



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**PETITION NO.61 OF 2018**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 10, 19(2), 20 (1-4), 21(1), 23(3), 40, 47(1) & (2), 50 (1), 60(1)(B) AND 251 (1);**

**AND**

**IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT & CO-ORDINATION ACT, 1999;**

**AND**

**IN THE MATTER OF: THE WATER ACT, ACT NO. 43 OF 2016;**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015;**

**AND**

**IN THE MATTER OF: L.R NO. 209/20032 (I.R 128568)**

**BETWEEN**

**MILIMANI SPLENDOR MANAGEMENT LIMITED.....PETITIONER**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**WATER RESOURCE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY.....3<sup>RD</sup> RESPONDENT**

**MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. In the petition dated 09/10/2018, the Petitioner seeks a declaration that the Respondents have violated its right to property guaranteed under Article 40 of the Constitution; its right to fair administrative action under Article 47 (1) & (2) of the Constitution read with the Fair Administrative Action Act 2015; and its right to a fair hearing under Article 50(1) of the Constitution. The Petitioner also seeks an order to quash the decision of the 1<sup>st</sup> Respondent vide which it issued an improvement notice to the Petitioner together with an order to restrain the Respondents either by themselves or by their agencies from demolishing, destroying, evicting or in any way interfering with the quiet possession of the Petitioner's property known as land reference number 209/20032 ("the Suit Property"). In addition, the Petitioner also seeks compensation for the violation of its fundamental rights and the costs of the petition.

2. The Petition was supported by the affidavit of Kamwana Njue Muriithi, a director and Chairman of the Petitioner who deponed that a real

estate Developer known as Faraday Limited (“the Developer”), was previously registered as the owner of all that parcel of land known as L.R. No. 209/11946 (I.R. no.65865) located along Ring road Kilimani, Nairobi, which borders Kirichwa Kubwa River, and that it maintained 10 metre riparian reserve between the river and the boundary of the land, which was measured from the middle of the river. He annexed copies of letters from the Commissioner of Lands’ office dated 19/05/2005 and the partial development plan dated 30/06/1993.

3. He also deponed that the Developer applied for approval for change of user of the suit land from single dwelling to multi-dwelling from the City County of Nairobi, conducted due diligence on the registration of the property, obtained development permission including the approval of building plans and drawings, as well as an EIA license from the 1<sup>st</sup> Respondent before it commenced development on the suit land by constructing 29 multi-dwelling flats which were collectively named the Milimani Splendor Apartments. He annexed a copy of the notification of approval of development permission dated 27/10/2006.

4. He deponed that at some point during the construction of the flats, a the 1<sup>st</sup> Respondent issued a stop order and there was an attempt to terminate the Developer’s EIA license ostensibly on the ground that the development would interfere with the riparian reserve of Kirichwa Kubwa River. He annexed copies of the improvement order issued by the 1<sup>st</sup> Respondent on 19/07/2007 and stop order dated 03/08/2007.

5. He deponed that the Developer moved to court and filed **Judicial Review Application No. 792 of 2007 Republic v National Management Authority, Ex parte Faraday Limited**, in which the 2<sup>nd</sup> Respondent was joined as an Interested Party having also issued a stop order to the development on the grounds firstly, that the area in question was a riparian reserve and secondly, that a permit for development on a riparian reserve had not been obtained. He further averred that the Developer and the 2<sup>nd</sup> Respondent agreed to undertake a joint survey to determine whether the riparian reserve of Kirichwa Kubwa River had been encroached on by the Developer. He averred that the joint survey was undertaken and it established that all the buildings fell outside of the riparian reserve which led the 2<sup>nd</sup> Respondent to withdraw its complaint against the Developer following which a consent was filed in court on 26/11/2007 which settled the matter. He annexed a copy of the consent filed on 26/11/2007.

6. He deponed that upon settlement of the dispute in court, the Developer resumed construction and obtained approval from the 3<sup>rd</sup> Respondent to put up three additional flats, bringing the total number of flats to 32. These were completed in 2010 and a certificate of occupation issued by the 3<sup>rd</sup> Respondent’s predecessor. The Petitioner averred that it had a legitimate expectation that the 3<sup>rd</sup> Respondent was satisfied with the manner of construction and the Developer’s compliance.

7. Further, he stated that the Developer’s title was revoked vide Gazette Notice 33460 of 2010 in the Kenya Gazette issue of 01/04/2010 on the basis that the land had been reserved for public purposes which prompted the Developer to file **ELC Miscellaneous Application No. 51 of 2010 Republic v The Minister for Lands & 2 others Ex parte Faraday Limited**. This matter was settled through a consent entered into by the parties under which the Ministry of Lands was to withdraw the gazette notice revoking the Developer’s title and the Developer would withdraw the suit and re-align its perimeter wall that had slightly fallen on the riparian reserve.

8. He deponed that in compliance with the consent order, the Developer demolished the initial perimeter wall and replaced it with a new wall that was outside the riparian reserve. The Ministry of Lands issued a new letter of allotment to the Developer and changed the land reference number to L.R 209/20032. The Developer then sold the units and subleases were registered against this title. The reversionary interest of the title was transferred to the Petitioner as the management company, in which each unit owner holds a share. The Petitioner averred that the unit owners have been living in the estate for almost eight years without any challenge.

9. He deponed that in August 2018, the Respondents created Nairobi Regeneration Committee and the Multi-Agency Team, both of which were being coordinated from the 4<sup>th</sup> Respondent’s offices. He averred that these entities began a highly publicised campaign of reclaiming riparian and public areas in Nairobi. On 15<sup>th</sup> and 16<sup>th</sup> August 2018, the 1<sup>st</sup> Respondent issued an improvement notice to the Petitioner claiming that there were permanent structures on the riparian reserve and requiring it to remove the structures marked on its premises within 7 days, failing which the structures would be demolished by the Multi-Agency Team. He annexed copies of the improvement notices.

10. He deponed that the Petitioner was not invited to give any input prior to the issuance of the notice. The Petitioner visited the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s offices in a bid to resolve the issue amicably. He further deponed that the 2<sup>nd</sup> Respondents sent officials who placed beacons on the boundary between the riparian reserve and the Suit Property. He claimed that where the beacons were placed showed that the Petitioner had not encroached on riparian land.

11. The Petitioner averred that out of abundance of caution, it commissioned a fresh survey of the Suit Property which revealed that as a result of activities upstream, erosion had occurred on the river’s bank which caused Kirichwa Kubwa River to alter its course slightly thereby eating into the reserve bordering the Petitioner’s land. And that as a result of the alteration of the river’s course, which was not brought about by the activities of the Petitioner or its residents, it now appeared as if the edges of some block of the apartments on the Suit Property were on the riparian reserve.

12. The Petitioner averred that going by the manner in which no notice was issued to it, it was apprehensive that the Respondents may send a demolition squad to the Suit Property without following due process. The Petitioner maintained that the Respondents’ action was contrary to the principles of natural justice. Further, that the notice issued by the 1<sup>st</sup> Respondent was unconstitutional and exhibited illegality which the Petitioner claimed could be seen from the contradiction on the measurements of the riparian reserve. The Petitioner argued that its own deed plan clearly showed the riparian reserve and that its distance had been observed by the Developer. The Petitioner urged that it would be illegal for the Respondents to adopt any other measurements for the riparian reserve other than those on its title documents.

13. He deponed that the Respondent’s decision to demolish the structures when the Petitioner was not at fault was unreasonable because there was an available alternative of addressing the erosion of the river or authorising the Petitioner to take mitigation measures including building gabions at the points of erosion on the reserve. It contended that the decision to serve the Petitioner with the improvement notice was marred with malice and that the Respondents had failed to accord it a fair hearing.

14. He further deponed that as a result of the improvement notice and the threat of demolition, the Petitioner and its shareholders have suffered anxiety, fear, uncertainty and inconvenience for some were forced to move out of the Suit Property and others who had let out their apartments lost rent because the tenants left fearing that the Suit Property may be demolished. He also deponed that the right to property is one of the most guarded fundamental rights and any activity geared towards deprivation of property must out of necessity, meet a high threshold of proof and fairness. He urged the court to quash the improvement notice.
15. In response to the petition, the 1<sup>st</sup> Respondent filed a replying affidavit sworn on 05/02/2019 by Njoki Mukiri, its County Director of the Environment. She deponed that the Developer, Faraday Limited made an application to the 1<sup>st</sup> Respondent for an EIA license through the letter dated 24/04/2007 in respect of the proposed development of 29 flats on the Suit Property. Before issuing the EIA license, the 1<sup>st</sup> Respondent wrote to the Developer vide its letter of 30/03/2007 stipulating the conditions for the approval of the proposed housing development. Condition 4 of the EIA license enjoined the Developer to observe a 10-meter boundary between the highest watermark and the project.
16. She deponed that the Developer wrote to the 1<sup>st</sup> Respondent confirming its willingness to comply with all the conditions of the approval. She annexed copies of the EIA license dated 24/04/2007 and the Developer's letter dated 04/04/2007. She further deponed that the 1<sup>st</sup> Respondent issued an environmental improvement notice dated 15/08/2018 to the Petitioner stating that there were permanent structures within the Suit Property that had encroached onto the riparian reserve of Kirichwa Kubwa river. She deponed that the notice provided an opportunity for the Petitioner to avail all the requisite documents to it and to write to the 1<sup>st</sup> Respondent committing to comply with the directive. She averred that the notice also informed the Petitioner of its rights to appeal.
17. She maintained that the 1<sup>st</sup> Respondent complied with all relevant laws, regulations and proper rules of procedure when it issued the notice to the Petitioner. In addition, that the Environmental Impact Assessment and Audit Regulations 2003 enjoined a proponent of a project to conduct environmental audits annually, which is not a punitive measure as alleged by the Petitioner, but was a means to mitigate any adverse impact of human activity on the environment; ensure a safe environment for all and ensure the environment is sustained for generations to come. She urged the court to dismiss the petition.
18. The Honourable Attorney General filed grounds of opposition on 15/11/2018 on behalf of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. The grounds for opposing the petition were that the Petitioner has encroached on a riparian area and that its continued occupation of the suit Property would interfere with the hydrological and ecological balance of the ecosystem as the developments offend the provisions of the Water Act on the provision for the riparian reserve.
19. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents also filed the replying affidavit dated 15/03/2018 sworn by Timothy Waiya Mwangi, the National Deputy Director of Physical Planning in the Ministry of Lands, Ardh House. He deponed that the functions of the National Director of Physical Planning were set out in Sessional Paper No. 17 of 2017 on the National Land Use Policy prepared by the Executive to give effect to Section 21 of Part 1 of the Fourth Schedule of the Constitution, which mandates the National Government to formulate principles of land planning and coordination of planning by counties. He averred that Sessional Paper No. 17 of 2017 was approved by Cabinet and adopted by the National Assembly. The National Director of Physical Planning was the lead advisor on matters of physical planning and urban development, and was required to map and document disaster prone areas, riparian areas, wetlands, open spaces, parks and river deltas.
20. He deponed that the process leading to the marking of properties constructed on riparian land for demolition was done under the Nairobi Regeneration Program whose functions were undertaken by the Multi-Sectoral Agency Consultative Committee (MSACC) comprising representatives from the Ministry of Lands and Physical Planning, the National Environment Management Authority, Nairobi City County and the Water Resources Authority. MSACC identified encroachment on riparian reserves as one of the major challenges facing Nairobi City.
21. He averred that restoration of riparian reserves was in compliance with Chapter 3 (3.16 (ii) of Sessional Paper No. 7 of 2017 of the National Land Use Policy which states that to mitigate the problems of urban environment, the Government shall restore and reclaim riparian areas, wetlands, escarpments, forests, open spaces and parks that may have been allocated back to public ownership to ensure that they revert back to the original state.
22. He deponed that a riparian reserve was deemed to be a wayleave or reserve along any river, stream or watercourse of not less than 10 metres in width on each bank except in areas prone to flooding. He explained that riparian reserves are critical for our natural environment as they reduce the impact of flooding, provide a habitat for flora and fauna, enhance the urban aesthetics, provide space for recreation, promote the functions of the ecosystem and recharge ground water aquifers.
23. He deponed that the Suit Property had structures going into the riparian reserve on Kirichwa Kubwa River. He averred that the Petitioner's interference with the river was the basis for the issuance of the enforcement notice as defined by the Physical Planning (Sub-division) Regulations, 1998. Section 15 (c) of this Act requires the subdivision scheme of land within the area of a local authority to provide for a wayleave or reserve along any river, stream or water course of not less than 10 metres in width on each bank, except in areas where there was an established flooding. He maintained that in mapping out original water courses in Nairobi, MSACC was alive to the fact that laws such as the Survey Act and Agriculture Act which also provide for the size of the riparian reserves were not applicable in development control in urban areas.
24. He further deponed that the riparian reserves had been encroached onto and interfered with by human activities such as construction of structures on the reserve, canalisation, discharge of raw sewage and solid waste into the river and informal commercial activities which should be removed. He averred that the Suit Property had interfered with the course of the river as a result of canalisation which made it difficult to tell the route the river would take.
25. The 3<sup>rd</sup> Respondent filed the replying affidavit dated 10/01/2019, sworn by its County Chief Officer-urban Planning, J.M Mathenge, who deponed that the Petitioner presented copies of approved building plans to the 3<sup>rd</sup> Respondent, which were verified to be authentic following

which the 3<sup>rd</sup> Respondent issued the necessary permits to the Petitioner. He further deponed that the fact that it issued a certificate of occupation to the Petitioner after it presented approved building plans cannot be prejudicial to it as it acted within the law. He maintained that the 3<sup>rd</sup> Respondent does not endorse developments on riparian land which is public land. He added that the 3<sup>rd</sup> Respondent was wrongly joined to this suit as it did not issue the impugned improvement notices.

26. The Petitioner filed a further affidavit sworn by its director and chairman, Kamwana Njue Muriithi on 22/03/2019 where he deponed that even though the improvement notice indicated the right to approach the National Environmental Tribunal (NET), the multi-sectoral approach taken by all the respondents who were involved in the decision made it imperative to have this court as the only place where all the players could be challenged as they are not subject to NET tribunal save for the 1<sup>st</sup> Respondent. He also deponed that the 1<sup>st</sup> Respondent had admitted that it inspected the Suit Property before issuing the improvement notice but it did not annex it to its report.

27. Parties filed submissions which the court has considered. The Petitioner submitted that the 3<sup>rd</sup> Respondent was a necessary party to these proceedings because it issued the building approvals and upon completion of the development, it issued a certificate of occupation and was part of MSACC which issued the directions to demolish the building in question. It also submitted that the issues in question touch on physical planning under the Physical Planning Act which is part of the mandate of the 3<sup>rd</sup> Respondent.

28. The Petitioner highlighted various pieces of legislation such as the Land Act, the Survey Act, the Physical Planning Act, the Environmental Management Coordination Act (EMCA), the Water Act 2016 and the Agriculture Act that deal with the sizes of riparian reserves. It submitted that the Land Act made reference to the Survey Act and other written laws in defining the riparian reserve. That the Survey Regulations only provided for tidal rivers without mentioning small rivers. It added that the Water Quality Regulations 2006 under EMCA prescribed a minimum of 6 metres and a maximum of 30 metres on either side of the river based on the highest recorded flood level which contradicts the Water Rules that bases the measurement on the top edge of the river. The Petitioner submitted that the Water Act of 2016 did not give much guidance on the width of the riparian reserves. The Agriculture Act and Basic Land Usage Rules of 1965 prescribed the size of the riparian reserve for farming activities.

29. The Petitioner added that the Part development plan of 1968 indicated a minimum reserve of 30 metres from Nairobi River between Museum Hill and Racecourse roundabout and recommended a minimum of 10 metres and maximum of 50 metres for other rivers. The Petitioner pointed out that the multiple laws on the size of the riparian reserve are not in harmony, and that it should not therefore be condemned in light of the differences in the riparian reserves provided by these different pieces of legislation. It submitted further that it would be an illegality to use any other measurement to assert an encroachment on its part on the riparian reserve when it had complied with its deed plan by keeping the 10 metres from the centre of the Kirichwa Kubwa River. The Petitioner urged that the problem in determining encroachment on riparian reserves was compounded by the survey plans which show that the boundary was the centreline of the river.

30. The Petitioner submitted that despite the 1<sup>st</sup> Respondent's assertion that it had inspected the Suit Property and found that its developments encroached on the riparian reserve of Kirichwa Kubwa River, the 1<sup>st</sup> Respondent had failed to produce the report it relied on to arrive at the finding that the Suit Property had encroached on the riparian reserve. The Petitioner relied on the case of **Joseph Nzila v Minister for Lands [2017] eKLR** in support of the position that he who alleges that a parcel of land falls on a riparian zone must prove with documents and reports.

31. The 1<sup>st</sup> Respondent admitted in its submissions that it issued an EIA license to the Developer in respect of the development on the Suit Property and that it approved the project. It further submitted that the Developer was required to comply with conditions of the license which included condition 13 that required the proponents to comply with NEMA'S improvement orders throughout the project cycle. On the improvement notices, the 1<sup>st</sup> Respondent submitted that it was empowered under Section 108 of EMCA to issue environmental orders to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment.

32. With regard to the improvement notice dated 15/08/2018 which sought to direct the Petitioner to remove the structures marked as encroaching into the riparian reserve of Kirichwa Kubwa river, and which is the subject of this suit, the 1<sup>st</sup> Respondent submitted that the notice was properly issued by a qualified environmental inspector after ascertaining the particulars of the project and in accordance with the EMCA. The 1<sup>st</sup> Respondent submitted that further to the said improvement notice, it had issued a notice to the general public vide the newspaper notice dated 6/08/2018, in respect of all illegal structures on riparian reserves in Nairobi.

33. It submitted that the notice informed the public, including the Petitioner, that the riparian reserve is set at a minimum of 6 metres to a maximum of 30 metres from the highest water mark in accordance with the Environmental Management & Coordination (Wetlands, Riverbanks, Lakeshores and Seashores) Regulations, 2006. It also submitted that it had previously issued improvement notices over developments on the Suit Property and the Developer complied with those notices at the time and singled out the improvement notice dated 17/07/2007. It submitted that the notice that gave rise to the instant suit was blatantly neglected yet the Petitioner has not satisfied this court that its development falls outside the riparian reserve under the law.

34. On challenging the creation and establishment of the multisector committee as an amorphous structure, the 1<sup>st</sup> Respondent submitted that it is empowered to co-ordinate various environmental management activities being undertaken by lead agencies under Section 9 of EMCA. It also submitted that it was tasked to undertake a survey of the entire Kirichwa Kubwa river and ensure the riparian reserve on each side was left free of any pollution by this court in **ELC Petition No. 7 of 2017 (Formerly HCCC Pet 24 of 2017)- Castle Rock Gardens Management Limited v NEMA & 4 others [2018] eKLR**.

35. The 3<sup>rd</sup> Respondent contended in its submissions that the petition seeks to interfere with its role and mandate, yet it is a constitutional entity established under Article 176 of the Constitution of Kenya and further, that its role and functions should not be interfered with by the courts without exhausting and going through the laid down procedures and processes in the law. It relied on the case of **International Centre for policy and conflict and 5 others [2013] eKLR** where the court stated that in matters where functions of a constitutional body are in question, the court should only step in where the constitutional body fails to do that which is demanded of it by the Constitution and the courts should not cross over to areas which the Constitution and legislation have specifically reserved for other authorities.

36. The 3<sup>rd</sup> Respondent distanced itself from the notices in question, submitting that it should not have been joined as a party in the proceedings since it was not part of its role to determine whether the suit land was a riparian reserve or not. It submitted that the Petitioner presented copies of approved building plans to it which it believed were authentic based on which it went ahead to give approval for the development. It argued that the certificate of occupation cannot be used by the Petitioner to blame the 3<sup>rd</sup> Respondent for the construction on the riparian reserve.

37. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents submitted that a notice duly served amounted to a fair hearing as that was the procedure provided in law, therefore the issue that the Petitioner's right to fair hearing under Article 47 and 50 of the Constitution had been violated does not arise. They submitted that the improvement notice issued to the Petitioner by the 1<sup>st</sup> Respondent complied with the Constitution.

38. A local authority such as the 3<sup>rd</sup> Respondent in this case, may serve an enforcement notice on the owner or occupier of land under Section 38 of the Physical Planning Act when it comes to the attention of the local authority that the development of land was carried out without the required development permission or if the conditions for the grant of the development permission were not complied with. These provisions of the Physical Planning Act show that the 3<sup>rd</sup> Respondent had a role to play in the approval of the Petitioner's development and was therefore a necessary party in these proceedings.

39. The Petitioner contended that Kirichwa Kubwa River had changed its course owing to activities upstream. The Petitioner neither produced any survey records to show where the river originally flowed nor did it attempt to demonstrate that the river had actually changed its course. A river includes the bed, the banks, the adjacent land as well as the flood plain. The floodplain includes the portion of the river valley that is covered with water when the main river channel overflows during floods. The risk of the river flooding during heavy rains justifies the need for a buffer zone or verge. Rivers are of different sizes and widths and the width of a river also varies at different points of its flow. Geographical factors affect the size, shape and course of a river which may also change over time. A river may be narrower upstream while lowland streams which are prone to meandering may have broader valleys. In determining the riparian reserve, one of the factors for consideration is whether the river has a well defined channel. For the protection and rehabilitation of the riparian ozone, it would be helpful if there was a base map and other cadastral drawings mapping out the river channel and the riparian reserve in respect of Kirichwa River.

40. Section 9 of EMCA enjoins the 1<sup>st</sup> Respondent to co-ordinate the various environmental management activities being undertaken by lead agencies and to promote the integration of environmental considerations into development policies, plans, projects and programmes to ensure the proper management and use of environmental resources. Sections 108 and 111 of EMCA empower NEMA and the court respectively to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment. This places the court and NEMA on the forefront in the protection of the environment and lends credence to the preamble to the Constitution which states that the people of Kenya are respectful of the environment and are determined to sustain it for the benefit of future generations.

41. Section 42 of EMCA makes provision for the protection of rivers, lakes, seas and wetlands including prohibiting any person from erecting any structure or part of it in or under the river or disturbing the river without the approval of NEMA. Rivers and the riparian reserves form part of the environment under the definition in Section 2 of EMCA.

42. It is useful to review the legislation on riparian reserves in Kenya. Section 29 of the Physical Planning Act empowers local authorities, which refers to county governments, to prohibit or control the use and development of plots within its area. The section mandates the local authority to consider and grant development permissions. It can also prohibit the subdivision of existing plots into smaller areas. One of the conditions to be complied with in a scheme of subdivision under Regulation 15 of the Physical Planning (Subdivision) Regulations of 1998 is that wayleaves or reserves along any river, stream or water course should be of not less than 10 metres in width on each bank except in areas which flood.

43. Rule 111 of the Survey Regulations of 1994 provides for a reservation of not less than 30 metres in width above high-water to be made for Government purposes but allows the Minister to direct that a lower width of the reservation be made in special circumstances. It is not clear from this regulation how the riparian reserve is to be measured considering that rivers vary in sizes and may also meander in their course as they flow downstream. Regulations 40 and 88 of the Survey Regulations of 1994 stipulate where and how line and river beacons are to be placed by the surveyor.

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

45. Rivers and all land between the high and low watermarks constitute public land pursuant to Article 62 of the Constitution. Black's Law Dictionary, 10<sup>th</sup> edition defines a watermark as the highest or lowest point to which water rises or falls. The dictionary defines the high watermark in a river not subject to tides as the line that the river impresses on the soil by covering it long enough to deprive it of agricultural value and the low watermark as the point in a river to which the river recedes at its lowest stage.

46. The Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009 defines the high watermark as the historical recorded point of the highest level of contact between the water and the bank while the low watermark is defined as the historical recorded point of the lowest level of contact between the water and the bank. The river bank is defined as the rising ground from the highest normal watermark bordering the river in the form of rock, mud, gravel or sand; and in case of flood plains would include the point where the water surface touches the land which is not the bed of the river.

47. The court notes that the Regulations under EMCA came into force later than those made under the Survey Act and Physical Planning Act. In defining the riparian reserve, all these pieces of legislation did not take into consideration the land between the high and low watermarks stated in the Constitution of 2010. From the definition of the high and low water marks in the Environmental Management and

Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009, it is evident that the measurement of the riparian reserve is to be pegged on the riverbank and the highest point on the land which water gets to during flooding. The riparian reserve is not to be measured from the centre of the river as the Petitioner contended.

48. The court agrees with the Petitioner that there are conflicting legal provisions on the measurement of the riparian reserves in Kenya and there is need for Parliament to harmonise the different laws to guide the surveyors in determining the boundaries of privately held land that is adjacent to rivers and other water bodies.

49. The Petitioner maintained that there was a 10 metre riparian reserve between the Suit Property and Kirichwa Kubwa River measured from the middle of the river and that over time the river had changed course for which the Petitioner should not be made to suffer since the river's change of course reduced the size of the riparian reserve. From the definition of the high and low watermarks in the Regulations made under EMCA, it is evident that the measuring of the 10 metre riparian reserve from the middle of River Kirichwa to the Petitioner's suit land was erroneous as does not take into account the high and low watermarks which are determined with reference to the level of contact between the water and the bank and not from the centre of the river. There is no evidence to show that the highest recorded flood level for Kirichwa Kubwa River was taken into consideration when the survey of the riparian reserve adjacent to the Petitioner's land was done.

50. The Petitioner made reference to previous court proceedings over the Suit Property, which were resolved by the parties out of court. The Petitioner averred that after the parties undertook the joint survey which established that its buildings fell outside the riparian reserve, it went ahead to construct three additional flats on the Suit Property. The Developer put up additional flats on the Suit Property when it knew very well that the planning authorities had taken issue with the riparian reserve adjoining the Suit Property.

51. In **ELC Petition number 7 of 2017 (formerly HCCC Petition No. 24 of 2017)- Castle Rock Gardens Management Limited v the Attorney General and 4 Others** the Petitioner sought a declaration that it was entitled to a clean and healthy environment and that the Respondents were obligated by Articles 42, 69 and 70 of the Constitution to eliminate all processes and activities that are likely to pollute River Kirichwa and the environment in general including eliminating all pollution sources into Kirichwa River such as raw sewage or waste which were directly being disposed into this river. **This court directed the Respondents** to undertake a survey of the entire Kirichwa River from its source to determine the riparian reserve and restore it to the state it was in before the developments were carried out along River Kirichwa. The 3<sup>rd</sup> Respondent in this petition was directed to perform its obligations under the law and ensure that the riparian reserve on either side of Kirichwa River was left free and uninterrupted so that sewer lines and manholes could be laid out and maintained for purposes of draining sewage and waste from all the developments abutting Kirichwa River.

52. Article 69 (1) of the Constitution enjoins the State to meet several responsibilities in relation to the environment, some of which are to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources and to eliminate activities that are likely to endanger the environment. Sustainable development is one of the national values and principles of governance under Article 10 of the Constitution which bind all State organs, public officers and all persons whenever they apply or interpret any law or when they make or implement public policy decisions. In the court's view, these constitutional imperatives should not only guide the Respondents, but also the Nairobi Regeneration Committee and the Multi-Agency Team, as they reclaim the riparian reserves in Nairobi.

53. It now behoves every person to play an active role in environmental protection in light of the Article 69 (2) of the Constitution which places the duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to River Kirichwa.

54. The court directs the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to undertake a survey of Kirichwa Kubwa River from its source all the way downstream within 90 days of the date of this judgement to determine the boundary between the river and the adjacent landowners whose land abut the riparian reserve and with a view to restoring the riparian reserve for Kirichwa Kubwa River. The measurement of the riparian reserve will be based on the high and low watermarks and not the centre of the river in conformity with the definition of the high and low watermarks under the Regulations made under EMCA.

55. Having considered the petition, the affidavits and the submissions of parties, the court is not satisfied that the Petitioner's fundamental rights have been contravened as it claims and declines to grant the orders sought in the petition dated 9/10/2018. Each party will bear its own costs.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of October 2019**

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. F.G. Thuita for the Petitioner

Ms. C. Sakami for the 1<sup>st</sup> Respondent

Ms. C. Sakami holding brief for Mr. M. Motari for the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents

Ms. N. Nduta for the 3<sup>rd</sup> Respondent

