Onyera & 8 others (Suing on their own Behalf and on Behalf of the Residents and Homeowners of Greenpark Estate) v Superior Homes Kenya Limited & 3 others; Greenpark Estates Management (GEMS) Limited (Interested Party) (Environment & Land Petition E007 of 2023) [2024] KEELC 329 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 329 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION E007 OF 2023

A NYUKURI, J

JANUARY 31, 2024

IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTION UNDER ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 22, 23, 35, 40, 42, 47 AND 70 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3, 58, 59, 60, 63 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999

AND

IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019 AND THE ZONING POLICY MASTER PLAN OF GREENPARK ESTATE, STONEY ATHI, MACHAKOS

AND

IN THE MATTER OF THE PROPOSED CONSTRUCTION OF AN UNLAWFUL AND HAZARDOUS FILING STATION AT ARCADIA MALL SITUATED ON L.R. NO. 27409 BY SUPERIOR HOMES KENYA LIMITED WITHIN GREEN PARK ESTATE

BETWEEN

PAUL ONYERA .... 1ST PETITIONER

HEZRON ARUNGA .... 2ND PETITIONER

GEORGE AIKA .... 3RD PETITIONER

DENNIS MUTIRA .... 4TH PETITIONER

EDSON MPYISI .... 5TH PETITIONER

GEORGE WANYUTU NJOROGE .... 6TH PETITIONER

MR. DAVID WAINAINA .... 7TH PETITIONER

PAUL RUKARIA .... 8TH PETITIONER

NJERI SARAH .... 9TH PETITIONER

SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE RESIDENTS AND HOMEOWNERS OF GREENPARK ESTATE

AND

SUPERIOR HOMES KENYA LIMITED .... 1ST RESPONDENT

ENERGY PETROLEUM REGULATORY AUTHORITY .... 2ND RESPONDENT

MACHAKOS COUNTY GOVERNMENT .... 3RD RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 4TH RESPONDENT

AND

GREENPARK ESTATES MANAGEMENT (GEMS) LIMITED .... INTERESTED PARTY

RULING

Introduction

1. Before court is a Notice of Motion dated 14th November 2023 filed by the petitioners seeking the following orders;

   a. Spent

   b. Spent

   c. In the alternative and without prejudice to the above, this Honourable Court be pleased to maintain the status quo (no further construction) on the subject property pending the hearing and determination of this application and the petition herein.

   d. A conservatory order be and is hereby issued restraining the 1st respondent by itself, agents, servants, employees or otherwise howsoever from constructing and/or carrying on with the illegal construction of a filing station at Arcadia Mall situated on LR. No. 27409 within Green Park Estate, Stoney Athi, Machakos County, pending the hearing and determination of this petition.

   e. An order compelling the respondents to supply to the petitioners with all the relevant information and documents sought vide the letters dated 25th May 2023 and 11th October 2023.

   f. The costs of this application be in favour of the petitioners.

2. The application is predicated on the grounds on its face together with the supporting affidavit sworn on 10th November 2023 by Paul Onyera the 1st petitioner. The applicants' case is that in 2010, when

the respondent conceptualized the gated Green Park project using the catching tagline "where dreams come home", they marketed the estate for sale to persons who wanted to enjoy serene high-end living within an upper-middle class gated neighbourhood. He stated that the GreenPark Estate (the estate) was properly designed, zoned and a master plan formulated, approved and registered with the 3rd respondent which is the legal basis and framework for controlling and regulating all future developments within the estate.

3. The 1st applicant deposed that the estate which consist of 612 housing units, is planned and built on tenets of environmental sustainability located on Mombasa Road with panoramic views of Lukenya Hills and designed to offer residents safe, stable, peaceful, secure and serene environment. He stated that the estate boasted of social amenities like kindergartens, shopping centres and recreational areas. He stated that it is on the basis of the promise of strict implementation and compliance with the master plan zoning and polices therein that the petitioners and other home owners and residents of the Estate bought into the plan and chose to invest in the estate.

4. According to the applicants, the estate should not be haphazardly constructed as the master plan has specifically designed commercial zones preserved for future development of retail centres. That over the years and against the objections of residents and zoning polices, the 1st respondent has put up commercial developments that are out of character with the estate thereby putting unsustainable strain on the estates physical resources and amenities.

5. That in 2021, the 1st respondent keen on altering the planned land use of the estate sought from the 3rd respondent an extension of use to extend the estate's original residential user licence to include commercial (retail centre) use; so as to put up retail stores and a petrol filing station at the frontage of the estate bordering Mombasa Road. That this sparked vehement objections from residents on the basis that it will violate the master plan and breach the promise and representations made by the 1st respondent to the petitioners of strict implementation and compliance with the master plan. That despite the objections, the extension was issued by the 3rd respondent and in blatant breach of the petitioners' right to fair administration action, the grant of the licence was never communicated to the petitioners and residents. He complained that the 1st respondent had continued constructing retail shops including eateries like chicken inn, Art Cafe and convenient stores which erode and devalue the petitioners' investments and degrade the serenity of the estate.

6. He stated that when the 1st respondent intended to construct a petrol filing station in the estate on the suit property, the 1st respondent sought one Environmental Impact Assessment (EIA) licence from the 4th respondent and a construction permit from the 2nd respondent, which prompted the petitioners and other residents of the estate to complain to the 2nd and 4th respondents asking them not to allow the project due to obvious environmental, health and safety risks that would accompany it as it is so close to the estate. That this led to a stakeholders meetings held on 8th October 2022 and 12th May 2023 where the residents of the estate made their representation.

7. That the petitioners through their advocates wrote to the 2nd and 4th respondents vide their letters dated 25th May 2023 requesting for information relating to the proposed project. This information included the 1st respondent's EIA report and the construction permit application and supporting technical drawings submitted to the 2nd respondent. That the petitioners learnt that the 1st respondent had been granted EIA licence No. NEMA/EIA /PSL/26193 and therefore their counsel wrote another letter dated 11th October 2023 to the 2nd and 4th respondents requesting for a copy of the licence. He stated that by the time the 4th respondent was responding to the petitioners request for information on 17th October 2023, the 1st respondent had been granted a construction permit by the 2nd respondent and commenced construction of the impugned project. He maintained that it was apparent that the 1st

respondent worked in cahoots with the 2nd and 4th respondents in unscrupulous fashion deliberately with intention of frustrating the petitioners' constitutional right to a fair administrative action by withholding information relating to the grant of the EIA licence No. NEMA/EIA/PSL/26193 for more than 60 days, so as to prevent the residents of the estate from seeking redress from the National Environmental Tribunal (NET) as contemplated under Section 129 of the Environmental Management and Coordination Act, 1999 (EMCA).

8. The deponent swore that in a well calculated move, the 1st interested party purported to file EPA Case No. E018 of 2023 Gems Management Limited v. Superior Homes Kenya PLC & 3 Others (EPA Case) before the Energy and Petroleum Tribunal seeking orders of permanent injunction to restrain the 1st respondent from proceeding with the construction. He insisted that the EPA Case is a sham and smokescreen and doomed to fail as it is intended to unscrupulously advance the 1st respondent's interests since some of the directions of the 1st respondents are directions of the 1st interested party and therefore the 1st interested party is a special purpose vehicle for advancing the 1st respondent's interests as an entity cannot sue itself.

9. The applicants' apprehension is that if the impugned project is allowed to continue, there is a real and imminent danger of irreversible damage to the environment and the health of the residents of the estate as it will impose an unsustainable strain on the physical resources and amenities of the estate including sewage, refuse disposal, access and roads. That the impugned project will degrade the surrounding environment through noise pollution, traffic congestation, air pollution, and release of noxious carcinogenic petroleum gases which will endanger the lives and property of residents.

10. He stated that the impugned project being constructed so close to the residents is unreasonable, based on extraneous considerations, arbitrary, ultra vires and unconstitutional as it alters the planned land use of the area and the character of the estate to the residents' detriment. He stated that the petitioners Constitutional rights guaranteed by Articles 40, 42, 47 and 70 have been breached by the respondents who allowed the impugned project contrary to the law and the petitioners legitimate expectations. He stated that if orders sought are not granted, the petition will be rendered moot and superfluous. He urged the court to invoke the principles of sustainable development and precautionary principle and grant orders sought. He attached the master plan of the estate; title for IR 103926, LR 27409; approval for extension of use to include commercial use; letter to NEMA dated 9th September 2021; letters to Gitbench Consolidated Company Ltd and EPRA dated 3rd October 2022; minutes of stakeholders meeting of 8th October 2022; letter from NEMA dated 23rd November 2022; letter dated 9th May 2023 from EPRA to Gitbench Consolidated Company Limited; Mukami Njeru Advocates' letter dated 17th May 2023 to EPRA, letter from Pro. Albert Muma & Co. Advocates dated 25th May 2023 to EPRA, letter dated 11th October 2023 Prof. Albert Muma & Company Advocates to NEMA and the EIA study report.

11. The application was opposed. The 1st respondent filed a preliminary objection and replying affidavit sworn by their Chief Executive Officer one Shiv Arora; both dated 24th November 2023. The 2nd respondent filed a preliminary objection dated 29th November 2023 and a replying affidavit dated 4th December 2023.

12. In the 1st respondent's preliminary objection dated 24th November 2023, the 1st respondent averred that this Honourable Court lacks jurisdiction to hear and determine this suit which is filed contrary to Section 129 of EMCA, Section 80 of the *Physical and Land Use Planning Act*, 2019 and Section 36 of the *Energy Act*, 2019. They maintained that the petitioners had not exhausted all the dispute resolution mechanisms provided in statute before approaching this court.

13. Regarding the replying affidavit filed by the 1st respondent, it was their case that the petition was not a legitimate claim under *the Constitution* as it merely challenged the approvals granted by the 3rd and 4th respondents. He stated that the petitioners had failed to exhaust available dispute resolution mechanisms. He further asserted that the petitioners' claim ought to have referred this dispute to the County Physical and Land Use Planning Liaison Committee in regard to the planning permission issued by the 3rd respondent; the National Environment Tribunal as regards issuance of EIA licence by the 4th respondent; and the Energy and Petroleum Tribunal regarding approvals issued by the 2nd respondent. He confirmed that there is a suit before the Energy and Petroleum Tribunal being EPA Case No. E018 of 2023 Green Park Management Limited v. Superior Homes (Kenya) PLC & 3 Others and stated that in that case the Energy and Petroleum Tribunal has asserted that it had jurisdiction to determine the dispute before it.

14. He maintained that the applicants had not demonstrated any attempt to lodge appeals before NET as they are entitled to leave to file appeal.

15. He stated that the 1st respondent who is the developer of Green Park Estate, a master-planned gated community with over 500 completed and occupied homes and an array of amenities including schools, a hotel, restaurant and bar, swimming pool, gym, wedding grounds, football turf, retail strip mall and a retirement village. He stated that the 1st respondent continues to improve the estate to ensure quality living standards for the residents and that in their effort to increase social amenities within and adjacent to the estate, the 1st respondent embarked on the impugned project of constructing a fuel service station which is adjacent to the estate. His position is that prior to commencing the project, the 1st respondent ensured compliance with the applicable laws and the regulatory requirements of the 2nd, 3rd and 4th respondents.

16. He asserted that the 2nd respondent commissioned Gitbench Consolidated Company Limited (Gitbench) an environmental consultancy firm, to conduct an environmental and social impact assessment of the project before commencement, which company submitted the project report to the 4th respondent on 25th October 2021. He averred that the 4th respondent called for comments from members of public including the petitioners and consulted with the lead government agencies being the 2nd and 3rd respondents. That the meetings for public consultation were held on 5th October 2022, 11th November 2022, and 16th November 2022. He stated that the petitioners concerns included allegations that the impugned project will pose health risk; the risk of storage and sale of petroleum product; the proximity of the project to residential homes; pollution and noise pollution due to loading and unloading of petroleum products and equipment; volatility of carcinogenic chemicals, air pollution, explosions, spillage and interference and high demand of sewerage and water services; pollution of Athi River, as source of drinking water; destroyed trees and that the residents were not aware of members of the 1st respondent.

17. According to him, the above concerns raised by the petitioners were addressed as follows; for health risks and hazards, the service station tanks and pumps will have automated fail switches that would shut automatically in the event of leakage; to address storage and sale of petroleum product, there will be double skin tanks with highest rating which have been tested in other service stations without incident; for security of homes, there will be a boundary wall of 2.4 meters height and a buffer distance of 4.5 meters kept from the residential wall and onboarding of established security within the service station; for noise pollution, there will be portable barriers to shield the compressor and other equipment as well as noise suppressors/silencers and the distance between the wall and the service station will be considerable; for water pollution there will be underground storage tanks with double skin fabrication technology and enclosed with reinforced concrete tank farm, which will detect leaks and the surface

drainage will ensure surface drain through oil water separator before release to roadside drainage; that the 1st respondent has never engaged in destruction of trees and that the management company of the 1st respondent was involved in stakeholder engagement and that the two petitioners Paul Onyera and Hezron Arunga are also directors of the 1st interested party where two directions of 1st respondent are board members.

18. He maintained that after public participation, the 4th respondent granted the EIA Licence No. NEMA/EIA/PSL/26193 to the 1st respondent subject to attached conditions and that the 1st respondent has always consulted the 4th respondent's officials to ensure compliance with conditions in the licence. He stated that the 1st respondent also obtained approvals from the Kenya Highways Authority and the 2nd respondent.

19. According to him, the only concern by the petitioners being that the impugned project is out of character for the Estate would impose unsustainable strain on the estate's physical resources and amenities yet the 1st respondent had taken all remedial measures to address their concerns. He denied there being any collusion between the parties in EPA Case No. 018 of 2023 on the basis that two petitioners herein are directors of the 1st interested party and that counsel for the latter served the petitioners' counsel herein with pleadings in the above case. He therefore took the view that the petitioners under a different corporate vehicle having elected to lodge a claim before the Energy Petroleum Tribunal acknowledge this court's lack of jurisdiction.

20. His assertions were that the petitioners had failed to show the manner in which the 1st respondent violated their rights under Articles 22, 23, 35, 40, 42 and 70 of *the Constitution*. He stated that the 1st respondent has a Constitutional right under Article 40 of *the Constitution* to enjoy the use of its property and that this court must consider the competing interests. He stated that the application lacks merit. He attached the project report; minutes of public consultation meetings; the 1st respondent's presentation; EIA licence; site visit report by the 4th respondent; approvals by the Kenya National Highway Authority and the 2nd respondent; and email extract from counsel for the petitioners.

21. On the part of the 2nd respondent, their preliminary objection is that this Honourable Court lacks jurisdiction to hear and determine both the petition and the application herein because the petition offends Sections 24, 25, 36 and 37 of the *Energy Act* 2019. They also contended that the petition and the application offend the provisions of Section 6 of the *Civil Procedure Act*, and that the same were filed prematurely and in violation of the provisions of Sections 9(2) and (3) of the *Fair Administrative Action Act* and the principles of exhaustion. They also argued that the application was misconceived, incompetent, frivolous and an abuse of the court process and ought to be struck out with costs.

22. Eng. Edward Mwirigi Kinya, a director of the 2nd respondent, swore the replying affidavit on behalf of the 2nd respondent wherein he deposed that this suit ought to be struck out as the same was prematurely filed contrary to the doctrine of exhaustion. He stated that the mandate of the 2nd respondent is to investigate complaints and disputes arising from petroleum operations and to issue, review, modify suspend or revoke licences and permits in the energy sector under Sections 10 and 11 of the *Energy Act* 2019. He stated that the 2nd respondent was independent and the performance of their functions is not subject to the directions or control of any person or authority. He maintained that the 2nd respondent acted within the confines of the law in regard to the impugned project.

23. He deponed that the petitioners were supplied with the information requested and that if there was unreasonable delay in providing information, Sections 10 and 11 of the *Access to Information Act*, 2016 provides that the commission on Administrative Justice ought to have been the first port of call for an aggrieved party and not this court. He stated that it is the statutory mandate of the 2nd respondent to

issue permits for undertakings in the energy sector and that such permits are issued on compliance of requisite legal requirements by applicants.

24. According to him, this matter is subjudice and in violation of Section 6 of the *Civil Procedure Act* as there is another matter pending before the Energy and Petroleum Tribunal, and that by the Tribunal's ruling, it has jurisdiction to determine this matter. He denied allegations that the matter before Energy and Petroleum Tribunal was a sham and stated that such allegations were contemptuous. He took the view that the petition lacked precision on how the petitioner's rights had been breached. He attached pleadings and a ruling of the Tribunal from the Energy and Petroleum Tribunal.

25. In a rejoinder to the replying affidavits filed on behalf of the 1st and 2nd respondents, Paul Onyera the 1st applicant, swore a supplimentary affidavit dated 13th December 2023. He stated that the replies by the 1st and 2nd respondents constituted a misrepresentation of facts and non-disclosure of material facts calculated at misleading this honourable court and meant to frustrate the fair administration of justice in this matter.

26. He maintained that the genesis of the petition is the 1st and 3rd respondents' unlawful change of the Estate's Master Plan from residential to commercial and light industries contrary to the 1st respondent's representations to the residents of the estate that the frontage to the estate would be reserved as a green area and not open to any developments so as to cushion residents from noise pollution from Mombasa Highway.

27. In answer to the allegation that the petition merely challenged approvals and the licences of the 2nd to 4th respondents, he deponed that the respondents made a poor attempt at belittling the petition from a legitimate Constitutional claim to a mere challenge of approvals of the 2nd to 4th respondents. He stated that the reasons were that the 1st and 3rd respondents change of the estate's master plan was unlawful and in contravention of Article 10 of *the Constitution* regarding principles of public participation and sustainable development; that the grant of approvals and licences by the 2nd and 4th respondents contravened principles of public participation and sustainable development under Articles 60 and 69 of *the Constitution*; that the 1st and 4th respondents violated Articles 35 and 47 of *the Constitution* by failing to provide the Petitioners with the sought information thus frustrating their right to seek administrative action under Section 129 of EMCA; that the impugned project is located less than 10 meters from the Estate where fire and other flammable materials are used on daily basis and that the project is a high-risk threat to health and safety of the petitioners contrary to Article 42 of *the Constitution*; that the 1st respondent's project is out of character with the estate and will have adverse effect concerning the value of the petitioner's homes which will result in loss of property contrary to Article 40 of *the Constitution*.

28. Concerning the exhaustion principle, he took the position that the respondents cannot argue that the petitioners contravened the exhaustion principle when in cahoots they withheld the relevant information and therefore frustrated the petitioners' right to fair administrative action under Section 129 of EMCA. He also stated that the respondents breached Sections 58 and 59 of EMCA by failing to make public information concerning the impugned EIA licence. Further that the 2nd and 4th respondents failed to issue the petitioners with relevant information contrary to Article 35 of *the Constitution*. That the respondents having denied the petitioners the information needed to file an appeal before NET, their argument is not rational.

29. Regarding the respondents' contention that this suit is sub judice due to the pendency of EPA case No. E018 of 2023, he deposed that the said case has no bearing whatsoever to the petition herein as the petitioners are not party to that case and that the Constitutional questions raised in this suit cannot be

addressed in another forum other than this suit. He maintained that the 1st interested party are the ones that filed the EPA case and that they have no interests of the estate's residents. He stated that the 1st and 2nd petitioners were merely nominal directors without any say in the activities of the 1st interested party whose reigns are in the hands of directors controlling the 1st respondent. He stated that the petitioners have not acquiesced to the impugned project's construction, and that the alleged remedial measures notwithstanding, the impugned project remains a risk to the residents of the estate.

30. He stated that the EIA report failed to take into account the view of the residents of the estate. He insisted that building a filing station less than 10 meters from the petitioners' houses will not in any way improve the quality and standard of living of the estate residents as purported by the 1st respondent and that the project is based on greed and not needs of the estate.

31. The court heard both the application and the preliminary objections filed by the 1st and 2nd respondents together. The same were canvassed by way of written and oral submissions made on 14th December 2023. On record are the petitioners/applicants' submissions filed on 15th December 2023, the 1st respondent's submissions filed on 11th December 2023 and the 2nd respondent's submissions filed on 6th December 2023.

Applicants' submissions

32. Counsel for the applicant framed the issues for determination as follows;

    a. Whether the subject preliminary objection raises pure points of law capable of disposing this petition without need for a detailed consideration, evaluation, and determination of the facts of the case? If not, should the purported preliminary objections be dismissed with costs?

    b. Whether the petitioners have failed to exhaust any other available remedy alleged by the two preliminary objections and/or at all?

    c. Whether the matter herein is sub judice in light of the proceedings before the Energy and Petroleum Tribunal?

    d. Whether the applications herein have met the requisite requirements needed for the issuance of the sought conservatory orders.?

33. On their first issue, counsel submitted that the preliminary objections herein are premised on factual allegations to wit that the petition offends provisions of Sections 24, 25, 36 and 37 of the *Energy Act* 2019 and 130 of EMCA and Section 9(2) and 3 of the *Fair Administrative Action Act*. Counsel argued that the question of whether a party has exhausted available remedies before coming to court is a factual matter that needs evidence to be proved. Counsel cited Section 107 of the *Evidence Act* to contend that whoever alleges is under obligation to prove their allegations. Counsel argued that the respondents ought to demonstrate that the alternative remedies were available to the petitioners as at the time of filing the petition and that the same were efficacious and had jurisdiction to determine questions of breach of fundamental rights guaranteed in *the Constitution*.

34. Counsel argued that it was not enough for the respondents to allege that there is a case before the Energy and Petroleum Tribunal, they ought to demonstrate how those proceedings relate to the instant suit; and that therefore such analysis would require an application supported by affidavit.

35. Counsel argued that by the respondents' unlawful acts of frustrating the Constitutional rights of the petitioners, they deprived the latter a chance to approach the National Environmental Tribunal in accordance with Article 47 of *the Constitution* and Section 129 of EMCA.

36. Citing the case of Mukisa Biscuits v. West End Distributors Limited [1969] EA 696, counsel contended that a preliminary objection must raise a pure point of law on the assumption that the raised facts are correct. Counsel maintained that issues raised by the respondents were contested facts which negates the legality of their preliminary objections.

37. Placing reliance on the case of R. V. Independent Electoral and Boundaries Commission (IEBC) & Others Exparte The National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR, counsel argued that where a suit primarily seeks to enforce fundamental rights and freedoms and where it is shown that the claimed Constitutional violations are not mere bootstraps a petitioner is not barred by the doctrine of exhaustion, as the question of violation of rights can only be determined by this court. To buttress this point, counsel also referred the court to the decisions in the cases of Angela Mbugua & 4 Others (Officials of Redhill Kentmere Residents Associations) v. K. O. Holding Limited & 2 Others [2021] eKLR and Benson Ambuti Adega & 2 Others v. Kibos Distillers Limited & 5 Others [2020] eKLR.

38. On whether the petitioners had failed to exhaust available remedies, counsel argued that by dint of Articles 22, 23, 70, 165 (5) (b) of *the Constitution* as read with Section 3(3) of EMCA, the questions raised herein being Constitutional questions can only be determined by this court. Counsel argued that under Articles 42 and 70 of *the Constitution*, it is only this court that can determine questions of environmental rights. Counsel took the position that under Section 129 of EMCA, an Appeal to NET ought to be filed in 60 days and that in various decisions, NET has held that that period cannot be extended and therefore the respondents having frustrated that right of appeal cannot argue for exhaustion of available remedies. Reliance was placed on the case of Ramison Tumbes Lega & Others v. Six Zero Zero Six Investment Limited & Others [2023] eKLR. Counsel also insisted that EPA case only raised a civil dispute and not Constitutional issues and cited the cases of Okiya Omtatah Okoiti v. Judicial Service Commission & 2 Others [2021] eKLR and Republic v. Firearms Licencing Board & Another Exparte Boniface Mwaura [2019 eKLR for the proposition that statutory provisions ousting the court's jurisdiction must be restrictively construed because the quality of audience before a forum must be proportionate to the interests advanced by a party; and that since the exhaustion requirement is not clearly delineated; the court ought to interrogate the facts, the regulatory scheme involved, and the nature of interests involved including the level of public interest involved.

39. Regarding the question of whether this matter is subjudice, counsel argued that the substratum of the petition is different from that of the EPA case as the dispute therein does not raise Constitutional questions raised herein; that the EPT has no jurisdiction and that the parties in that case are not the same as the parties herein.

40. On whether the applicants met the requirements for conservatory orders, counsel relied on the decisions in the cases of Gatirau Peter Munya v. Dickson Mwenda Kithundi & 2 Others [2014] eKLR and Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR to argue that to grant conservatory orders, the court ought to consider the merit of the case, taking into account public interest, and Constitutional values. Counsel maintained that the applicants had established a prima facie case by demonstrating that the 1st and 3rd respondents had changed the Estate's Master Plan and obtained approvals contrary to Articles 10, 60 and 69 of *the Constitution*; that they demonstrated that the respondents failed to provide them with sought information contrary to Articles 35 and 47 of *the Constitution*; that the impugned project is located less than 10 metres from the petitioners' houses where there is daily use of flammable materials exposing them to high-risk threat to health and safety; that the impugned project is out of character with the estate and that the 1st respondent is keen to complete the construction of the impugned project.

41. Counsel argued that grant of the orders sought would advance the values and objects of the Constitutional values of transparency and accountability, public participation and sustainable development. Further it was contended for the applicants that if the orders sought are not granted, the subject matter of the petition would be rendered otiose.

Submissions by the 1st respondent

42. Counsel for the 1st respondent submitted that the issues raised herein are whether this court has jurisdiction to hear and determine this dispute and whether the petitioners have met the threshold for grant of conservatory orders. On the first issue, counsel relied on the case of Geoffrey Muthiga Kabiru & 2 Others v. Samuel Munga Henry & 1756 Others [2015] eKLR to contend that where there is a forum provided in law to address a concern, then a party must first exhaust those options before approaching court.

43. It was submitted for the 1st respondent that jurisdiction is everything and without it a court should not take any step. Counsel cited the case of Owners of the Motor Vessel 'Lillian S" KLR 1, to buttress his position. Counsel argued that although the petitioners' contention is that the impugned project is out of character with the estate, the 1st respondent has taken remedial measures to address the concerns raised by the petitioners.

44. Counsel argued that this court lacks jurisdiction to hear and determine this dispute as Section 129 (1) (a) of EMCA allows persons aggrieved with grant of the licence by NEMA to appeal to NET in 60 days. That the petitioners' grievance is against issuance of the EIA licence and therefore should have appealed before NET and not filed the petition herein. Counsel referred to the case of Speaker of the National Assembly v. Njenga Karume [2008] 1 KLR 425 in support of their argument.

45. Further reliance was placed on the decision in the case of Eaton Towers Kenya Limited v. Kasing'a & 5 Others [2022] KECA 645 (KLR) (28 April 2022) for the proposition that allegations of Constitutional violations cannot clothe this court with jurisdiction that it does not have.

46. Regarding approvals made by the 3rd respondent, counsel argued that by dint of Section 80 of the *Physical and Land Use Planning Act* 2019, the County Physical and Land Use Planning Liaison Committee, is the body with jurisdiction to hear and determine appeals relating to building permissions of the 3rd respondent and not this court. To buttress this argument, reference was made to decisions in the cases of Daniel Kariuki Mbugua & 8 Others v. Joseph Njenga Wachaiyu & 4 Others [2022], Jeremiah Nyandusi Abuga & 17 Others v. City Council of Nairobi [2013] eKLR and Sikalie (Chairman) suing on behalf of the Karen Langata District Association v. Nairobi County Government & 3 Others [2022] KEELC KLR.

47. Concerning the provisions of the *Energy Act* 2019, counsel contended that Section 36 thereof vests the Energy Petroleum Tribunal with jurisdiction to hear disputes relating to the Energy and Petroleum Tribunal, which has an appellate jurisdiction over decisions of the 2nd respondent and also original civil jurisdiction in disputes between licencees. Counsel argued that as the petitioners had challenged the construction permit issued by the 2nd respondent to the 1st respondent, that challenge ought to have been filed before the Energy and Petroleum Tribunal and not before this court. Reliance was placed on the decisions in the cases of Damour Florian Emmerric v. Director of Immigration Services [2022] eKLR and Isiah Luyara Odando & Another v. Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya (Interested party) [2022] eKLR. Counsel argued that the petitioners were in violation of the doctrine of Constitutional avoidance as they had through the art and craft of drafting, by mischievous drafting of the petition, crafted it as though there were Constitutional violations. They cited the case of Benson Ambuti Adega v. Kibos Distillers Ltd & 5 Others [2020] eKLR.

48. On whether the prayer for conservatory orders was merited, counsel referred to decisions in the cases of Damour Florian Emmeric v. Director of Immigration Services [2022] eKLR and Isiah Luyara Odando & Another v. Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya (Interested Party) [2022] eKLR, and argued that to be granted conservatory orders, an applicant must demonstrate a prima facie case with chances of success and a real danger that he may suffer prejudice due to violation of their rights; that if conservatory orders are not granted, the petition will be rendered nugatory; and that public interest must be considered. Counsel argued that the petitioners had not demonstrated that they deserved conservatory orders, as they had not presented sufficient material for the court to conclude that their rights had been infringed by the 1st respondent.

2nd respondent's submissions

49. Counsel for the 2nd respondent submitted that the petitioners were in utter violation of the doctrine of exhaustion and prematurely invoked the court's jurisdiction. Counsel relied on the case of Geoffrey Muthinja & Another v. Samuel Muguna Henry and 1756 Others [2015] eKLR and argued that the exhaustion doctrine dictates that where a specific dispute resolution mechanisms is prescribed by *the Constitution* or a statute, parties ought to invoke that mechanism first before invoking the court's jurisdiction. Counsel submitted that the doctrine has been codified in Section 9(1) (2) and (3) of the *Fair Administrative action Act*. They hastened to add that this court is enjoined by Article 159 (2) (c) to promote alternative dispute resolution mechanisms and therefore the court ought to uphold the exhaustion principle.

50. It was submitted for the 2nd respondent that as the bone of contention against the 2nd respondent is the licence issued to the 1st respondent to operate a petrol station, and that Section 36 of the *Energy Act* vests jurisdiction of this dispute in the Energy and Petroleum Tribunal. To buttress this argument, reliance was placed on decisions in the cases of Vitalis Ouma Osan v. Kenya Power & Lighting Company Limited [2021] eKLR and Nathan Ombati Soire & 7 Others v. Kenya Power & Lighting Company Limited [2021] eKLR.

51. Further, counsel contended that this suit is subjudice and contravened provisions of Section 6 of the *Civil Procedure Act* as there is EPA Case No. No. E018 of 2023 pending before the Energy and Petroleum Tribunal which touches on the same matter herein as in that dispute, the claimants have sought for a permanent injunction against construction of the petrol station on LR. No. 27409. On this point, the court was referred to the case of Kinatwa Cooperative Savings & Credit Society Limited v. Kinatwa Prestige Ltd [2021] eKLR.

52. On whether the conservatory orders sought were merited, counsel argued that the petitioners had not met the threshold set out in the case of Isiah Luyara Odando & Another v. Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya (Interested Party) [2022] eKLR, as they failed to show a prima facie case with chances of success, a real danger of violation of fundamental rights, the risk of the petition being rendered nugatory if the orders are not granted and the bearing of the petition on public interest.

Analysis and determination

53. I have carefully considered the application herein; the supporting affidavits thereto and annextures; replying affidavits; preliminary objections and parties' rival submissions. It is clear that four issues emerge for consideration, namely;

    a. Whether the petition herein was filed in violation of the exhaustion principle;

b. Whether this suit is subjudice in view of the pendency of EPA Case No. E018 of 2023;

c. Whether the petitioners have met the threshold for grant of conservatory orders;

d. Whether the petitioners are entitled to be supplied with the documents listed in their letters dated 25th May 2023 and 11th October 2023.

54. The doctrine and or principle of exhaustion of administrative remedies requires that where there is specific administrative dispute resolution mechanisms provided by *the Constitution* or statute, a claimant must first seek relief as provided by law from the provided administrative body before seeking judicial intervention.

55. The Black's Law Dictionary, 11th Edition defines exhaustion of remedies as follows;

The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary.

56. In the case of Wambua & 2 Others (Suing for themselves and on behalf of the other residents of Muumoni Village, Utithini Sub-Location, Masii Location) v. County Government of Machakos & 3 Others (Constitutional Petition No. E004 of 2022 [2023] KE ELC 786 KLR (8th February 2023) (Ruling) at paragraph 33, this court observed as follows;

While the doctrine of exhaustion of remedies is not purely a jurisdictional issue, it requires that courts ought to exercise restraint and be hesitant to hear and determine matters which although they appear to apparently have jurisdiction, the same have been delineated by legislation to be heard and determined by other administrative bodies.

57. The doctrine is underpinned on the conceptual notion of separation of powers and efficient use of judicial resources, because not every dispute must be resolved in court. The purpose of the exhaustion principle is to allow administrative agencies to act within their sphere of expertise; uphold the administrative autonomy of administrative bodies and should the matter end up in court, the court will benefit from the administrative agencies fact finding exercise. I am in agreement with the position taken in the Article "Exhaustion Doctrine should not be a doctrine with Exceptions" 103 W. Va. L. Rev. [2001] only in regard to the purpose of the doctrine of exhaustion, where the learned author, Rebeccah Donnellan, argues that the doctrine respects the administrative autonomy of administrative organs by placing the primary responsibility for administering programmes they are mandated by the legislature to undertake as the courts ought not interfere in the exercise of their powers and duties; it allows administrative bodies to act within the sphere of their special competence and expertise thus giving them opportunity to correct their own errors; and when a matter has been heard by an administrative body and ends up in court, the latter will benefit from the agency's record and findings on facts leading to more accurate decisions as agencies expertise especially on complex factual issues assist in factual findings.

58. In the case of Speaker of the National Assembly v. Njenga Karume [2008] 1 KLR, the court held as follows;

Where there is a clear procedure of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

59. Similarly, in the case of Geoffrey Muthinja & Another v. Samuel Muguna Henry and 1756 Others [2015] eKLR, the Court of Appeal stated that;

Where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be a fora of last resort and not the first call the moment a storm brews ......the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.

60. While questions of jurisdiction are anchored on rigid rules as jurisdiction is conferred by *the Constitution* or statute or both, with no room for exceptions, the principle of exhaustion is not cast in stone, but emphasises judicial restraint in instances where the legislature has mandated administrative bodies to determine some disputes. Therefore the exhaustion principle has exceptions which are applied to avoid injustice. Where for instance, the available alternative administrative remedy is inadequate, wanting in efficaciousness or futile; or the decision complained of is marred with procedural irregularities and illegality, a claimant in such case is allowed to bypass alternative administrative remedies. In my view, the key question that the court ought to address is whether the provided administrative dispute resolution mechanism will avail to the parties, substantive justice viewed in the prism of effective remedies as encapsulated in the broad notions of the right to access to justice enshrined in Article 48 of *the Constitution*.

61. In the case of Chief Justice and President of Supreme Court of Kenya & Another v. Bryan Mandila Khaemba [2021] eKLR, the Court of Appeal took the view that where the decision complained of is marred in procedural irregularity and illegality, not withstanding the doctrine of exhaustion, the court still retains the residual jurisdiction to intervene. In that case, the court stated as follows;

> Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

62. The quality of the audience before an administrative body is key in determining whether there exists special circumstances to warrant an exception from the exhaustion principle. In the case of Night Rose Cosmetics [1972] Ltd v. Nairobi County Government & 2 Others [2018] eKLR at paragraph 34 and 35 as follows;

> "......where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal menchanism is suitable to determine it.....
>
> 35. The second principle suggested by the case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit.

The rationale behind this is that statutory provisions ousting court's jurisdiction must be construed restrictively.

63. Section 9(2) and (4) of the *Fair Administrative Action Act* No. 4 of 2015, while restating the application of the principle of exhaustion, it also recognizes exceptions thereto; and provides as follows;

9.(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

4. Notwithstanding sub-Section (3) of the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt, such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interests of justice.

64. In the case of Abidha Nicholas v. The Attorney General & Others; National Environmental Complaints Committee & 5 Others (Interested Parties) Petition No. E007 of 2023, the Supreme Court of Kenya addressed the question as to whether in Constitutional Petitions raising violations of Constitutional rights concerning the environment and land; a petitioner is obligated to comply with the exhaustion principle. In that case, the Supreme Court observed that court decisions in Kenya have held two schools of thought, on one hand that even if the ELC has original and appellate jurisdiction on environmental and land disputes, parties should first exhaust administrative remedies provided in statute before appealing to the ELC; and on the other hand that where a complaint and prayers by a petitioner relate to infringement of Constitutional rights, then statutory provisions for alternative administrative redress are in applicable.

65. In adopting the restraint and effective remedy rule and leaning towards the school of thought that where the petitioner seeks redress of violations of Constitutional rights, the exhaustion principle is inapplicable; the Supreme Court in the above case held as follows;

Under Article 165 (1) (c) of *the Constitution*, the High Court has jurisdiction to determine whether a right or fundamental freedom outlined in the bill of rights has been denied, violated, infringed upon or is under threat, in that contest article 165 (5) (b) imposes limitation on the High Court's jurisdiction concerning mattes falling within the purview of the courts specified in Article 162 (2) which provides that;

Parliament shall establish courts with the status of the High Court to determine disputes relating to;

a. Employment and labour relations; and

b. The environment and the use and occupation of, and title to, land.

...In this context, and in the exercise of these powers, parliament enacted the *Environment and Land Court Act* 2011, (No. 19 of 2011) and by Section 4 thereof established the ELC. It's jurisdiction is as provided for in Section 13 with Section 13(1) specifically outlining that the court

" shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 163 (2) (b) of *the Constitution*. Section 13 (2) then grants express and original jurisdiction in matters;

a. Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. Relating to compulsory acquisition of land;

c. Relating to land administration and management;

d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. Any other dispute relating to environment and land.

And further provides;

> Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of *the Constitution*.

98. These provisions must be read in contrast to those in EMCA which provide for instances where disputes pertaining to compliance with breach ....of the provisions of EMCA and which disputes ought to be lodged with .....NET.....redress for Constitutional violations is not part of this mandate.

100 In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a Constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*.

66. Article 70 of *the Constitution* grants the ELC power to grant orders for redress in regard to violations of the right to a clean and healthy environment.

67. It is therefore clear that where a dispute relates to violation of Constitutional rights relating to the environment and or land, by dint of the provisions of Articles 70, 162 (2) (b) and 165 (3) (b) (5) (b) as read with Sections 13 (3) of the *Environment and Land Court Act* No. 19 of 2011, this court's original jurisdiction to hear and determine such disputes is not ousted by the exhaustion principle.

68. I have considered the dispute herein wherein the petitioners allege that the construction of the impugned project is anchored on unlawfully acquired approvals and licences; is contrary to the Master Plan which was the basis of their purchase of their homes in the estate; and that the petrol station intended to be constructed will violate their right to a safe and healthy environment and their property rights contrary to Articles 10, 35, 40, 42, 47, 60 and 69 of *the Constitution* of Kenya. The 1st and 2nd respondents position is that the petition is a mere challenge of the approvals and licences issued to the 1st respondent by the 2nd to 4th respondents, and that Constitutional provisions quoted by the petitioners amount to nothing more than bootstrings. I have examined the dispute as framed by the petitioners and the response by the 1st and 2nd respondents and my assessment of the two sides is that it is clear that the petition discloses ostensible violations of environmental and property rights; besides other

Constitutional rights. It is my view that the Constitutional violations raised by the petitioners herein do not amount to a drizzle and or garnish meant to embellish a mere challenge of approvals and licences issued by the 2nd to 4th respondents; but goes to the core of the dispute stated in the petition.

69. Considering that Section 129 of EMCA delineates decision that can be appealed against before NET, namely;

    a. The grant of a licence or permit or refusal to grant a licence or permit, or the transfer of a licence or permit, under EMCA or its regulations;

    b. The imposition of any condition, limitation or restriction on the person's licence under EMCA or its regulations;

    c. The revocation, suspension or variation of the person's licence under EMCA or its regulations;

    d. The amount of money required to be paid as a fee under EMCA or its regulations;

    e. The imposition against the person of an environmental restoration order or environmental improvement order by the Authority under the Act or its regulations;

    It is my finding that the Constitutional questions raised in the petition, herein transcend the limitations of the jurisdiction of NET as provided above, and therefore the dispute herein ought not be filed before NET.

70. In the same vein, the jurisdiction of the Energy and Petroleum Tribunal as prescribed in Section 36 of the *Energy Act* being jurisdiction to determine matters relating to the energy and petroleum sector and more specifically original civil jurisdiction regarding disputes between a licencee and a third party or between licencees; and appellate jurisdiction on decisions of the Energy and Petroleum Regulating Authority and any licencing authority; is in my view, too limited and excludes the power to determine Constitutional violations of environmental and property rights.

71. In addition, the jurisdiction of the County Physical and Land Use Planning Liaison Committee as prescribed under Section 78 of the *Physical and Land Use Planning Act*, 2019, being to determine complaints against applications submitted to the Planning Authority of the County and appeals against decisions by the planning authority of the County; does not cover Constitutional violations.

72. Seeing that the provisions of Articles 70, 162 (2) (b) and 165 (3) (b) (5) (b) and Section 13 (3) of the *Environment and Land Court Act* have ring fenced the jurisdiction of the ELC to determine redress for violations of infringement of rights relating to a clean and healthy environment and other Constitutional rights relating to the Environment and Land, I find and hold that the dispute herein presents exceptional circumstances and therefore the petitioners were not obligated to exhaust administrative remedies under EMCA, the *Energy Act* and or *Physical and Land Use Planning Act*. I therefore find and hold that the filing of the petition herein is not in violation of the exhaustion principle.

73. On the question of whether this suit is subjudice in view of the pendency of EPA Case No. E018 of 2023, Section 6 of the *Civil Procedure Act* provides for the doctrine of subjudice as follows;

    > No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties; or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

74. Therefore a suit filed by parties who are parties in a similar suit previously filed, where the matter in dispute in the earlier suit is the same as the one in the subsequent suit, where that dispute is before a competent court, then the court ought to stay the subsequent suit.

75. The 1st and 2nd respondents' contention herein is that as EPA Case No. E018 of 2023 involves the same parties and the same issues as those raised herein, and therefore this suit ought to be stayed.

76. Having considered the pleadings filed in EPA Case No. E018 of 2023, it is clear that the plaintiff therein is Gems Management Limited, which is the management company of the estate. The defendants are Superior Homes Kenya; Energy and Petroleum Regulatory Authority; Physical and Land use Planning Machakos County; and National Environment Management Authority. All these parties are parties herein save that the petitioners herein are not parties in that suit. As for the plaint filed before the Energy and Petroleum Tribunal, the issue raised therein is that Superior Homes intends to construct a petrol station on LR. No. 27409, next to Green Park Estate on the basis of unlawful licences and approvals granted by the respondents which were granted without public participation. The plaintiff sought for a declaration that the impugned project violates the right to a clean and healthy environment of the residents; a permanent injunction to restrain the 1st respondent from proceeding with construction of the impugned project; general damages, costs and interest thereon.

77. Comparing the issues raised in EPA Case No. E018 of 2023 and the issues in this petition; it is apparent that in this case, the owners of homes within the estate have complained of violation of their rights to a clean and healthy environment and the right to property due to the impact of the impugned project to the value of their property. They have also pleaded violation of their rights in Articles 10, 35, 40, 42, 47, 47, 60 and 69 of *the Constitution* of Kenya 2010. Having held that it is this court with the jurisdiction to determine questions of violations of environmental and land rights as delineated under Articles 70, 162, (2) (b) and 164 (3) (b) and (5) (b) and Section 13 (3) of the *Environment and Land Court Act*; and having found that the Energy and Petroleum Tribunal has no jurisdiction to determine the Constitutional questions raised in this petition; it is the finding of this court that the respondents have not proved elements of subjudice and therefore this suit is not subjudice as the Energy and Petroleum Tribunal has no jurisdiction to determine this petition.

78. On whether the applicants have met the threshold for grant of conservatory orders; the Supreme Court's decision in the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR set the threshold for grant of conservatory orders in the following terms;

    Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

79. In the case of Wilson Kaberia Njunja v. Magistrates and Judges Vetting Board & Another [2016] eKLR, the court summarized the requirements to be satisfied before grant of conservatory orders as follows;

    25. It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is;

        a. An applicant must demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation of *the Constitution*;

        b. Whether if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

        c. The public interest must be considered before grant of a conservatory order.

80. In the case of Martin Nyaga Wambua v. Speaker of the County Assembly of Embu & 3 Others, Petition No. 7 of 2014, the court discussed the aspect of proof of real danger as follows;

> 60. To those erudite words, I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus an allegedly threatened violation that is remote and unlikely will not attract the courts' attention.

81. On the other hand, the Black's Law Dictionary, 11th Edition at page 1486 defines public interest as;

> The general welfare ref a populace considered as warranting recognition and protection. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

82. It is clear therefore that to persuade the court to grant conservatory orders, an applicant must demonstrate that they have a case with merit; that there is imminent and real danger of their Constitutional rights being violated if the orders are not granted; that if the conservatory orders are not granted, their petition seeking protection of fundamental Constitutional rights and or freedoms will be rendered nugatory and the court also ought to consider the stake of the public in the matter.

83. Applying the required elements discussed above to the instant matter, first on the question of whether there is a prima facie case, the applicants have averred that the construction of a petrol station less than 10 meters to their residential homes poses both environmental, property and personal risk to the applicants. The fact that the construction of the impugned project is less than 10 meters from the residential houses is not denied by the 1st respondent whose Chief Executive Officer one Shiv Arora deponed that there are 4.5 meters buffer distance between the residential wall and the impugned petrol station. It is common knowledge that a petrol station presents an ever present risk of fire which is acknowledged in the 1st respondent's EIA study report. The 1st respondent stated in their response that they have taken remedial measures and therefore that matter has been addressed. As the estate consists of 500 houses, the probable risk involved may not just be in regard to petitioners herein but so many other residents of the estate and those on abutting properties. The attendant air pollution and apparent risk of fire poses environmental, personal and property risks to the residents.

84. In addition, the applicants' assertion that at the time of purchase of their respective houses, the master plan did not contain a petrol station; which in my view is a project out of character with the estate, in view of its high risk character; was not contested by the respondent. The applicants assert that having a petrol station next to their homes will lower the value thereof, which argument is merited since purchasing property next to a petrol station carries with it an apparent risk. Although the 1st respondent stated that the impugned project will improve the living standard in the estate, they did not demonstrate how a petrol station next to residential premises will improve the living standards of the residents. For the above reasons, I am satisfied that the petitioners have demonstrated a merited case with chances of success.

85. On the question as to whether the petition would be rendered nugatory if the orders sought are not granted, the applicants having demonstrated that the impugned project is a high risk project with real imminent danger to the environment, their properties and their persons in view of the proximity to their houses, I am convinced that if conservatory orders are not granted, the petition herein may be rendered nugatory.

86. Regarding public interest, my view is that as the impugned project affects persons beyond the petitioners together with other residents of the 500 houses in the estate and bearing in mind that

controlled development and or sectional property ownership as regulated under the *Sectional Properties Act* is now widespread in this county, it is important that engagements between home owners, developers, management companies and state regulatory bodies are properly guided by the court's in regard to protection of environmental and competing property rights attendant to such interactions. For those reasons, I take the view that public interest tilts in favour of grant of the conservatory orders sought. Ultimately, I am satisfied that the applicants deserve grant of conservatory orders.

87. The applicants also sought an order compelling the respondents to supply petitioners with the relevant information and documents sought vide their letters dated 25th May 2023 and 11th October 2023. In the letters dated 25th May 2023, the applicants sought from NEMA, the ESIA Report and the Kenya Gazette publication. A letter of the same date addressed to EPRA sought copies of the project proponent's application for a no objection letter together with supporting documents including the supporting engineer's technical drawings. Besides, in their letter dated 11th October 2023, the petitioners sought from NEMA, the ESIA licence.

88. Section 6 of the *Fair Administrative Action Act* of 2015 provides that a person who is materially or adversely affected by an administrative action has a right to be supplied with information that may be necessary to facilitate their application for appeal or review. Having considered the letters dated 25th May 2023 and 11th October 2023, it is clear that the information sought therein is in regard to administrative decisions taken by the 2nd and 4th respondents in regard to the impugned project; and since those decisions materially affect the petitioners herein, they are entitled to the information sought.

89. Having considered the responses filed by the 2nd respondent, it is clear that they do not deny being in possession of the requested documents. As for NEMA, the 4th respondent herein, they neither entered appearance or filed response to the application herein and therefore they are deemed not to be objecting to the application. That being the case, there is no reason why the court should not compel the 2nd and 4th respondents to avail to the petitioners the documents sought, the same being documents relevant to the matters in dispute in the petition herein.

90. In the premises, I find no merit in the 1st and 2nd respondents' preliminary objections dated 24th November 2023 and 29th November 2023 respectively; and I hereby dismiss the same with costs to the petitioners. I find and hold that the petitioners' notice of motion dated 14th November 2023 is merited and the same is hereby allowed as follows;

    a. A conservatory order be and is hereby issued restraining the 1st respondent by themselves, agents, servants, employees or otherwise howsoever from constructing and/or carrying on with the construction of a petrol filing station at Arcadia Mall situated on L.R. No. 27409 within Green Park Estate, Stoney Athi, Machakos County, pending the hearing and determination of this petition.

    b. An order be and is hereby issued compelling the respondents to supply to the petitioners with all the relevant information and documents sought vide the letters dated 25th May 2023 and 11th October 2023.

    c. The costs of the application are awarded to the petitioners.

91. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Agwana holding brief for Prof. Muma for petitioners

Ms. Akal holding brief for Kuyo for 1st respondent

Mr. Odhiambo for 2nd respondent

Josephine - Court Assistant