



**Mwangi & 2 others (Suing on Behalf of Kisiwa West Estate Residents Welfare Group)
v Kiambu County Executive Committee Member for Land, Physical Planning,
Housing and Urbanization & 2 others; Kago (Interested Party) (Environment and
Land Appeal E076 of 2023) [2024] KEELC 5798 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5798 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E076 OF 2023**

**BM EBOSO, J
JULY 24, 2024**

BETWEEN

**DAVID MAINA MWANGI 1ST APPELLANT
BERNADETTE WAMBUI KARARI 2ND APPELLANT
CELESTINE WANJIRU NGURE 3RD APPELLANT
SUING ON BEHALF OF KISIWA WEST ESTATE RESIDENTS WELFARE
GROUP**

AND

**KIAMBU COUNTY EXECUTIVE COMMITTEE MEMBER FOR LAND,
PHYSICAL PLANNING, HOUSING AND URBANIZATION 1ST RESPONDENT
MARKERRYL COMPANY LIMITED 2ND RESPONDENT
LEERAND SCHOOL THIKA LIMITED 3RD RESPONDENT**

AND

FRANCIS GITHUTHWA KAGO INTERESTED PARTY

*((Being an Appeal against the Decision of the Kiambu County Physical and Land Use
Planning Liaison Committee, rendered on 8/12/2023 in Appeal No. CGK/KLC/022 of 2023))*



JUDGMENT

Introduction

1. This appeal challenges the decision rendered by the Kiambu County Physical and Land Use Planning Liaison Committee (referred to in this Judgment as “the Liaison Committee” or simply as “the Committee”) on 8/12/2023 in Appeal Number CGK/KLC/022 of 2023. The appeal to this court was brought under Section 61 (4) of the *Physical and Land Use Planning Act*, 2019 [referred to in this Judgment as “the PLUPA”]. The three appellants in the appeal were the appellants in the case before the Liaison Committee. The three respondents were the respondents in the said case. The case in the Liaison Committee challenged the decision of the Kiambu County Executive Committee Member for Land, Physical Planning, Housing and Urbanization [referred to in this Judgment as “the CECM”] granting the 2nd respondent approval to change the user of LR No 8468/62 from residential single dwelling to educational [kindergarten & play school]. The case also challenged the subsequent grant of a construction permit to the 2nd respondent to undertake construction works on the said parcel of land.
2. The two key issues that fall for determination in the appeal are: (i) Whether the approval and the permit were granted in violation of the provisions of Section 58(7) of the PLUPA as read together with rule 16 of the Physical and Land Use Planning [General Development Permission and Control] Regulations 2021; and (ii) Whether the approval and the permit were granted in violation of the provisions of Article 10(2) of *the Constitution* as read together with Section 115 of the County Government Act. Before I dispose the two issues, I will briefly outline: (i) the background to the appeal; (ii) the grounds of appeal; and (iii) the parties’ respective submissions in the appeal. I will also briefly discuss some of the peripheral issues that the parties submitted on.

Background

3. The appellants filed an appeal [a case] at the Liaison Committee through a Statement of Appeal dated 8/11/2023. They sought revocation of the approval for change of user of LR No 8468/62 granted to the 2nd respondent by the CECM on 8/5/2023 and a revocation of the construction permit granted to the 2nd respondent by the CECM dated 21/9/2023. Their case was that the CECM erred in granting approval for change of user without the 2nd and 3rd respondents submitting their application for change of user to effective public participation. They contended that they were not accorded reasonable opportunity to be heard on the matter which affected them.
4. The Liaison Committee heard the appeal and made findings to the effect that: (i) there was adequate public participation in the grant of the approval and the permit; and (ii) the approval and the permit were granted in accordance with the law. Consequently, the Liaison Committee dismissed the case with an order that parties were to bear their respective costs of the case.

Appeal to the ELC

5. Aggrieved by the decision of the Liaison Committee, the appellants brought this appeal under Section 61(4) of the PLUPA. They advanced the following three (3) verbatim grounds:
 1. The Committee erred in law by making a finding that the 2nd respondent, the 3rd respondent and the interested party complied with Section 58 (7) of the *Physical and Land Use Planning Act* and Rule 16 of the Physical and Land Use Planning (General Development and Control) Regulations 2021.



2. That the Committee erred in law by failing to apply itself rightly in the face of the mandatory provisions of Article 10 (2) of *the Constitution* of Kenya, Section 115 of the County Government Act and Rule 16 of the Physical and Land Use Planning (General Development and Control) Regulations 2021.
3. That the Committee erred in law by delivering a determination that violated *the Constitution* and the proper administration of justice.
6. The appellants sought the following reliefs in their memorandum of appeal: (i) that the appeal be allowed and the determination of the Liaison Committee delivered on 8/12/2023 be quashed and set aside; and (ii) that the costs of the appeal be awarded to them.

Appellants' Submissions

7. The appeal was canvassed through written submissions and further submissions dated 8/2/2024 and 5/3/2024 respectively, filed by M/s WNK Advocates LLP. On whether the Committee erred in law by making a finding that the 2nd and 3rd respondents and the interested party had complied with Section 58 (7) of the *Physical and Land Use Planning Act*, counsel submitted that Section 58 (7) of the Act made it mandatory for the public to be made aware of any intended development on land. Counsel further submitted that the notice to the public should have been in the form prescribed by the Cabinet Secretary under rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021. Counsel contended that the respondents did not dispute the fact that the onsite notice did not have a date and the name of the registered planner and the fact that the notice was obstructed by a shrub. Counsel further contended that the certified proceedings of the Liaison Committee which bore the signature of all the members did not show that the 2nd respondent, the 3rd respondent and the interested party complied with rule 16 of the Physical and Land Use Planning [General Development Permission and Control] Regulations, 2021. Counsel added that the Liaison Committee's failure to vote as required by Section 79 (3) of the *Physical and Land Use Planning Act* combined with the acts of the Chairperson altering and misrepresenting the findings of the Liaison Committee made the entire determination a nullity in law.
8. On whether the Committee erred in law by failing to apply itself correctly in the face of the mandatory provisions of Article 10 (2) of *the Constitution* of Kenya 2010, Section 115 of the *County Governments Act* and rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021, counsel submitted that the participation of people contemplated under Article 10 (2) of *the Constitution* of Kenya had been legislated under Section 115 of the *County Governments Act* and rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021. Counsel further submitted that the requirement for public participation in development planning and control is outlined under Section 58 of the Physical Planning Act and Regulation 16 of the Physical Planning Use Planning (General Development Permission and Control) Regulations 2021 which requires any person pursuing a change of user to publish an onsite notice as per FORM PLUPA/DC/4. Counsel added that the failure to meet the mandatory requirements of the law denied the appellants a reasonable opportunity to know about the proposed change of user and the opportunity to give their opinion on the matter. Counsel submitted that the certified proceedings of the Liaison Committee showed that it found that the 2nd respondent, the 3rd respondent and the interested party exhausted all available means and methods of public participation provided for in the



Physical and Land Use Planning Act, 2019. Counsel faulted the Chairperson of the Committee for changing the finding of the Committee in the determination to read as follows:

“ That the 2nd respondent, the 3rd respondent and the interested party exhausted all available means and methods of public participation provided in the Act and Regulations.”

9. Counsel contended that from the evidence on record, it was clear that the 2nd respondent, the 3rd respondent and the interested party did not exhaust all the requisite facets of public participation when they failed to publish an onsite notice that complied with Regulation 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021. Counsel added that the failure of the Liaison Committee to vote on the issues for determination as required by Section 79 (3) of the *Physical and Land Use Planning Act* rendered the resultant findings and determination a nullity in law.
10. On whether the Committee erred in law by delivering a determination that violated *the Constitution* and the proper administration of justice, counsel submitted that the appellants presented compelling arguments in the case before the Liaison Committee and discharged their burden of proof by showing that the change of user approval and the construction permit were issued irregularly and in contravention of the law. Counsel contended that Hannah Maranga who was the 1st respondent’s approving officer deposed that the developer’s application was reused/rejected and the developer was issued with a refusal of approval on 27/3/2023. Counsel added that the developer appealed against the said decision and the approval was issued on 8/5/2023. Counsel faulted the developer for appealing the decision before the CECM instead of lodging an appeal to the Liaison Committee.
11. Counsel submitted that the Liaison Committee failed to consider the pleadings filed by the approving officer despite being fully aware that it had the statutory mandate to hear appeals made from the decisions of the 1st respondent. Counsel further submitted that, from the onset, the Liaison Committee ignored the evidence before it and proceeded to render a determination that was a nullity in law. Counsel contended that on 6th/ 7th and 8th December 2023, during the Liaison Committee virtual deliberations when members were giving their observations on the appeal, Engineer Geoffrey Mbugua who had been absent during the hearing of the appeal on 24/11/2023, was of the view that the appeal ought to be dismissed. Counsel added that Engineer Geoffrey Mbugua was automatically disqualified from participating in the deliberations by virtue of his absence during the hearing of the appeal.
12. Counsel submitted that despite the Liaison Committee outlining two issues for determination, the Committee failed to vote on the two issues for determination as required under Section 79 (3) of the *Physical and Land Use Planning Act*. Counsel added that the minutes of the meeting held by the members showed that 4 members were of the view that the appeal lacked merit and ought to be dismissed with costs while two members were in support of the appeal. Counsel added that Section 79 (3) of the *Physical and Land Use Planning Act* stated that every decision of a County Physical and Land Use Planning Liaison Committee ought to be by a majority vote of the members present and voting and where there is a tie, the Chairperson of the Committee would cast the deciding vote. Counsel faulted the Chairperson of the Committee for omitting some of the findings of the Committee when preparing the determination. Counsel submitted that the Chairperson of the Committee abused the public faith and confidence entrusted in his position through his aforementioned actions. Counsel urged the Court to allow the appeal on the ground that the Liaison Committee erred in law by delivering a determination which violated *the Constitution* and the proper administration of Justice.



13. On whether this Court has supervisory jurisdiction over the decisions of the respondent and the Liaison Committee, counsel relied on Section 61 (4) of the *Physical and Land Use Planning Act* which states as follows:
- “An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”
14. Counsel contended that it was clear from the above provision that the intention of Parliament was to grant the Environment and Land Court supervisory jurisdiction over the decisions of the 1st respondent and the Liaison Committee.
15. On whether the 2nd respondent, the 3rd respondent and the interested party complied with Section 58 (7) of the *Physical and Land Use Planning Act* and Rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021, counsel submitted that the 2nd and 3rd respondents argued in paragraph 40 of their submissions that the lack of time-frame in the onsite notice worked in favour of the appellants. Counsel contended that through their submissions, the trio inadvertently admitted grounds 1 and 2 of the memorandum of appeal dated 14/12/2023.
16. On whether the conduct of the Liaison Committee was contrary to the principle of proper administration of justice, counsel submitted that the proper administration of justice required the Liaison Committee to determine the matter on merits and to exercise fidelity to the law when carrying out its functions. Counsel further submitted that in an effort to arrive at a pre-determined outcome, the Liaison Committee abdicated its statutory obligations and rendered a determination that was a nullity in law for non-compliance with Section 79 (3) of the *Physical and Land Use Planning Act*.

1st Respondent’s Submissions

17. The 1st respondent filed written submissions dated 27/2/2024 through David Mararo - a State Counsel in the Office of the Kiambu County Attorney. Counsel for the 1st respondent submitted on, among others, the following issues:
- (i) Whether this Court wields supervisory jurisdiction to review the decisions of the 1st respondent and the Liaison Committee in the instant appeal;
 - (ii) Whether the Liaison Committee erred in law and in fact in arriving at the finding that the respondents discharged their constitutional, statutory and regulatory mandate in ensuring public participation prior to granting of approval of user; and
 - (iii) Whether the appellants are entitled to the orders sought.
18. On whether this Court wields supervisory jurisdiction to review the decisions of the 1st respondent and the Liaison Committee in the instant appeal, counsel for the 1st respondent submitted that this Court lacked jurisdiction to entertain the instant appeal because the appeal invited the Court to make a determination as to the exercise of the 1st respondent’s discretion in the discharge of its statutory mandate. Counsel relied on the decisions in the cases of *Patrick Musimba v National Land Commission & 4 Others* [2016] eKLR and *Sabina Moraa Swanya v Everly Kemunto Ontiri & Another* [2021] eKLR.
19. Counsel invited the Court to peruse the memorandum of appeal, the grounds and prayers contained therein. Counsel submitted that the issues raised therein concerned exclusively the lawfulness of the process by which the development approval decision was arrived at as opposed to the merits of the



decision. Counsel further submitted that the appeal as couched was a judicial review application disguised as an appeal hence the Court ought to decide whether it had the requisite jurisdiction.

20. On whether the Liaison Committee erred in law and in fact in arriving at the finding that the respondents discharged their constitutional, statutory and regulatory mandate of ensuring public participation before granting the approval for change of user, counsel submitted that Article 10 (2) (a) and (b) of *the Constitution* of Kenya, 2010 identified participation of the people and inclusivity as foundational principles of governance. Counsel further submitted that it was against this backdrop that the framework on public participation is clearly set out in Section 58 (7) and (8) of the *Physical and Land Use Planning Act*, 2019 and paragraphs 15 (2) (g), (h) and 16 of the Physical and Land Use Planning (Developing Permission & Control (General) Regulations 2021. Counsel relied on the decision in the case of *British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) Sup Ct Pet. 5 of 2017 [2019] eKLR* where the Supreme Court laid down general principles against which allegations of lack of public principles may be assessed.
21. Counsel submitted that it was well-established law that the degree of public participation that was reasonable in a given case depended on several factors, including the importance of the issues at hand and the intensity of its impact on the public. Counsel added that the right of public participation did not guarantee that each individual's views would be taken as controlling nor was it meant to usurp the role of the officeholders.
22. On whether the appellants are entitled to the orders sought, counsel submitted that the orders sought invited the honourable court to quash and/or set aside the decisions of the Liaison Committee and the consequential orders. Counsel argued that the nature of the reliefs sought by the appellants was closer to the realm of judicial review as they invited the Court to interfere with the decision of public authorities and to consider the fairness, legality or reasonableness of the decision-making process as opposed to the merits thereof. Counsel contended that there was no evidence that the 1st respondent exercised its discretion in discharge of its statutory mandate unreasonably and/or ultra vires. Counsel further contended that there was no evidence or reason provided by the appellants that would justify overturning the decision of the Liaison Committee and, by extension, that of the 1st respondent. Lastly, counsel argued that the appellants were not entitled to the remedies sought and therefore the instant appeal ought to be dismissed with costs.

2nd and 3rd Respondents' Submissions

23. The 2nd and 3rd respondents opposed the appeal through written submissions dated 27/2/2024, filed by M/s Mukami Mwangi & Company Advocates. Counsel for the 2nd and 3rd respondents submitted on, among others, the following issues: (i) Whether the Committee erred in finding that the 2nd respondent, the 3rd respondent and the interested party had complied with Section 58 (7) of the *Physical and Land Use Planning Act* and Rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021; (ii) Whether the Committee failed to apply itself rightly to the provisions of Article 10 (2) of *the Constitution* of Kenya, Section 115 of the County Government Act and Rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021; and (iii) Whether the Committee's ruling violated *the Constitution* and the proper administration of justice.
24. On whether the Committee erred in finding that the 2nd respondent, the 3rd respondent and the interested party had complied with Section 58 (7) of the *Physical and Land Use Planning Act* and Rule 16 of the Physical and Land Use Planning [General Development Permission and Control]



- Regulations 2021, counsel submitted that once comments and objections from the public were received by the County Executive Committee Member, she was obliged to consider them alongside the requirements outlined in Section 61(1) of the Act. Counsel added that the County Executive Committee Member was not bound by the said comments and objections but she was required to consider them in good faith taking into account any evidence and reports adduced in support vis-a-vis the requirements under Section 61 (1) of the [Physical and Land Use Planning Act](#).
25. Counsel added that the 2nd respondent, the 3rd respondent and the interested party produced the following documents to demonstrate that they had complied with the aforementioned legal provisions: (i) copy of newspaper advertisement dated 2/3/2022; (ii) copy of onsite notice of the proposed Change of User; (iii) copies of Architectural and Structural Plans; and (iv) copy of an Environmental Impact Assessment License dated 10/8/2023. Counsel contended that what was in contention was whether the absence of a date and the name of the registered planner on the onsite notice undermined the appellants' right to participate in the approval process; and whether the Liaison Committee was correct in finding that the 2nd and 3rd respondents had complied with Section 58 (7) & (8) of the [Physical and Land Use Planning Act](#), despite the aforementioned defects on the onsite notice.
26. Counsel submitted that the purpose of an onsite notice was to notify and invite members of the public to participate in the development application process hence if the onsite notice contained the relevant information required to notify and invite the public, it should be deemed to have been effective in facilitating adequate public participation. Counsel contended that in the present case, the onsite notice contained:
- (i) the land reference number of the suit property,
 - (ii) the person who intended to make the application for change of user;
 - (iii) the current use of the property,
 - (iv) the proposed change of user from single-dwelling to educational;
 - (v) the approving authority; and
 - (vi) an address and an invitation to the public to submit their objections or comments. Counsel further contended that the lack of a date and name of the registered planner on the onsite notice did not undermine its effectiveness. Counsel added that on the contrary, the lack of a date worked in favour of the appellants because they were not limited to a specific timeline within which to submit their objections and comments. Counsel argued that the onsite notice was effective in achieving its purpose.
27. Counsel contended that in the unlikely event that this Court finds that the onsite notice was incurably defective due to the absence of a date and name of the registered proprietor, then the Court ought to take into account the fact that the appellants applied for and were granted leave to file an appeal out of time after they got notice of the approvals on 8/10/2023.
28. On whether the Committee failed to apply itself rightly to the provisions of Article 10 (2) of [the Constitution](#) of Kenya, Section 115 of the County Government Act and Rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021, counsel submitted that to answer the above question, the court ought to examine whether the Liaison Committee analyzed and verified that the 2nd and 3rd respondents and the interested party published a newspaper advertisement and the onsite notice at least 14 days before 16/9/2022.
29. Counsel submitted that the Liaison Committee found that the 2nd and 3rd respondents had complied with the law because they published an onsite notice and a newspaper advertisement which contained



- all the relevant information required to inform and invite the public to participate in the impending Change of User. Counsel further submitted that the Liaison Committee also analyzed whether the 2nd and 3rd respondents had submitted the documents outlined in Section 58 (1-6) of the *Physical and Land Use Planning Act* and whether the Executive Committee Member had considered the factors outlined in Section 61 (1) of the Act vis-a-vis the evidence produced by all the parties and found that all the respondents had complied. Counsel argued that in the circumstances, the Liaison Committee rightly applied and interpreted Article 10(2) of *the Constitution* and Section 115 of the *County Governments Act* in finding that the 2nd and 3rd respondents and the interested party had facilitated adequate public participation.
30. On whether the Liaison Committee’s determination violated *the Constitution* and the proper administration of justice, counsel submitted that it was trite law that where a litigant claimed that there was a violation of *the Constitution*, then he/she ought to plead the specific Article which had been violated. Counsel relied on the decision of Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR to support his submission. Counsel contended that since the appellants had not pleaded the specific Article of *the Constitution* which had been violated, the ground of appeal ought to fail.
31. Counsel faulted the appellants for failing to adduce evidence in accordance with Section 109 of the *Evidence Act* to support their claims that;
- (i) there was obstruction and delay of justice because Engineer Geoffrey Mbugua participated in the deliberations of the Liaison Committee yet he was not present during the hearing;
 - (ii) that the Committee did not vote or decide by a majority;
 - (iii) that the Chairperson made alterations and additions in the Determination which were not in the findings; and
 - (iv) that the Liaison Committee ignored the evidence produced in support of the case.
32. Counsel submitted that an examination of the minutes of the Liaison Committee dated 24/11/2023, 6/12/2023, 7/12/2023 revealed that Engineer Geoffrey Mbugua was a member of the Committee and as such, he was duly authorized to attend the meetings and/or deliberations of the Committee. Counsel further submitted that four out of all the members found that the appeal lacked merit while two members thought that it had merit. Counsel argued that if Engineer Geoffrey Mbugua had not participated in the deliberations, the appellants’ case would still have been dismissed since three out of the five remaining members found that the appeal lacked merit.
33. On the claim by the appellants that the chairperson made alterations to the determination by adding the words “Rule 16”, counsel submitted that the Committee indeed found that the respondents had complied with the provisions of Section 58 (7) and 58 (8) of the Act and Regulations made pursuant to that provision which in essence means they complied with Rules 15 (2) (e) and (g) and Rule 16 regardless of whether the same was specifically mentioned in the deliberations. Counsel argued that the inclusion of the word “Rule 16” in the Determination did not alter the decision of the Committee.
34. On the claim that the Committee failed to consider the appellants’ evidence, counsel submitted that the appellants did not produce any evidence to demonstrate that the impugned approval and permit were issued irregularly, unprocedurally and in contravention of the existing county physical planning policy. Counsel contended that the Liaison Committee properly considered the evidence on record against the requirements of the law and rightly found that the appellant’s appeal lacked merit.



Analysis and Determination

35. I have read and considered the record of the Liaison Committee; the memorandum of appeal; and the parties' respective submissions in this appeal. I have also considered the relevant constitutional and statutory frameworks, alongside the jurisprudence relevant to the key issues in this appeal.
36. Based on the three grounds of appeal and the submissions tendered in this appeal, the following are the two key issues that fall for determination in the appeal:
- (i) Whether the grant of approval for change of user dated 8/5/2023 and the grant of the construction permit dated 21/9/2023 violated the provisions of Section 58(7) of the *Physical and Land Use Planning Act* 2019 as read together with rule 16 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021 and Section 115 of the County Government Act; and
 - (ii) Whether grant of the said approval and permit violated the provisions of Article 10(2) of *the Constitution* as read together with Section 115 of the *County Governments Act*. I will analyse and dispose the two issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction of this nature. As observed in the introductory part of this Judgment, I will also briefly discuss some of the peripheral issues that the parties submitted on. The court will remain alive to the law on appeals – that an appeal is disposed on the basis of the grounds of appeal.
37. Although a dispute in the Liaison Committee is described by the PLUPA as an appeal, the Liaison Committee receives primary evidence and exercises primary adjudicatory jurisdiction. In essence, the Liaison Committee serves as a trial court/primary adjudicatory body. In this regard, the Environment and Land Court is seized of this appeal as a first appellate court.
38. The principle upon which a first appellate court exercises jurisdiction is well settled. The principle was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
39. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.
40. The first key issue in this appeal is whether grant of the approval and the permit violated the provisions of Section 58(7) of the PLUPA as read together with rule 16 of the Physical and Land Use Planning [General Development Permission and Control] Regulations 2021 [hereinafter referred to as “the Regulations”]. The case of the appellants is that grant of the approval and the permit violated the above frameworks. They contend that there was no public participation in the process leading to the grant of the approval and the permit. Key among the arguments advanced by the appellants in this



regard is that under Section 61 of the PLUPA, once the 1st respondent made and communicated its decision refusing approval, she had no jurisdiction to entertain an appeal from the applicant on the same application. They also fault the 2nd respondent for non-compliance with the requirements of Section 58(7) of the PLUPA.

41. Part IV of the PLUPA contains an elaborate framework on development approvals. The framework covers:

- (i) the procedure for applying for development permission/approval;
- (ii) mandatory authorities or agencies that must be involved in the processing of the application;
- (iii) framework on decision-making and communication by the CECM;
- (iv) framework on appeals against decisions of the CECM; and
- (v) framework on appeals to the Environment and Land Court.

42. Under Section 61(3) of the PLUPA, an appeal against a decision of the CECM on an application for development permission lies to the Liaison Committee. Put differently, the CECM does not have jurisdiction under the Act to consider an appeal against her own decision. Yet this is exactly the appellate jurisdiction which the 1st respondent purported to exercise, leading to the grant of the impugned development approval and construction permit.

43. In the replying affidavit sworn on 23/11/2023, Ms Hannah Maranga who served as the CECM deposed in paragraphs 10, 11, 12 and 13 as follows:

“ 10. That in view of the foregoing, it is worth noting that an application for change of user from residential single dwelling to educational (kindergarten and play school) in respect to L.R No 8468/62 (hereinafter referred to as the Development) was done on 16th September 2022.

11. That from our office records, a refusal of approval was communicated to the Developer on 27th March, 2023 vide minute CPTC/2022/094/248, requiring the applicants to provide a survey map. [the underlining is by the court]

12. That after the Developer appealed and having met the approval conditions, an approval was issued on 8th May, 2023 for the development of a Kindergarten and playschool. [underlining is by the court]

13. That the approval conditions granted was for development of a kindergarten and playschool which allows for a maximum three floors with 30% ground coverage.”

44. Further, the minutes of the Liaison Committee capture the submissions of the 1st respondent’s counsel at page 306 of the record of appeal as follows:

“Regarding the date of application of change of user, the counsel noted that the application was done on 16th of September, 2022 and the subsequent communication of refusal of approval/development permission was done on 27th of March, 2023 vide minute number CPTC/2022/094/248 requiring the applicant to provide a survey map. Further and following the communication, the application was resubmitted as an appeal and development permission granted on 8th of May, 2023 allowing for change of user from



residential single dwelling to educational (kindergarten and play school). The counsel averred that upon granting of approval for the change of user, the 2nd, 3rd and interested party proceeded to present to the 1st respondent building plans in line with Section 58 of the *Physical and Land Use Planning Act* on the 27th June, 2023 and the same were presented to the technical committee meeting held between 11th to 14 July 2023 vide minute number CPTC/097/2023/122 and granted development permission on 11th August, 2023.” (underlining is by this court.)

45. It is clear from the above evidence and submissions that the 2nd respondent’s application was considered and refused/rejected. Instead of the 2nd respondent appealing to the Liaison Committee, it lodged an appeal to the same CECM. The CECM, clearly acting without jurisdiction and in contravention of the provisions of Section 61(3) of the PLUPA, purported to exercise appellate jurisdiction. She reviewed and set aside her earlier decision on a purported appeal lodged before her. She had no appellate power to entertain an appeal against her own decision. If not for any other reason, this appeal would succeed on this ground. That is, however, not the only breach that was committed.
46. The application for development approval/permission having been refused, the 2nd respondent had two options:
- (i) to either appeal to the Liaison Committee; or
 - (ii) to address the reasons that led to the refusal and thereafter start the process afresh by lodging a fresh application within the framework of Part IV of the PLUPA. In the event that the 2nd respondent elected to go for the second option, it was required to meet all the procedural and public participation requirements of Part IV of the PLUPA afresh. In the present appeal, there is no evidence that the 2nd respondent made a fresh application. Similarly, there is no evidence that the 2nd respondent met the procedural and public participation requirements of Part IV after 27/3/2023.
47. In contending that there was no public participation, the appellants faulted the 2nd respondent on the ground that the alleged onsite notice was not posted. The appellant further contended that the alleged notice lacked key information. I have looked at the exhibited onsite notice. First, the notice was undated yet it required the public to raise objections within 14 days. Secondly, the exhibited onsite notice did not disclose the particulars of the proponent of the proposed development. Thirdly, it did not disclose the identity of the author of the notice itself. Fourthly, it did not disclose where the objection was to be lodged/forwarded. All the above are key elements in public participation. Without them, the purported notice cannot be said to have satisfied the requirements of the Law.
48. For the above reasons, it is the finding of this court that grant of the impugned approval for change of user and grant of the impugned construction permit violated the provisions of Section 58(7) of the *Physical and Land Use Planning Act* 2019 as read together with rule 16 of the Physical and Land Use Planning [General Development Permission and Control] Regulations 2021.
49. The second issue is whether the grant of the change of user approval and the construction permit violated the provision of Article 10(2) of *the Constitution* as read together with Section 115 of the *County Governments Act*. Article 10(2) sets out national values and principles of governance. Participation of the people in the making of decisions that affect them is a cardinal principle of governance. The principle is echoed in Section 115 of the *County Governments Act* which provides as follows:
- (1) Public participation in the county planning processes shall be mandatory and be facilitated through—



- (a) mechanisms provided for in Part VIII of this Act; and
 - (b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—
 - (i) clear strategic environmental assessments;
 - (ii) clear environmental impact assessment reports;
 - (iii) expected development outcomes; and
 - (iv) development options and their cost implications.
- (2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.”
50. The framework in Article 10(2) of *the Constitution* and Section 115 of the County Government Act underscores the centrality of public participation in the processes of making decisions that affect the citizenry. Public participation in decisions relating to development approvals and construction permits cannot be gainsaid because physical developments have a direct impact on the environment.
51. The centrality of public participation in public decision making processes was emphasized by the Supreme Court of Kenya in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* supra in the following words:
- “Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of *the Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them:
- (a) applies or interprets *the Constitution*;
 - (b) enacts, applies or interprets any law; or
- SUBPARA (c)
- makes or implements public policy decisions.”
52. In the present appeal, it has been demonstrated that the CECM properly made a decision refusing the 2nd respondent’s application. She communicated her formal decision to the 2nd respondent. Subsequent to that, she received an appeal from the 2nd respondent. Without jurisdiction, she purported to exercise appellate jurisdiction. Further, without jurisdiction, she purported to grant the approval in purported exercise of appellate jurisdiction. Most importantly, no public participation was undertaken consequent to the lodging of the purported appeal.
53. It is clear from the above analysis that in granting the impugned approval and permit, the affected people, among them the appellants, were not given the opportunity to participate in the decision making process. For this reason, the court finds that the impugned development approval [approval for change of user] and the construction permit were granted in violation of Article 10(2)(a) of *the Constitution* as read together with Section 115 of the *County Governments Act*.
54. As indicated earlier, before I make my disposal orders, I will briefly comment on some of the peripheral issues which were raised in the parties’ submissions. One of them relates to the jurisdiction of this court.



- Counsel for the 1st respondent contended that this appeal is essentially a judicial review application and argued that the Environment and Land Court does not have supervisory jurisdiction over the 1st respondent.
55. First, this court is seized of this dispute as an appellate court. The appellate jurisdiction of the court is clearly set out in Section 61(4) of the [Physical and Land Use Planning Act](#) 2019 which provides as follows:
- “(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”
56. Secondly, it is now settled jurisprudence that disputes relating to allegations of violation of [the Constitution](#) or statute in relation to environment or land properly fall within the jurisdiction of the Environment and Land Court, regardless of whether they are judicial review applications, constitutional petitions or ordinary suits commenced by way of plaint. For these two reasons, the court does not find any merit in the contention that it lacks jurisdiction to deal with the appeal.
57. The second peripheral issue relates to failure of the Liaison Committee to conduct actual voting in tandem with Section 79(3) of the PLUPA. The Liaison Committee exercises quasi- judicial jurisdiction. In this regard, the Liaison Committee is expected to give reasoned decisions. Whereas the Act provides for voting, what is more important is the finding and the reason for the finding reached by each member on the merits of the case. In my view, once a member declares an individual verdict on the merits of the case and unequivocally pronounces a verdict on the merits of the appeal, the requirement for voting should be deemed to be satisfied because the unequivocal verdict constitutes the vote of the member.
58. In the present appeal, a perusal of the record of the Liaison Committee indicates that each of the participating members made observations and pronounced themselves on the merits of the case that was before them. It is clear that majority of them did not find merit in the appeal and were for rejection of the appeal. For this reason, I do not think failure to take an actual vote vitiated the quasi- judicial findings which each member had made on the merits of the appeal.
59. On the participation of Engineer Mbugua in the final deliberations of the Liaison Committee yet he did not participate at the stage of submissions and arguments, the view this court takes is that the Liaison Committee must always remain alive to the fact that it discharges a quasi-judicial function. If probable prejudice is revealed and it is demonstrated that the probable prejudice may have arisen from a last minute participation of a member who did not have the benefit of full participation in the proceedings of the Committee, the likely result is that the decision of the Committee would stand to be annulled.
60. In the dispute leading to this appeal, even if Engineer Mbugua’s “vote” were to be excluded, the tallies were not going to change the decision of the Committee.
61. On costs of this appeal, the grave errors highlighted in the appeal escaped the attention of the Liaison Committee. Had the Liaison Committee noticed that the CECM purported to exercise appellate jurisdiction and that there was no fresh application and no fresh compliance with the framework on public participation, the dispute might not have reached this court. Consequently, parties are to bear their respective costs of the appeal and the proceedings in the Liaison Committee.
62. In the end, this appeal succeeds in the following terms:



- a. The decision of the Kiambu County Physical and Land Use Planning Liaison Committee rendered on 8/12/2023 is set aside wholly.
- b. The change of user approval for LR No 8468/62 from residential single dwelling to educational (kindergarten and play school) dated 8/5/2023 issued to the 2nd respondent is hereby revoked.
- c. The construction permit issued to the 2nd respondent dated 21/9/2023 for construction of a kindergarten and play school on LR No 8468/62 is hereby revoked.
- d. Parties are to bear their respective costs of this appeal and the appeal in the Liaison Committee.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF JULY 2024

B M EBOSO

JUDGE

In the presence of:

Mr Kioko for the Appellants

Ms Muli for the 2nd and 3rd Respondent and for the Interested Party

