



**Nzomo (Suing on Behalf of Kunde Road Residents Welfare Association)
v Ontime Real Estate Limited & 2 others (Environment & Land Petition
E004 of 2023) [2024] KEELC 6011 (KLR) (19 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 6011 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E004 OF 2023

AA OMOLLO, J

AUGUST 19, 2024

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 21, 22, 23, 40,
47, 60, 61, 64, AND 184 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTIONS 40, 49, 50, 55 OF THE
PHYSICAL AND LAND USE PLANNING ACT, 2019**

AND

**IN THE MATTER OF: SECTIONS 7, 8, 9(2) AND 11 OF THE PHYSICAL AND LAND USE
(LOCAL PHYSICAL AND LAND USE DEVELOPMENT PLAN) REGULATIONS, 2021**

AND

**IN THE MATTER OF: SECTIONS 3(2A), (3), 4, 5(A), 40, 48 AND 51 OF THE
ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999**

BETWEEN

RAPHAEL NZOMO PETITIONER

**SUING ON BEHALF OF KUNDE ROAD RESIDENTS WELFARE
ASSOCIATION**

AND

ONTIME REAL ESTATE LIMITED 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 3RD
RESPONDENT**



JUDGMENT

1. This petition challenges the legality of the change of user and/or development approval and the environmental impact assessment license issued to the 1st Respondent by the 2nd and 3rd Respondents over land parcel number L.R No. 330/478 located along Kunde Road adjacent to the Petitioner's properties.
2. The Petition is dated 26th October 2023 and was filed on the 27th of October 2023. The Petitioner seeks the following prayers:
 - a. That this Honourable Court be pleased to issue a declaration that the process of issuance of the change of user for land parcel known as L.R No. 330/478 from single dwelling unit to a multi-dwelling unit (townhouses) was null and void;
 - b. That this Honourable Court be pleased to issue a declaration that the building and construction approvals issued by the 2nd Respondent for the development on L.R No. 330/478 are illegal, null and void and of no effect;
 - c. That this Honourable Court be pleased to issue a declaration that the 2nd Respondent's actions and/or omissions in the issuance of the approvals for change of user and development of L.R No. 330/478 were contrary to the law and infringed upon the rights of the Petitioner;
 - d. That this Honourable Court be pleased to revoke the development approvals and change of user issued by the 2nd Respondent over L.R No. 330/478 from single dwelling residential unit to 4 multi-dwelling (town houses);
 - e. That this Honourable Court be pleased to DECLARE that the inaction of the 1st Respondent of failing to undertake a proper environmental impact assessment study infringed upon the constitutional rights of the Petitioner;
 - f. That this Honourable Court be pleased to issue a declaration that the actions of the 3rd Respondent to issue an Environmental Impact Assessment License to the 1st Respondent without first carrying out proper or adequate public participation was unconstitutional, illegal, null and void;
 - g. That this Honourable Court be pleased to order the 1st Respondent to immediately bring down all buildings and structures erected on the parcel of land known as LR No. 330/478;
 - h. That this Honourable Court be pleased to issue a restorative order directed to the 1st Respondent to replant trees on the parcel of land known as L.R No. 330/478 to improve the tree cover in the area as a measure to preserve the environment within Thompson Estate;
 - i. That costs of this Petition be borne jointly and collectively by the Respondents;
 - j. That such other and/or further remedy as this Honourable Court may deem fit and just to grant.
3. The Petition is supported by the affidavit of Raphael Nzomo who described himself as the chairman of the Kunde Road Residents Welfare Association (the Association) dated the 26th October, 2023; a supplementary affidavit dated 19th April, 2024; and a further supplementary affidavit dated 10th July, 2024. The Petitioner explains through the affidavits that the approved user under the zoning regulations for properties on Kunde Road area have been and continues to be a low-density single-



dwelling residential user and it's the Association's mandate to ensure that the area maintains its character as a quiet, well-ordered, low-density neighborhood. That the zoning policy is intended to maintain the area as a single-dwelling residential area and any change of user to the neighborhood requires the participation of the residents.

4. On the issue of the change of user of land parcel LR No. 330/478 also known as House Number 29, the Petitioner depones that sometime in 2020 the residents observed that the said property was being cleared and there was preparation for the demolition of the house. That this was being done without any notice to the neighbours and without public participation of the residents causing the Petitioner's committee members to approach the 1st Respondent for a physical consultation which took place. The 1st Respondent confirmed the demolition and the intended construction of 6 units, to which they raised an objection. That they shared their sentiments with the 1st Respondent vide a letter dated 17th August 2020 in which they requested that the matter be discussed with the members of the association at a meeting to be attended also by the Government and Nairobi City County Departments.
5. That the Respondents never got back to the Association and went quiet for two years until sometime in 2022 when the 1st Respondent resurfaced and commenced demolition of the existing house, cutting down the trees on the property and started developing it. That no notice was given to the residents or the general public about the change of user or development approval thereof. The Petitioner contends that upon further investigation, they discovered that an environmental impact assessment report had been prepared which report they are seeking to challenge because the change of use will have adverse effects on the character, security, peace, and environmental health of the locality. The Petitioner gave the following reasons for their discontent:
 - a. That the said change of use poses grave environmental concerns;
 - b. The construction of multi-dwelling developments would completely alter the calm and peaceful residential environment considering the neighborhood is a low-density single-dwelling residential area;
 - c. The noise levels associated with such large-scale construction and subsequent multi-dwelling units continue to cause great nuisance and disturbance to the residents around the area;
 - d. The increased vehicle and foot traffic would pose a security threat to the area;
 - e. The proposed development consisting of multi-storey, overlooking single dwelling houses would be a breach of the adjacent resident's constitutional right to privacy;
 - f. The proposed construction of multi-dwelling houses would further strain water distributed in the neighborhood by Nairobi City Water and Sewerage Company;
 - g. The proposed construction of multi-dwelling houses would further burden the already overwhelmed drainage system of the low-density single dwelling residential area;
 - h. The change of user and construction of multi-dwelling houses in the area would completely and adversely change the nature and character of the neighborhood and further lead to financial losses as the property value is likely to stagnate if not decrease;
 - i. The approval for change of user and subsequent construction would set a dangerous and negative precedent and leading to the slippery slope consequence of multi dwelling unit being developed in the area akin to estates such as Kilimani and Kileleshwa which have lost their character completely and place great demand to the resources available and posing environmental dangers to the society.



6. Vide a report dated 19th April 2024 prepared by Theobald Musungu Luchidio who described himself as an EIA lead expert, it listed the numbers and categories of trees found at Thompsons Estate in Kunde road. Some of the categories were described as indigenous, non-native and native plants. At page 6 of the report, the author notes that the forest in the suit area have undergone massive reduction in size due to urban development but few relics of the vegetation type still remains in protected areas such as the Ngong and Karura forests. He stated further that the Plot's vegetation composition is man-made in nature comprised inter alia of exotic and indigenous trees and flower gardens.
7. Mr Luchidio observed at page 8 of his report that the plots vegetation was facing several threats in terms of uncontrolled clearing of trees and shrubs to pave way for development and invasion of alien invasive plants without plants expert's consultation. He concluded by stating that the plots plant diversity is dependent on human intervention, natural re-generation, edaphic factors and climatic conditions.
8. The Petitioner contends that the 1st Respondent illegally obtained both the change of user and the Environmental Impact Assessment license and blames the 2nd and 3rd Respondents for not doing due diligence before issuing the same. That the 1st Respondent failed to inform the members of the association about both the change of user and the license because it was afraid of the objections and/or appeals that were bound to arise. The appeal filed before the County Liaison Committee by the Petitioner was dismissed for having been filed out of time.
9. The Petitioner urged the Court to allow the petition because it is imperative to have the construction stopped and the subject property restored to its former state because the current development overlooks the neighbouring houses and breaches their right to privacy.

Responses to the Petition:

10. In its Replying Affidavit sworn by Abdisalam Abdullahi Ahmed on the 28th March 2024, the 1st Respondent denies all the allegations of violation of the constitution outlined in the Petition. The 1st Respondent depones that it is building four town houses on an acre of land and the area does not fall under Zone 5 (c) which is near James Gichuru Road. The 1st Respondent contends that it carried out the requisite public participation and published the intention to apply for change of user in the newspaper and even affixed the same at the property. That there were numerous objections received after the publication but the approval was issued on the 17th November 2022 after the consideration of the said objections.
11. The 1st Respondent depones that it engaged with the Petitioners on numerous occasions and satisfactorily met the requirement of public participation. That the development is low risk and that that all the concerns that were raised including noise pollution were addressed before the 3rd Respondent issued the license. The 1st Respondent blames the Petitioner for being lax in bringing the petition since the excavations have been done and the foundations laid already. That the Petitioner filed an appeal out of time at the Liaison Committee and the same was dismissed on the 29th March 2023.
12. The 1st Respondent questions the jurisdiction of this Court and depones that the Petitioner mischievously opted not to challenge the issue of the license at the National Environmental Tribunal and hoped straight to this Court with the constitutional petition knowing well that the Court is not seized of jurisdiction. The 1st Respondent has urged the Court to dismiss the petition with costs.
13. The 2nd Respondent opposed the petition through a Replying Affidavit sworn by its Deputy Director Management, Philomena Wanjiru dated 10th June 2024. The 2nd Respondent started by explaining that its mandate is to approve the building and construction plans presented to it as per section 31 of the Physical Planning Act. The 2nd Respondent deponed that it was not the Petitioner's mandate to



- plan and regulate zoning areas as this mandate lies with the County Executive Member responsible for physical and land use planning under section 58(5) of the Physical and Land Use Planning Act, 2019.
14. That the 2nd Respondent was not privy to any meetings the Petitioner held with the former Governor, Evans Kidero and/or agreements reached with a view of overturning the applicable planning regulations at the time and therefore no undertaking exists between the Petitioner and the 2nd Respondent to refuse the approval of the development applications in defiance of section 58 of the Physical and Land Use Planning Act, 2019 and even if the same existed it would not defeat the written laws on development permissions.
 15. The 2nd Respondent deponed further that it was satisfied that the 1st Respondent's development application complied with mandatory provisions of the law hence exercising its authority under section 61(2) of the Physical and Land Use Planning Act, 2019, it granted the 1st Respondent the development permission on 15th October 2020. That the appeal against the change of user filed by the Petitioner at the County Physical and Land Use Planning Liaison Committee under reference NCCG/NMS/PLUPLC/019/2023 dated 1st March, 2023 was heard, determined and dismissed on the 29th March 2023.
 16. The 3rd Respondent opposed the petition through a Replying Affidavit dated 26th April 2024 sworn by Jimmy Owiti, a Senior Environment Officer at the 3rd Respondent. The 3rd Respondent depones that the 1st Respondent's proposed residential development consists of four, six-bedroom town houses and two servant quarters and other associated facilities located on L.R No. 330/478 Lavington, Nairobi and it was classified as 'medium risk'. That on the 4th November 2022, the 1st Respondent submitted an environmental impact assessment report and the 3rd Respondent shared the said report with the lead agencies for their comments in line with Regulation 9(1) of the Environmental (Impact Assessment and Audit) Regulations 2003 (the Regulations). That a site visit was conducted on the 11th November 2002 and it was confirmed that the area for the proposed development is mostly developed with high-rise residential developments.
 17. The 3rd Respondent explained that the 3rd Respondent is guided by the project design, environmental management plan, physical site inspection of the proposed project site to ascertain the environmental conditions, comments from lead agencies, views from the public participation exercise and the EIA technical decision guiding principles in its decision on whether or not the license should be issued and the conditions thereto. That the 3rd Respondent followed the due process in the review of the 1st Respondent's EIA project report in compliance with Environmental Management and Coordination Act, 1999 (EMCA) as well as the subsidiary legislation and issued the 1st Respondent with an EIA license reference number NEMA/EIA/PSL/22943 on 28th November 2022 with mandatory conditions to safeguard the environment and for compliance monitoring.
 18. The 3rd Respondent clarified that it was only where the project report has been upgraded to a full study report that the same is processed in accordance with Part III of the Regulations which would require the proponent to publicise the report in the newspapers and through the radio and convene public hearings. That the instant project was never upgraded to a full study report. The 3rd Respondent reiterated that the EIA reports processed at the project level such as the instant one is guided by the process set out in Part II of the Regulations where only questionnaires are required as the tools for collection of information and comments from the public.
 19. The 3rd Respondent addressed some of the complaints raised in the petition in paragraph 18 of its Affidavit. On the issue of cutting down the indigenous trees, the 3rd Respondent stated that in the EIA project report, the expected impact on vegetation and flora was indicated to be zero or negligible.



and that upon decommissioning of the project site the same will be restored to near its original state or better. On the issue of increased traffic and pressure on public utilities, the 3rd Respondent explained that the report had proposed mitigation measures to accommodate the trucks as well as a waste management strategy.

20. The 3rd Respondents also challenged the jurisdiction of this Court by stating that the Petitioner ought to have filed an appeal at the National Environment Tribunal as provided under section 129 of EMCA and as such the petition should be dismissed with costs.

Submissions:

21. The petition was canvassed by way of written submissions with the parties highlighting their respective submissions on the 11th July 2024.
22. The Petitioner's submissions are dated 19th April 2024. While highlighting the same, Counsel for the Petitioner, Mr. Wamai commenced by stating that the Petition alleges various infringements of the rights listed on its face and in particular the right to a clean and healthy environment. He contended that the approvals and licenses issued to the 1st Respondent to do construction in the neighbourhood of 69 houses along Kunde Road within Lavington estate, in particular on L.R No. 330/448(House Number 29) were obtained without consulting the immediate neighbours. He submitted that the area is a single-dwelling low-density area and no public participation was undertaken in contravention of section 58(8) of the Physical and Land Use Planning Act which requires invitation of the public to make comments.
23. Further, the newspaper cutting advertising the notice was not compliant with regulation 15 of the Physical and Land Use Planning Regulations because the notice in the advert is dated 22nd September 2020 while the application for change of user was made on the 24th of September 2020. That the said notice did not provide adequate time as it did not run for 14 consecutive days and the one displayed on the impugned property did not have a time stamp. That the change of user was done clandestinely so that the petitioners could not raise issues and none of the Association's 69 members' views were sought. The Petitioner submitted that the change of user was irregular and unconstitutional in so far as the views or interests of the members of the Association were not put into consideration.
24. While submitting on the EIA license, the Petitioner submitted said that no study report was undertaken neither was it compliant with the Environmental Impact Assessment and Audit Regulations, 2013 specifically regulation 17(2). That none of the residents neighbouring L.R No. 330/478 filled any questionnaires filed by the 1st Respondent as all the people who filled the forms are unknown to the Petitioners. That two of the people are from the impugned house meaning they were speaking to their own application.
25. On the issue of zoning, the Petitioner submitted that although the regulations provided by the 2nd Respondent state that Kunde Road is in Zone 4 which is mixed developments, Kunde Road is in Zone 5. That none of the Respondents factored in the vegetation in the area despite being furnished with a biodiversity forensic report on the tree cover and the impact on the environment. That the area is on a slippery slope with incidents of erosion and the 1st Respondent will not suffer any loss as he is a developer who will build, sell and move out of the area afterwards.
26. The Petitioner concluded by submitting that the 2nd and 3rd Respondents have consistently frustrated the Petitioner by declining to give the Petitioner the information that they have constantly requested for. The Petitioner urged the Court do allow the Petition with costs to the Petitioner.



27. The 1st Respondent's submissions are dated 13th May 2024 and its Counsel Ms. Asli Osman, highlighted the same on its behalf. The 1st Respondent submitted that the Petitioner is giving an impression that the development is monstrous while the 1st Respondent is only building 4 town houses on an acre of land which is relatively minimal in comparison to other developments in the area. That the said area did not fall under Zone 5 (C) but instead lies under Zone 4 which is the area between Ngong Road and Argwings Kodhek Road.
28. On the issue of public participation, the 1st Respondent submitted that it is the developer's obligation to publish the notice in the newspaper and affix the same on the subject property. That the 1st Respondent did both of these and the application was made on the 24th of September 2020. The 1st Respondent submitted that it engaged the Petitioners between September and November, which according to the 1st Respondent satisfactorily met the requirement of public participation.
29. The 1st Respondent submitted further that the category of the development is low risk and such projects require only an expert report for the EIA license hence the 3rd Respondent only needs to consider a project report to issue the license. That the issues raised by the neighbourhood residents in the questionnaires including noise pollution, traffic congestion and dust were all addressed and mitigation measures were proposed. That the petition was filed after the 4 structures of the four townhouses were up meaning that the Petitioner was lax in bringing this petition.
30. The 1st Respondent also submitted on the issue of the appeal filed by the Petitioner at the Liaison Committee and stated that the failure by the Petitioner to appeal the decision of the committee should not be ignored since the Petitioner waited to institute the present petition to assert a constitutional rights' breach instead of challenging the license before the National Environmental Tribunal (NET).
31. On the issue of the change of user, the 1st Respondent submitted that the presentation of objections by themselves did not in any way nullify the license because it is the mandate of the CEC Environment to review the objections and then exercise his discretion on whether or not to grant the license. That in this case, there is no empirical evidence that has been presented to confirm the harmful effect that the four houses will have on the environment. The 1st Respondent concluded by urging the Court to find that the petition is an abuse of the court process and to dismiss the same with costs.
32. The 2nd Respondent's submissions are dated 28th June, 2024 and were highlighted by its Counsel Mr. Ondieki. The 2nd Respondent challenged the Petitioner's complaint that the notice of the application for change of user was never advertised. He submitted that the fact that the Petitioner was aware of the development meant that there was some form of advertisement. The 2nd Respondent argued that there was an advertisement of the change of user application in one of the dailies and the notice of the application was even placed at the gate. That this informed every one of the developments to give their objection and or comments. The 2nd Respondent submitted that the requirement for change of user is knowledge and not consensus. The 2nd Respondent submitted that the zoning for the area is 4(C) and the developments the subject of the petition are allowed in the area. The 2nd Respondent associated itself with the submissions of the 1st Respondent and urged the Court to dismiss the petition.
33. Ms. Muyai highlighted the submissions of the 3rd Respondent dated 20th May 2024. She submitted that although it is true that section 58(2) of the Environmental Management and Coordination Act (EMCA) requires proponents of developments to submit E.I.A study report. There is a proviso empowering the 3rd Respondent to exercise its discretion to allow the parties to forego the EIA process. That the EIA and Audit Regulations 2003 amended by L.N No. 32 of 2019 sets the procedure for receiving reports.



34. The 3rd Respondent submitted that the second schedule thereto refers to medium risk projects and that under the Regulations medium and low risk projects proponents submit EIA project reports. The 3rd Respondent submitted that under regulation 17 the study report is only recommended for high-risk projects. That the 3rd Respondent therefore complied with the law in issuing the impugned license.
35. On the issue of public participation, the 3rd Respondent submitted that questionnaires were sufficient and that there was no need for a meeting. The 3rd Respondent submitted that the issue of the questionnaires being fraudulent was never brought to its attention. The 3rd Respondent explained that the proponent of the project and the expert signed the report confirming that it was correct.
36. On the impact on the environment, the 3rd Respondent submitted that the project report annexed to the petition indicated that there were environmental management plans and that if the said information was not adequate to take care of the environmental concerns, the license would not have been issued. That the breach or violations of the Petitioner's rights was never pleaded. The 3rd Respondent urged this Court to dismiss the petition with each party bearing its own costs because this was a public interest suit.

Analysis and Determination:

37. Before delving into the substantive issues, it is imperative to note that the issue of this Court's jurisdiction is one that has been repeatedly submitted upon by the 1st Respondent. However, by the ruling delivered on the 14th day of March 2024, this Court deliberated on the issue of jurisdiction and found that this Court was seized with the requisite jurisdiction to handle the instant petition.
38. Keeping in mind the foregoing, and having reviewed the Petition, the Replying Affidavits and the respective parties' submissions, the following issues arise for determination:
 - a. Whether the process for the issuance of the change of user for the suit parcel number L.R No. 330/478 from a single dwelling to multiple dwelling units and the development approvals issued by the 2nd Respondents is illegal, null and void;
 - b. Whether the process of the issuance of the environmental impact assessment license to the 1st Respondent by the 3rd Respondent was illegal, unconstitutional, null and void for lack of public of participation;
 - c. Whether the Respondents have infringed on the Petitioner's constitutional rights;
 - d. Who bears the costs of this petition?
39. The process for issuing a development approval is one of the major debates in the instant petition. The Petitioner contends that Kunde Road, where the suit property, L.R No. 330/478 is located is a single dwelling zone which has 69 town houses yet the 1st Respondent seeks to construct storeyed buildings. The 1st Respondent contends that the development complained of comprises of four town houses on the one-acre suit property and not a storeyed building as claimed by the Petitioner. The 2nd Respondent in its Replying Affidavit confirmed that it is responsible for issuance of the change of use approval and the development permission granted was construction of four town houses with two domestic quarters.
40. It was the 1st Respondent's submission that the suit property L.R No. 330/478 is located in Zone 4 of the Nairobi City Developments Ordinances and Zones. The document annexed and referred to as the Ordinance lists the following estates under Zone 4: Spring Valley, Riverside Drive, Kileleshwa, Kilimani, Thompson and Woodley where only residential are allowed up to four storeys maximum on



a plot measuring 0.05ha. I am not sure if the document is a zoning policy and will revert to it later in this judgement.

41. The Third Schedule of the Physical and Land Use Planning Act 2019 places the mandate to consider the application for change of user on the County Government and specifically on a board constituted therein. Paragraph 5 of the said Schedule lists the conditions to be considered by the County Government while considering an application for change of user.
42. Although the powers to approve development rests on the County Government, this court has the mandate under articles 22, 47 and 70 of the Constitution to consider whether due process was followed in issuing the change of user approval and the EIA license to the 1st Respondent. The specific process being considered is whether the Petitioner and other members of the public that were affected or likely to be affected by the proposed developments were adequately consulted as provided for under article 10(2) and 47 of the Constitution (public participation).
43. Public participation is enshrined as a right in the bill of rights and is also important in achieving sustainable development by creating avenue for a that minimizes conflicts as well as receiving good ideas on how to plan an area. In *Kaps Parking Ltd and another vs the County Government of Nairobi and another* (2021) eKLR, Mrima J stated as follows at paragraph 129;
 - “ 120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black’s Law Dictionary 10th Edition defines ‘consultation’ as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.
 121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders’ engagement. Speaking on consultation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....”
44. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, [2014] eKLR. The Supreme Court of Kenya stated inter alia that: “Public participation is the cornerstone of sustainable development and it is so provided in the Constitution...
 - (381) Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped



in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted.”

45. The impugned development was to be done in an identified neighborhood and thus the target group likely to be affected was easily reachable. In defending itself that the public/residents including the Petitioner were engaged, the 2nd Respondent has pleaded and submitted that the 1st Respondent met all the conditions in the Act as well as those in the zoning policy. That the notice of intended change of user was advertised in the daily Nation Newspaper inviting objections if any from the public. A copy of the said newspaper advertisement was annexed to the 1st Respondent’s Replying Affidavit together with a picture of the said notice pinned on some gate which they asserted to be that of the suit premises.
46. The existence of the newspaper advert cannot be denied with the evidence provided by a copy thereof. The 1st Respondent added that they engaged the members of the Petitioner between September and December of 2020. The question is whether placing such an advert and notice on a gate at the suit premises as alleged by the 1st Respondent and if there any physical engagements which then constituted qualitative and quantitative public participation.
47. The owner of house 28 who deposed to be living opposite the suit premises stated that he never saw any such notice pinned on the gate as alleged by the 1st Respondent. The Petitioner stated that they only became aware of the intended development when they saw some activities on the land and therefore approached a representative of the 1st Respondent who was present in the suit premises. Subsequently, the representatives of the Association held a meeting with the said 1st Respondent’s representative (Hassan) on 1st August 2020 which culminated to the writing of the letter dated 17th August 2020. It is their contention that despite that meeting and their objections raised in the letter of 17th August 2020, they never heard from the 1st and 2nd Respondents.
48. The Petitioner averred that it was shocking that the 2nd Respondent disregarded the consultation that was previously held between the residents and the County Government, and the resolutions arrived at pursuant thereto. The consultation referred to was pursuant to a petition by Kunde Road residents to H.E Governor Kidero the former governor of Nairobi City dated 15th August 2015. One of the requests by the residents was to have the development status quo on Kunde Road maintained. The meeting mandated the County Attorney as part of the resolutions to do a letter for the County Secretary’s signature responding to the Kunde Residents Welfare Association and communicate the County’s decision on the matter that the request for status quo was approved.
49. In the petition and consultation referred to above, the Association mentioned a request to revoke the change of user granted in respect of L.R. 330/485 Kunde Road. It is not clear whether the Petitioner’s Association’s request for the maintenance of the status quo was granted. Other than the minutes requiring action by the County Attorney, there is no letter signed by the County Secretary. Thus, the Petitioner’s documents confirm previous engagement with the County Government (the 2nd Respondent) regarding the change of user of properties along Kunde Road. The Association expressed surprise that their views were not been taken into consideration when the 2nd Respondent issued a change of user approval to the 1st Respondent.
50. In paragraph 11 of his supplementary affidavit, the Petitioner faults the 1st Respondent for not providing evidence of public participation. However, the 1st Respondent has annexed a copy of a newspaper advertising the change of user, there was a meeting held on 1.8.2020, one month before presenting the application to the 2nd Respondent. The change of use license was granted on 10th November, 2020 and the 1st Respondent pleaded that it engaged the Petitioner and the Association



- between September and December, 2020. The burden then shifted on the Petitioner to prove why in his opinion these engagements with the 1st Respondent was not qualitative. No such evidence was led.
51. On its part, the 2nd Respondent deposed in paragraph 6 and 7 of its replying affidavit that the Petitioner's engagement with the former governor of Nairobi City County was superfluous and of no legal effect as the Petitioner was seeking to interfere and usurp the statutory mandate of the County Executive Committee Member (CEC) responsible for Physical Planning and Land Use provided in section 58 of Physical and Land Use Planning Act (PLUPA). The 2nd Respondent submitted that the change of user approval issued to the 1st Respondent was issued within the law.
52. Section 58(5) requires the County Executive Member to grant development permission subject to compliance with the provisions of any other written law. Any other written law in my opinion excludes the PLUPA and includes all that governs land use and environmental protection. Nowonder the requirement to share the planning brief with other lead agencies. The pamphlet produced by the 1st Respondent is not a regulation and there is no proof that it was published as required under relevant sections mandating change of local land use and planning (such as sec 40 & 48 of PLUPA). Despite lack of evidence that the document referred to by the 1st and 2nd Respondents does not have any backing of the law, I find no sufficient proof was put forth by the Petitioner on the zoning regulations governing the area under which the suit property L.R. No 330/478 falls. The burden rested on him to discharged as provided for under sections 107 to 109 of the Evidence Act Cap 80 and production of a copy would have helped their case.
53. In the case of *British Tobacco PLC versus Cabinet Secretary of Health (2019) eKLR*, the Supreme Court of Kenya at paragraph 96 of the judgement while setting out guiding principles of public participation had this to say; "It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.
- i. As a constitutional principle under Article 10(2) of the Constitution, public participation applies to all aspects of governance.
 - ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
 - iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means."
54. Section 58 of PLUPA does express the manner in which the public participation is to be undertaken and going by the decision herein above, the Respondents had a duty to ensure public participation took place. For the 1st Respondent, it stated that they placed an advertisement in the newspaper as required by the Regulations. On the face of the copy of the advert produced, it invited comments from individuals/institutions to raise any objection to the proposed change within 14 days of the advertisement. The comments were to be addressed to the 2nd Respondent. Section 58(7) and (8) of PLUPA states thus;
- "7. A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe.



8. The notification referred to under sub-section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration”
55. On account that the 1st Respondent put up notices both on the suit premises and on the newspaper, it complied with the requirements of notifying the public. Since this matter proceeded by way of affidavit evidence it is impossible for this court to reach a finding that the notice placed on the gate of the suit premises was falsified because the said evidence was not verified by way of cross-examination. Besides the notices published, there was a meeting held between the Petitioner and the 1st Respondent where the Petitioner and the Association were informed of the proposed development. Pursuant to this meeting, the Petitioner proceeded to write the letter of 17th August, 2020 to the 1st Respondent (annex RNO4).
56. The Act requires the objections to be addressed to the decision-making authority and in this case, the letter was not addressed to the CEC in charge of Physical planning of the Nairobi City County. The letter was copied to the Director-general, Nairobi Metropolitan Services who in my view was not mandated with the power to approve development plans.
57. The Act in section 60(2) of PLUPA, states;
- “Within fourteen days of receiving the copy of the development permission from a county executive committee member, the relevant authorities or agencies shall submit their comments to the respective county executive committee member.”
58. This part implies that the 2nd Respondent is required to disseminate copies of the development permission not development application to relevant authorities/agencies. This section implies that the 2nd Respondent does engage the public at the application stage only if they receive comments/objections from the public pursuant to the publication by the developer. This creates a lacuna in PLUPA because there ought to be some obligations placed on the 2nd Respondent as the decision-making authority to notify the public in compliance with article 10(2), 35 and 47 of the Constitution.
59. A similar scenario appears under section 61(3) which provides that any interested party aggrieved by the decision of the county executive committee member to appeal within 14 days of the decision. However, the manner in which a party who was unaware of the development application gets to know about the decision is not clear. However, I cannot in this petition determine whether the two subsections contravened the rights of the Petitioner for want of providing for their right to public participation because no such declaration (of the unconstitutionality of section 61) has been sought in this Petition.
60. Thus, the applicability of public participation to section 58 of the Physical Land Use and Planning Act which governs the issuance of change of user license limited to advertising and placing of the notice on site was complied with for the general notification of the public. Generally, the decision-making authority/licensing body is not bound by the proposals received during such public participation but they are bound to give reasons/feedback. In this case, since no proposals were received with respect to the impugned development except an earlier petition by the Petitioners made in 2015, hence the 2nd Respondent could not give feedback.
61. In regard to the application/adoption of their petition to the Nairobi City County Government in 2015 on maintaining the status-quo, the Petitioner ought to bring an independent suit to challenge the alleged new land use and planning regulation that is being touted by the Nairobi City County to be now in place that is affecting the environment of Kilimani area and Kunde road in particular.



The Petitioner has not moved the court to make a determination on whether the 2nd Respondent was bound by the outcomes of the meeting held in 2015 and instead used the document as evidence that they had earlier objected to a change of user application. For now, it remains a stakeholder engagement that is not binding either party.

62. The other issue to be considered is whether the change of user granted to the 1st Respondent was out of character with the neighborhood making it illegal, null and void. Some of the considerations when application for change/extension of user is presented for approval include the applicable zoning regulations. None of the parties herein annexed the zoning regulations governing the area where Kunde Road falls under. The 2nd Respondent annexed an undated document described as “a guide of Nairobi City Development Ordinance and Zones” which has designated developments for the areas mentioned in it. The 1st Respondent argued that it is this document which was used in considering their development application and that their development falls within the zoning regulations.

63. An introductory statement in this document under the overview page stated thus;

“The information contained here is based on what the City Planning Department is currently doing to control development in the entire City and is open to challenge to do it better. To improve on outcomes, development control will only be effective if all stakeholders work closely together. Towards this direction, this pamphlet is a summary of Planning ordinances to be shared with interested stakeholders to ensure that development control and indeed the wider planning agenda is being implemented across the city.” (underline mine for emphasis).

64. There were no ordinances attached to this document (described as a pamphlet) and the overview part does not cite any section or regulations of the Physical Planning and Land Use Act to back it up. The document speaks for itself that the City Planning Department will engage all interested stakeholders as required under section 42(5) and regulation 11 of L.N No 248 of 2021 of PLUPA. The 2nd Respondent did not provide evidence to show that the pamphlet was circulated/shared to the Petitioner and or members of the Association/stakeholders. If the 1st and 2nd Respondents are relying on this document to support the change of user approval granted to the 1st Respondent, then they had the obligation to show it was legit and which they failed to show.

65. Having spoken about the document relied upon by the 1st and 2nd Respondents on zoning of the area, the Petitioner has purely relied on the evidence of change of user to support their averment that zoning in Kunde Road is still retained as single dwelling residential area. However, as stated earlier, no such zoning policy document was produced to support their claim in opposing the change of user permission granted. I am thus not satisfied that the Petitioners have proved this limb of the claim.

66. Under the heading of the right to clean and healthy environment, I will consider it in two ways, first if the Petitioner has proved that the violation of the process of the issuance of the license breached their right to a healthy environment. This finds support in the case of *Moffat Kamau & 9 Others versus Actors of Kenya Ltd* (2016) eKLR which held thus;

“where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat.”

67. Second, whether proof is made that if the proposed project is implemented then it is likely to violate the rights of the Petitioner to a clean and healthy environment. I am guided by the case of *Peter K. Waweru vs Republic* (2004) eKLR, it was held that any development that jeopardizes life is not sustainable development and ought to be halted.



68. The Petitioner contended that the approvals issued by the National Environment Management Authority were unconstitutional and therefore should be declared null and void. The process of obtaining an EIA license is stated in section 58 of the Environmental Management and Co-ordination Act (EMCA) 2015. It provides as follows:
1. Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
 2. The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any license by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.” (underline mine for emphasis).
69. The process is buttressed by the Environmental (Impact Assessment and Audit) Regulations 2003 as amended by Legal Notice No. 32 of 2019. Regulation 2 states thus;
2. The Environmental (Impact Assessment and Audit) Regulations, 2003 are amended in by deleting regulation 7 and substituting therefor the following new regulation —
 7. (1) Every proponent undertaking a project specified in the Second Schedule of the Act as being a low risk project or a medium risk project, shall submit to the Authority a summary project report of the likely environmental effect of the project.
70. The 1st Respondent explained that its project is for development of four (4) six-bedroom townhouses and two (2) no. servant quarters and other associated facilities on the suit parcels. It submits that its EIA project report is dated the 4th November 2022 prepared by Eric Miriti. Upon receiving the report, the 3rd Respondent conducted a project site visit on the 11th November 2022 and the project site report was prepared by Isaac Kimitei who is an Environmental Officer at Nairobi City County. The report described the project site and gave the recommendations that the 1st Respondent should undertake to carry out once the license was issued. The report was then shared with the lead agencies being to wit; the Department of Water and Irrigation, Director of Physical Planning in the Department of Lands and Settlement, Ministry of Labour and Human Resource Development, the Nairobi Water and Sewerage Company and the Department of Housing. Thereafter, the Authority issued the EIA license No. NEMA/EIA/PSL/22943.
71. The Petitioner faults the Authority for failing to advertise the EIA Report; failing to involve them in the process; and failing to consider their views. In response to this, the 3rd Respondent stated that where only a project report is needed, there is no requirement for advertisement or publication unless the project was upgraded to a full study. That the instant project was never upgraded to a full study.
72. Although Section 58(2) of the EMCA 2015 provides that full EIA study reports be conducted for all the projects specified in the Second Schedule, the proviso to the same quoted herein above (para 67) gives the 3rd Respondent discretion to excuse the proponent from undertaking the study in certain cases. Besides the proviso, the amended Regulations have also exempted medium risks projects from



- undertaking a study report. The Court of Appeal decision in *Kibos Distillers Ltd vs Benson Adeg* cited did not hold that it was mandatory that all projects require a study report and the Court did refer to the amendment of the Regulations hence it is distinguishable. The regulations do not require project reports to be published. Thus, in so far as a preparation of the project report and non-publication of the same in the media, the 1st and 3rd Respondents did not contravene the applicable law.
73. The other angle raised by the Petition regarding the process of obtaining the EIA License was the lack of public participation. The Petitioners averred that the people who alleged to have signed the questionnaires used to obtain views were filled by persons who were not residents of Kunde Road. That amongst the people who filled the questionnaires, only two people were their neighbours and the two lived in the suit plot and were thus conflicted in giving their views. A few samples of the questionnaires were annexed in the 1st respondent's replying affidavit which gave names of participants who all indicated on the forms their locality as Kunde road.
74. The 3rd Respondent pleaded that the project report was prepared and signed by an expert and the owner who declared that all the information contained therein were true and correct. There was no reason for the 3rd Respondent to doubt that the persons who filled the questionnaires were not residents of Kunde Road. Besides relying on the project report dated 4th November, 2020; they also undertook their own site inspection report which gave recommendations and which were considered while issuing the EAI License.
75. As stated herein earlier while discussing the subject of change of user license, the engagement between the 1st Respondent and the Kunde Residents Welfare Association took place on 1.8.2020. The residents gave their views/objections to the proposed project which views seemed not to have been considered as despite their objections, the 2nd and 3rd Respondents proceeded to issue the impugned licenses. The Petitioner wanted a meeting held similar to the one which took place in March 2024 conducted by one of the developers (annexture EMM2). However, there is no format set in the law on how public participation ought to be conducted. It is only required to meet the threshold of a quantitative and qualitative engagement.
76. The issue raised by the Petitioner that the persons who filled the questionnaires were not residents of Kunde Road is difficult to affirm when such persons did not swear an affidavit to that effect. The Petitioner did not apply to call any of them for cross-exam to verify which part of Kunde Road they lived in.
77. The final question for determination is the establishment of the violation that the development is a violation or likely violation of the right to a clean and healthy environment. The Petitioner claims that the 1st Respondent's development poses grave environmental risks because of the cutting down of the indigenous trees on the suit parcel, noise pollution and the increased traffic flow to the area during construction. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70.
78. The Petitioner gave the particulars of breaches in the Petition highlighted in paragraphs 22, 31, 36, 37, 54 and 58 which raised issues inter alia; infringement of their right to privacy since peopled that will live in the storey building to be put up will see the inside of the neighbouring compounds in addition to the building blocking their natural lights. Secondly, that the indigenous trees have been cut thus interfering with the aesthetic value of the estate in addition to loss of species. Thirdly, the Petitioner insist increase of traffic flow and gave examples of heavy vehicles bringing building materials on site which end up blocking access and destroying grass of neighbouring homes.



79. The impugned development is to be undertaken on private property whose owner is also bestowed with the right to property under article 40 of the Constitution and the right to occupy and use given by Statute and which has to be balanced with the rights of Petitioner and the environment. In order for the scale to tilt pro-clean and healthy environment, the Petitioner was under a duty to prove the violations complained of. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR stated as follows:

“Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.” (underline mine for emphasis)

80. Gleaning the report prepared by the EIA lead and produced by the Petitioner, it affirms that the area in dispute is not virgin land. It is already occupied by 69 houses and the Petitioner did not intimate the number of populations occupying the 69 homes. The report produced by the Petitioner stated that the trees existing in this neighborhood are largely man-made (page 31 of the supplementary affidavit of Edward Mwongo). He gave some of the benefits of trees to include providing oxygen and improving air quality by taking certain harmful gases from the atmosphere etc.

81. At figure 7, he gave what seems to be the photo of the structures already put up in the suit premises (it looks similar to the photographs in the application filed by the 1st Respondent. The comment given below the picture read thus, “clearing of trees to pave way for new development without expert consultation has led to loss of indigenous trees.” Looking at the said figure 7, one can see a tree standing in front of the building already put up as well as some form of vegetation/flowers. The author of the report does not state whether or not any additional trees can be planted to replace any that were cut once the construction is complete considering his professional view that the vegetation in the area was man-made.

82. To the extent that there are still some vegetation existing on the suit plot and probability of planting more to replace any that were cut to allow development to take place, I am not persuaded to find that the development is deleterious to the environment is so far as greening of the environment is concerned. In the case concerning *Gabcikovo Nagimaro Project* (1997) ICJ Rep 88, Justice Weremanty expressed that the principle of sustainable development constitutes a principle which enables the balancing between the environmental concerns and development concerns.

83. In the planning brief attached to the application for change of user and which the Petitioner annexed in his pleading, the 1st Respondent set out measures it will take to address the questions regarding public utilities. For instance, the 1st Respondent stated that the property is connected to water from the Nairobi City Water and Sewerage Services Limited and connected to supply of electricity from Kenya Power which sources supply from the national grid.

84. The brief also stated that disposal of waste will be done by contracting private dealers to supplement garbage collection services offered by Nairobi City County Government and further do landscaping to ensure proper management of storm waters on the suit property. If the 1st Respondent fails to carry out these measures while undertaking the construction, the Petitioner has recourse to report and or



sue for breach of conditions contained in the approval licenses. However, they do not perse amount to constitutional violations.

85. The public utilities and or amenities that is likely to be strained, the Petitioner was not very specific. However, if they included water and electricity, the Petitioner does not state their current source of water and the impact of use by the additional occupiers of the houses being put on the existing source. The electricity is sourced either from Kenya Power & Lighting Co. limited or solar power. Where there is a likelihood of strain, the confirmation report ought to have been obtained from Kenya Power & Lighting Co. Ltd. and the attendant costs required to improve/stabilise the supply. Again, the Petitioner did not present any evidence to support the likelihood of such strain.
86. On the right to privacy, each of the developments are on their own plots and the right to privacy envisaged must balance the rights of a land owner to use and enjoy their land within the law. The type of development being undertaken is a town house except they are more than one town house on the plot unlike the neighboring plots which have one house each. They are not a storeyed building save for being built in the form of a bungalow and I find that the same will not breach the rights to privacy nor block any natural lights for which the Petitioner is entitled to.
87. The Petitioner also complained of vehicular traffic caused by heavy vehicles delivering supply to the site. This caused some of the neighbours to put measures to protect their grass and the inconveniences. This violation is proved as the 1st Respondent ought to use vehicles that would not encroach on the neighbouring plots. The violation is a temporary occurrence which cannot be a basis to cancel the licenses issued. However, the Petitioner shall be compensated for the inconvenience caused and by issuance of an order that the 1st Respondent to plant grass to restore the affected area. For the compensation, I award a sum of Kshs100,000 to the Petitioner. On restoration, I direct the 1st Respondent to buy, plant and water the type of grass that was damaged near Edward Mwongo's gate and the immediate affected neighbours forthwith.
88. The upshot of the foregoing is that, the Petitioner has not proved the alleged violations of rights pleaded and the reliefs claimed in paragraphs (a) to (g) of the Petition and they are hereby dismissed. I make an order under paragraph (h) and (j) for the award of compensation and restoration of the grass of the immediate neighbouring houses. Since the issues raised in the Petition were of public interest, I make an order that each party will meet their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2024.

A. OMOLLO

JUDGE

