



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

PETITION NO. 4 OF 2017

**IN THE MATTER OF ARTICLES 22, 23 AND ARTICLES 163, 165, 258 AND 259 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 10, 21, 40, 42, 69, 70 OF THE CONSTITUTION OF KENYA,
2010**

BETWEEN

SAFARICOM STAFF PENSION SCHEME

REGISTERED TRUSTEES.....PETITIONER

AND

ERDEMANN PROPERTY LIMITED.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

MAVOKO WATER & SEWERAGE CO. LTD.....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

AND

EVEREST LIMITED.....1ST INTERESTED PARTY

SUNSET HOUSING LIMITED.....2ND INTERESTED PARTY

JUDGMENT

The Petitioner’s case:

1. In the Petition dated 17th February, 2017, the Petitioner has averred that it has filed the Petition on its own behalf and in the public interest.
2. The Petitioner averred in the Petition that it is the registered owner of L.R. No. 337/5183 (*Original No.*

337/974) situated in Mavoko Municipality (*the suit property*); that on the suit property, the Petitioner is undertaking a substantial mixed use development christened “Crystal Rivers” comprising residential units and a Mall; that the Crystal Rivers Project is bordered on the Western Side by Quarry Road and that on the Southern side it borders an access road adjacent to the Old Mombasa Road.

3. According to the Petitioner, the 1st Respondent is engaged in developing a project christened “The Great Wall Gardens” comprising 1,000 units of two bedroomed apartments and 1,000 units of three bedroomed apartments; that the Great Wall Gardens access is through Quarry Road and that in November, 2016, the Petitioner became aware that the 1st Respondent is undertaking a sub-truck sewer construction works along Quarry Road with a view of connecting the Great Wall Garden to the County sewer system.

4. In the Petition, the Petitioner has averred that the sewer line construction works by the 1st Respondent conflicts with some aspects of its project and design in the following respects: the embankment of the sewer line along Quarry Road is over one (1) metre above the existing road; that the sewer line cuts across the main access to the Petitioner’s Project thus blocking the Petitioner’s access to its property and that the sewer embankment works would cause a major challenge to the drainage of the road.

5. The Petitioner’s further complaint is that the proposed road designs were not inclusive because they did not consider other stakeholders served by the Quarry Road and the access road adjacent to the Old Mombasa Road; that the level difference between the ground level and the new level creates a steep descend of 20% grade which is above the maximum required and that the sewer line was too close to the boundary wall of the Petitioner’s property.

6. According to the Petitioner, the approvals that were obtained by the 1st Respondent from the 2nd, 3rd and 4th Respondents for the construction of the impugned sewer line were issued without due process and without public participation, particularly by parties directly affected by the decision in contravention of the Petitioner’s legitimate expectation.

7. It is the Petitioner’s cases that they are entitled to protection of their rights to acquire, use and occupy property as envisaged under Article 40 of the Constitution; that the 2nd and 4th Respondents illegally approved the construction of the sewer line along Quarry Road and Old Mombasa Road to the detriment of all the affected parties and that the 3rd Respondent also gave approvals for the construction of the sewer works whose natural consequence was to limit the Petitioner’s right of access and use of its property.

8. According to the Petitioner, its members are entitled to the right of fair administrative action pursuant to the provisions of Article 47 of the Constitution and the Fair Administrative Act.

9. The Petitioner averred that the failure by the 2nd and 4th Respondents to abide by the procedure set out in the Kenya Roads Act contravened the Petitioner’s right to an administrative action that is lawful and fair; that the failure by the 3rd Respondent to abide by the procedure set out in the Water Act, the Urban Areas and Cities Act and the County Governments Act contravened the Petitioner’s right to an administrative action that is lawful and procedurally fair and that there was no public participation prior to the impugned decision being made.

10. The Petitioner further averred that the Respondents have infringed the Petitioner’s right to a clean and healthy environment in contravention of Article 42 as read with Articles 69 and 70 of the Constitution.

11. Consequently, the Petitioner is seeking for the following orders:

a. This Honourable Court do make a declaration that the approvals granted to the 1st Respondent by the 2nd, 3rd and 4th Respondents with respect to the construction of a sewer line along Quarry road and Old Mombasa Road for the Great Wall Gardens Project was illegal,

unconstitutional and tantamount to an infringement of the Petitioner's right to use of its property as enshrined in Article 40 of the Constitution and contravened the Petitioner's right to fair administrative action that is lawful and procedurally fair as enshrined in Article 47(1) of the Constitution of Kenya.

b. This Honourable Court do make a declaration that the approvals granted to the 1st Respondent by the 2nd, 3rd and 4th Respondents with respect to the construction of a sewer line along Quarry Road and Old Mombasa Road for the Great Wall Gardens Project was illegal, unconstitutional and tantamount to an infringement of the Petitioner's right to a clean and healthy environment as enshrined in Articles 42, 69 and 70 of the Constitution.

c. This Honourable Court do make a declaration that the failure of the 2nd, 3rd and 4th Respondents to take action, or any action, in relation to the complaints lodged with them by the Petitioner amounted to a breach of the Petitioner's fundamental right to equality before the law and to have the complaint heard and concluded within a reasonable time as set out under Article 50(1) (e) of the Constitution.

d. An order by way of Judicial Review to call before the court and quash the decisions issued by the 2nd to 3rd Respondents on dates unknown to the Petitioner granting approval to the 1st Respondent to proceed with the construction of a sewer line along Quarry Road and Old Mombasa Road for its Great Wall Garden Project.

e. A permanent injunction do issue restraining the 1st Respondent from proceeding with the construction of the sewer line along Quarry Road and Old Mombasa Road on the basis and/or on the authority of the approvals granted by the 2nd to 4th Respondents.

f. An order by way of Judicial Review being an order for mandamus directed at the 2nd, 3rd and 4th Respondents directing them to reconsider the submitted designs for construction of a sewer line by the 1st Respondent along Quarry Road and Old Mombasa for its Great Wall Gardens Project and make a decision thereon in line with the applicable law and after full public participation by the Petitioner and all other affected stakeholders as provided for in the law.

g. The Respondents to pay the costs of the Petition.

The Interested Partys' case:

12. The 1st Interested Party's Director filed an Affidavit in support the Petition.

13. According to the 1st Interested Party's Director, the 1st Interested Party is the registered proprietor of L.R. N0. 337/861; that the said land is being developed with high-rise apartments and that phase 1 has already been developed and occupied.

14. It is the 1st Interested Party's case that its land is serviced at the back by Quarry Road; that the ongoing construction by the 1st Respondent of a sewer line which is 2.8 metres above the ground is obstructing access to the Interested Party's land and that the said construction will also cause flooding to its property.

15. According to the 1st Interested Party, it owns a sewer line which runs below the ground and that its manholes which were designed for a maximum height of 1.5 metres cannot withstand the extra pressure of a unit raising to 2.8 metres.

16. It is the 1st Interested Party's case that the approvals that were granted to the 1st Respondent did not allow them to raise the sewer line; that the construction of the sewer line by the 1st Respondent is

narrowing the existing road by 40% making it dangerous to pedestrians and that the Interested Party's right to access its property will be violated unless the Petitioner is allowed.

17. The 1st Interested Party's Director finally deponed that it was not invited for any public participation before the 1st Respondent was granted with the approvals to put the sewer line along Quarry road.

18. The 2nd Interested Party's Director filed an Affidavit in support of the Petition in which she deponed that the 2nd Interested Party owns L.R. No. 12867/509 where it has constructed high-rise residential houses; that its land is served by Quarry Road and that the ongoing construction of a sewer line by the 1st Respondent which is 2.8 metres above the ground will obstruct access to the Interested Party's property.

19. According to the Director, the impugned sewer line will affect its sewer line which is below the ground and that the same shall also cause flooding of its properties.

20. The 2nd Interested Party's Director finally deponed that the 1st Respondent did not obtain approvals to construct a sewer line with a height of 2.8 metres; that the said sewer line narrows the existing road by 40% and that there was no public participation before the approvals that were granted to the 1st Respondent were given.

The 1st Respondent's case:

21. The 1st Respondent filed an Affidavit and Grounds of Opposition.

22. In the Grounds of Opposition, the 1st Respondent averred that the Petitioner's right under Article 40 of the Constitution is not absolute; that the said right is limited to the extent that the enjoyment of the right does not prejudice the rights and fundamental freedoms of others and that the 1st Respondent has not entered, occupied or trespassed on the Petitioner's property.

23. According to the 1st Respondent, the construction of the sewer line by the 1st Respondent is being undertaken on the corridor of existing roads and road reserves within specific areas; that the approval of the said works by the 2nd, 3rd and 4th Respondents and NEMA confirms that the sewer works have been undertaken in accordance with the Constitution and that the said sewer line will not restrict access to and use of the property by the Petitioner or cause any major challenge to the drainage of the road.

24. According to the 1st Respondent, the sewer embankment works along Quarry Road are configured with and constructed to rise to the level of the plans to raise Quarry Road to the height of Nairobi-Mombasa Highway as the road feeds into the highway.

25. In the said Grounds of Opposition, the 1st Respondent averred that it has complied with the Kenya Roads Act, the Water Act, the Urban Areas and Cities Act and the Constitution of Kenya; that the Respondents have complied with the National Values and Principles including the principle of public participation and that the impugned sewer line is not for the exclusive use of the Great Wall Gardens Estate.

26. According to the 1st Respondent, the re-routing of the sewer line has been compromised by existing public infrastructure, private developments and challenges of constructing a sewer line through a riparian area and that the sewer line as designed and constructed by the 1st Defendant was found to be the correct decision by all the lead agencies including the 2nd, 3rd and 4th Respondents.

27. The 1st Respondent's Director deponed that there has been no existing sewer line in the area; that upon completion, the sub-trunk sewer line will be handed over to the 3rd Respondent and that the sewer line follows a viable route that takes into consideration the unique topography and geography of the area including the fact that it is a flood prone area.

28. It is the 1st Respondent's case that it applied to the 2nd Respondent to use the service lane along Quarry Road and the approval was granted; that one of the conditions given to the 1st Respondent by the 2nd Respondent was to raise Quarry Road to cater for the flood levels and to be able to feed directly to the planned elevation of Nairobi-Mombasa dual carriage way and that the 1st Respondent designed and elevated the road to the 2nd Respondents' specifications.

29. According to the 1st Respondent, it also received approvals from the 3rd Respondent, the 4th Respondent, EPZA and NEMA to put up the said sewer line.

30. It is the 1st Respondent's case that there was public participation undertaken by the lead experts prior to the preparation of the Environmental Impact Assessment Project Report.

31. The 1st Respondent finally deponed that the Petitioner's plan for the development of Crystal Rivers Project was based on the old development plans for the area including the Old Mombasa Road and Quarry Road; that there is access to Crystal Rivers Project through several points on Quarry Road and that the Minutes of the meetings that the Petitioner is relying on have been doctored and the same are not signed.

32. In his Supplementary Affidavit, the 1st Respondent's Director deponed that in its own E.I.A Report, the Petitioner was advised to engage the 4th Respondent to develop suitable access to its development because Mombasa road was to be raised to about 3 metres and that the Petitioner was to designate entry and exist points.

The 2nd Respondent's case:

33. The 2nd Respondent's representative deponed that Quarry Road is within the 2nd Respondent's jurisdiction; that the 1st Respondent sought and obtained conditional approval to erect the impugned sewer line and to rehabilitate Quarry Road and that in granting the said approval, all technical and geographic aspects were taken into account.

34. It is the 2nd Respondent's case that when the Petitioner objected to the construction of the sewer line, KURA scheduled a meeting on 15th December, 2016 involving all stakeholders; that it was agreed that the Petitioner and the 1st Respondent jointly “ *design review for the road works and provide a compromise design for implementation that is agreeable to both.* ”

35. The 2nd Respondent's representative further deponed that whilst the joint review term report was being awaited, the 1st Respondent was to halt the works and that the Petitioner's representative failed to attend the subsequent meetings.

36. According to the 2nd Respondent's representative, he later discovered that the Petitioner's land was on a swampy terrain and that the design of its project was technically incompatible with the adjoining road infrastructure; that the Petitioner's project does not have a traffic management component approved by the relevant Roads Authorities and that the challenges that the Petitioner is now facing are self-inflicted.

The 3rd Respondent's case:

37. The 3rd Respondent's Managing director deponed that having seen the drawings of the proposed sewer line by the 1st Respondent, the 3rd Respondent gave its approval with conditions; that the construction of the sewer line is in accordance with the relevant laws and that the sewer line is on the way leave and does not in any way extend into the Petitioner's property.

The 4th Respondent's case:

38. According to the Affidavit of the 4th Respondent's Manager, the 1st Respondent applied to the 4th Respondent to be granted approval to construct a sewer line along Nairobi-Mombasa Road which is under its jurisdiction.

39. The 4th Respondent's Manager deponed that the 1st Respondent's letter had engineering drawings; that the said Application was approved by the 4th Respondent and that the 1st Respondent complied with the conditions that were in the letter of approval.

40. It is the 4th Respondent's case that on 16th February, 2017, it was agreed between the Petitioner's representatives and the 1st Respondent that the parties were to form a joint team to review the design and that instead of the said team being formed, the Petitioner filed the current suit.

The Petitioner's Further Affidavits:

41. In response to the Affidavits by the Respondents, the Petitioner filed three detailed Further Affidavits sworn by Richard Gitahi, Engineer Solomon M. Kitema and Engineer Josephat Muthumbi.

42. In the first Affidavit, it was deponed that the 1st Respondent never obtained approval to raise Quarry Road; that neither KENHA nor KURA have applied and obtained a way leave and that there was no public participation before the said approvals were granted.

43. In the second Further Affidavit, Engineer Solomon M. Kitema deponed that he prepared a Traffic Impact Study for the proposed Crystal Rivers in the year 2015; that the proposal in his report were meant to improve the flow of traffic on both Quarry Road and Old Mombasa Road and that his proposals were sent to KENHA for approval.

44. It was the deposition of the deponent that the problem of rising the level of the road is that it severely limits access to the Petitioner's property.

45. In the final Further Affidavit, Engineer Muthumbi deponed that he is the one who chaired the meeting of 15th December, 2016 in which it was agreed that the 1st Respondent stops the ongoing works; that the 1st Respondent was to lower the road level to a maximum of 1.24M above the existing road and that the road was never lowered.

Submissions

46. The Petitioner's and the Respondents' advocates appeared before me and made oral submissions. Those submissions reiterated the contents of their respective clients' Affidavits.

47. The Petitioner's advocate submitted that the right to own property comes with a right to use and access the property; that the approvals that were granted to the 1st Respondent to develop the sewer line were done without public participation and that the people who were to be affected by the said construction were not consulted.

48. Counsel submitted that the 2nd and 4th Respondents violated the provisions of Section 22 and 47 of the Kenya Roads Act and that the lack of public participation is demonstrated by the fact that the 1st Respondent was given approval on the same day it made the application for the construction of the sewer line.

49. The Petitioner's counsel submitted that the decisions of the 2nd, 3rd and 4th Respondents are administrative in nature; that the Respondents were enjoined to give notice to people who were to be affected by their decisions and that this never happened in the instant case.

50. Counsel relied on several authorities which I have considered.

51. The Interested Parties' advocate submitted that his clients are key stakeholders in matters pertaining to Quarry Road; that her clients have developed their properties; that they have their sewer lines underground and that they were not involved when the 1st Respondent was given approvals to put the sewer line along Quarry Road.

52. Counsel submitted that the 1st Respondent only received a licence from NEMA after commencing the project and that the 1st Respondent was not given approvals to raise the Road.

53. The 1st Respondent counsel on the other hand submitted that new issues that were not in the Petition were introduced as the matter proceeded; that the only allegation that was raised in the Petition was whether there was any public participation, and if so, its adequacy and sufficiency and that parties are obligated to confine themselves to their pleadings.

54. The 1st Respondent counsel submitted that there are no averments in the Petition on the issue of public participation; that every right in the Constitution is not absolute and that the averments in the Petition are general in nature.

55. Counsel submitted that the Petitioner is praying for total absolute access to Quarry Road and Old Mombasa Road, which cannot happen; that looking at the annexures, it is not clear which body or person is prosecuting this Petition and that the Petition should be dismissed.

56. The 1st Respondent's advocate submitted that the Petitioner and the Interested Parties cannot appropriate service lanes on road reserves; that the sewer line is not passing on the Petitioner's land but on the road reserve and that the said sewer line is not permanent in nature.

57. Counsel submitted that because Mombasa Road is raised, and considering that the area is prone to floods, the sewer line had to be done above the ground and that this fact was brought to the attention of the Petitioner by its own consultant in the E.I.A Report.

58. The 1st Respondent's counsel finally submitted that the decision of the 2nd, 3rd and 4th Respondents was based on technical evaluation; that the said Respondents could not have approved work that would block the Petitioner's access to its land and that we should have confidence in our institutions.

59. The 2nd Respondent's advocate submitted that Quarry Road is a public road; that the Petitioner has not sought any permission from the 2nd Respondent to access the Road and that the Petitioner wants other people to fit in their design.

60. The 3rd Respondent's counsel agreed with the submissions of the 1st and 2nd Respondents' counsels.

61. The 3rd Respondent's advocate submitted that the Petitioner has other access points to its property.

62. The 4th Respondent advocate submitted that his client approved the 1st Respondent's Application to construct a sewer line along the Old Mombasa Road; that the conditions in the letter of approval were met by the 1st Respondent and that the conditional approval was based on the planned upgrade of Mombasa Highway.

Analysis and findings:

63. Having considered the pleadings on record, the Affidavits, the annexures, the submissions and the authorities, the following issues have emerged for determination.

a. Whether the Petitioner has the locus standi to commence these proceedings.

b. Whether there is breach of Articles 10, 40, 42 and 47 of the Constitution and

c. Who should meet the costs of the Petition?

64. In the Petition, the Petitioner has described itself as an incorporate trust under the Trustees (*perpetual succession*) Act, having been so incorporated on the 23rd December, 2016.

65. It is the Petitioner's claim that it has filed the Petition on its behalf and in the public interest as provided for under Articles 22(1) and 258(1) and (2) of the Constitution.

66. According to the Petition, the Petitioner, through its trustees, is the registered owner of the land known as L.R. No. 337/5183 (*Original No. 337/974*) situated in Mavoko Municipality, Machakos County.

67. It is not in dispute that on the said land, there is an ongoing mixed use development christened "Crystal Rivers" which comprises of both residential units and a Mall. The said project is bordered on the Western side by Quarry Road and on the Southern side by an access road adjacent to the Old Mombasa Road.

68. The Petitioner has exhibited on the Petition a certificate of incorporation for Safaricom Staff Pension Scheme Registered Trustees.

69. The said certificate shows that the Petitioner was registered as a body corporate under the Trustees (*perpetual Succession*) Act on 23rd December, 2016. However it was not until 11th January, 2017 that the Registrar of Documents registered the said Certificate of incorporation as a document.

70. Before the incorporation of the Petitioner in the year 2016, the evidence before the court shows that L.R. No. 337/974 was registered in favour of Trustees of Safaricom Staff Pension Scheme on 24th July, 2013.

71. The Petitioner's advocate informed the court that although the Petitioner was incorporated in the year 2016, it is one and the same entity as the proprietor of L.R. No. 337/974.

72. In the absence of evidence to show that the proprietor of L.R. No. 337/974 is different from the Petitioner herein, I am convinced that the Petitioner is the legal owner of L.R. No. 337/974. Consequently, the Petitioner has the *locus standi* to file these proceedings in so far as its rights in respect to L.R. No. 337/974 are concerned.

73. I say so because it is the Petitioner who is developing L.R. No. 337/974, and is aggrieved by the actions of the 1st Respondent to develop a sewer line covering approximately 13 kilometers along Quarry Road and the Old Mombasa Road.

74. Indeed, in a matter where the issue of public interest is raised, it is enough for the Petitioner to simply demonstrate sufficient interest. The Petitioner has demonstrated that it has an interest on how the sewer line being put up by the 1st Respondent along the two roads should be constructed.

75. The Petitioner has also raised environmental issues viz-a-viz the construction of the sewer line by the 1st Respondent along Quarry Road and Old Mombasa Road.

76. In the Petition, the Petitioner has alleged that the Respondents have infringed the Petitioner's constitutional right to a clean and healthy environment by granting the approvals to the 1st Respondent to proceed with the impugned sewer works without due regard to the natural consequences it would have on the environment.

77. Article 70(1) of the Constitution provides that if a person alleges that a right to a clean and healthy environment has being, is being or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress.

78. Article 70(3) of the Constitution on the other hand provides that for the purpose of the Article, an Applicant does not have to demonstrate that any person has incurred loss or suffered injury.

79. In the circumstances, whether or not the Petitioner has suffered any loss or injury or not due to the actions of the Respondents, it has the standing to challenge those actions.

80. It is not in dispute that having acquired L.R. No. 337/974, the Petitioner is developing a mixed use development on the said land.

81. According to the Environmental Impact Assessment Study Report which was prepared in the year 2015, the proposed development will consist a retail centre (Mall), 113 units of 4 bedroom town houses, community centre, kindergarten, recreation facility, waste water treatment plant amongst other facilities.

82. The Deed Plan annexed on the Petitioner's title shows that L.R. No. 337/974 can be accessed by either using Quarry Road which is on the Western side or Mombasa Road which is on the Southern side.

83. The 1st Interested Party on the other hand owns L.R. No.337/861 on which it has constructed high-rise residential houses.

84. According to the Affidavit of the 1st Interested Party, the 1st Interested Party accesses its land through Quarry Road.

85. The 2nd Interested Party owns L.R. No. 12867/508 on which it has also build high-rise residential houses. The 2nd Interested Party accesses its property through Quarry.

86. The 1st Respondent is developing a Multi-dwelling residential project known as the Great Wall Gardens Estate comprising of 2000 units of apartments.

87. The 1st Respondent has proposed to build a sub-trunk sewer line (*the impugned sewer line*) which is to run from its development to the Main Export Processing Zone Authority (EPZA) Trunk sewer line.

88. The 1st Respondent has not denied that the embankment of the impugned sewer line along Quarry is supposed to be over one (1) metre above the existing road while along the Old Mombasa Road, the sewer line cuts across the main access to the Petitioners project at a height of about 1 metre above the access road level.

89. The Petitioner and the Interested Parties' complaint is that the proposed works if undertaken as designed would completely block their access; that the said works would cause a major challenge to the drainage of the road and that it would lead to flooding of the area which is prone to floods.

90. Although the 1st Respondent's design proposes U-turns to access the Petitioner's land, the Petitioner states that those accesses negates the smooth flow of traffic into its property.

91. The evidence before this court shows that by way of a letter dated 7th October, 2016, the 3rd Respondent granted to the 1st Respondent permission to construct a sewer line as proposed in its letter of "7th October, 2016."

92. In the said letter, the 3rd Respondent informed the 1st Respondent that it may proceed to commence the construction of the sewer line after obtaining approvals from the 2nd and 4th Respondents.

93. In response to the 1st Respondent's letter of 11th October, 2016, the Export Processing Zone Authority (EPZA) allowed the 1st Respondent to connect its proposed sewer line to the "EPZA Trunk Sewer line" upon payment of Kshs. 15,182,100 being a non-refundable sewer line connection fees. The approval by

the EPZA to the 1st Respondent was made on 14th October, 2016.

94. In terms of maintenance, Quarry Road is within the jurisdiction of Kenya Urban Roads Authority (KURA), the 2nd Respondent.

95. The evidence before this court shows that on 10th October, 2016 the 1st Respondent sought for approval from KURA, the 2nd Respondent, to lay a sewer line for the proposed Great Wall Project along Quarry Road.

96. The application by the 1st Respondent was approved by the 2nd Respondent on 12th October, 2016.

97. The 4th Respondent, (KURA) which is in charge of national roads and road reserves, gave the 1st Respondent approval to build its sewer line along the Nairobi-Mombasa Road on 30th November, 2016, after receiving the request from the 1st Respondent vide its letter dated 24th October, 2016.

98. In response to the 1st Respondent's letter dated 24th October, 2016, the National Environment Management Authority (NEMA) gave to the 1st Respondent approval to place a sewer line along Nairobi-Mombasa Road vide its letter dated 30th November, 2016. However, it was not until 13th December, 2016 that NEMA granted to the 1st Respondent a licence to construct a 13 kilometer long sewer line from Great Wall Garden Estate joining the EPZ main sewer line.

99. The 1st Respondent has exhibited on its Replying Affidavit all those approvals together with a detailed report of the design of the sub-trunk sewer.

100. The 1st Respondent also annexed on its Affidavit the Environmental Impact Assessment Project Report for the proposed sewer line development. The said Report was received by NEMA on 14th October, 2016 and is dated 13th October, 2016.

101. In the report, it was noted that the project is anticipated to have less adverse impacts both to human population and the environment.

102. Although the E.I.A Project Report addressed the issue of the potential negative impacts of the project, it did not at all address the issue of accessibility of the Petitioner and the Interested Parties to their parcels of land.

103. Indeed, the Report did not mention the impact of raising the sewer line by one (1) metre above the ground will have considering that the Interested Parties' sewer lines on the two roads were underground and the fact that ordinarily, sewer lines are usually underground.

104. The E.I.A Report states that the local people were informed about the project and that interviews were done. According to the E.I.A Report, *"the stakeholders were taken through the proposed project including its objectives, technologies of implementation and possible impacts associated with implementation of the project."*

105. The proponent of the E.I.A Report annexed the questionnaire that he prepared and administered to *"various stakeholders"* that he identified.

106. The annexed questionnaire shows that five people were interviewed. They were: Isaac Mutuku of Athi River Fourth Nurseries, Catherine Koki of Marino Church, Ruth Mwikali of Athi River Youth, Joseph Mwendwa of Kenani and Evelyne Mutha.

107. All the five people who were interviewed had no objection to the project and they all filled the questionnaire on 27th September, 2016.

108. The only question that was captured in the questionnaire was the likely “*Social, Environmental and health concerns and the proposed mitigation.*”

109. There is no evidence before this court to show that the five people who were interviewed before the E.I.A Report was prepared were aware that indeed the sewer line was to be raised one (1) metre above the ground or that indeed those people owned land and along houses Quarry Road and the Old Mombasa Road.

110. Considering that the 1st and 2nd Interested Parties already owned apartments along Quarry Road and the Petitioner was already putting up its mixed use development on its land, it is strange that the lead expert who prepared the E.I.A Report did not deem it fit to interview the three parties.

111. I say so because the sewer line was going to be raised one (1) metre above the ground, and there was likelihood that its construction was going to affect the access of the adjoining parcels of land.

112. Having acquired the properties adjoining the two roads on the basis that those properties can be accessed either through Quarry Road or the Old Mombasa Road, the Petitioner and the Interested Parties had the legitimate expectation that the said roads will remain accessible, or will at least be consulted in case of any changes to the said roads.

113. It was therefore imperative that before the final E.I.A Report could be completed, the Petitioner and the Interested Parties be consulted, or at least, the said project be advertised in the local newspapers calling for any objections. That did not happen.

114. The 2nd and 4th Respondents have the mandate under Section 49 of the Kenya Roads Act to grant permission to any person or body to erect, construct or lay or establish any structure or other thing on or over or below the surface of a road reserve.

115. The 2nd Respondent gave its permission to the 1st Respondent for the construction of the sewer line along Quarry Road on 12th October, 2016, only two days after receiving the 1st Respondent’s Application.

116. There is no evidence to show that the 2nd Respondent critically looked at the design of the proposed sewer line that was to be built on Quarry Road by the 1st Respondent viz-a-viz the Petitioner’s claim.

117. Although the 1st Respondent has deponed that the complaints by the Petitioner on the issue of accessibility to its land will be mitigated by raising the said Quarry Road, there is no evidence before me to show that that issue was considered by the 2nd Respondent before it gave its approval on 12th October, 2016.

118. Indeed, there is no evidence that was placed, before the court to support the 1st Respondent’s deposition that the 2nd Respondent gave it approval to raise Quarry Road to cater for the flood levels and to be able to feed directly to the elevated Mombasa Road.

119. Neither the 3rd Respondent nor the 4th Respondent considered the negative effects that the sewer line will have on the neighbouring plots before they gave their approval. Indeed, the 2nd respondent gave the 1st Respondent the approval to construct the 13 kilometer sewer line on the same day the said approval was sought.

120. The analysis of the evidence before the court shows that before the 2nd, 3rd and 4th Respondents and NEMA gave to the 1st Respondent permission to construct a sewer line along Quarry Road and Old Mombasa, there was no public participation at all.

121. This position was confirmed by the Affidavits of the representatives of the 2nd and the 4th Respondents. The 2nd Respondent's Manager deponed as follows:

“5. That in the course of EPL’s construction of the sewer line and road, the Safaricom Staff Pension Scheme Registered Trustees (SSPSRT), the Petitioner herein, approached KURA and raised objection against the same, in response wherefore KURA scheduled a meeting on 15th December, 2016 bringing together the technical personnel of EPL and SSPSRT alongside other stakeholders who had property alongside Quarry Road.”

122. The 2nd Respondent therefore confirmed in its Affidavit that there was no public participation at all before it gave its approval for the construction of a sewer line along Quarry Road.

123. On the part of the 4th Respondent, it was deponed as follows:

“11. That on 16th February, 2017 to amicably resolve the issues herein the Authority invited representatives from the Petitioner and the 1st Respondent to discuss their concerns and seek a way forward.

12. That during the meeting it was agreed that the Petitioner, the 1st Respondent and Authority will form a joint team to review the design and report back to the authority with their findings.”

124. The 2nd and 3rd Respondents have admitted in their respective Affidavits that they granted to the 1st Respondent approvals to put up a sewer line which was one metre above the ground without consulting the Petitioner, the Interested Parties and other stakeholders.

125. In my view, the Petitioners and the Interested Parties should have been consulted or informed about the said sewer line before the approvals to construct the sewer line were given.

126. I say so because the right to own property pursuant to Article 40(1) of the Constitution is not limited only to the use and occupation of the land, but also to access it.

127. Pray, what use would a property be to a person if he cannot access it freely, or if the acts of another person will lead to the property being flooded with water when it rains?

128. The 2nd and 4th Respondents knew that their actions will affect the rights of the Petitioner and the Interested Party to access their property. Indeed, by the time the 4th Respondent was giving its approval to the 1st Respondent to put up the sewer line along Mombasa Road, it had received the Petitioner's Application to approve *“a Traffic Impact Study for the proposed Crystal Rivers Project”* way back in the year 2015, which it has never approved to date. However, the 4th Respondent went ahead and approved the 1st Respondent's project without regard to the Petitioner's application which it had received earlier.

129. It is now a constitutional requirement that citizens should participate in the conduct of public affairs, and more so where those public affairs affect their rights and fundamental freedoms.

130. Under Article 47 of the Constitution, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

131. Section 4(3) of the Fair Administrative Action Act, 2015 provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard.

132. The importance of the right to an administrative action that is lawful and fair was captured in the case of President of the ***Republic of South Africa and others vs. South African Rugby Football Union***

and others (CCT 16/98) 2000(1) SA 1 as follows:

“The principal function of Section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

133. In the circumstances, and for the reasons I have given above, I find that the 2nd, 3rd and 4th Respondents unprocedurally approved the construction of the sewer line along Quarry Road and Old Mombasa Road to the detriment of the Petitioner and the Interested Parties and without hearing them.

134. Consequently, this court allows the Petitioner’s Petition dated 17th February 2017 in the following terms:

a. A declaration be and is hereby issued that the approvals granted to the 1st Respondent by the 2nd, 3rd and 4th Respondents with respect to the construction of a sewer line along Quarry road and Old Mombasa Road for the Great Wall Gardens Project was illegal, unconstitutional and tantamount to an infringement of the Petitioner’s right to use of its property as enshrined in Article 40 of the Constitution and contravened the Petitioner’s right to fair administrative action that is lawful and procedurally fair as enshrined in Article 47(1) of the Constitution of Kenya.

b. An order by way of Judicial Review to call before the court and quash the decisions issued by the 2nd to 3rd Respondents on dates unknown to the Petitioner granting approval to the 1st Respondent to proceed with the construction of a sewer line along Quarry Road and Old Mombasa Road for its Great Wall Garden Project be and are hereby issued.

c. A permanent injunction is hereby issued restraining the 1st Respondent from proceeding with the construction of the sewer line along Quarry Road and Old Mombasa Road on the basis and/or on the authority of the approvals granted by the 2nd to 4th Respondents.

d. An order by way of Judicial Review being an order for mandamus directed at the 2nd, 3rd and 4th Respondents be and is hereby issued directing them to reconsider the submitted designs for construction of a sewer line by the 1st Respondent along Quarry Road and Old Mombasa for its Great Wall Gardens Project and make a decision thereon in line with the applicable law and after full public participation by the Petitioner and all other affected stakeholders as provided for in the law.

e. The 1st Respondent to pay to the Petitioner the costs of the Petition.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE