



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kassam & 13 others v Njoroge & 23 others (Petition E021 of 2024)  
[2024] KEELC 6174 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6174 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**PETITION E021 OF 2024**

**OA ANGOTE, J**

**SEPTEMBER 19, 2024**

**IN THE MATTER OF ARTICLES 1, 10, 19, 20, 22(1), 23(1), 70(1),  
162(3) AND 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ONGOING BREACH, VIOLATION AND CONTRAVENTION, AND  
FURTHER INTENDED BREACH, VIOLATION AND CONTRAVENTION OF ARTICLES  
28, 35, 42, 43(1)(B), 47(1), 69(1), 70 AND 75 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ACCESS TO INFORMATION ACT 2016**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF SECTIONAL PROPERTIES ACT NO. 21 OF 2020**

**AND**

**IN THE MATTER OF PHYSICAL LAND USE AND PLANNING ACT NO. 13 OF 2019**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL  
MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999**

**AND**

**IN THE MATTER OF NATIONAL CONSTRUCTION AUTHORITY ACT**

**AND**

**IN THE MATTER OF THE ONGOING BREACH AND CONTRAVENTION AND  
FURTHER INTENDED CONTRAVENTION OF SECTION 20(J), 56(A), 57(1) & (3),  
58(4), 61(1)(B), 62 AND 72 OF THE PHYSICAL LAND USE AND PLANNING ACT 2019**



AND

IN THE MATTER OF ACTIVITIES DELETRIOUS TO THE ENVIRONMENT  
ON L.R. NAIROBI/ BLOCK 37/66, NAIROBI/ BLOCK 37/65, NAIROBI/ BLOCK  
37/66/1, NAIROBI/BLOCK 37/66/2, NAIROBI/BLOCK 37/66/3, NAIROBI/BLOCK  
37/66/4, NAIROBI/BLOCK 36/66/5, NAIROBI/BLOCK 37/66/6, NAIROBI/BLOCK  
37/66/7 AND NAIROBI/BLOCK 37/66/8- CITY PARK DRIVE, PARKLANDS

AND

IN THE MATTER OF INHUMANE AND DEGRADING TREATMENT OF THE  
PETITIONERS, THE RESIDENTS OF L.R. NO. 209/871/13, L.R. NO. 209/20730,  
L.R. NO. 209/161816, L.R. NO. 209/870/3, 209/9083 AND THE GENERAL PUBLIC

BETWEEN

KARIM 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  
RITA KUMARI ZAVERCHAND VISARIA ..... 14<sup>TH</sup> PETITIONER

AND

GRACE NJERI NJOROGE ..... 1<sup>ST</sup> RESPONDENT  
WASHINGTON MBAYA MUTHAMA ..... 2<sup>ND</sup> RESPONDENT  
JULIE WANJIRU KIBATHI ..... 3<sup>RD</sup> RESPONDENT  
DAVID ALEXANDER RUBIA GATHURA ..... 4<sup>TH</sup> RESPONDENT  
ELIJAH MALEKYI MATIBO ..... 5<sup>TH</sup> RESPONDENT  
JOSEPHINE VIVIAN AWUOR ..... 6<sup>TH</sup> RESPONDENT  
QALI HUSSEIN SIAD ..... 7<sup>TH</sup> RESPONDENT



|  |                             |
|--|-----------------------------|
| LOUISE MUMBI MAHINDI .....                     | 8 <sup>TH</sup> RESPONDENT  |
| LEORNARD OPERE KWELU .....                     | 9 <sup>TH</sup> RESPONDENT  |
| DOROTHY OMINDE NYANGAYA .....                  | 10 <sup>TH</sup> RESPONDENT |
| JOYCE KARIMI MUTHAMIA .....                    | 11 <sup>TH</sup> RESPONDENT |
| AKHWAM CONSTRUCTION LTD .....                  | 12 <sup>TH</sup> RESPONDENT |
| ARCH MUNEER KHALID OMAR ALKIZIM .....          | 13 <sup>TH</sup> RESPONDENT |
| ENG NYAMWINARA SIBHORA SIMION .....            | 14 <sup>TH</sup> RESPONDENT |
| NAIROBI CITY COUNTY GOVERNMENT .....           | 15 <sup>TH</sup> RESPONDENT |
| PATRICK ANALO AKIVANGA .....                   | 16 <sup>TH</sup> RESPONDENT |
| STEPHEN GATHUITA MWANGI .....                  | 17 <sup>TH</sup> RESPONDENT |
| TOM ACHAR .....                                | 18 <sup>TH</sup> RESPONDENT |
| ENG MICHAEL ASWANI .....                       | 19 <sup>TH</sup> RESPONDENT |
| NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... | 20 <sup>TH</sup> RESPONDENT |
| MAMO B MAMO .....                              | 21 <sup>ST</sup> RESPONDENT |
| CATHELINE THAITHI .....                        | 22 <sup>ND</sup> RESPONDENT |
| NATIONAL CONSTRUCTION AUTHORITY .....          | 23 <sup>RD</sup> RESPONDENT |
| MAURICE A AKETCH .....                         | 24 <sup>TH</sup> RESPONDENT |

## RULING

1. The Petitioners have filed a Notice of Motion application dated 24<sup>th</sup> June 2024 under Sections 3, 4, 13 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Section 3 of the *Environmental Management and Co-ordination Act*, Section 3 and 10 of the *Environment and Land Court Act*. They have sought for the following orders:
  - a. That a conservatory order of temporary injunction be and is hereby given stopping, halting and discontinuing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> Respondents, their servants/agents /proponents, or any other person, from undertaking any further construction and development activities on the properties known as Nairobi/Block 37/66, Nairobi/Block 37/66/1, Nairobi/Block 37/66/2, Nairobi/Block 37/66/3, Nairobi/Block 37/66/4, Nairobi/Block 37/66/5, Nairobi/Block 37/66/6, Nairobi/Block 37/66/7 and Nairobi/Block 37/66/8- City Park Drive Parklands, pending the hearing and determination of this Petition.
  - b. That a conservatory order of temporary injunction be and is hereby given, compelling the 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, and 24<sup>th</sup> Respondents jointly and/or severally, to take immediate measures to stop, prevent or discontinue any construction and development activities or any act or omission deleterious to the environment, on the properties known as Nairobi/Block 37/66, Nairobi/Block 37/66/1, Nairobi/Block 37/66/2, Nairobi/Block



37/66/3, Nairobi/Block 37/66/4, Nairobi/Block 37/66/5, Nairobi/Block 37/66/6, Nairobi/Block 37/66/7 and Nairobi/Block 37/66/8- City Park Drive Parklands, including arresting and prosecuting any person or equipment being used to undertake further development on the said property by the 1<sup>st</sup> to 14<sup>th</sup> Respondents, their agents/proponents, or any other person, pending the hearing and determination of this Petition.

- c. That this Honourable court do give any further orders and/or directions deemed just, fair and necessary.
  - d. That costs of the application be provided for.
2. The grounds on which the application is based on are set out on the face of the Motion. The application is also supported by the Supporting Affidavit sworn on 24<sup>th</sup> June 2024 and the Further Supporting Affidavit sworn on 9<sup>th</sup> August 2024 by the 1<sup>st</sup> Petitioner, who is the owner of Apartment No. E7 on Block E jointly with the 2<sup>nd</sup> Petitioner, who is the owner of residential apartment units on LR No. 209/871/13.
  3. The 1<sup>st</sup> Petitioner deponed that the applicants herein are owners/residents of the properties on LR Nos 209/871/13, 209/20730 and 209/161816, which are next to the suit properties known as Nairobi/Block 37/66, Nairobi/Block 37/66/1, Nairobi/Block 37/66/2, Nairobi/Block 37/66/3, Nairobi/Block 37/66/4, Nairobi/Block 37/66/5, Nairobi/Block 37/66/6, Nairobi/Block 37/66/7 and Nairobi/Block 37/66/8- City Park Drive Parklands.
  4. It was deponed that the development and construction activities on the suit properties commenced in December 2023 at which time no licenses or approvals had been issued; that the noise caused by heavy excavation equipment is denying the Petitioners peaceful and quiet occupation of their residencies and that the excavation was undertaken so negligently and carelessly by the 1<sup>st</sup> to 14<sup>th</sup> Respondents, causing damage to the walls of houses erected on L.R. No. 209/161816, the same having been done beacon to beacon in violation of laws and regulations on land use and planning.
  5. The deponent asserts that the owners/developers of the subject properties are undertaking development and construction activities through their agents without any known approvals from the 15<sup>th</sup> to 24<sup>th</sup> Respondents; that the 15<sup>th</sup> to 24<sup>th</sup> Respondents are aware that the said construction is illegal and irregular as no approvals for change of use and development permission were issued to the 1<sup>st</sup> to 14<sup>th</sup> Respondents and that the alleged approvals by the 12<sup>th</sup> Respondent are fraudulent, illegal, null and void.
  6. It was deposed by the Petitioners that despite the knowledge and confirmation, no action has been taken to stop or halt the ongoing illegal construction activities, and that the said construction will continue unabated unless this court grants the conservatory orders prayed for.
  7. The 1<sup>st</sup> Petitioner deponed that if the construction and development activities on the subject properties are not halted or discontinued at this stage of the foundation and basement level, the Petitioners' fundamental rights to life and to a clean and healthy environment will continue to be denied, breached and violated and that the development is deleterious to the environment and the damage caused and to be caused is immeasurable and irredeemable, and will render the Petition a mere academic exercise.
  8. It was deposed by the Petitioners that they had previously filed *Petition No. E007 of 2024* in respect to the developments on the suit property and that they have since withdrawn that suit following discovery of new facts and information that was not previously within their knowledge.



9. In his Further Supporting Affidavit, Mr. Karim Kassam deponed that the property referred to by the 1<sup>st</sup> to 14<sup>th</sup> Respondents as LR No. 209/ 9316 or LR No. 209/9316 (now Nairobi/Block 37/66/1-8) does not exist on the ground and in any government record; that no development approval or permission was granted by the 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Respondents permitting the development on Nairobi/Block 37/66 and Nairobi/Block 37/66/1-8; that the parcel of land known as LR No. 209/9316 measuring approximately 0.2282 Ha was extinguished following sub-division of the parcel into two equal portions vide survey plan F/R No. 368/160 in 1999 and authenticated in 2000 vide approval letter reference no 1027286/17 and that the two sub-divided portions were allocated parcel numbers Nairobi/Block 37 (City Park 65 and 66).
10. According to the Petitioners, Nairobi/ Block 37/66-City Park was concurrently surveyed to eight sectional units as Nairobi/Block 37/66/1 – 8 and sectional titles issued to the respective owners; that the sectional titles of the units have never been terminated or extinguished and that no sale of the units have been approved, transferred and registered in accordance with the *Sectional Properties Act*.
11. Mr. Karim Kassam asserted that the development and construction activities that commenced in December 2023 with demolition of the eight residential houses has never been approved by the 15<sup>th</sup>, 16<sup>th</sup> and the 17<sup>th</sup> Respondents in breach of Section 57 and 58 Of PLUPA; that vide a letter dated 7<sup>th</sup> June 2024, the 16<sup>th</sup> Respondent informed the Petitioners that they had received an application for development approval on plot LR No. 37/66 City Park Drive from the 12<sup>th</sup> Respondent, and had not granted any approvals for the same and that any agreement, approval, license or permit entered into referring to the property described as LR No. 209/9316 and/or LR No. 209/9316 (now Nairobi/Block 37/66/1-8) are fraudulent, null and void.
12. The deponents averred that there is no law, by-law or regulation permitting the construction of the development of 18 floors and that the Nairobi City County Development Control Policy 2021 is not a Local Physical and Land Use Development Plan nor a County Development Control Policy, and has no legal effect as it is yet to be subjected to legislative process.
13. They assert that demolition of existing structures, excavation of the property from beacon to beacon and the noise and pollution from the construction will adversely affect air and natural lighting of the Petitioners' residences and that the lack of adequate sewer and other drainage facilities near the subject property breaches the environmental planning and protection laws and infringes and threatens the Petitioners' rights and fundamental freedoms to life and to a clean and healthy environment.
14. The 1<sup>st</sup>-11<sup>th</sup> Respondents opposed the application by way of a Notice of Preliminary Objection dated 15<sup>th</sup> July 2024 and a Replying Affidavit dated 15<sup>th</sup> July 2024.
15. They have raised an objection to the Petitioners' suit on the grounds that the Petitioners have not exhausted the mandatory statutory mechanisms for redressing the dispute, set out in Section 78 of Physical Planning and Land Use Act, 2019 which confers jurisdiction on the County Physical and Land Use Planning Liaison Committee to hear and determine complaints and claims made in respect to applications and decisions of a planning authority in the county and Section 125 and 129 of the Environmental Management Coordination Act that vests jurisdiction on the National Environment Tribunal (NET) to hear, in the first instance, disputes relating to and arising from licensing by National Environmental Management Authority.
16. In a Replying Affidavit sworn by Elijah Malekya Matibo, the 5<sup>th</sup> Respondent averred that this Petition and application is averse to the doctrine of exhaustion of remedies; that the provisions of Section 78 of the *Physical and Land Use Planning Act* 2019 and Section 125 and 129 of the Environmental Management and Coordination Act have provided statutory mechanisms for hearing



and determination of the matters herein, and that the jurisdiction of this court has not been invoked and ought to be dismissed.

17. He deponed that the 1<sup>st</sup>-11<sup>th</sup> Respondents are the registered and legal owners of the land subject of the impugned development particularly constituted under Sectional Title Nairobi/Block/ 37/66/1-8 also comprised under the deed plan registered as LR No. 209/9316; that there is no dispute concerning the ownership or boundaries over the subject property and that the property previously comprised of a low density flat consisting 8 apartment units in which the owners have been residing until they were demolished to pave way for the ongoing development.
18. The 5<sup>th</sup> Respondent deposed that the owners of the subject property entered into a Joint Venture Agreement with the 12<sup>th</sup> Respondent dated 3<sup>rd</sup> November 2023, in which they agreed to demolish the existing 3-storey residential flat and to develop in its place a 68 unit highrise residential complex; that the 12<sup>th</sup> Respondent validly sought and was issued with regular and valid approvals from all relevant authorities with proper notices to the general public and that the applications for change of user and building permission were conspicuously displayed on the gate and walls of the subject property opposite the entrance of the 1<sup>st</sup> Petitioner's residence and advertised in a newspaper of wide circulation.
19. Mr. Elijah Matibo further asserted that the owners vacated the suit property in late January 2024; that there was no activity as early as November 2023; that the Petitioners were properly notified of the development and they cannot therefore employ lack of knowledge or notice as a basis of a late challenge, when they ought to have utilized the notice periods and approval processes to lay their claim and that the Petitioners are now estopped from laying this late challenge which would visit and occasion grave and irreparable harm and prejudice to the owners of the land.
20. The deponent stated that the 1<sup>st</sup> Petitioner had failed to produce or demonstrate properly executed authority or consent to act on behalf of the alleged Petitioners and that the 1<sup>st</sup> Petitioner accordingly has no locus standi to purport to bring the Petition on behalf of the alleged Petitioners; that the 1<sup>st</sup> Petitioner has not produced any ownership documents other than his to substantiate the assertion and that the Petitioners are indeed neighbours of the subject property as claimed.
21. According to the 5<sup>th</sup> Respondent, the claim that the wall of LR. No. 209/161816 has been breached has no basis as no owner of the said property has made any such claim and that the Petitioners have not demonstrated with specificity the constitutional clauses of how the alleged irregularity in the approval process of the development has occasioned any harm or is likely to prejudice them.
22. The deponent deposed that the owners of the subject property are mostly retirees who purchased the property as their retirement homes, which have now been demolished and are living on rental compensation paid by the developers for the duration of the project, which is set to be two and a half years and that if this project is stopped or delayed, the owners are likely to be rendered homeless and destitute, and deprived of their constitutional right to housing without sound and justifiable cause.
23. The 12<sup>th</sup> Respondent filed a Notice of Preliminary Objection dated 5<sup>th</sup> July 2024 on similar grounds as that of the 5<sup>th</sup> Respondent. The 12<sup>th</sup> Respondent also filed a Replying Affidavit of even date sworn by Abdiwahab Mohammed Hussein, a director of Akhwam Construction Ltd, the 12<sup>th</sup> Respondent.
24. He deposed that this suit is a case of forum shopping and abuse of court process; that the Petitioners filed a similar suit vide ELC Petition *E009 of 2024* Karim Kassam & 13 others v Grace Njeri and 11 others dated 12<sup>th</sup> April 2024 and that the Petitioners withdrew the Petition but have not disclosed that the matter is still alive before this court pending determination of the issue of costs and the same is scheduled for mention on 9<sup>th</sup> October 2024 to confirm filing of submissions.



25. Abdiwahab Mohammed Hussein asserted that this Petition offends the doctrine of exhaustion and constitutional avoidance as the Petitioners have not exhausted the existing dispute resolution mechanisms provided for under Section 78(b) of the *Physical and Land Use Planning Act* and Section 129(1)(a) of the *Environmental Management and Co-ordination Act* and that the NEMA license for the development was issued on 12<sup>th</sup> March 2024 and vide a letter dated 14<sup>th</sup> March 2023, the 12<sup>th</sup> Respondent's advocate communicated the details of the NEMA license.
26. The deponent averred that the contention that parcel No. 209/9316 (now Nairobi 37/66/1-8) does not exist is a blatant misrepresentation; that the Petitioners confirm and acknowledge the existence of this property in the consents filed before this court and exhibited at pages 71 and 72 of the annexures and that the Petitioners have not met the legal threshold for the grant of the equitable remedies sought.
27. Abdiwahab Mohammed Hussein contended that the process leading to the change of user was undertaken openly and lawfully and that prior to the grant of permission relating to the change of user, notices were published in the Standard and Nation Newspaper dated 10<sup>th</sup> November 2023.
28. It was deposed that the 12<sup>th</sup> Respondent submitted drawings for approval by the County Government of Nairobi, which approval was granted on 30<sup>th</sup> November 2023; that the 12<sup>th</sup> Respondent obtained an Environmental Impact Assessment License No. NMEA/EIA/*PSL/31291* pursuant to an Environment Impact Assessment Report which was submitted to NEMA in which views of the neighbors were obtained through questionnaires and that the 12<sup>th</sup> Respondent obtained an approval from the National Construction Authority vide project Reg No. 53127415710870.
29. He deposed that excavation did not commence until after 16<sup>th</sup> February 2024 when an excavation permission was granted to the 2<sup>nd</sup> Respondent by the 5<sup>th</sup> Respondent and that the signboard was erected on 13<sup>th</sup> March 2024 and not 10<sup>th</sup> March 2024 as claimed by the Petitioners.
30. It is the 12<sup>th</sup> Respondent's case that the emission of dust pollution or other waste was not true and that necessary measures have been put in place such as scaffolding safety/dust nets, undertaking the works within permitted hours and proper control of movement of trucks in and out of the site and that the 12<sup>th</sup> Respondent has spent more than Kshs. 100 million in site preparation, mobilization of machinery and materials.
31. The 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> Respondents filed a preliminary objection on the grounds that this court lacks jurisdiction to determine the Notice of Motion application and Petition by virtue of Section 61(3) of the *Physical and Land Use Planning Act*, 2019 and that the Petition is premature because the Petitioners have failed to exhaust the alternative means of dispute resolution provided under the laws of Kenya.

### Submissions

32. Counsel for the Petitioners submitted that neither the County Physical and Land Use Planning Liaison Committee nor the National Environment Tribunal have authority and jurisdiction to hear and determine the Petitioners' suit. Counsel relied on the case of David Alfred Njeru Ndambiri & Another vs Nairobi Metropolitan Services and 13 Others [2024] eKLR as well as Section 61(3) of the *Physical and Land Use Planning Act* and Section 129(1) of EMCA.
33. Counsel submitted that the Environment and Land Court is the right forum and has original jurisdiction to hear and determine claims and disputes in respect to breach, violation and infringements or threats to denial and violation of rights and fundamental rights in respect to the right to a clean and healthy environment, vis a vis the National Environment Tribunal and the County Physical and Land



- Use Planning Liaison Committee. This, it was submitted, was settled by the Supreme Court in *Abidha Nicholus vs the Attorney General & 7 Others; National Environment Complaints Committee & 5 others* [2023] KESC 113 (KLR).
34. It was submitted that the alternative mechanisms are not adequate, and that the issues raised in this suit are within the original jurisdiction of the ELC as decreed by *the Constitution*, the ELC Act as well as EMCA.
  35. It was Counsel's submission that the Petition raises very fundamental issues on the rights and fundamental freedoms provided for under *the Constitution* of Kenya and that the complains and violations herein are in furtherance to the obedience of the principles and values set out in Article 10 of *the Constitution* including the rule of law, human rights, good governance and accountability.
  36. Counsel submitted that the Petitioners have locus standi; that they instituted the proceedings on their own behalf and on behalf of the general public whose rights and fundamental freedoms are denied; that the 1<sup>st</sup> Petitioner has written consent allowing him to swear supporting affidavits in this Petitioner and that under Article 22(1) of *the Constitution*, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. Counsel relied on the case of *Centre for Human Rights and Democracy & Another vs the Judges and Magistrates Vetting Board & 2 Others* [2012] eKLR.
  37. The Petitioner's counsel relied on the definition of a conservatory order as set out in *Damour Florian Emmeric vs Director of Immigration Services* (2022) eKLR, *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others* [2014] eKLR and *Judicial Service Commission vs Speaker of the National Assembly & Another* [2013] eKLR.
  38. Counsel submitted that Petitioners have adduced evidence proving that the development and construction was not approved by the 15<sup>th</sup> and 16<sup>th</sup> Respondents; that they have also established that the alleged LR No. 209/ 9316 ceased to exist after it was subdivided in 1999, and the subdivisions issued with parcel numbers Nairobi/Block 37(City Park) 66 and 65 and that they have proved that the construction was not approved by the 20<sup>th</sup> to 24<sup>th</sup> Respondents and that despite their knowledge of the illegality, they have opted to give a wide berth to the unapproved construction and development works.
  39. Counsel asserts that construction of the suit property is ongoing despite the 20<sup>th</sup> to 22<sup>nd</sup> Respondent giving an order to the 12<sup>th</sup> Respondent to stop further excavation works on the suit property pending submission of a copy of a deed plan of the property and that no deed plan of the property referred to as LR No. 209/9316 has ever been submitted to the 20<sup>th</sup> to 22<sup>nd</sup> Respondents.
  40. It was submitted that the development activities were illegal and in violation of Section 57 of the PLUPA; that the 15<sup>th</sup> to 19<sup>th</sup> Respondents are aware of the ongoing developments and have refused to perform their statutory mandates to halt the ongoing activities that are deleterious to and infringing on the Petitioners' right to life and to a clean and healthy environment, contrary to Section 56 of PLUPA.
  41. The Petitioners' counsel relied on the cases of *Chebii Kipkoech vs Barnabas Tuitoek Bargarioria & Another* [2019] eKLR, *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR, which cases expound on the meaning of balance of convenience.
  42. The Respondents did not file submissions.

### **Analysis and Determination**

43. The following issues are for this court's determination:



- a. Whether this court has jurisdiction to hear and determine this suit
  - b. Whether this court should issue conservatory orders against the Respondents.
44. This application concerns the legality of the construction and development being undertaken by the 12<sup>th</sup> Respondent on the subject properties, which are eight plots that are owned by the 1<sup>st</sup> -11<sup>th</sup> Respondents.
  45. The Petitioners assert that the said construction has been undertaken with licenses and permissions that are illegal, null and void and that the construction has been conducted recklessly, such that it has caused and continues causing harm to the owners and residents in the adjacent properties.
  46. The Respondents have raised a preliminary objection against the jurisdiction of this court to determine this Petition. They assert that this suit offends the doctrine of exhaustion of remedies and constitutional avoidance, the Petitioners having failed to exhaust the alternative remedies provided for under Section 129 of the Environmental Management and Coordination Act, and Section 78(b) of the *Physical and Land Use Planning Act* (PLUPA).
  47. It is trite that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. This was the position taken in the celebrated case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696.
  48. Jurisdiction is central to judicial proceedings, and it is trite that without it, a court cannot proceed with the suit. The Preliminary Objections raised by the 1<sup>st</sup>-11<sup>th</sup> Respondents, the 12<sup>th</sup> Respondent and the 15<sup>th</sup>-19<sup>th</sup> Respondents on the question of the jurisdiction of this court, satisfy the legal parameters of what a preliminary objection should entail.
  49. The doctrine of exhaustion is defined in Black's Law Dictionary 10<sup>th</sup> Edition as follows;  

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”
  50. The 12<sup>th</sup> Respondent also asserts that this suit offends the doctrine of constitutional avoidance. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 Others* [2014] eKLR. The Court held as follows: -  

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”



(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).(258)From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

51. According to the Respondents, the National Environment Tribunal (NET) is clothed with original jurisdiction under Section 129 of EMCA to determine any dispute by a person aggrieved by the grant of a license or permit or a refusal to grant a license or permit, or the transfer of a license or permit, under EMCA.
52. They also assert that under Section 78(b) of the *Physical and Land Use Planning Act*, the County Physical and Land Use Planning Liaison Committee has the exclusive jurisdiction to hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county.
53. Section 61(3) of the *Physical and Land Use Planning Act* also stipulates that an applicant aggrieved by the decision of a county executive member regarding an application for development permission may appeal to the County Physical and Land Use Planning Liaison Committee within 14 days of such decision.
54. The question as to the jurisdiction of the Environment and Land Court over disputes that fall within the jurisdiction of Tribunals and quasi-judicial forums has been settled by the Supreme Court in *Abidha Nicholus vs Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties)* [2023] KESC 113 (KLR). This determination is the prevailing authority on exhaustion of legal remedies, which is binding upon this court.
55. In the Nicholus case, the Supreme Court held that the provisions of the *Environmental Management and Co-ordination Act* (EMCA) 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. It was held that in the ordinary course of events, the ELC still has original jurisdiction over matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner.
56. The Supreme Court championed a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that establishes alternative dispute resolution mechanisms. In that respect, the court stated as follows:

“105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such



constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court...

...

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet.No.15 of 2020)* [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment)”

57. In *William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR, the High Court articulated the principles that a court should consider in determining whether the exhaustion requirement should be waived. The court held as follows:

“As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

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.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court...”



58. It is upon this court to consider the specific circumstances in this case, and determine whether there are exceptional conditions upon which to waive the requirement of exhaustion of remedies.
59. The Petitioners assert that the construction and development activities being conducted on the subject properties are illegal because the 1<sup>st</sup>-11<sup>th</sup> Respondents failed to obtain valid licenses or permissions and that the licenses and permissions obtained by the 12<sup>th</sup> Respondent are illegal, unlawful, null and void.
60. It is the Petitioners' case that the 15<sup>th</sup> to 24<sup>th</sup> Respondents are aware that the said construction is illegal and irregular and that despite the knowledge and confirmation, no action has been taken to stop or halt the ongoing illegal construction activities, and that the said construction will continue unabated unless this court grants the conservatory orders prayed for.
61. They further claim that the noise caused by heavy excavation equipment is denying the Petitioners peaceful and quiet enjoyment of their residencies; that excavation was undertaken so negligently and carelessly by the 1<sup>st</sup> to 14<sup>th</sup> Respondents, causing damage to the walls of houses erected on L.R. No. 209/161816; and that the excavation was done beacon to beacon in violation of laws and regulations on land use and planning.
62. Lastly, the Petitioners averred that if the construction and development activities on the subject properties are not halted or discontinued at this stage of the foundation and basement level, their fundamental rights to life and to a clean and healthy environment will continue to be denied, breached and violated. The Petitioners pleaded that the development on the suit properties is deleterious to the environment and that the damage to be caused is immeasurable and irredeemable.
63. The Petitioners in this suit have claimed that their constitutional right to a clean and healthy environment has been breached and violated, contrary to Article 42 of *the Constitution*. They have also claimed that there is a laxity from government officials to halt the construction and development.
64. The Petitioners have also raised the issue of the reference of the suit property as LR No. 209/ 9316 in the licenses and permissions issued to the Respondents.
65. They assert that this plot ceased to exist in 1999, when it was subdivided into parcel numbers Nairobi/Block 37(City Park) 66 and 65, and that that Nairobi/Block 37 (city Park) 66 was thereafter subdivided into eight sectional units as Nairobi/Block 37/66/1, Nairobi/Block 37/66/2, Nairobi/Block 37/66/3, Nairobi/Block 37/66/4, Nairobi/Block 37/66/5, Nairobi/Block 37/66/6, Nairobi/Block 37/66/7 and Nairobi/Block 37/66/8.
66. It is not disputed that these sectional properties are owned by the 1<sup>st</sup>-11<sup>th</sup> Respondents. The 1<sup>st</sup>-11<sup>th</sup> Respondents have asserted that they have entered into a joint venture agreement with the 12<sup>th</sup> Respondent, which is a developer. It is not disputed that the property has not been amalgamated and sold to the 12<sup>th</sup> Respondent.
67. This court further takes due notice that the administrative remedy of appeal to the National Environment Tribunal is limited by time. Under Section 129(1)(a) of EMCA, an Applicant should appeal against the issuance of a license within sixty days of such decision, and as indicated under Rule 7 of the National Environment Tribunal Procedure Rules, there is no provision to extend this timeline which is limited by statute.
68. In this case, the EIA License was issued on 12<sup>th</sup> March 2024. Should this court find that it has no jurisdiction, the remedy of an appeal to the National Environment Tribunal would not be available to the Petitioners, the same being out of time.



69. Similarly, Section 61(3) of the *Physical and Land Use Planning Act* provides for a timeline of fourteen days to appeal against the decision of a county executive member with respect to development permission. Considering that the decision of the county executive member was made on 29<sup>th</sup> November 2023, the window to file an appeal before the County Physical and Land Use Planning Liaison Committee is far gone. Such remedy would also not be available to the Petitioners, were this court to find that it was deficient of jurisdiction in this matter.
70. To the extent that the Respondents have not shown that the Petitioners were aware or ought to have been aware of the decisions of the two administrative bodies, that is NEMA and the County Government, within the stipulated timelines, it's the finding of this court that the Petitioners have a right to approach the court in the manner they have done. This is so because under Article 48 of *the Constitution*, all persons have the right to access justice.
71. This Petition further raises issues that would not be fully resolved through the established administrative mechanisms, including the determination of whether the Petitioners right to a clean and healthy environment has been breached or not. Consequently, it is the finding of the court the said administrative mechanisms are not available to the Petitioners at this point in time.
72. As to the locus standi of the Petitioners, this court takes due notice that locus standi with respect to environmental suits has been fundamentally transformed under *the Constitution* of Kenya as read with Section 3(3) of the Environmental Management and Coordination Act.
73. Under Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person, or as a member of, or in the interest of a group or class of persons, or in the public interest. Article 70 further prescribes that with respect to environmental rights, an applicant does not have to demonstrate that he/she or any other person has incurred loss or suffered injury.
74. Lastly, under Section 3 (3) of the *Environmental Management and Co-ordination Act*, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest apply to the Environment and Land Court for redress.
75. There is therefore no bar against the 1<sup>st</sup> Petitioner on grounds of lack of locus standi. In any event, the 1<sup>st</sup> Petitioner did annex the authority that he obtained from the other Petitioners to plead and swear affidavits on their behalf.
76. Having found that this court has the jurisdiction to determine this suit, the next issue to consider is whether conservatory orders should issue to stay the construction activities on the suit properties, and to compel the Nairobi City County and NEMA officials to take immediate measures to stop, prevent or discontinue any construction and development activities on the subject properties.
77. It is quizzical that the Petitioners have sought 'conservatory orders of temporary injunction' yet by their nature, conservatory orders are distinct from injunctions.



78. It is trite that conservatory orders in constitutional Petitions are in the nature of public law as they are applied in the public's interest. The Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR articulated this position as follows:

“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 stay 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 Applicant’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.”

79. The court in *Invesco Assurance Co. Ltd vs MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR defined a conservatory order as follows;

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

80. In *Judicial Service Commission vs Speaker of the National Assembly & Another* [2013] eKLR the Court had the following to say about the nature of conservatory orders:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

81. The conditions for consideration by the court in granting conservatory orders were persuasively set out in *Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others* (2015) eKLR as follows:

- a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
- b) 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.
- c) Thirdly, the Court should consider whether, if an interim conservatory orders is not granted, the Petition or its substratum will be rendered nugatory.
- d) The final principle for consideration is whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.”



82. A prima facie case was defined in *Mrao Ltd vs First American Bank of Kenya and 2 Others*, (2003) KLR 125 as follows:
- “ A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
83. The Petitioners’ case is that no lawful license and permissions have been issued with respect to the development on the subject properties LR No. Nairobi/Block/ 37/66/1-8; that whatever licenses and permissions that have been issued with respect to LR No. 209/9316, they are illegal, null and void; that the construction activities have been undertaken so negligently and carelessly by the 1<sup>st</sup> to 14<sup>th</sup> Respondents, causing damage to the walls of houses erected on L.R. No. 209/161816; and that the excavation was done beacon to beacon in violation of laws and regulations on land use and planning.
84. The documents annexed by the Petitioners to the affidavits sworn by Mr. Karim Kassam include photographs of construction vehicles at the suit properties between February 2024 and June 2024 and letters from the Petitioners’ advocate to Nairobi City County officials dated 14<sup>th</sup> February 2024 and 26<sup>th</sup> February 2024 in which they indicated that the 1<sup>st</sup>-12<sup>th</sup> Respondents commenced development activities in January 2024 without proper signage.
85. The Petitioners also annexed a letter from the Office of the Governor Nairobi City County dated 25<sup>th</sup> April 2024 in which he indicated that the development on the suit property was approved through the issuance of approval of change of user and approval of business plans on 29<sup>th</sup> November 2023 and that the intention of changing use of the plot was duly advertised on site and in a newspaper advertisement in the Standard Newspaper of 10<sup>th</sup> November 2023.
86. The same letter further states that Mr. Patrick Analo Akivaga of the Nairobi City County through a letter dated 4<sup>th</sup> June 2024 asserted that LR No. 209/9316 is the mother plot which was sub-divided into nine plot numbers, Nairobi/Block 37/66 and 37/66/1-8 and that he revoked the approval for the development pending ascertainment of the rightful owner of the property.
87. According the said letter, Mr. Akivaga, through a letter dated 7<sup>th</sup> June 2024, received an application from the 12<sup>th</sup> Respondent requesting for development approval with respect to LR No. 37/66 City Park Drive but no approvals were granted, and the application was sent back to the project architect with comments. The Petitioners also annexed a Certificate of Compliance issued by the National Construction Authority to the 12<sup>th</sup> Respondent dated 20<sup>th</sup> February 2024, with respect to LR No. 209/9316 City Park Drive.
88. The Petitioners also adduced a copy of EIA License No. NEMA/EIA/[PSL/31291](#) issued to the 12<sup>th</sup> Respondent with respect to Plot LR No. 209/9316 along City Park Drive issued on 12<sup>th</sup> March 2024; a copy of the notification of approval of application for change of user dated 29<sup>th</sup> November 2023 with respect to LR No. 209/9316 from single swelling unit to multi dwelling units and a notice of approval for application for development permission for the proposed development of 68 apartments on LR No. 209/9316 dated 30<sup>th</sup> November 2023.
89. From these documents, it is clear that the 12<sup>th</sup> Respondent obtained licenses and permissions in respect of LR No. 209/9316, rather than LR No. Nairobi/Block 37/66 and LR No. Nairobi/Block /37/66/1-8. It is the Petitioners case that on this basis, the said licenses and permissions were issued fraudulently and are therefore null and void.



90. The discrepancy of the Land Reference number of the suit property that is being developed might be true, the same having been sub divided before the licenses were issued. However, there is no ownership or boundary dispute in this matter, and the Petitioners have not stated the prejudice that they or the public have suffered by referring the suit properties using its former reference number.
91. Indeed, there is no dispute that the suit properties upon which the 12<sup>th</sup> Respondent is conducting its activities is owned by the 1<sup>st</sup>-11<sup>th</sup> Respondents and is currently held under eight sectional property titles, and that the property is the subject of a joint venture agreement between the 1<sup>st</sup>-11<sup>th</sup> Respondents and the 12<sup>th</sup> Respondent. That being case, nothing, prima facie, turns on the misdescription of the suit properties on the license and approval that was issued by NEMA and the County Government respectively.
92. The Petitioners assert that their right to a clean and healthy environment has been infringed by the construction activities; that the noise caused by heavy excavation equipment is denying them peaceful and quiet occupation of their residencies; that excavation was undertaken so negligently and carelessly by the 1<sup>st</sup> to 14<sup>th</sup> Respondents, causing damage to the walls of houses erected on L.R. No. 209/161816; and that the excavation was done beacon to beacon in violation of laws and regulations on land use and planning.
93. Further, it is the Petitioners' case that the noise and pollution from the construction will adversely affect air and natural lighting of their residences and that the lack of adequate sewer and other drainage facilities near the subject property breaches the environmental planning and protection laws and infringes and threatens their rights and fundamental freedoms to life and to a clean and healthy environment.
94. The Petitioners have however not indicated that the noise levels exceed legal and reasonable limits, neither have they presented any evidence of the supposed damage to the walls of the houses in the neighbouring plots, or that the excavation was conducted contrary to the law. As to the sewer, the EIA report indicates that the development would be connected to the existing sewer system network. Indeed, the Petitioners have not indicated the extent to which the existing sewerage infrastructure is inadequate.
95. Further, the EIA License issued to the Petitioners stipulates conditions, including that the 12<sup>th</sup> Respondent should ensure that adequate measures are put in place to mitigate air and dust pollution, and that they should comply with the EMCA (Noise and Excessive Vibrations Pollution Control) Regulations 2009. The Petitioners have not shown by way of evidence that these terms have been breached or have not been complied with.
96. While the Petitioners have sought to assert their right to a clean and healthy environment, they have failed to lay any basis as to how the development has infringed on their right. This court is not persuaded that issuing the conservatory orders sought will enhance the objects of the Petitioners rights to a clean and healthy environment.
97. To this end, it the finding of the court that the Petitioners have failed to establish that they have a prima facie case with a likelihood of success.
98. For these reasons, this court finds that the application herein is unmerited and is dismissed.
99. Costs shall abide by the outcome of the Petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**



**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Muchoki for 12<sup>th</sup> Respondent

Mr. Ndambiri for Petitioners/Applicants

Mr. Gitonga for NEMA

Ms Ogolla for 23<sup>rd</sup> and 24<sup>th</sup> Respondent

Mr. Gathaga for 15<sup>th</sup> Respondent

Court Assistant - Tracy

