



REPUBLIC OF KENYA



**Kassam & 12 others v Exotic Real Estates Limited & 12 others (Petition  
E002 of 2024) [2024] KEELC 6022 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 6022 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION E002 OF 2024**

**AA OMOLLO, J  
AUGUST 15, 2024**

**BETWEEN**

**KARIM SHERALI KASSAM ..... 1<sup>ST</sup> PETITIONER  
J & J FAMILY VENTURES LIMITED ..... 2<sup>ND</sup> PETITIONER  
KUNAL BID ..... 3<sup>RD</sup> PETITIONER  
SANJAY ADVANI ..... 4<sup>TH</sup> PETITIONER  
HARSH NARAN CHAVDA ..... 5<sup>TH</sup> PETITIONER  
SHAFIQ DAWOODANI ..... 6<sup>TH</sup> PETITIONER  
MARGARET KAPTUIYA KOMEN ..... 7<sup>TH</sup> PETITIONER  
FAIZAL JERAJ ..... 8<sup>TH</sup> PETITIONER  
SAIRA GILANI ..... 9<sup>TH</sup> PETITIONER  
KETAN GOSWAMI ..... 10<sup>TH</sup> PETITIONER  
ASHMI SHAH ..... 11<sup>TH</sup> PETITIONER  
SHELINA MANJI ..... 12<sup>TH</sup> PETITIONER  
HEENAL TANK ..... 13<sup>TH</sup> PETITIONER**

**AND**

**EXOTIC REAL ESTATES LIMITED ..... 1<sup>ST</sup> RESPONDENT  
EXOTIC REAL VENTURES LIMITED ..... 2<sup>ND</sup> RESPONDENT  
ALI ABDI ..... 3<sup>RD</sup> RESPONDENT  
ABDI ALI ..... 4<sup>TH</sup> RESPONDENT  
NAIROBI CITY COUNTY GOVERNMENT ..... 5<sup>TH</sup> RESPONDENT**



<b>PATRICK ANALO AKIVAGA .....</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>STEPHEN GATHUITA MWANGI .....</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>JOHN P. MALAWI .....</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>M. LUMADETE .....</b>	<b>9<sup>TH</sup> RESPONDENT</b>
<b>V. NDIDI .....</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>NEMA .....</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>CATHELINE THAITI .....</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>NATIONAL CONSTRUCTION AUTHORITY .....</b>	<b>13<sup>TH</sup> RESPONDENT</b>

## RULING

1. Through an application dated 2<sup>nd</sup> February 2024 and brought under Certificate of Urgency, the Petitioners/Applicants sought the following orders from this court:
  - a. Spent.
  - b. That a conservatory order of temporary injunction be and is hereby given stopping, discontinuing and preventing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their servants/agents/proponents, or any other person, from excavating and/or undertaking any development on L.R. No. 209/20729 (original no. 209/870/3/5- City Park Drive, Parklands, pending the hearing and determination of this application.
  - c. That a conservatory order of temporary injunction be and is hereby given compelling the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Respondents to take immediate measures to prevent or discontinue any act or omission deleterious to the environment on L.R. No. 209/20729 (original no. 209/870/3/5- City Park Drive, Parklands, including arrest and prosecution of any person or equipment being used on the said property, pending the hearing and determination of this application.
  - d. That a conservatory order of temporary injunction be and is hereby given stopping, discontinuing and preventing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their servants/agents/proponents, or any other person, from excavating and/or undertaking any development on L.R. No. 209/20729 (original no. 209/870/3/5- City Park Drive, Parklands, pending the hearing and determination of the Petition.
  - e. That a conservatory order of temporary injunction be and is hereby given compelling the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Respondents to take immediate measures to prevent or discontinue any act or omission deleterious to the environment on L.R. No. 209/20729 (original no. 209/870/3/5- City Park Drive, Parklands, including arrest and prosecution of any person or equipment being used on the said property, pending the hearing and determination of the Petition.
  - f. That costs be in the Petition.
2. The application was supported by the affidavit sworn by Karim Sherali Kassamand the following grounds inter alia;



- i. The Petitioners/Applicants are owners/occupiers/residents of houses/units erected and developed on property known as Nairobi/Block37/27, which property is next to the property known as L.R. No. 209/20729 – City Park Drive, Parklands (the subject property).
  - ii. The owners/developers/proponents of the subject property who have been identified as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents started excavating on the said subject property and further, undertaking other development activities on 20<sup>th</sup> December 2003.
  - iii. There is no signage on the property where excavation and other development activities are being undertaken to show/indicate the details and particulars of approvals (if any) from NCCG-CECM, NEMA and NCA, name/particulars of the licensed contractor (if any) and names/details of any other professionals involved in the development activities.
  - iv. Excavation and other development activities are being undertaken very carelessly and negligently, and with no regard to safety and security of the Petitioners, their families and the neighbouring community.
  - v. The Petitioners/Applicants have since established that no approvals were issued to the 1<sup>st</sup> – 4<sup>th</sup> Respondents by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Respondents, allowing them commence excavation on the said property and/or commence any developments therein.
  - vi. The 1<sup>st</sup> – 4<sup>th</sup> Respondents, their agents/servants/proponents have been stopped from continuing with excavation and other development activities on the subject property by the 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents, but they have failed/refused to do so.
  - vii. Although the said 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents did in fact issue the stop orders, they too have failed/refused to perform their statutory duties to enforce the said orders, with results that excavation work continues unabated.
  - viii. The acts and omission of the 1<sup>st</sup> – 4<sup>th</sup> Respondents, their agents/servants/proponents are deleterious to the environment, and are denying and violating the Petitioners/Applicants right to a clean and healthy environment.
  - ix. The act and omission of the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents to prevent and discontinue the ongoing excavation and other development activities is aiding and abetting the 1<sup>st</sup>-4<sup>th</sup> Respondents' acts which are deleterious to the environment, and are also denying and violating the Petitioners/Applicants right to a clean and healthy environment.
  - x. Unless stopped and discontinued by way of conservatory orders, the 1<sup>st</sup> to 4<sup>th</sup> Respondents jointly and severally with the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents will continue with their acts and omissions that are deleterious to the environment, and are denying the applicants their rights to life, and to a clean and healthy environment.
  - xi. It is in the interest of justice and fairness that the prayers sought herein be granted.
3. The 2<sup>nd</sup>-4<sup>th</sup> Respondents filed their Replying Affidavit dated 22<sup>nd</sup> February 2024 sworn by ABDI ALI who is the 4<sup>th</sup> Respondent. He deposed that he is a director of the 2<sup>nd</sup> Respondent and with authority from the 3<sup>rd</sup> Respondent. They denied being related in any way to the 1<sup>st</sup> Respondent indicating the same did not exist. They contended that they have conducted themselves within the law and any claim to the contrary is denied from the onset. They averred that the 2<sup>nd</sup> Respondent has a right to construct their own property so long as the law is followed and they undertook to get the necessary licenses, permits and consents prior to engaging in the construction of their property.



4. Mr Ali deposed that it is hypocritical of the applicants to refuse the construction of an apartment building yet proudly display the fact that he is a unit owner of an apartment. The 2<sup>nd</sup> to 4<sup>th</sup> stated that the applicants are not a statutory body or authority with the requisite power to determine who can and cannot build property in that particular location. They said that the applicants have failed to show any claim or anything worth of note to disturb this Honourable Court to entertain the petition and application before it. They contended that the application bemoans dust, a by-product of excavation and construction and wishes to obtain conservatory orders on the same and they have failed to show to what end this would be beneficial and how stopping a construction is in their right.
5. They continued that the applicants have failed to fulfil the necessary limbs for an injunction as per *Giella vs Cassman Brown*. They informed the court that there is a clear misjoinder of parties as the 3<sup>rd</sup> Respondent is not a director of the 2<sup>nd</sup> Respondent nor is he in anyway involved. They raised the following grounds in opposition of the application;
  - a. That the Petition and Application peddles the violation of the rules of natural justice.
  - b. That the Petition and Application is undeserving of the orders prayed for.
  - c. That the applicant's Petition and Application goes contrary to the doctrine of exhaustion as they have failed to exhaust the statutory remedies under *Physical and Land Use Planning Act*.
  - d. That the application is improper under law as the enabling provision used contradicts the facts of the case.
  - e. That there is no cause of action made as against the 2<sup>nd</sup> to 4<sup>th</sup> Respondents herein.
  - f. That the Petition and Application therefore falls short of the legal requirement and should be struck out.
6. They concluded by saying that the application is devoid of merit and it is in the interest of justice that the same be dismissed with costs to the Respondent.
7. The 5<sup>th</sup> Respondent filed their Replying Affidavit 18<sup>th</sup> April 2024 in response to the application. Stephen Gathuita Mwangi swore the affidavit on behalf of the 5<sup>th</sup> Respondent and himself as the 7<sup>th</sup> Respondent. He deposed that he is the County Executive Committee Member for Built Environment and Urban Planning for the 5<sup>th</sup> Respondent – Nairobi City County. He was aware that pursuant to Rule 1 to Rule 11 of the Third Schedule, the *Physical and Land Use Planning Act*, the aspects of development control and the development control and procedures includes distinct and separate approvals and permits.
8. He was also aware and had been advised that Section 57 of PLUPA, however, requires and/or obligates the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to only carry out any developments on the suit property after the issuance and grant of a development permission. He stated that pursuant to Section 58 of the PLUPA, the 5<sup>th</sup> Respondent only issues the development permission on application by any person and upon provision of all necessary documents, plans, particulars and purpose of the proposed developments. He was aware that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents are carrying out the stated construction activities without any development permission from the 5<sup>th</sup> Respondent's planning authority considering that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents have not made any applications for development permission.
9. He deposed that the court he was aware that on 11<sup>th</sup> December 2023 and on application by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents, the 5<sup>th</sup> Respondent has approved and issued a Change of User for the suit property and that on 8<sup>th</sup> March 2023, the 5<sup>th</sup> Respondent also approved the Building Plans for the proposed



- development on the suit property. He admitted that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents only have a Change of User, approved Building plans and a certificate of excavation but the said approvals do not permit commencement of any construction activities and/or development of the suit property as they are distinct and distinguishable from a development permission.
10. He avers that in accordance with Section 72 of PLUPA and under his instructions, the 5<sup>th</sup> Respondent enforced and/or issued an enforcement notice dated 1<sup>st</sup> January 2024 against the ongoing and the proposed construction activities on the suit property. He said that equally on 20<sup>th</sup> January 2024, they proceeded to the suit property and engraved and/or inscribed on the construction site's main gate the enforcement notice "illegal site. Closed. 20/01/2024. He stated that as from 1<sup>st</sup> January 2024 to date, they are aware of their mandates under the PLUPA and are on the lookout against any construction activities on the suit property and consequently, any compelling orders are undue and unnecessary.
  11. The 13<sup>th</sup> Respondent filed their Replying Affidavit dated 25<sup>th</sup> February 2024 sworn by ARCH. Stephen Mwilu who is the Manager Compliance of the 13<sup>th</sup> Respondent. He deposed that on 7<sup>th</sup> February 2024, they received pleadings from the Applicants alleging that the 1<sup>st</sup>- 4<sup>th</sup> Respondents have commenced excavation works on subject property L.R. No. 209/20729, which is near the Applicants' property known as Nairobi/Block 37/27 – City Park Drive Parklands, without being informed of the proposed development and requisite approvals. The applicants allege that the construction on the said property is being undertaken at night, with dust and noise pollution which is degrading the Applicants' residences and further denying them their right to a clean and healthy environment
  12. He averred to the Regulations requiring the proprietor of a construction project to make an application for registration in writing to the 13<sup>th</sup> Respondent within 30 days of an award of tender of construction to a contractor registered under the Act. Upon receipt of the application form from the owner, the 13<sup>th</sup> Respondent is required to issue a compliant certificate within 30 days of receipt of the application. He averred that the 13<sup>th</sup> Respondent received a project registration application via its Online Project Registration System from developer, Exotic Real Ventures Limited, the 2<sup>nd</sup> Respondent herein.
  13. Mr Mwilu asserted that the 2<sup>nd</sup> Respondent furnished them with all the requisite documents required for project registration, including the requirements and approvals from the 5<sup>th</sup> and 11<sup>th</sup> Respondents. He said upon completion of review and verification of the required documentation by the 13<sup>th</sup> Respondent, it necessitated approval and issuance of a Compliance Certificate Registration no. 53127415710864 valid from 7<sup>th</sup> February 2024 to 7<sup>th</sup> February 2026 for the proposed development on plot L.R. No. 209/20729 Parklands.
  14. He said the 13<sup>th</sup> Respondent plays an independent but complementary role with other agencies and regulators, including the 5<sup>th</sup> and 11<sup>th</sup> Respondents with the mandate of the 13<sup>th</sup> Respondent is to ensure compliance of a construction meeting required standards of construction. He added that the issues raised in the Applicants' application constitute matters of the environment, zoning and planning which are covered under the Environment Management and Coordination Act 1999, and the [Physical and Land Use Planning Act](#) 2019, respectively, to which the 13<sup>th</sup> Respondent is not a regulator. He contended that the Applicants have not demonstrated that the 13<sup>th</sup> Respondent has failed to fulfil its legal duty and mandate under the [National Construction Authority Act](#) and the National Construction Regulations 2014.
  15. Besides the replying affidavit, the 5<sup>th</sup> Respondent also filed a Preliminary Objection dated 12<sup>th</sup> February 2024 and raised the following three points of law:
    - a. That the Applicants/Petitioners' Application and Petition both dated 2<sup>nd</sup> February 2024 in their entirety are defective, bad in law and in blatant violation of the legal doctrine of



exhaustion as both the Application and Petition raises issues under the *Physical and Land Use Planning Act* (Section 72, 76, 78(d) and 80) without exhausting the remedies provided under the said Act.

- b. That the Applicants'/Petitioners' Application and Petition both dated 2<sup>nd</sup> February 2024 in their entirety are defective, bad in law and in blatant violation of the doctrine of Pullman as both the application and petition raises issues under the Environmental Management and Coordination Act (Sections 125, 126 and 129) without exhausting the remedies provided under the said Act.
  - c. That the Petition raises no Constitutional issue for this court to determine.
16. They prayed that the Petition and application as drawn and filed are tantamount to an abuse of the court process and is ripe to be struck out in limine with costs.

#### **Petitioner's Submissions:**

17. The Petition filed submissions dated 22<sup>nd</sup> May 2024 and at the introductory part produced a summary of the pleadings. They plead that the action/inaction of the 1<sup>st</sup> to 13<sup>th</sup> Respondents violated and continue to violate their rights under article 10, 26, 35 and 42 of *the Constitution*. In responding to the preliminary objection by the 5<sup>th</sup> Respondents, the Applicants aver that their petition contained complaints hedged on the provisions of inter alia articles 26, 28, 35, 42, 43, 47, 50, 69, 70, 73 and 75 of *the Constitution* 2010 and the respective Statutes. That the complaints are constitutional issues which only this court is clothed with jurisdiction to deal with as set out in article 165 (3)(b). They cited among others the case of Abidha Nicholus and Others versus A.G and 7 Others (2023)eKLR where the Supreme court of Kenya dealt with the issue of jurisdiction.
18. On the merit of their application, they reiterated that their application is brought pursuant to rule 3, 4, 13 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and section 3 of EMCA and section 13 of ELCA. They cited the case of Gatarau Peter Munya vs Dickson Mwenda Githinji & 2 Others (2014) eKLR where the Supreme Court discussed the purpose of Conservatory orders. The Applicants contend that when the excavation commenced, there was no signage on the suit premises to disclose the nature of the development being undertaken and that they have shown by way of affidavits that the 5<sup>th</sup> to 13<sup>th</sup> Respondents being aware of the on-going activities failed to perform their statutory duties by enforcing the stop order.
19. It is their assertion that unless the orders herein are issued, the construction will continue unabated. That the 5<sup>th</sup> and 7<sup>th</sup> Respondents have deposed in their replying affidavits that the 1<sup>st</sup> to 4<sup>th</sup> Respondents developments have not been approved hence the reason they issued the enforcement notice. The Petitioners accuse the 13<sup>th</sup> Respondent of being reckless in issuing the certificate of compliance to the 2<sup>nd</sup> to 4<sup>th</sup> Respondents. They urged the court to grant the orders on the basis of the issues raised in their pleadings.

#### **2<sup>nd</sup> to 4<sup>th</sup> Respondents Submissions:**

20. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents filed their submissions dated 3<sup>rd</sup> June 2024 and outlined two issues for determination by this court. On whether the applicant has made a case for an injunction, it was their submission that the Petitioners have not met the threshold for issuance of conservatory orders. They relied in the authority in *Katiba Institute v Judicial Service Commission & 2 Others; Kenya Magistrates and Judges Association & 2 Others (Interested Parties) (Constitutional Petition E128 of 2022) (2022) KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling)*, where the court set out the principles for grant of conservatory orders.



21. Does the Petitioner have a prima facie case and will they suffer prejudice if conservatory orders are not granted? They submitted that the right that the applicants claim has been infringed upon is that of purported disturbance which come with the construction of property. They said the applicants have failed to show proximity to the construction site and how the construction would affect them. They contended that they have provided proof of compliance with statutory and regulatory requirements and the 2<sup>nd</sup> Respondent has a right to construct their own property so long as the law is followed. They referred to their Replying Affidavit and in particular annexures marked AA4, AA5, AA6, AA7 and AA8 which show the notification of approval of application by NCCG, official receipt for excavation permit, authority to excavate from NCCG, Environmental Impact Assessment Report and receipt for payment for Project Submission report. They contended that the Environmental Impact Assessment Report has proof of public participation of the persons who would generally be affected by the said construction and their responses were positive. It was therefore clear that the applicants do not have a prima facie case with a chance of success.
22. They continued that lack of a prima facie case is reinforced by the fact that this application and petition that it is pegged upon goes contrary to the doctrine of exhaustion. They informed the court that the matter as stated is before the relevant county authority and is in the process of determination before the applicants disturbed this Honourable Court. They cited Section 78 of the *Physical and Land Use Planning Act* which provides for the functions of the County Physical and Land Use Planning Liaison Committee.
23. They argued that a complaint was made by the applicants leading to the enforcement order and the process for appeal was ongoing before the applicants decided to file their ill-advised Petition. They said the doctrine of exhaustion serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.
24. They submitted that to answer this question, we must first bear in mind the essence of a conservatory order. They said the word conservatory order appears in Article 23 of *the Constitution* as one of the instruments that the courts could use in order to protect the enforcement of constitutional rights. They relied on the case of *Chebii Kipkoech v. Barnabas Tuitoel Bargarioria & Another* (2019) EKLK where it was held that:

“ the meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”
25. These Respondents contended they would suffer more as they have put up funds for construction of the development as they also have a fundamental right to property under Article 40(1) of *the Constitution*. They claimed that they are yet to start construction as they stopped as soon as the enforcement notice was provided. Despite having all the necessary approvals to excavate the property, they are not allowed to do so due to claims that excavation of the property would infringe on the rights and freedoms of the Petitioners. They argued that the applicants on the other hand shall suffer no harm at all.
26. They said their claims of noise and dust pollution does not hold water as they are by-products of construction similar to the construction giving rise to the apartments they currently live in. They concluded by saying that the applicants have no case before this Honourable Court befitting a hearing or grant of orders prayed and the same should be struck out with costs.



### 13<sup>th</sup> Respondent's Submissions

27. The application was canvassed by way of written submissions. The 13<sup>th</sup> Respondent filed their submissions dated 12<sup>th</sup> February 2024 and outlined two issues for determination. On whether the 13<sup>th</sup> Respondent fulfilled its mandate in line with the laws and regulations, they submitted that they could not have issued the 2<sup>nd</sup> Respondent with the Certificate of Compliance before they had obtained the approved building plans and the Environment Impact Assessment License from the 5<sup>th</sup> and 11<sup>th</sup> Respondents. They stated that they take cognizance that a government and any public body can do only what the law positively allows before deciding or taking other action. That they cannot usurp the powers of another statutory body and have demonstrated that they acted within its mandate in line with provisions of the [National Construction Authority Act](#) and the National Construction Authority Regulations.
28. On whether the court should grant the orders pleaded under the application, it was their view that for the Petitioners/Applicants to raise a prima facie case with a probability of success, they must demonstrate that the 13<sup>th</sup> Respondent's decision to issue an NCA compliance certificate for the suit-subject property violated [the Constitution](#) and their human rights. Considering the matters aforesaid and issues averred in the 13<sup>th</sup> Respondent's affidavit, there are conditions precedent that disentitles the Applicants' for a conservatory order as against the 13<sup>th</sup> Respondent. They stated that they registered the proposed development in accordance with the Act and Regulations.
29. They continued that the burden was on the Applicants to show that there is a danger imminent and evident, valid and actual, and such danger deserves immediate remedial attention or redress by this Honourable Court. However, no evidence was tendered to show any prejudice or danger the Applicants will face if the proposed development is completed. Being a crucial component and condition for the grant of conservatory orders, it is not enough to make averments and it is vital to exhibit evidence of such danger.
30. They cited the decision of the Supreme Court in GATIRAU PETER MUNYA V. DICKSON MWENDA KITHINJI & 2 OTHERS, Supreme Court Application [no. 5 of 2014](#) (2014) eKLR.

### 5<sup>th</sup> Respondent's Submissions

31. The 5<sup>th</sup> Respondent filed their submissions dated 14<sup>th</sup> June 2024 and outlined four issues for determination of the application and preliminary objection. On whether the Petitioners were required to exhaust the alternative dispute resolution mechanisms provided for under statute before filing the instant suit, they submitted that pursuant to the doctrine of exhaustion, the Petitioners were indeed mandated by law to exhaust all other avenues of redress before approaching this Honourable Court. They contended that under the doctrine of exhaustion where there is an alternative method of dispute resolution established by courts must exercise restraint in proceeding with any such matter and must give preference to such dispute resolution mechanism established by law with the mandate to deal with specific disputes in the first instance.
32. They aver that Section 78 of PLUPA provides for the functions of the County Physical and Land Use Planning Liaison Committee which includes to hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county. Section 9(1) of the EMCA provides the object and purpose for which NEMA is established which is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. While section 129(1,2) of EMCA provided instances where disputes pertaining to compliance with breach and/or violation



of the provisions of the Act, ought to be lodged with and/or addressed by the National Environmental Tribunal.

33. The 5<sup>th</sup> Respondent submits that the application and petition are bad in law as they blatantly violate the Pullman Doctrine. They cited the decision of the Supreme Court of Kenya in *Benson Ambuti Atega & 2 Others v Kibos Distillers Ltd & 5 Others* (2020) EKLR. Further, they argue that a perusal of the Petition discloses that it raises no constitutional issue for this court to determine. They said that the Petition is primarily founded on the fact that the 1<sup>st</sup>-4<sup>th</sup> Respondents began to excavate and/or otherwise develop the suit property without acquiring the requisite approvals as required by the law.
34. They submitted that even if it is argued that there are indeed constitutional issues for determination, the correct procedure by the Petitioner would have been to seek redress through the mechanisms provided by Statute as outlined above and reserve the constitutional issues pending the determination on the issues of the approval. On whether the application is merited, they submitted that Section 57 of PLUPA obligates the 1<sup>st</sup>-4<sup>th</sup> Respondents to only carry out any developments on the suit property after the issuance and grant of development permission.
35. Section 58 of PLUPA states the 5<sup>th</sup> Respondent only issues development permission on application by any person and upon provision of all necessary documents, plans, particulars and purpose of the proposed development. As admitted by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents, they began development and construction activities in the suit property without any development permission from the 5<sup>th</sup> Respondent's Planning Authority. Consequently, in accordance with Section 72 of PLUPA and under the instructions of the 7<sup>th</sup> Respondent, they issued an Enforcement Notice dated 1<sup>st</sup> January 2024 against the ongoing and the proposed construction activities on the suit property

### **Analysis and Determination**

36. I frame the following issues as coming up for determination by this court:
  - a. Whether the Preliminary Objection is merited;
  - b. Whether conservatory orders should issue;
  - c. Who should pay costs?

### **The Preliminary Objection**

37. The 5<sup>th</sup> Respondent has questioned the jurisdiction of this court on account of the doctrine of exhaustion. They have stated that the applicants/petitioners did not exhaust other avenues available to them before approaching the court with their application and petition. The Supreme Court of Kenya in the case of *Abidha Nicholus & Others versus Attorney General & Others* (2023) eKLR observed that there are two schools of thought on this question. They stated thus;
  - “ 83. On one hand, there is a series of decisions that have taken the position that, even though the ELC has original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under EMCA, by first referring a matter to NET before an appeal can lie to the ELC.
  88. There is however another school of thought that has posited that, if the complaints and prayers by a petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacks the jurisdiction to determine the



constitutional issue hence the provisions of Section 129 of EMCA are inapplicable to such claims.”

38. In order to reconcile the two schools of thought, the Supreme Court went further in the same case and held that;
100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant’s claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*.
39. The court is invited to scrutinize the case presented by the Applicants before dismissing it on account of the doctrine of exhaustion. At paragraph 105, the Supreme Court stated that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. In the instant Petition, the Applicants are alleging a violation inter alia of their right to information by the 5<sup>th</sup> to 13<sup>th</sup> Respondents; right to dignity, right to a clean and healthy environment. They pleaded that the 1<sup>st</sup> to 4<sup>th</sup> Respondents were carrying out constructions outside the licensed hours (at night).
40. The 5<sup>th</sup> Respondent has stated that the applicants/petitioners should have approached the County Physical and Land Use Planning Liaison Committee with their complaint before approaching this court. The second ground of preliminary objection was that the Petition and application is a violation of the doctrine of Pullman as they raise issues under the Environmental Management and Coordination Act. Section 125 of the EMCA established the National Environment Tribunal. Section 126 of EMCA lays out the proceedings of the Tribunal and Section 129 provides for the appeals to be handled by the Tribunal. The Applicants submitted that the alternative dispute resolution mechanism is not adequate as the Liaison Committee cannot address the Constitutional issues raised.
41. On account that the Supreme Court in the *Abidha Nicholus* case has settled the fact that the doctrine of exhaustion does oust the jurisdiction of this court unless the stated statute does so in compliance with *the Constitution*, the preliminary objection raised fails. Whether there is merit on the alleged constitutional rights violations pleaded by the petition, the answer can only be got after hearing the petition. The merit of the petition cannot be determined by way of a preliminary objection.
42. The Court in *William Odhiambo Ramogi & 3 others* provided exceptions to the doctrine of exhaustion as follows:
- “ 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus: What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal



acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*)

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR.*"
43. In light of the foregoing analysis, I hold that the preliminary objection raised has no merit and it is dismissed.

### **The Application**

44. The Petitioners/Applicants have asked this court for conservatory orders of temporary injunction against the 1<sup>st</sup>-4<sup>th</sup> Respondents pending the hearing and determination of the Petition. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* discussed conservatory orders as follows:
  - (86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
45. For a conservatory order to be issued, the Petitioners/Applicants must satisfy the conditions as discussed in *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR*, where the Court summarized the principles for grant of conservatory orders as: -
  - (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
  - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.



46. Using the above laid out guiding principles, the Petitioners/Applicants have to show that they have a prima facie case with a likelihood of success and they are likely to suffer prejudice. A prima facie case was defined in *Mrao vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 to mean: -  
... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.
47. The Petitioners/Applicants have alleged that the 1<sup>st</sup>- 4<sup>th</sup> Respondents are undertaking excavation and development activities in L.R. No. 209/20729 – City Park Drive, Parklands without the requisite permits. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents admitted in their Replying Affidavit that they have begun development and construction activities on the suit property. The 5<sup>th</sup> Respondent stated that they received an application for Change of User from the 2<sup>nd</sup> and 4<sup>th</sup> Respondents which they approved on 11<sup>th</sup> December 2023 and on 8<sup>th</sup> March 2023 approved building plans for the proposed development on the suit property but did not issue Development Permission.
48. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents annexed a copy of development permission issued to Exotic Real Ventures Ltd the by the Nairobi City County on 20<sup>th</sup> July 2023. They also annexed copies of EIA License issued by 11<sup>th</sup> Respondent. The 13<sup>th</sup> Respondents told the court that they only register construction works once the relevant County Government has approved a construction project. That they received a project registration application from the 2<sup>nd</sup> Respondent who furnished them with all the requisite documents including the requirements and approvals from the 5<sup>th</sup> and 11<sup>th</sup> Respondents. Thereafter they issued a Certificate of Compliance to the 2<sup>nd</sup> Respondent.
49. The 5<sup>th</sup> Respondent stated that on 1<sup>st</sup> January 2024 they issued an Enforcement Notice against the ongoing construction on the suit property and on 20<sup>th</sup> January 2024 they engraved the construction site “Illegal Site”. However, they make no mention is made about the notification of approval they issued on 20<sup>th</sup> July, 2023 to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents also stated they stopped excavations/constructions after they were issued with the enforcement notice. The allegations of conducting developments without approvals is vindicated by the copies of licences issued by NEMA, Nairobi City County and NCA. In the pleadings raised in support of the application, the Applicants have not brought out any issue as regards the manner in which the licenses were issued.
50. Part of the complaints raised by the Applicants is that the 1<sup>st</sup>- 4<sup>th</sup> Respondents ongoing development are being carried out during odd hours, weekends and public holidays to the detriment of the petitioners/applicants’ peaceful environment. That this was being done despite the existence of the enforcement notice served on the 2<sup>nd</sup> to 4<sup>th</sup> Respondents. The licenses issued to the 2<sup>nd</sup> – 4<sup>th</sup> Respondents set out the conditions that ought to be observed and in case of non-compliance, the issuing bodies or this court now moved can make appropriate orders. They are likely to suffer prejudice and their right to a clean and healthy environment further violated unless the 2<sup>nd</sup> to 4<sup>th</sup> Respondents comply with the conditions of their licenses.
51. One of prayers the Petitioners/Applicants have asked for is an order compelling the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents to take immediate measures to prevent or discontinue any act or omission deleterious to the environment on L.R. 209/20729, City Park Drive, Parklands. The 7<sup>th</sup> Respondent in his replying affidavit sworn on behalf of the 5<sup>th</sup> Respondent explained the steps they have taken after finding that the 1<sup>st</sup>-4<sup>th</sup> Respondents were illegally constructing “without Development Permission.” From the 5<sup>th</sup> Respondent’s Replying Affidavit, there is no information on whether the



1<sup>st</sup>-4<sup>th</sup> Respondents complied with the said Enforcement Notice and to meet the demands outlined therein.

52. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents in response averred that even the premises occupied by the Applicants generated dust during their construction. There was no evidence to support this averment and the matter at hand is their development. They have a responsibility to ensure that their development minimise negative effects both to the environment and to the neighbours such as the Applicants. Since the area is a residential area (noticeable even from the change of user license), the Applicants have a right to complaint about the dust and the night constructions and which therefore establishes a prima facie case.
53. I have stated that the complaints raised can be remedied while undertaking the construction hence, the orders I will issue will be temporary subject to the 2<sup>nd</sup> to 4<sup>th</sup> Respondents putting up measures to minimise the effect of dust pollution emanating from the suit premises on the Petitioners. They shall also not undertake any construction work post 6pm as well as control vehicular movement to and from the suit property. Therefore, I allow the application on the following terms;
- a. That a conservatory order of temporary injunction be and is hereby given compelling the 5<sup>th</sup> , 11<sup>th</sup> and 13<sup>th</sup> Respondents and their officers to take immediate measures to prevent or discontinue any act or omission deleterious to the environment on L.R. No. 209/20729 (original no. 209/870/3/5- City Park Drive, Parklands and in particular to ensure the construction works is not undertaken outside the hours of 6am to 6pm until this petition is heard and determined.
  - b. That a conservatory order of temporary injunction be and is hereby given stopping, discontinuing and preventing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their servants/agents/ proponents, or any other person, from excavating and/or undertaking any development on L.R. No. 209/20729 (original no. 209/870/3/5- City Park Drive, Parklands until they put up dust covers under the supervision of NEMA. A report shall be filed in court as soon as the 2<sup>nd</sup> to 4<sup>th</sup> Respondents comply. Upon compliance, the temporary orders shall be lifted.
  - c. Costs of the application in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST, 2024**

**A. OMOLLO**

**JUDGE**

