguish between a project report under Section 58(1) and an Environmental Impact Assessment Study Report under Section 58(2) by referring to Rule 2 of the Environmental Impact Assessment and Audit Regulations for the definition of an "*Environmental Impact Assessment Study Report*" and of a "*Project Report*". Counsel pointed out that the two kinds of reports are distinct and are provided for in different parts of the Environmental Impact Assessment and Audit Regulations being **PART II** and **PART IV** thereof; that Rule 7(1) of the EIA Regulations provides for low-risk

projects or medium risk projects to submit a Summary Project Report.

35. It was further submitted that Rule 10(3) provides that NEMA shall require the proponent to undertake an Environmental Impact Assessment Study only in instances where the project will have a significant impact on the environment and the project report discloses no sufficient mitigation measures. *London Distillers Kenya Limited Versus National Environment Management Authority and Another Environment & Land Appeal E007 Of 2020 2023 KEELC 190075 KLR* was cited in support of that proposition; that there can only be a violation of the Constitution where the law creates a legal obligation, and in this case there was no legal obligation upon the first respondent to undertake an environmental impact assessment study; that consequently, the respondents' granting of approvals to the first respondent to carry out the construction of a multi-storey building without an EIA Report, and holding public hearings, was not in violation of **Article 69** of the Constitution by virtue of the provisions of regulations 7(1) and regulation 10 of the EIA Regulations; that as no EIA study report was supposed to be submitted, **Article 69** of the Constitution could not have been violated simply because the approval for the impugned construction was based on a purportedly false and invalid report or because that approval was issued for the structure while the EIA Report was limited to a swimming pool. Counsel emphasized that nothing turns on the EIA Report because it was not required by the law and thus it matters not whether the same was for a swimming pool or for a building; that it matters not whether the EIA Study Report was submitted or not. It was also urged that even if the project fell under the category of those in the Second Schedule, it would fall under those with a **low risk** and thus only require a project report. It is further urges that the 1st respondent is under no obligation to table

evidence to prove that she submitted a project report to NEMA because that is not the case she is facing; that the case of the petitioners is that there was no EIA report. That the pleaded violation can not therefore be measured on the basis of lack of a project report, but only on the scale of lack of an EIA Report which applies to **high-risk** projects.

36. It was urged that the claim that there were no public hearings was not supported by law as the low-risk projects such as the 1st respondent's non-multi-storey structure, do not need a public hearing; those public hearings apply only to EIA assessment study, certified by NEMA as having a significant impact on the environment, under part III and IV of the Act **At Regulations 17 And 20**. Counsel urged that any claim of violation of **Article 69** based on such a structure was unsound, and so was the claim of violation of the same Article by NEMA for the granting of approval for a residential development while the EIA was limited to a swimming pool.
37. Counsel also submitted that there was no threat to the genetic resources and biological diversity in the area since it has been established that the project is not being carried out on riparian land, and the Kipepeo Project through its expert report dated 8/8/2023 has certified that only one of the species of flora is said to be vulnerable. That whether or not there is threat to genetic resources and biological diversity ought not be pleaded without evidence, but requires proof by an expert and the petitioners never called an expert.
38. Regarding the alleged violation of **Article 42**, counsel submitted that allegations based on clean and healthy environment need an expert report to prove which the petitioners lack, yet they are not environmental experts; that there was no evidence of the alleged neighbouring developments which would be affected by the lack of

view of the sea, the blockage of free flow of breeze from the ocean and the rise of temperatures, and in any event those violations can not occur in the first place because the structure being built by the 1st respondent is not a multistorey structure. Citing *Kibo Distillers Ltd & 4 others v Benson Ambuti Adegga & 3 others 2020 eKLR* counsel submitted that guesswork being ruled out, specifics involving scientific empirical and technical evidence regarding, e.g., rate or range of temperature rise or other effect on environmental phenomena, were required to be tabled by the petitioners to prove their claim but they did not. It was stated that the 1st respondent has adduced evidence in the form of her experts' technical drawings and the descriptions therein to prove that her development is environment friendly; that e.g., the walls will be left open to allow for free air flow, commitment to utilization of solar power, green spaces, garden roof, vents and operable windows and timber frames to minimize heat loss or gain.

39. As to violation of **Article 62(2)(1)**, it was urged that it can not be violated as it does not exist; that there is no multi-storey structure; that there is no encroachment on riparian land; that in any event the illegal appropriation of public land can only be dealt with in an ordinary suit and by way of *viva voce* evidence; that the 1st respondent produced a letter by the NLC dated 14th July 2023 as proof that the NLC gave her consent to use the subject area since it fronts her property (see page 24-25 of the bundle) subject to stipulated conditions, to wit, observance of a 30 metres gap from the high-water mark and that no permanent structure to be erected thereon; that the NLC consent has not been challenged and in any event, the NLC has not been joined in the present petition for that consent to be effectively challenged.

40. As to whether the prayers sought ought to be granted, the 1st respondent's counsel citing *Kibos* (supra) and *United Millers Limited*

V Kenya Bureau of Standards & 5 Others Petition (Application) 4 of 2021 KESC 72 (KLR) on the doctrine of judicial abstention or restraint, submitted that this court lacks jurisdiction to grant prayer no (iv). That this court must therefore give way for the National Environmental Tribunal to determine whether the impugned NEMA approval licence violated the law. The case of *Sikalieh (Suing As Chairman Of KLDA) V Nairobi City County Government & 3 Others Environment And Land Petition E001 Of 2023 [2023] KEELC 16996 (KLR)* was cited for the proposal that the proper dispute resolution mechanism ought to have been applied in the present case. That prayer no (iv) can not be issued for the reason that the 60 days window under Section 129 EMCA to challenge the NEMA licence has since expired. The argument was also attached to the lack of proof of the other allegations in the suit.

41. Counsel submitted that regarding **prayer no (vii), Section 68 and 69 EMCA** confer on NEMA mandate on environmental audit and monitoring and thus these court's directives are not necessary in that regard as NEMA has not been shown to have failed in the discharge of its duties.
42. It was urged that the present petition ought to be dismissed with costs.

2nd Respondent's Submissions

43. The 2nd respondent submitted that that the 1st respondent's development encroached onto riparian land; that it was the legitimate expectation of the 2nd respondent that the 1st respondent would adhere to the conditions in the EIA Licence issued; citing regulation 15 of the EMC (Wetlands, River Banks, Lake Shores, And Sea Shore Management) Regulations 2009, counsel for the 2nd respondent pointed out that the 1st respondent however acted contrary to the expectations; that EMCA at Section 66 stipulates

that EIA Licences are not indefeasible and can not form the basis for a defence by a project proponent. That in the consideration of the 2nd respondent, the 1st respondent has violated environmental law and in particular Article 42 and the “polluter-pays” principle under Section 2 of EMCA should be invoked against the 1st respondent. that should an environmental audit be necessary, the 1st respondent ought to bear the costs thereof. That no case has been established as against the 2nd respondent.

Analysis and determination

44. The following issues are admitted by the parties in this petition:
- a. That the petitioner is building a structure outside the boundaries of her plot;*
 - b. That the purported applicant for the EIA Licence was long deceased by the time the applications were made in her name;*
 - c. That NEMA issued an EIA Licence in the deceased’s name;*
 - d. That the EIA Licence covers only a swimming pool and not building;*
 - e. That no environmental impact assessment study was carried out for the 1st respondent’s project;*
 - f. That the terms of the licence do not cover any area outside the boundaries of LR Number 8594/13;*
 - g. The Land on which the 1st respondent through her limited liability company, Mjukuu Beach Front Watamu Limited, is attempting to build a semi-permanent structure is public land under the administration of the National Land Commission as per Article 67 (2);*
 - h. That the structure the 1st respondent is building is not more than 51 metres away from the high-water mark.*
45. The issues that remain for determination in the present petition are as follows:
- a. Whether the doctrine of judicial abstention applies in the present petition;*
 - b. Whether the first respondent’s development is being carried out on riparian land;*
 - c. Whether the approvals granted by the second and third respondents are illegal invalid and unenforceable for inter*

alia, having been based on an application made in the names of Cherry Rosanne Wood more than 18 months after her death;

- d. Whether the first respondent's development required a prior EIA Study Report under Section 58 EMCA and issuance of EIA Licence from the 2nd respondent;*
- e. Whether the actions and omissions on the part of the respondents have violated Articles 42, Article 62 2(1), Article 63(2)(2)(I) Article 69 and Article 70 of the Constitution of Kenya;*
- f. What orders ought to issue.*

Whether the doctrine of judicial abstention or exhaustion applies in the present petition;

46. The starting point with regard to this issue is that this court has original jurisdiction to hear and determine matters relating to the environment under article 165(2)(b) and Section 13(1) of the Environment and Land Court Act, and that under section 3 of EMCA every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment and where the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, to apply to the Environment and Land Court for redress, and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate avail him relief.
47. *Kibos (supra) and United Millers Limited V Kenya Bureau Of Standards & 5 Others Petition (Application) 4 of 2021 KESC 72 (KLR)* were cited by the 1st respondent's for the application of the doctrine of judicial abstention or exhaustion, or restraint by this court in the present petition and it was hence submitted that this court lacks jurisdiction to grant **prayer no (iv)** and that this court

must therefore give way for the National Environmental Tribunal to determine whether the impugned NEMA approval licence violated the law. *Sikalieh* (supra) was also cited for the proposal that the proper dispute resolution mechanism ought to have been applied in the present case. It was submitted that prayer no (iv) can not be issued for the reason that the 60 days window under Section 129 EMCA to challenge the NEMA licence has since expired.

48. This court must refer to the case of *Valentini v Farid & 3 others* [2025] KEELC 253 (KLR) where the court stated as follows:

“To merit being a petitioner in environmental litigation requires attainment of a very low threshold, all that a person needs to do is to identify a right to a clean and healthy environment recognised and protected under Article 42 and allege, even where he has not demonstrated or can not demonstrate that he has incurred loss or suffered injury, that it has been, is being or is likely to be, denied, violated, infringed or threatened....

*Of course it can be argued that such a low threshold is susceptible to abuse by unscrupulous persons but it is not beyond the vigilance of this court to weed out unnecessary or incompetent petitions. Environment is life and the low threshold is indeed a mark of the high calling to which this court has been appointed to the extent that an extraordinary measure of trust has been invested in its diligence and ability strike a certain balance in order to weed out offending petitions without prejudicing genuine environmental litigation. Indeed, the Court of Appeal in appreciating that delicate balance stated as follows in *Abidha* (supra):*

“While a court should not make an order that can be construed as impinging on a party’s right to fair hearing, it must always be vigilant so that its process is not abused.” ...

It is also clear from the framing of the provisions of Article 70(1) that a petition alleging denial, violation infringement or threat of infringement of environmental rights under Article 42 may be filed in addition to any other legal remedies that are available in respect to the same matter. This is vital because it implies that a Constitutional petition based on the same set of facts as an action before another forum may exist parallel to that other action in that other forum; that as long as the Constitutional petition confines itself to matters of violation or threatened violation or denial of rights, it matters not whether the petitioner is during the pendency of the petition, prosecuting an ordinary

cause of action based on the same facts before another forum on the same set of facts. That other cause of action must be deemed to be different and the two litigations should keep to their lane on the highway to eventual justice. The rationale for the provisions in Articles 42, 69 and 70 is clearly that the other forum not seized of Constitutional jurisdiction shall determine the ordinary legal issues while this court determines the Constitutional issues...

The totality of the import of the foregoing Constitutional provisions spontaneously deal a serious blow to any prospects of having an entire Constitutional petition struck out for violation of the exhaustion doctrine. They also mandate a court to jealous and eternal vigilance against violation or threat of violation of Constitutional rights and call on the court to decline to defer to any distractions that may, under the aegis of the exhaustion doctrine or any other defence in the nature of a procedural defect, occasion the court a loss of focus on the Constitutional issues already raised before it.

To appropriately effectuate such liberal provisions, when a party pleads the exhaustion doctrine and especially in a multifaceted petition, and seeks its striking out or dismissal for breach of the exhaust doctrine or some other defence of procedural defect, this court must habituate its reflexes to unrelentingly scour the terrain of the impugned petition for identification of any fact, set of facts or allegations that would even in the remotest sense point to probability of existence of a Constitutional violation or threat thereof not tied to matters subject to exhaustion, and upon finding a scintilla of such fact, etc, decline to strike out a whole petition in limine."

49. In the *Valentini* case (supra) the court adopted a middle path suggested by the Supreme Court in the *Kibos* Case (supra) and took the view that *"even where a court declines to hear a multifaceted suit because it lacks original jurisdiction in respect to some of the causes of action, the court should fashion orders that do not impede a party's right to fair hearing in respect to the matters which are properly before it; that the trial court ought to reserve those issues properly before it pending the exhaustion of the dispute resolution mechanism of the other matters."*

50. However as was learnt in that case after the adoption of that path, parties who are referred by court to the fora of original

jurisdiction regarding some of the issues in a multifaceted petition risked having their pursuit of appropriate proceedings in those fora rendered a wild goose chase by a declaration in those proceedings that they are already time barred, hence lengthening the time for processing justice. In this court's view, the convolution of issues that results, including of whether the court can validly repossess for its final disposal the issues declared time barred, is an improper outcome in a constitutional dispensation that not only abhors overreliance on technicalities over justice, but also delayed justice.

51. In the present case, the objection based on judicial restraint is premised on the submission that prayer no (iv) in the petition can not be issued for the reason that the 60 days window under Section 129 EMCA to challenge the NEMA licence has since expired which raises the same apprehension of this court contained in the immediately preceding paragraph herein.

52. In the *Valentini* case (*supra*) the prayers were as follows:

"a. A declaration that the petitioner's rights to a clean and healthy environment as guaranteed by article 42 of the Constitution has been violated by the actions and the inactions of the respondents as outlined in the petition;

b. A conservatory orders halting the construction by the 1st respondent on parcel no 9643;

c. A conservatory order compelling the respondents jointly and severally to take measures to stop /prevent/discontinue the development or any omission deleterious to the environment on the property;

d. Further orders and/or directions as this court may deem just fair and necessary;

e. An order directing the respondents to remove all developments that have taken place during the pendency of the

suit proceedings to restore the project site to its original condition.”

53. It is plain that **prayers nos (b) and (c)** in *Valentini* case (supra) could be dealt with by the National Environment Tribunal or by the Physical Planning Liaison Committee and the court on that basis upheld the doctrine of exhaustion.

54. In contrast, an examination of the impugned **prayer (iv)** in the present petition reveals that it seeks the following:

“A declaration that the approval number NEMA/SPA/10439 by the 2nd respondent and CGK/P/WTM/192/2022 by the 3rd respondent were obtained in a manner inconsistent with the requirement of the Constitution and the resultant construction is therefore illegal;”

55. It is the opinion of this court that that specific prayer seeks not a statutory but a Constitutional interpretation regarding matters relating to the environment which are in any event covered by Article 165(2)(b) and Section 13(1) of the Environment and land court Act.

56. Obviously, this court is seized of jurisdiction under the Constitution and the Act to examine and declare whether the acts and omissions of any person run contrary to the requirements of the Constitution, and there is no submission that the acts and omissions of the 2nd and 3rd respondents in issuing the licences and approvals that they gave for the 1st respondent’s project.

57. In *Nabatkhanu Karim H.P & 12 others v Hwaock IM & another; National Environment Management Authority (Interested Party) [2021] KEELC 848 (KLR)* the court, faced with a preliminary objection on the doctrine of exhaustion, held as follows:

“On the first issue, the Respondents have contended that whether or not the change of user approval was validly obtained is an administrative issue that should have been referred in the first instance to the Nairobi Liaison Committee for determination

under the Physical and Land Use Planning Act, 2019. The Respondents have contended that an appeal against the decision of the said Liaison Committee lies to this court. I find no merit in this limb of the objection. In their petition, the Petitioners have contended that as a result of the Respondents' violation of the zoning regulations, the provisions of the sublease under which the suit property is held and the provisions of the Environment Management and Coordination Act, 1999 (EMCA), their constitutional rights to among others, a clean and healthy environment is threatened with violation by the Respondents. The Petitioners have contended further that they were not consulted before a change of user approval was given to the Respondents for the development in dispute in breach of their constitutional and statutory right to be heard before a decision affecting their interests is made. Section 3 of EMCA provides as follows:...

The Petitioners have a right both under EMCA and the Constitution to approach the court for redress for violation or threatened violation of their right to a clean and healthy environment. The Liaison Committees established under the Physical and Land Use Planning Act, 2019 and the National Environment Tribunal established under EMCA have no jurisdiction to determine issues regarding violation of a right to clean and healthy environment. I do not agree with the Respondents that the Petitioners have brought this petition to challenge the legality of the Change of user approval that has been issued to the Respondents. The Petitioners' case is that the change of user approval was issued or obtained without public participation and that the development that is being undertaken following that approval is going to violate their right to a clean and healthy environment."

58. Having regard to statute and case law as above, this court is thus of the view that it should not reject the present petition or any part thereof, or refer it to any other forum, under the doctrine of exhaustion.

Whether the first respondent's impugned development is being carried out on riparian land;

59. One notable admission is that the 1st and 2nd respondents have conceded that the structure being constructed by the 1st respondent is outside the premises to which the 2nd respondent's licence applied. She faulted the petitioners for not having provided a statutory or regulatory definition of the term "*riparian zone*", or even evidence that the development is occurring on a riparian zone. The 1st respondent avers that her structure is on the land between LR Number 8594/13 and the high-water mark of the Indian Ocean, which is government land lawfully designated as "*coastal foreshore reservation*", and which is under the control and management of the National Land Commission. Therefore, the issue arising is what are the proper definitions of "*riparian zone*" and "*coastal foreshore reservation*", and on which category of land the 1st respondent's structure falls. In submissions, the 1st respondent's counsel referred to *Milimani Splendor Management Limited Versus National Environment Management Authority And 4 Others 2019 KEELC 1225 KLR* and urged that according to that decision, all other regulations except the **Survey Regulations 1994** refer to land "*30m and below*" as riparian reserve, and that that is the only measurement that should be applied to determine the extent of riparian land from the high watermark. Counsel submitted that since the respondent's development is 51m from the high watermark, using that yard stick, the construction is 21m outside the riparian reserve.

60. EMCA fails to define either "*riparian zone*" and "*coastal foreshore reservation*" and neither does the Survey Act and the Physical and

Land Use Planning Act 2019 or the EMC (Wetlands, River Banks, Lake Shores, And Sea Shore Management) Regulations 2009. However, internationally, it is recognized that riparian reserves with regard to oceans are measured from the high-water mark (or highest annual tide) and extending inland and that was the holding in *Milimani Splendor Management Limited Versus National Environment Management Authority And 4 Others 2019 KEELC 1225 KLR*. The problem that the *Milimani Splendor case (supra)* grappled with regarding establishment of a riparian boundary, is not unlike the issue in the present case. The court therein urged legislative reform to ensure consistency in determining riparian limits.

61. The Survey Regulations (Legal Notice 168 Of 1994) provide as follows:

“110. Coast foreshore reservation

(1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above high-water mark for Government purposes:

Provided that, if the interests of development require, the Cabinet Secretary may direct that the width of this reservation shall be less than 60 metres in special cases.

(2) High-water mark in all cases in these Regulations means the Mean High-Water Mark of Spring Tides.”

62. The plain language employed in regulation 110 of the Survey Regulations (Legal Notice 168 Of 1994) is indicative that the definition is applicable only in respect of surveys of unalienated Government Land which is not the case herein.

63. The Physical and Land Use Planning (General Development Permission and Control) Regulations provide as follows:

““riparian reserve" means the ecological buffer of earth surface not being the bed of a stream, river, ocean, dam, natural or

artificial lake, swamp or riverine wetlands measured horizontally from the highest water mark and may include part of any land parcel situated at the distance from the bank within the measurements specified in regulation 14, that is protected under the Act or its use regulated under any other written law;”

64. **Regulation 14** the Physical and Land Use Planning (General Development Permission and Control) Regulations reads as follows:

“14. Measurement of the extent of riparian reserves

The following standards shall apply during the measurement of riparian reserves for the purposes of these Regulations—

(a) for rivers, a minimum riparian reserve of ten metres or a reserve that is equal to the average full width of the river measured from the highest water mark, whichever is higher, but which shall not exceed thirty metres, on either side of the river shall be maintained:

Provided that in the case of a flood plain, the riparian reserve may be higher as may be determined by the Water Regulation Authority:

(b) for lakes, a riparian reserve of not less than one hundred metres and not more than two hundred metres as measured from the highest water mark shall be maintained for all lakes:

Provided that in the case of Lake Naivasha, there shall be observed a contour of one thousand eight hundred and ninety-two point eight metres above sea level;

(c) for the Indian Ocean, a riparian reserve of three hundred metres as measured from the highest water mark shall be maintained;

(d) for swamps measuring more than one acre, a riparian reserve of at least fifty metres and not more than seventy metres as measured from the highest water mark shall be maintained;

(e) for swamps measuring less than one acre, a riparian reserve of at least twenty metres and not more than thirty metres as measured from the highest water mark shall be maintained;

(f) for dams, a riparian reserve of seventy metres as measured from the highest water mark shall be maintained for all dams:

Provided that downstream of the dam, there shall be maintained a riparian reserve of at least twenty metres and not more than one hundred metres as measured from the toe of the dam as determined by structural engineer; and

(g) for springs, a riparian reserve of at least six metres as measured from the source of the spring shall be maintained.”

65. It is clear that were the provisions of the regulation set out herein above to be applied to the present case, the structure and the 1st respondent’s land would both be covered by the resulting expanse that would be referred to as “*riparian reserve.*”

66. Despite the apparent conflict in legal provisions, the inescapable conclusion is that the law envisages that there must be a buffer zone called a riparian reserve that must extend from the high-water mark towards the inland. This court can not abandon the quest to establish what should be deemed to be riparian reserve solely because none of the two sets of regulations herein above specifically fit into the situation on the ground with regard to the area under development.

67. In *Kiluwa Limited & another v Business Liaison Company Limited & 3 others (Petition 14 of 2017) [2021] KESC 37 (KLR) (6 August 2021) (Judgment)* the Supreme Court of Kenya stated as follows:

“54. Pursuant to section 45 of the Survey Act, the Survey (Amendments) Regulations 1994, were enacted. Regulation 110 thereof provides as follows:

Coastal offshore reservation

“110. (1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above the high-water mark for Government purposes:

Provided that, if the interests of development require, the Minister may direct that the width of this reservation shall be less, than 60 metres in special cases.

(2) High-watermark in all cases in these regulations means the 'Mean High Water Mark of Spring Tides.'”

Section 82 of the repealed Government Lands Act provides:

“a conveyance, lease or license under this Act shall not, unless otherwise expressly provided therein, confer any right to the foreshore”.

55.A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands. Therefore, it is incorrect for the respondents to assert that the lands in question were un-alienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. Un-alienated government land remains public until it is privatized through allocation to individuals or other private entities.

56. Secondly, to the extent that this assertion by the appellants remains un-controverted, the additional portion of land (6.0 Ha. thereof), which land is comprised within Plots MN/1/5901 and MN/1/5902 (allocated to the 2nd and 1st respondents respectively) was hived off the coastal foreshore by the 3rd respondent. Such foreshore consists of land lying between the Low-Water Mark and the High-Water Mark plus an additional 60 metres above the High-Water Mark within the meaning of regulation 110(1) of the Survey Regulations of 1994. Such land is reserved for Government/Public use.

57. Although article 62(1)(l) of the Constitution makes no reference to the 60 metres above the High-Water Mark (only limiting itself to the language of “the high and low water mark”) sub-article (1)(n) provides for another category of public land as being any other land declared to be public land by an Act of Parliament in force at the effective date; or enacted after the effective date; hence the relevance of regulation 110(1) which was enacted before the effective date pursuant to section 45 of the Survey Act. Furthermore, section 82 of the Government Lands Act (repealed) which predates the Survey Act, and under which the lands herein fell as un-alienated government land, outrightly forbids the conferment of any right to the foreshore by a conveyance, lease or license.

58. Thirdly, the right of access to the Ocean through the foreshore by members of the public or any other owner of land along the coast (ie, the appellants) whether for economic, recreational or aesthetic reasons, is a public right secured by a public easement. Such right is not acquired through a private treaty. It follows that a person or private entity who has encroached on the foreshore cannot interfere with or limit the enjoyment of a public easement through acts of commission or

omission. On the other hand, the Government may interfere with or limit such easement only in promotion or protection of the Public Interest as guaranteed by the Constitution and the law.

59. The foregoing determination of the issues, leads us to make the following declarations:

a. The 3rd respondent herein, acted illegally by allocating land parcel No MN/1/5901 to the 2nd respondent, which land he had partly curved out of the foreshore contrary to section 82 of the Government Lands Act (repealed) and regulation 110(1) of the Survey Regulations of 1994.

b. The 3rd respondent herein, acted illegally by allocating land parcel No MN/1/5902 to the 1st respondent, which land he had curved out of the foreshore contrary to section 82 of the Government Lands Act (repealed) and regulation 110(1) of the Survey Regulations of 1994.

c. The actions of the 3rd respondent herein, violated the appellants' right to fair administrative action as guaranteed by article 47 of the Constitution."

68. Having regard to the foregoing, this court is of the view that the proper definition of riparian land in the law is the **300** metres from the high-water mark as per **Regulation 14** of the Physical and Land Use Planning (General Development Permission and Control) Regulations; the land defined as coastal foreshore reservation under Regulation 110 of the survey regulations automatically subsumed within the expanse of land defined as "riparian reserve" by **Regulation 14** of the Physical and Land Use Planning (General Development Permission and Control) Regulations.

69. Where titled land has already considerably encroached the 300 metres stipulated in Regulation 14 of the Physical and Land Use Planning (General Development Permission and Control) Regulations, only Regulation 110 of the Survey regulations (Legal

Notice 168 Of 1994) remains as the only source of guidance as to what the law intended to be the land reserved for the “*Government purposes*” alluded to in Regulation 110.

70. Under the current Constitutional dispensation, the government has the mandate under **Article 69 (d), (e) and (g)** to encourage public participation in the management, protection and conservation of the environment, to protect genetic resources and biological diversity, and to eliminate processes and activities that are likely to endanger the environment.

71. In the case of *Tukero Ole Kina & another v Tahir Sheikh Said (also known as TSS) & 5 others [2015] KEELC 313 (KLR)* it was stated as follows by the court:

“85. In fact, the Constitution having granted the foreshore to the public, the issue of the Plaintiffs having an exclusive right to the beach front under the current constitutional dispensation does not arise. The beach front belongs to the public at all times and is subject use and allocation pursuant to the provisions of the Constitution and the Land Act. Previously, the foreshore formed what was un alienated Government land and could only be dealt with in accordance with the Government Lands Act.”

72. The implication of the foregoing is that even governmental authorities, bodies or agencies would not be expected to undertake any developments on riparian reserve of **60** metres from the high-water mark in a manner which would be contrary to **Article 69 (d), (e) and (g)**.

73. By extrapolation, it means therefore that where titled land has already considerably encroached the 300 metres stipulated in Regulation 14 of the Physical and Land Use Planning (General Development Permission and Control) Regulations, the proper guidance drawn by this court from the provisions of Regulation 14 of the Physical and Land Use Planning (General Development Permission and Control) Regulations, and Regulation 110 of the Survey regulations (Legal Notice 168 Of 1994) as read with **Article**

69 (d), (e) and (g) is to the effect that the strip of land of a minimum of 60 metres width above the high-water mark must be considered a riparian reserve. Counsel for the 1st respondent submitted that the respondent's development is 51m from the high watermark. Consequently, since the 1st respondent has admitted that her structure is being built on government land lawfully designated as "*coastal foreshore reservation*" that fixes the structure within the 60 metres defined under regulation 110, the conclusion of this court is thus that the structure is within the riparian reserve.

Whether the approvals granted by the second and third respondents are illegal invalid and unenforceable for inter alia, having been based on an application made in the names of Cherry Rosanne Wood more than 18 months after her death;

74. Regarding this issue it has been posited by the petitioner that the approvals are invalid since the purported applicant is deceased.

75. The process provided for in Section 58 of EMCA is a legal process. It envisages its commencement by a person, whether natural or juristic, who is in existence. Whereas room for debate is left where a juristic person exists or not, very little of such room is left in respect of a natural person. It is either they are living, dead or presumed dead, and in the last case presumption is a conclusion of the law after application of necessary facts. In Kenyan jurisprudence no legal process can be commenced by or in the name of a or against a deceased person. Even where proceedings have been commenced in the name of or against a deceased person, substitution cannot be effected as seen in *Ernest Ngugi Waithaka & 2 others v Peter Mutunga Gachigi [2017] eKLR* where the court held as follows:

"The word "person" can only refer to either a natural living person or a legal person. It follows therefore that a deceased person is not a person for purposes of Order 1 rule 3. When a

suit is filed against a non-existent person, it is void ab initio. There is no suit. The notice of withdrawal was thus not even necessary. Even if it had not been filed there would still be no suit. Since there is no suit, there is nothing that the applicants can join in place of the deceased. A substitution of a party can only be done where a suit exists. In the end, the Notice of Motion dated 14th February 2017 is dismissed. No order on costs.”

76. In the case of *Japhet Nzila Muangi v Hamisi Juma Malee [2022] KEELC 434 (KLR)* the court held as follows:

“4. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR where he reviewed various authorities as follows: -

In the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian Case of Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision observed as follows,

“if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule

10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

5. Having reviewed the above authorities, he found that the suit as against the 7th defendant, who was dead when the case was filed, was null and void ab initio.”

77. In the case of *Naikuni v Naikuni & 7 others; Manyuele (Applicant)* [2025] KEELC 3064 (KLR) it was stated as follows:

“For the above submissions, the Plaintiff/ Respondent relied on the case of Isaya Masira Momanyi vs Daniel Omwoyo & Another (2017) eKLR, where the court held; -

“...it is trite that the estate of a deceased person can only be represented in any proceedings by a person who is duly authorized to do on behalf of the estate. Only a person who has been issued a grant of letters of Administration has capacity to represent the estate of a deceased person.””

78. The defence raised by the 1st respondent is to the effect that she is the personal representative of the deceased proprietor of LR Number 8594/13. However, the issue arising is not whether or not she is the deceased’s personal or legal representative; it is whether all the applications and licences were made or issued in the name of the deceased or her legal or personal representative.

79. This court has referred to the exhibits labelled NEMA 1 and NEMA 2 in the sworn affidavit of **George Peter Oyoo** dated 12/9/2023 and found that the summary project report acknowledged as received by the 2nd respondent was made and submitted by a project proponent named “*Cherry Rosanne Wood*”. This was not a mistake as is evidenced by the introduction which reads as follows:

“1.1 Introduction.

Cherry Rosanne Wood herein after referred to as the project proponent, sought to develop within the confines of the law. The proponent commissioned NEMA registered environmental experts to conduct an EIA summary Project Report”

80. This court does not find there to be any controversy regarding whether Cherry Rosanne Wood died on 5/5/2021 and before the

Summary Project Report was made and submitted to the 2nd respondent on 10/11/2022. Consequently, and naturally then, neither should there be any controversy regarding the fact that it was not Cherry Rosanne Wood who commissioned or signed the said Summary Project Report.

81. Where a person is deceased, there is clearly no one to commence proceedings except his legal representative. It is not whether or not there was a personal representative at the time of the lodging of proceedings that is relevant; it is whether the proceedings were commenced in the name not of the deceased but of his or her personal representative. In the case of **McFoy vs United African Company Limited (UK) [1962] AC 152**, it was held as follows:

“If an act is void, then it is in law a nullity. It is not only bad ... and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

82. The Summary Project Report having been purportedly made by a deceased person, it is nullity *ab initio*. By that very fact, the acts of grant of approvals and licences in her name by the 2nd and 3rd respondents are illegal null and void and so are the licences so granted, and it can not be relied on for construction even within the boundaries of LR NO 8594/13.

Whether the 1st respondent’s development required a prior EIA Licence from the 2nd respondent;

83. This court has, while disposing of the previous issues as herein above, found not only that the 1st structure is within the riparian reserve but also that the grant of approvals and licences in a deceased person’s name by the 2nd and 3rd respondents, and the licences so granted are illegal null and void.

84. On a preliminary basis, this court's observation is that the 1st respondent clearly lacks any proprietary right to enable her erect any structure on riparian land. Her response that the riparian land is under the administration of the National Land Commission is correct. The purpose of maintaining and protecting a riparian reserve must be examined in order to establish whether an EIA study and EIA licence are required for her project.

85. **Section 55 of EMCA provides for the protection of the coastal zone as follows:**

" 55. Protection of the coastal zone

(1)The Cabinet Secretary may, by notice in the Gazette, declare an area to be a protected Zone.

(2)The Cabinet Secretary shall conduct a survey of the coastal zone and prepare an integrated national coastal zone management plan based on the report of such survey.

(3)The Cabinet Secretary shall, from time to time, not exceeding every four years, review the national coastal zone management plan prepared under subsection (2).

(4)The report of the survey of the coastal zone shall contain—

(a)an inventory of all structures, roads, excavations, harbours, outfalls, dumping sites and other works located in the coastal zone;

(b)an inventory of the state of the coral reefs, mangroves and marshes found within the coastal zone;

(c)an inventory of all areas within the coastal zone of scenic value or of value for recreational and cultural purposes;

(d)an inventory of areas within the coastal zone of special value for research in respect of fisheries, erosion, littorals movement and such other similar subjects;

(e)an estimate of the quantities of sand, coral sea shells and other substances being removed from the coastal zone;

*(f)an estimate of the impacts of erosion on the coastal zone; and
(g)an estimate of the extent, nature, cause and sources of coastal pollution and degradation;*

(h)an estimate of freshwater resources available in the coastal zone; and

(i)any other relevant data or information that may be deemed appropriate.

(5)Any person who releases or causes to be released into the coastal zone any polluting or hazardous substances contrary to the provisions of this Act shall be guilty of an offence and liable upon conviction to a fine of not less than one million shillings or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.

(6)The Cabinet Secretary shall, in consultation with the relevant lead agencies, issue appropriate regulations to prevent, reduce and control pollution or other form of environmental damage in the coastal zone.

(7)Notwithstanding the generality of subsection (6) of this section, the regulations made thereunder shall provide for the control and prevention of pollution—

(a)of the marine environment from land based sources including rivers, estuaries, pipelines and outfall structures;

(b)from vessels, aircrafts and other engines used in the coastal zone;

(c)from installations and devices used in the exploration or exploitation of the natural resources of the seabed and subsoil of the exclusive economic zone; and

(8)Where any polluting or hazardous substances are discharged, released or in any other way escape into the Coastal Zone, any person responsible for management of the polluting or hazardous substances shall be liable—

(a)for any resultant damage; and
(b)for the cost of any measures reasonably taken after the release or escape for the purpose of preventing, reversing or minimising any damage caused by such discharge, release or escape; and
(c)for any damage caused by any measures so taken.

(9) Where there arises a grave and imminent threat or danger of damage of discharge, release or escape of polluting or hazardous substances into the Coastal Zone, any person responsible for management of the polluting or hazardous substances shall be liable—

(a)for the cost of any measures reasonably taken for the purpose of preventing, minimising or controlling any such damage; and
(b)for any damage caused by any measures so taken.”

86. **Part III** of the Environmental Management and Co-ordination (Wetlands, Riverbanks, Lake Shores and Sea Shore Management) Regulations 2009 provide for management of coastal areas. Regulation 15 thereof states as follows:

“15. Application of Part
This part shall apply to all river banks, lake shores and to the sea shore in Kenya.”

87. The objectives of Part III of the regulations are set out as follows in regulation 16:

“16. Objectives of Part
The objectives of this Part include—
(a)to facilitate the sustainable utilization and conservation of resources on river banks, lake shores, and on the seashore by and for the benefit of the people and community living in the area;
(b)promote the integration of sustainable use of resources in riverbanks lake shores and the seashore into the local and

national management of natural resources for socio economic development;

(c)enhance education, research and research related activities; and

(d)prevent siltation of rivers and lakes and control pollution or and other activities likely to degrade the environment.”

88. The language employed in regulation 16 shows that the list of objectives is not exhaustive.

89. The general principles to be observed in the management of coastal areas are in regulation 17 which states as follows:

“17. General Principles

The following principles shall be observed in the management and conservation of river banks, lake shores and the seashore—

(a)Resources on the river banks, lake shores and the sea shore shall be utilized in a sustainable manner;

(b)Environmental impact assessment as required under the Act shall be mandatory for all major activities on river banks, lake shores and the seashore; and

(c)Special measures, including prevention of soil erosion, siltation and water pollution are essential for the protection of river banks, lake shores and the seashore.”

90. **Regulation 21** of the Environmental Management and Co-ordination (Wetlands, Riverbanks, Lake Shores and Sea Shore Management) Regulations 2009 provides as follows:

“21. Requirement for Environmental Impact Assessment

(1) A developer intending to a undertake a project which may have a significant impact on a wetland, river bank, lake shore or the sea shore shall carry out an environmental impact assessment in accordance with the provisions of the Act.”

91. **Regulation 17 (b)** stipulates that Environmental impact assessment as required under EMCA shall be mandatory for all major activities on river banks, lake shores and the seashore.
92. Kenya ratified the Convention on Biological Diversity in 1994. Article 1 of that Convention provides that the objectives of the Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.
93. Promotion of biological diversity is a feature in the convention. Under **Article 6** of the CBD Kenya is thus obligated to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to her, and integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.
94. Under **Article 8**, Kenya is obligated to *inter alia*, establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity; develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity; regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use; promote the protection of

ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings; promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas; rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies; establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health; endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components; subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; and develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

95. Under **Article 14**, each state Party to the CBD is obligated to introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

96. Kenya ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) on 13th December 1978 which convention requires protection of flora and fauna that are part of the wider natural system. A vital aspect of that convention is that it binds state parties to take domestic measures for restriction and prohibition not only of trade but also possession of certain species.

97. It needs not be gainsaid that much of the Kenyan coastal area is covered with a great diversity of flora and fauna and that there is symbiotic relationship in some of the species available while some are endangered and that some of the coastal areas have a rich heritage of mangrove forests or other coastal flora under which numerous animal species thrive. To just emphasize on that statement, it is important to refer to the **Sessional Paper No.13 of 2014 On Integrated Coastal Zone Management (ICZM) Policy** which states as follows:

“2.2.1 Coastal and mangrove forests The coastal forests exist as isolated blocks covering a total area of about 83,800 hectares in a narrow belt which extends inland for about 30 km. The largest of these forest patches is the Arabuko Sokoke forest reserve. Other forest patches include the Boni-Lungi, Dakacha, Dodori, the Shimba Hills Forest reserve and the Kaya forests. These coastal forests bare unique communities of flora with high drought resilience, high levels of adaptation, endemism of birds, mammals and other 18 Integrated Coastal Zone Management (ICZM) Policy fauna. They play a significant role in the hydrological cycle, enhance soil moisture content, mitigate against soil erosion and promote the flow of clear water in rivers. There are between 53,000 - 61,000 hectares of mangrove forests along the coast with the largest stands occurring in Lam County (67%) and the Funzi-Vanga system in the south coast. The

mangrove ecosystem is a critical habitat for a variety of fish species and invertebrates, which depend on it for feeding and nursery grounds. The habitat also hosts a wide variety of bird life and provides a line of defence against shoreline erosion and excessive suspended sediment from terrestrial sources. Coastal and mangrove forests are important carbon sinks, reducing greenhouse gases that cause global warming. Kaya forests are of spiritual and cultural importance to the Mijikenda community. Coastal and mangrove forests have been exploited for timber, wood-fuel and herbal medicines. The artisanal fishers rely on the mangrove ecosystem for a substantial part of their catch. Nonconsumptive uses of coastal forests include aesthetic use of forest biodiversity in eco-tourism and for beekeeping. The mangrove skyline on Manda Island as seen from Lamu is gazetted as a national monument.”

98. The coastal zones being harbours to such diverse flora and fauna and being part of public land as recognized by the 1st respondent herein need the 2nd respondent’s interventions so as to protect them. The principles of sustainability, intergenerational equity, the precautionary principle, the polluter pays principle and the public participation principle come into action in such ecological zones. These are principles distilled over time in the practice of environmental law. Of all, the more overarching principle is that of sustainability, because it requires natural resources to be utilized in a way and at a rate that does not adversely affect biological diversity in the long run, and it therefore encapsulates both the precautionary principle and the principles of intergenerational equity. The municipal law requirement of Environmental Impact Assessment is in itself a measure of compelling the serious observance of the precautionary principle.

99. Sustainability is indeed the essence of **Article 2** of the Convention on Biodiversity. In sound environmental practice, in the assessment of the sustainability of a project, it is not the size that matters. In the present case, the 1st respondent may defend her *“merely small dwelling house on a riparian reserve”*, but supposing every landowner neighbouring the riparian reserve developed a craving to replicate, without any EIA licence, the 1st respondent’s structure on the riparian reserve adjacent to their own land? And supposing that set forth a chain reaction where even persons owning no beach lands moved to do the same under the perceived but wrongful impression of *“equality of all citizens before the law”*? This shows that perchance the 1st respondent’s precedent of a *“small house that needs no EIA Licence”* is followed by others, there may be no riparian reserve land to speak of. Given the plethora of multilateral environmental agreements that this country has ratified, it is not an exaggeration to state that in view of the serious sustainability question arising, the 1st 2nd and 3rd respondents’ acts and omissions can be deemed of international concern.
100. In the present case, this court finds that the developments on the riparian reserve were not authorized by either the 2nd and 3rd respondents who while they were issuing their respective approval or licence confined the physical scope of the approval or licence to the internal limits of the boundaries of the land known as LR Number 8594/13; it was only discovered later that the development was erected outside those boundaries and on a riparian reserve.
101. The necessary question that arises is therefore whether, and how, the biological diversity within the coastal area would be protected if no Environmental Impact Assessment was required.
102. Since **Regulation 17 (b)** of the Environmental Management and Co-ordination (Wetlands, Riverbanks, Lake Shores and Sea Shore Management) Regulations 2009 stipulates that Environmental

Impact Assessment as required under EMCA shall be mandatory for all major activities on river banks, lake shores and the seashore, this court must examine whether the 1st respondent's structure, while considered within the context of the environmental conditions in coastal areas as described above should require an EIA study report and Licence.

103. Section 58(2) provides as follows:

"The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases."

104. In its assessment, the court notes that the impugned structure is a development clearly not in consonance with its surroundings in that though it is referred to as a simple "*dwelling house*" by the project proponent, it is situated in an area where such development is not expected, a riparian reserve.

105. Though the 1st respondent argues that "*a dwelling house*" does not ordinarily require an EIA study Report for not being categorized under projects listed in the 2nd Schedule of EMCA, that argument can only lie when the dwelling house is within the boundaries of a land parcel or within a development zone clearly planned for such a development.

106. The question that arises is, perchance it was assumed for argument's sake that the 1st respondent's structure was authorized to be on the riparian reserve by the 2nd and 3rd respondents (which in this court's view it was not) what should happen when considerable flora and fauna is at risk, and it clearly threatens interference with the petitioner's members' view of the sea and the air flow, and the project proponent takes cover behind

the provisions of section 58(2) stating that the type of project being undertaken is not among those in the 2nd schedule? How would the authorities safeguard effectively the "*protected species*" means any plant or animal species declared as endangered or threatened species under the Wildlife (Conservation and Management) Act (Cap. 376), if any, are in the said natural habitat? Or any *endangered species* or any *threatened species* under the EMC (Wetlands, River Banks, Lake Shores, And Sea Shore Management) Regulations 2009? How would Kenya as a concerned State Party fulfil its contracted obligations under the Convention on Biological Diversity in the circumstances? In the long run, the cumulative effect of such apparently isolated incidents of illegal development on the microclimates of riparian reserves in the country, if not halted, risks severe, irreversible ecological destruction of a magnitude that can not be imagined. That is the spectacle that makes this court step in and reject the 1st respondent's argument that her development on the riparian reserve is only a "*small dwelling house*" that does not need an EIA Study Report. In this court's view, the legal provisions of section 58(2) of EMCA are applicable to the 1st respondent's development on riparian reserve and it is only that the 1st respondent has missed the proper provisions applicable to her project because she is referring to the wrong heading in the 2nd Schedule of EMCA. As stated before, the 1st respondent's development can only be deemed a minor and innocuous single dwelling house project not requiring an EIA Study Report if it were being carried out within the proper land or planning zone. When it is being carried out in a sensitive ecological zone where it is bound to be out of character with its surrounding, it should automatically be covered by **Schedule 2 Paragraph 3(1) (a) and (b) and 3(2) (a) and (b)** which provide as follows:

“3. High Risk Projects—

(1) General—

(a) an activity out of character with its surrounding; and

(b) any structure of a scale not in keeping with its surrounding.

(2) Changes in land use including—

(a) major changes in land use; and

(b) large scale resettlement schemes.”

107. The implication of **Schedule 2 Paragraph (3) (1) (a)** and **(b)** is that even where a project may be considered minor, it is bound to be subjected to severe environmental scrutiny by way of an EIA Study Report if it is to be effected outside the area it should have naturally been expected to be carried out, or where it involves change in land use since it is a new phenomenon in the area. The 1st respondent’s dwelling falls under the two categories for the reason that it is wrongly sited on a riparian reserve, and is therefore included in the description in the 2nd Schedule of EMCA under Paragraph (3) (1) (a) and (b) and 3(2) (a), and it thus requires an EIA Study Report under Section 58(2) and an EIA Licence from the 2nd respondent.

Whether the actions and omissions on the part of the respondents have violated Articles 42, Article 62 2(1), Article 63(2)(2)(I) Article 69 and Article 70 of the Constitution of Kenya;

108. In this court’s view the 2nd and 3rd respondents permitted or licenced development on LR No Number 8594/13. However, they issued permits and licence respectively pursuant to an application made in a deceased person’s name which was illegal. This court is of the view that the application should be lodged and the permit or licence ought to be issued in the name of a person who is alive so as to hold them accountable to their terms to the letter.

109. The implementation of the licences was wrongly done by the 1st respondent who went about on her own frolic to erect the

permitted structure on the wrong land which was riparian land under Article 62(1) (I) and Article 62(4) of the Constitution, acts to which the 2nd and 3rd respondent should have by use of their very adequate resources and manpower, prevented since it their duty to ascertain if a project they have approved or licenced is being carried out in accordance with the terms of the licence and, in particular, at the location specified in the licence.

110. In the entire EMCA institutional structure, the 2nd respondent holds the highest and most exploitable power to ensure environmental compliance and has nationwide mandate and officers on the ground.

111. In the Physical and Land Use Planning Act 2019, the 3rd respondent holds the strongest position for the approval and control of all developments occurring within its jurisdiction and possesses power to take action against illegal developers.

112. Under their respective empowering statutes, the 2nd and 3rd respondents can take the appropriate remedial action in respect of the offenders even without recourse to court action so long as they observe all the constitutional and statutory strictures regarding a fair hearing or fair administrative action. There is a clear intent by the legislature to arm the two respondents under their respective statutes so as to ensure expeditious remedial action without lengthy litigation. However, they have not demonstrated any attempts at such remedial action in the present case.

113. The 2nd and 3rd respondents thus have no explanation for why they never ensured that the project was implemented strictly within the boundaries of LR No Number 8594/13. The acts and omissions of the 1st 2nd and 3rd respondents have led to a constructive allocation and utilization of public land to and by the 1st respondent respectively in violation of article 62(4) of the constitution.

114. **Article 42** provides as follows:

“Every person has the right to a clean and healthy environment, which includes the right—

(a) 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

(b) to have obligations relating to the environment fulfilled under Article 70.”

115. Article 69 provides as follows:

69. Obligations in respect of the environment

(1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilize the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

116. Section 56 of the Physical and Land Use Planning Act (PLUPA) provides as follows:

“56. Power to undertake development control

Subject to the provisions of this Act, the Urban Areas and Cities Act, 2011 (No.

13 of 2011) and the County Governments Act, 2012 (No. 17 of 2012), the county

governments shall have the power within their areas of jurisdiction to—

(a) prohibit or control the use and development of land and buildings in

the interests of proper and orderly development of its area;

(b) control or prohibit the subdivision of land;

(c) consider and approve all development applications and grant all

development permissions;

(d) ensure the proper execution and implementation of approved physical

and land use development plans;

(e) formulate by-laws to regulate zoning in respect of use and density of

development;

(f) reserve and maintain all the land planned for open spaces, parks,

urban forests and green belts in accordance with the approved physical and land use development plans; and

(g) consider and determine development planning applications made in

respect of land adjoining or within reasonable vicinity of safeguarding areas.”

117. Section 57 of the PLUPA states as follows:

“57. Development permission

(1) A person shall not carry out development within a county without a

development permission granted by the respective county executive committee member.

(2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.

(3) A county executive committee member shall require a person who has

commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.

(4) Where a person who is required to do so fails to comply with the provisions of sub-section (3), the relevant county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.

(5) A county executive committee member may revoke development

permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.

(6) A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.”

118. The police power of the state is at the county government level exercised by the county governments and Sections 55 and 56 of PLUPA, among other written laws, grants them appropriate powers therefor. This court needs not restate herein the enforcement provisions in EMCA and the EMC (Wetlands, River Banks, Lake Shores, And Sea Shore Management) Regulations 2009 to

demonstrate that the 2nd Respondent too is an agent in the enforcement of the state's police powers in its own way.

119. In so far as the 1st respondent interfered with the riparian reserve ecosystem rather than protect it, her illegal acts subjected the biodiversity of the affected area to great risk of extinction by means of an unauthorized development contrary to the provisions of Section 58(2) of EMCA. The state, through the investigative, policing and monitoring and punitive statutory powers bestowed upon the 2nd and 3rd respondents, is obliged to protect the environment under Article 42 (a) and Article 69(1) and (2) through appropriate measures taken against the 1st respondent's offending acts and omissions. In so far as the 2nd and the 3rd respondents never utilized those state powers well enough to curb her illegal acts, they are complicit in the acts and omissions she has been found culpable of in the present petition. I therefore find that the 1st -3rd respondent's have jointly and severally violated the petitioner's rights to a clean and healthy environment envisaged in Article 42(a) and 69 (1)(a), (e) and (g) of the Constitution of Kenya.

120. As for compensation for violation of rights, this court is alive to the provisions of Article 23(3)(e) which mandates this court to award compensation. Having found that the rights of the petitioner have been violated, I now turn to the statute for guidance on reasonable compensation that may be awardable in the circumstances of the present case. Thus, this court must at this point still refer to the provisions in EMCA on environmental offences that can answer to the description of the 1st, 2nd and 3rd respondents' acts and omissions Section 138 EMCA provides as follows:

"138. Offences relating to Environmental Impact Assessment
Any person who—

(a) fails to submit a project report contrary to the requirements of section 58 of this Act;

(b) fails to prepare an environmental impact assessment report in accordance with the requirements of this Act or regulations made thereunder;

(c) fraudulently makes false statements in an environmental impact assessment report submitted under this Act or regulations made thereunder, commits an offence and is liable on conviction to imprisonment for a term not exceeding twenty-four months or to a fine of not more than two million shillings or to both such imprisonment and fine."

121. Section 144 of EMCA provides as follows:

"144. General penalty

Any person who contravenes against any provision of this Act or of regulations made thereunder for which no other penalty is specifically provided is liable, upon conviction, to imprisonment for a term of not less than one year but not more than four years, or to a fine of not less than two million shillings but not more than four million shillings, or to both such fine and imprisonment, or to both such fine and imprisonment."

122. Section 145 of EMCA provides as follows:

"145. Offences by bodies corporate, Partnerships, Principals and Employers

(1) When an offence against this Act, is committed by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence."

123. It was stated as follows in the case of *Kilonzo t/a Kokomo Beach Bar and Restaurant & another v County Executive Committee*

Member for Lands, Physical Planning, Housing and Urbanization & another; Lion Beach Resort (Interested Party) [2025] KEELC 6025 (KLR):

“94.Regarding whether the respondents violated any rights of the petitioners by allowing the interested party to have in their possession a copy of the enforcement notice or the demolition order, this court is of the view that the interested party herein is without doubt a real interested party in the dispute for the reason that the offending structure erected by the petitioners obstructs its clientele’s view of the ocean yet its property is a first row beach plot entitled to such sea front view. The Interested party’s anxiety over the respondents’ apparent condonation of a violation of the law by the petitioners is palpable. It cannot therefore be faulted for having reported its complaint regarding the petitioners’ illegal development to the respondents. As long as the petitioner’s structure and business were illegal, the interested party’s report per se, made to the respondents for their necessary action, should not be taken as collusion or malice. Such an approach would be flawed and would only in future discourage ordinary citizens from playing their role in environmental conservation in an age where such conservation is consistently being mainstreamed into numerous laws and socio-economic strata.

95. Where a very well-endowed and legally mandated constitutional entity such as the second respondent has been unable to completely discharge its mandate, it is understandable and indeed excusable for a private citizen aggrieved by such failure to seek any avenue in court to enforce the law in so far as that effectuation of the law will benefit that entity directly and even where it does not stand to so benefit. In stating that I rely on Articles 69 and 70 of the Constitution and Section 3(4) of

EMCA. The Constitution at Article 69(2) mandates any citizen to act to assist the state in the protection of the environment thus:

“(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

96. I interpret the term “state organs” in Article 69 to include the devolved level of government.

97. Article 70 expressly grants the interested party a right to approach court in respect of any actual or threatened violation of its environmental rights as follows:

“70. Enforcement of environmental rights

(1) 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.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

98. *The spirit of the provisions of the above clauses are fleshed out in Section 3(4) of EMCA as follows:*

“(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action—

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.”

99. *The interested party’s right to approach court for redress in environmental matters is thus protected by the Constitution.”*

124. It is the view of this court that the failure by the responsible officers of the 2nd and 3rd respondent within the jurisdiction hosting the impugned project would in criminal proceedings covered under the specification of *“failure to exercise due diligence, efficiency and economy to ensure compliance with this Act”* as stipulated under **Section 146** of EMCA and also require to be sanctioned for dereliction of duty. In particular, it is apparent that the officer in charge of the 2nd respondent’s Kilifi County Office never facilitated the issuance of environmental restoration orders against the 1st respondent as required under **Section 109** of EMCA and Regulation 22 of the EMC (Wetlands, River Banks, Lake Shores, And Sea Shore Management) Regulations 2009.

125. This court is aware now that in Kenya where some statutory and governmental authorities have adopted a very lackadaisical approach to environmental concerns of both the ordinary citizen and of international concern, it is mainly the citizen’s vigilance and petition to this court for relief that may ultimately seal the glaring gaps in regulation and bringing offenders to justice, and the citizen must be not only be commended but also heartened by compensatory awards for such vigilance.

126. Exemplary damages and punitive damages against the respondents are the appropriate damages in the present case. They are primarily punitive and deterrent. This court has cautioned itself that those damages should be of such a sum, as their classification suggests, as to deter any future violations of the environmental rights of residents; that they must not be such a slap on the wrist that the offender will pay instantly and walk off jubilantly to commit the same or other environmental offence; that they must be fair and not excessive relative to the wrong.

127. In the case of *Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others* [2023] KEHC 17591 (KLR), it was stated as follows:

“An action, such as the one before me, brought under Article 23 of the Constitution seeking enforcement, protection and preservation of fundamental rights is one borne of the realms of public law. Traditionally, the objectives of public law can be regarded as an acknowledgement that civilization is founded upon the power of the public. The fundamental rights and freedoms of citizens are not only guaranteed but are also protected and preserved. The rights are guaranteed through the constitutional and statutory provisions providing for the rights; they are to be protected by the various state ministries, departments and agencies (MDAs) so charged by the enabling statutes; and it is to be preserved by the Judiciary by way of a declaratory order or in some instances, penalizing the wrongdoer and fixing the liability for the public wrong on the State when it has failed in its public duty to protect the fundamental rights of the citizen. Monetary awards in damages in such cases is to be understood as a relief by an order of making 'monetary amends' under the public law for the wrong done in breach of public duty, or by not protecting the fundamental rights of the citizen, or by subjecting the citizen to acts which amount to infringement of the constitution.”

128. There is however no particular formula for computing such monetary awards of compensation and they are at the discretion of the court. In the case of *Rhoda S Kiilu v Jjangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR the court stated as follows:

“19. As for exemplary damages they are placed at the discretion of the court, though, they are awarded with some degree of caution and in limited situations. Ochieng J stated in the case of Mikidadi -vs- Khaigan and Another [2004] eKLR 496 that:

“Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.””

129. This court is also aware that this is not a criminal case but it nevertheless thinks that a perusal of the fines provided for in EMCA may guide it to a suitable sum as to damages.

130. There is no doubt that the petitioner is a registered homeowners and residents association within Watamu area of Kilifi a famous tourism destination worldwide and it has about 160 members on whose behalf it has brought this action. It was founded and registered in 1994, long before the enactment of EMCA. Its stated objectives include protection and promotion of the interests of its members and the residents of the Watamu area, protection of the biodiversity and ecology of the area, and its sustainable use for the benefit of Kenyans generally and local communities. The present petition is testimony of its engagement with environmental issues.

131. In the protection conservation and management of the environment in Kenya, the role of residents' associations in this era cannot be understated. They have been at the forefront of pursuing environmental justice where authorities mandated to act have refused or neglected to act. They have contributed heavy to

Kenya's environmental law jurisprudence. Their activism has halted construction of illegal structures or the establishments of a illegal enterprises in inappropriate locations. They have been instrumental in the protection of green places and generally have compelled adherence to planning laws. The law is currently evolving to accommodate the new phenomena, for example, **Section 11** of the **Urban Areas and Cities Act 2011** recognizes residents' associations and includes "*institutionalised active participation by its residents in the management of the urban area and city affairs*" among the principles for governance and management of urban areas and cities. In the same vein at **Section 13**, it also includes "*a cluster representing registered neighbourhood associations*" in boards of cities. It is clear that with such expanded representation local opinions stand a chance of reaching the decision-making governance institutions for healthy debate to avert any environmental and planning errors.

132. In our governance setting where some institutions charged with environment appear to be conferring insufficient attention to some vital sectors of the environment, these residents' associations are crucial in ensuring the environment is protected and that environmental justice is done in cases of violations.
133. The critical principle that has given birth this newfound formal attention to residents' associations is nothing new at all: it is the formalization of the recognition that the people on the ground who know and understand what kind of activity may be salubrious or detrimental to their welfare. It may even be termed as a child of the principle of public participation enshrined in the constitution.
134. However, it is believable they do all this out of a public spirit for a better society which they also are part of. It is therefore also proper for this court to take into consideration that they also sacrifice much of their social, financial, and time resources for the

purpose, hence the award of exemplary and punitive damages against environmental offenders the associations bring to court should be viewed as a constitutionally authorized means of holding those offenders civilly liable in contrast to seeking to hold them criminally liable, but with the same deterrent effect.

135. In the case of *Rhoda S Kiilu* (supra) the court awarded Kshs 10,000,000/= as damages in a case where there was trespass to and excavation of an expansive land parcel owned by the claimant.

136. In view of the legal provisions of EMCA and the various other considerations set out herein above, this court deems that the 1st respondent should compensate the petitioner with Kshs 4,000,000/- as exemplary damages for her illegal and unconstitutional acts to serve as a deterrent to other would be-violators, while the 2nd and 3rd respondents should each compensate the petitioner with Kshs 10,000,000/- as punitive damages for their illegal and unconstitutional acts and/or omissions, and that the officers of the 2nd and 3rd respondents who were the overall-in-charge holding office in Kilifi County with regard to environmental matters *as at the time of implementation of the 1st respondent's development* on the ground should be asked to account for why they failed to rein in the 1st respondent._

137. The upshot of the foregoing is that the petition dated 30/1/2023 has merit and the same is allowed and I issue the following final orders:

a. A declaration is hereby issued declaring that the Land created and lying between LR Number 8594/13 and the shores of the Indian ocean is a riparian reserve and is public land by virtue of Article 62(1)(I) of the Constitution;

- b. A declaration is hereby issued declaring that the construction or development of multi-storey and permanent concrete structures in riparian zones without any environmental impact assessment study report is inconsistent with sustainable utilization, management and conservation of the environment and a threat to the right to a clean and healthy environment;***
- c. A declaration is hereby issued declaring that the construction of the structure by the 1st respondent is being undertaken outside LR Number 8594/13 and on the riparian zone and is therefore illegal;***
- d. A declaration is hereby issued declaring that the approval number NEMA/SPA/10439 by the 2nd respondent and CGK/P/WTM/192/2022 by the 3rd respondent were obtained in a manner inconsistent with the requirements of the Constitution hence rendering the resultant construction illegal;***
- e. An order of permanent injunction be and is hereby issued restraining the 1st respondent whether by herself, agents, servants and whomsoever acting under her authority or instructions from any construction or further construction of the permanent building outside the boundaries of property LR Number 8594/13 or on the adjacent riparian reserve land;***
- f. The 1st respondent shall within 30 days of this order under the supervision and joint direction of the 2nd and 3rd respondents and at her own cost demolish the structure under construction on the riparian reserve and shall, also at her own cost and under the supervision and direction of the 2nd and 3rd***

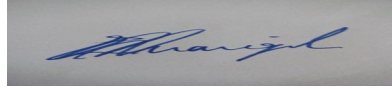
respondents jointly take such necessary steps to restore the land and environment on LR Number 8594/13 and adjacent riparian reserve land as nearly as possible to the state in which it was before the construction;

- g. In default by the 1st, 2nd and 3rd respondents with regard to enforcement of order no (f) herein above, the petitioner shall, under the supervision of the 2nd and 3rd respondents jointly, at their own costs effect the demolition of the 1st respondent's illegal structure located on riparian land as soon as practicable, and such enforcement costs as shall be incurred thereupon shall be quantified and aggregated with taxed costs of these proceedings awarded herein below and shall be recovered from the 1st respondent in the same process as those taxed costs;**
- h. The 2nd respondent shall take such necessary steps to audit the environmental impact that the construction by the 1st respondent has occasioned to the environment at and around the site and take such necessary measures to protect the environment and shall file a formal report providing in detail including photographic evidence the restoration process and its final outcome after it has been completed and the Deputy Registrar of this court shall in advance assign a mention date for this matter within 7 months from the date of this judgment for the purpose of addressing the said report;**
- i. The 1st respondent shall pay compensation to the petitioner association Kshs 4,000,000/= (Four Million Only) being exemplary damages for her violation of**

constitutional rights of the members of the petitioner to a clean and healthy environment;

- j. The 2nd respondent shall pay compensation to the petitioner association Kshs 10,000,000/= (Ten Million Only) being punitive damages for violation of constitutional rights of the members of the petitioner to a clean and healthy environment;***
- k. It is hereby recommended that the 2nd respondent shall take the appropriate action against the responsible officers who held office under it in Kilifi County during the period of implementation on the ground of the 1st respondent's project for failure to exercise diligence and bring to justice the 1st respondent for her illegal acts before the petitioners filed the present petition;***
- l. The 3rd respondent shall pay compensation to the petitioner association Kshs 10,000,000/= (Ten Million Only) being punitive damages for its violation of constitutional rights of the members of the petitioner to a clean and healthy environment;***
- m. It is hereby recommended that the 3rd respondent shall take the appropriate action against the officers who held office during the period of implementation on the ground of the 1st respondent's project for failure to exercise diligence and bring to justice the 1st respondent for her illegal acts before the petitioners filed the present petition;***
- n. The costs of this petition be borne by the 1st, 2nd and 3rd respondents jointly and severally.***

Dated, signed and delivered at Malindi on this 28th April 2026.



**MWANGI NJOROGE
JUDGE, ELC MALINDI.**