Millennium Gardens Management Limited v Metricon Home Nairobi Company Limited; Nairobi City County Government & 2 others (Interested Parties) (Environment & Land Petition E121 of 2023) [2024] KEELC 6040 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6040 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E121 OF 2023

OA ANGOTE, J

SEPTEMBER 19, 2024

BETWEEN

MILLENNIUM GARDENS MANAGEMENT LIMITED ..... PETITIONER

AND

METRICON HOME NAIROBI COMPANY LIMITED ..... RESPONDENT

AND

NAIROBI CITY COUNTY GOVERNMENT ..... INTERESTED PARTY

NATIONL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY

RESIDENTS ASSOCIATION (MARA ..... INTERESTED PARTY

JUDGMENT

1. Vide a Petition dated 12th October, 2023, the Petitioner seeks the following reliefs:

    a. A declaration that the intended development by the Respondent on LR No.330/155 (Original No 330/39/8) along Mbaazi Avenue, Thompson area, Nairobi County infringes on the Petitioner's members right to a clean and healthy environment.

    b. A declaration that the development being undertaken by the Respondent is contrary to the provisions of Article 10 of *the Constitution* to the extent that no proper and/or qualitative public participation was undertaken.

    c. An order of permanent injunction restraining the Respondent either by itself, servants, agents and/or employees from carrying on the proposed development on LR No. 330/155 (Original No. 330/39/8) along Mbaazi Avenue, Thompson area, Nairobi County.

d. An order directing the officer commanding station (OCS) Kilimani police station to enforce and ensure compliance with the orders issued herein.

e. General damages.

f. Costs of the Petition.

g. Any other or further relief that the Honourable Court may deem just and fit to grant.

2. The Petition is supported by the Affidavit of Moshe Zinyuk, the Secretary and Board Member of the Petitioner of an even date. It is his deposition that the Petitioner is a limited liability company solely mandated with managing 28 units, 4 storey residential homes erected on L.R No 330/1211 known as Millennium Gardens, measuring approximately 0.4073 Ha and situate along Mbaazi Avenue, Thompson Area, Nairobi County.

3. According to the Petitioner's Secretary, the aforesaid 28 units comprise of 24 three bedroom and 4, four bedroom well managed, quiet upmarket units; that 80% of those living on the property own the units and reside there with their families and that the 28 owners of the units formed the Petitioner which manages the property through elected Directors mandated in that respect by the Petitioner's Articles of Association.

4. It is the Petitioner's case is that the Respondent has commenced construction of three 16-storey blocks of apartments comprising 512 units on L.R 330/155 situated along Mbaazi Avenue, Thompson Area, Nairobi which entails 336 one bedroom units, 144 two bedroom units, 32 three bedroom units, a two level underground and one ground parking all on a one-acre piece of land and that the aforesaid project adjoins and shares a common boundary with the property they manage.

5. The Petitioner, through its Secretary/Board Member maintains that the development is irregular, unlawful and contrary to the 1st Interested Party's zoning policy which stipulates that development within the subject areas should not go beyond four storeys and that the proposed development is separated from the Petitioner's members' property by one common stone wall and a three 16-storey blocks of apartments which run all the way along the common stone wall with a less than 3-metre distance between it and the Petitioner's members apartments will render their apartments unsafe.

6. It was deponed that due to its high height, the proposed development will cut off all the natural sunlight to the apartments owned by the Petitioner's members, affect air circulation and the reception of the TV/DSTV and other ariel communication devices and that the development will further create a health hazard due to interference with air circulation and round the year incessant exhaust fumes emanating from the cars parked in both the underground and ground level parking lots, bordering the windows of the apartments belonging to their members.

7. The Petitioner further contends that as the two properties share an underground rock, and considering their proximity to each other, the 2-level underground and 1 level ground parking will weaken and/or compromise the structural stability and integrity of the buildings owned by the Petitioner's members during and after construction and that the Respondent's underground parking will contaminate the underground water surface which its members rely on having constructed a borehole.

8. According to Mr. Moshe, the Respondent's proposed parking lies directly adjacent to some of their members living and bedrooms and the pollution from the exhaust fumes will render the property uninhabitable; that as the two properties share the underground rock, the structural integrity of the buildings owned by the Petitioner's members will be compromised by the sheer weight of the proposed

development and that the drainage system will be unduly stretched due to increased demands by the occupants.

9. The Petitioner posits that that the developer's intention to cram 512 housing units on a one-acre plot in total disregard of zoning Regulations, scarce amenities and resources will infringe on the Petitioner's members' rights to a clean and healthy environment and that the intended project poses grave environmental, infrastructural, health, sanitation and other socio-economic hazards to the Petitioners members.

10. The Petitioner's Secretary urges that its members are greatly aggrieved and stand to be seriously affected if the construction of the said residential apartments is not halted and that their views were not considered by the Respondent in direct violation of Article 47 of *the Constitution*, Sections 4 and 5 of the *Fair Administrative Action Act* and Articles 10 and 69 of *the Constitution* which require transparency and proper public participation in the management, protection and conservation of the environment.

11. According to Mr. Moshe, the Respondent, while purporting to organize public participation meetings, did not address the concerns raised therein; that they registered their reservations with the National Environment Management Authority (NEMA) who promised to look into their concerns but nonetheless proceeded to issue a license without doing so and that additionally, their complaint to the National Construction Authority (NCA) did not yield any results.

12. The Petitioner's Secretary noted that pursuant to complaints by stakeholders, the 1st Interested Party issued an Enforcement Notice to the Respondent which was ignored prompting it to write another letter advising the Respondent to stop construction for want of public participation.

13. It is the Petitioner's plea that if allowed to continue un-abated, the Respondent's acts are likely to prejudice, compromise, jeopardize and even paralyze the water, drainage, sanitation, eco-system and infrastructural and socio-economic setting and amenities enjoyed by the Petitioner's members in total disregard of Articles 10 and 42 of *the Constitution*.

14. The Petitioner opines that the development by the Respondent is shrouded in secrecy as the same was commenced without putting up a signboard, making it difficult to ascertain whether the necessary approvals were obtained and that justice dictates that the orders sought are granted.

15. In response to the Petition, the Respondent, through its Director Yu Tang, swore a Replying Affidavit on 3rd June, 2024. He deponed that the Respondent is the registered owner of L.R No 330/155 located along Mbaazi Avenue in Thompson Area, Nairobi and that sometime in 2022, the Respondent sought to develop its property by constructing apartments thereon.

16. It was Mr. Tang's deposition that as advised by Counsel, before any approval is issued, public participation must be undertaken; that in this respect, prior to the submission of the application for change of user by the Respondent, an advert was published in the local newspaper on 24th March, 2022 inviting members of the public to submit their comments or objections to the proposed project.

17. The Respondent's Director deposed that pursuant to the provisions of the Physical Planning and Land Use Act, 2019, the Respondent submitted an application for change of user of the suit property on 7th March, 2022 which was approved by the County Planning Committee and a change of user approval was issued by the Interested Party on 24th March, 2022.

18. According to the deponent, after various meetings with the Petitioner's members, they undertook an Environmental Impact Assessment Study Report which provided mitigation measures; that the Petitioner's members' concerns that the Respondent's development will interfere with air

circulation and occasion pollution by exhaust fume emissions rendering their property inhabitable were adequately mitigated.

19. It was deponed that the Respondent enclothed the site with dust proof nets during construction ensuring sound conditioning of construction machinery and equipment, prohibited idling of vehicles and controlled speed and operation of construction vehicles to mitigate air and noise pollution concerns and that the averments that the project contravenes zoning requirements are unsubstantiated as the zoning policy in areas under zone 4 is under review as indicated in the Guide of Nairobi City Development Ordinances and Zones.

20. Further, Mr. Tang noted, the approvals in areas falling under zone 4 are guided by the Nairobi Integrated Urban Development Master Plan of December, 2014 which currently guides approval and developments by the County; that the Respondent legitimately obtained approvals for the project having undergone scrutiny and adhered to the established zoning laws and Regulations and that this is evinced by the fact that adjacent buildings surrounding the proposed project are higher than four storeys as indicated in the Guide of Nairobi City Development Ordinances and Zones.

21. The Respondent's Director deponed that the Petitioner's allegations that the proposed development's height and density will expose the environment to harsh and destructive effects in the area is unsubstantiated and that in compliance with the provisions of Section 58 of the EMCA, they made an application for an EIA License.

22. It was deposed that in so applying, and in accordance with Section 59(1) and (2) of the EMCA, they prepared an EIA Study Report and submitted it to NEMA; that the report also included social site assessment forms showing all reservations by the Respondent's in respect to the likely environmental impact as a result of the proposed project.

23. The Respondent's Director deposed that on 24th June, 2022, the 2nd Interested Party placed an advert in the Star newspaper and Standard newspapers requesting the public to submit comments on the EIA Report in respect to the project within 30 days to help it make a decision on the project; that it further invited public comments vide the Kenya Gazette Notice published on 1st July, 2022 and that on 10th August, 2022, and 17th August, 2022, the 2nd Interested Party placed a 2nd and 3rd advertisement in the Star Newspaper respectively calling for comments on the Report aforesaid.

24. He averred that the Respondent also placed three classified adverts per day on Ghetto Radio in respect to their development; that on 24th May, 2022, they prepared a notice to all stakeholders/members of the public along Mbaazi Avenue in Nairobi inviting them to a public participation meeting which was held at the subject property on the 3rd June, 2022 and which meeting was chaired by the Kilimani Area chief in line with Section 58 of the EMCA.

25. According to Mr. Tang, during the meeting of 3rd June, 2022, a majority of the Petitioner's members, as well as the deponent of the Petitioner's Supporting Affidavit, were present; that issues raised in the public meeting were discussed at length as highlighted in the minutes therein; that on 11th August, 2022, they published a notice in the Star Newspaper inviting all the stakeholders/members of the public to a public participation meeting to be held on the 20th August, 2022 at 9:30am and that the aforesaid meeting was chaired by Mr Gitau Muiruri in accordance with Section 58 of the EMCA.

26. The Respondent's Director maintained that in this meeting too, a majority of the Petitioner's members were present; that on 25th August, 2022, they prepared a notice to all stakeholders/members of the public for another meeting to be held at the site on 3rd September, 2022 at 9:30am which notice was published in the Star Newspaper on the 26th August, 2022; that the meeting of 3rd September, 2022

was chaired by Mr Omedo, the Kilimani Area Chief in line with Section 58 of the EMCA and that most of the Petitioner's members were present in the meeting as well.

27. It was his deposition that apart from carrying out the meetings as per the EMCA, they issued social site assessment questionnaires in April, 2022 and put up posters publishing the project; that they also carried out a traffic impact assessment study which report was submitted to NEMA; that they also carried out a geotechnical investigation for the project site to ascertain the suitability of the land and to provide geotechnical recommendations and that the Respondent engaged NEMA whenever they sought clarifications and promptly responded to issues/requests for information.

28. The deponent stated that the borehole on the site had been drilled by the previous owner of the suit property who had obtained the requisite approvals from the Water Resources Authority and that the Respondent also received approval from the Nairobi Water and Sewerage & Company stating that the sewer line has adequate capacity within Mbaazi area and has no challenges of frequent sewer blockages.

29. The Respondent maintains that it is evident that it adequately engaged the residents, stakeholders and the general public before commencing the construction; that it also equally adhered to the provisions of the law both under the Physical Land Use Planning Act(PLUPA) and the EMCA and that upon compliance, the Respondent was issued with an EIA License no NEMA/EIA/*PSL/2328*6.

30. It is the deponent's assertion that the Respondent was also issued with a Certificate of Compliance by the National Construction Authority, dated 27th September, 2023; that it submitted its Plan Registration PLUPA-BPM-000252-N, on 18th July, 2023 and received approval on 30th August, 2023 and that they also received approval to excavate and transport soil from the project site.

31. It is the Respondent's case that on 4th October, 2023, the 1st Interested Party issued it with an Enforcement Notice alleging that the Respondent did not carry out public participation before construction and had initiated construction contrary to approval conditions; that upon issuance of the notice, they stopped works on the proposed site and its architect responded vide a letter dated 5th October, 2023 and that the 1st Interested Party vide a letter dated 12th October, 2023 permitted the Respondent to resume works.

32. According to Mr. Tang, the Enforcement Notice had been issued arbitrarily and without reason as the Respondent was fully compliant; that the same had been issued without any right of response; that as advised by Counsel, there is public participation before the grant of a development permit is done in two phases being before the change of user process and during the Environmental Impact Assessment Report stage which they complied with.

33. It was deposed that these public participation processes are conducted by different authorities, which have different mandates and are bound by different statutes; that they have, as elaborated, duly undertaken public participation in both phases and that the Enforcement Notice and letter dated 9th October, 2023 did not indicate which phase of the public participation had not been conducted to the satisfaction of the 1st Interested Party.

34. He stated as that advised by Counsel, on matters concerning violation of constitutional rights, the complainant has to satisfy an evidential burden to establish that the specific right existed and has been restricted or violated and that the Petition does not meet the competency threshold and should be dismissed.

35. The 1st Interested Party, through its Chief Officer, Urban Development and Planning, Patrick Analo Akivaga swore a Replying Affidavit in which he deponed that the Respondent's proposed project is for construction of three residential blocks of 13 storeys each (two basements, ground plus 13 floors)

comprising 416 residential units being 273 one bedroom: 117 two-bedroom and 26 three bedroom units and that the project has an existing borehole intended to supplement water supply from the Nairobi Water and Sewerage Company.

36. It was his averment that prior to the commencement of the proposed project, the Respondent submitted its application for change of user which was approved by the County Planning Committee on the 24th March, 2022 subject to the Respondent complying with set out conditions including compliance with the approved zoning policy, provision of appropriate setbacks as per the rezoning plan; provision of adequate and functional on-site parking to the satisfaction of the Director of Roads, Public Works Transport and the development maintains the residential character and densities of the area.

37. The 1st Interested Party, through its Chief Officer, deposed that the Respondent made an application for development permission and the same was approved and a notification of approval issued on 20th July, 2022; that additionally, the 1st Interested Party approved the Respondent's application for proposed amendments to the initially approved plan resulting in the approval of plan PLUPA-BPM-000252-N(18 levels) in place of the initially approved 13 levels and that the notification of approval was issued on 30th August, 2023 subject to the Respondent's complying with a number of conditions.

38. It was deposed that the conditions aforesaid included an Environmental Impact Assessment approved by NEMA prior to the commencement of works; wayleaves for sewer, water, drainage and riparian be maintained and that the Respondent seeks approval from the Nairobi Water and Sewerage Company and the Water Resources Authority and that the issued approvals for change of user and development have never been challenged at the County Physical and Land Use Planning Liaison Committee as per Section 78 of the *Physical and Land Use Planning Act*.

39. It was the assertion of the Respondent's Director that considering the two positions from the residents of Mbaazi Avenue and the Respondent, the 1st Interested Party wrote to the Respondent on the 9th October, 2023 reiterating the suspension of all construction works on the project site and that they further directed the Respondent to convene a meeting with the residents for purposes of addressing their concerns.

40. He stated that in response, the Respondent, insisting that it had already conducted public participation requested for a consultative meeting between itself and the representatives of the 1st Interested Party; that upon holding the meeting and scrutinizing the approvals by the Respondent, it was found that the same were valid and had been legally obtained and that specifically, they found that the Respondent had followed due procedure when making the application for change of user and the 2nd Interested Party had issued its approval upon the Respondent's compliance with the conditions set out after review of the EIA Study Report submitted by the Respondent.

41. He noted that they established that the Respondent had satisfactorily conducted public participation and had implemented the desired mitigation measures to address the Petitioner's members' concerns; that the Traffic Impact Assessment Report submitted was satisfactory; that the 2nd Interested Party had been closely monitoring the project to ensure compliance with the set out conditions and that the EIA License was only granted after the 2nd Interested Party had assessed the possible impacts of the project and issued the same upon being satisfied that no likely negative impact would be occasioned to the environment.

42. According to Mr. Analo, they also noted that the 2nd Interested Party had written to the Petitioner a letter dated 12th October, 2023 detailing the critical steps taken in reviewing the Respondent's

application for an EIA License and that the Petitioner had been advised of its right of appeal to the National Environment Tribunal and that based on the foregoing, they recalled their Enforcement Notice issued on 4th October, 2023 and letter of 9th October, 2022 vide a letter of 12th October, 2023.

43. Further, he deponed, vide their letter of 12th October, 2023, they gave the Respondent a number of conditions to adhere to once it resumed its construction activities including the tabling of the Architectural Plan (PLUPA-BPM-002873-N) at the Urban Planning Technical Committee for reinstatement and joint site visit to review development elements of the building that would require corrections in order to comply with the Regulations as provided for in approval conditions in the reinstated building plans.

44. In response to the assertion that the project is against the area zoning policy, the Respondent's Director stated that the policy is currently under review so as to meet the current rising housing demand and that there are other existing developments in the area scaling up to 13 stories.

45. It was deposed that the 2nd Interested Party's site comments observes that there are old generation developments, mostly single dwelling bungalows and maisonettes which are gradually being replaced with medium density multi-dwelling apartment developments ranging between 3-5 story buildings as the second generation and third generation high rise developments going up to 12 storeys and that it is apparent that the proposed development is not out of place with the already existing developments.

46. He urged that having withdrawn the Enforcement Notice, there is no illegality if the Respondent proceeds to carry out construction of the project as the same is compliant with the applicable laws and that in the absence of any challenge against the legality and validity of the approvals, the project should be allowed to proceed.

47. Further, the 2nd Interested Party's Chief Officer deposed, the 2nd Interested Party's findings on the viability of the project remain uncontroverted; that having excavated the area before issuance of the injunctive orders, water has accumulated therein posing a significant health hazard and that the Respondent should be allowed to proceed with construction to avert any pending environmental hazards.

48. It was his deposition that the Petitioner's apprehensions as captured in the Petition are merely perceived and mistaken and no evidence has been adduced in respect thereof; that there are other high rise developments within the same project and none has reported any of the alleged issues; that the allegations cannot stand in light of the approvals by the different entities and that the Petition is unmerited and should be dismissed.

49. The 2nd Interested Party, through its Director, Environmental Compliance, David Ongare, swore a Replying Affidavit on 26th March, 2024 in which he deponed that the 2nd Interested Party as established under Section 7 of the EMCA is the principal institution of the Government mandated to exercise general supervision and co-ordination of all matters relating to the environment and that it is tasked with issuing Environmental Impact Assessment (EIA) licenses as provided for under the EMCA.

50. He deponed that prior to the commencement of the proposed project, the Respondent submitted copies of terms of reference for EIA Study Report for the proposed development of residential apartments on L.R 330/155(Orig No 330/39.8) along Mbaazi Avenue in Thompson Area, Nairobi County and that upon receipt and review of the application, it approved the terms of reference and directed the Respondent to submit copies of the report, a soft copy of the Environmental and Social Management Plan and an electronic copy of the EIA Report prepared by the registered expert.

51. The 2nd Interested Party's Director, Environmental Compliance, stated that on 20th May, 2022, the Respondent submitted an Environmental Impact Assessment Study Report for its review and that in accordance with the applicable law, the 2nd Interested Party identified relevant lead agency/committee/ stakeholders with regard to the proposed development and sought their review and submission of comments to aid it arrive at an informed decision.

52. Further, it was deposed, that a public notice was issued to the government printer by the Respondent vide its letter dated 23rd May, 2022 and vide two national newspapers on the 24th June, 2022 and that as directed, the Respondent submitted to the 2nd Interested Party adverts for the proposed project.

53. According to Mr Ongare, the 2nd Interested Party's Director, Environmental Compliance, on 18th July, 2022, they received complaints from the Petitioner on the pending application by the Respondent and that through its letter of 29th July, 2022, it directed the Respondent to undertake a public meeting and provide minutes and duly signed attendance lists with relevant stakeholders, provide a Traffic Impact Assessment report and provide legible designs for the project.

54. In response, he stated that the Respondent wrote to the 2nd Interested Party attaching photographic evidence of posters around the site publicizing the project, its effects and benefits, posters on the newspapers and radio correspondence relating to the project advert; that they further received submissions from the Respondent addressing the issues raised by the 2nd Interested Party including matters of public consultation and participation, traffic impact assessment report and legible drawing design and that the 2nd Interested Party undertook a site visit on the proposed project site on the 20th May, 2022 and subsequently wrote to the Respondent to address a number of issues arising therefrom.

55. He posited that they received from the Respondent, a reply on the issues raised on 13th December, 2022; that further, and guided by the law, the 2nd Interested Party being satisfied that the proposed project was within the law and set standards issued an EIA License to enable the carrying out of 3 residential blocks of 13 stories, comprising 416 residential apartments, parking, associated facilities and amenities and that the issuance was after assessment of possible impacts and being satisfied that no likely negative impacts would be caused to the environment.

56. It was the deposition of the 2nd Interested Party's Director, Environmental Compliance, that the Petitioner wrote to the 2nd Interested Party on 27th September, 2023 and vide a response on 12th October, 2023, the 2nd Interested Party detailed the critical steps undertaken in the review of the Respondent's application and informed the Petitioner of its right of appeal to the National Environment Tribunal.

57. According to Mr. Ongare, the 2nd Interested Party undertook a site inspection for monitoring purposes on 11th March, 2023 following reports made to it and made recommendations for remedial measures to safeguard the site, implement mitigation measures and avert any harm to the immediate neighbors.

58. Mr. Ongare stated that it was noted during the inspection that there were no activities on the project site and a pool of water was accumulating on the north eastern side of the site where excavation commenced and that the pool contained stagnant water left exposed to the elements with no vegetative cover establishing the need to institute immediate remedial measures.

59. The 2nd Interested Party's Director, Environmental Compliance, deponed that if the Petitioner had any concerns regarding the grant of the EIA License, they ought to have used the mechanism as set out under EMCA, 1999 and that the 2nd Interested Party has at all times remained conscious of the statute and Regulations and has made every step necessary to ensure compliance with the correct procedures as provided for under EMCA.

60. The 3rd Interested Party, through its Chairperson, Mr. Bernard M Kinara, filed a Replying Affidavit in support of the Petition on 3rd June, 2024. He deponed that on 26th October 2023, the MARA residents held a public demonstration against the proposed development of a high-rise 512 apartment building which was to be constructed on plot LR No 330/155.

61. He deponed that encapsulated in the letter aforesaid are the logical reasons why they are opposed to the construction including the fact that the development was contra to the zoning laws of the area; that it infringed on the resident's constitutional right to a clean and healthy environment; that it would potentially strain the water table, existing roads, sewerage infrastructure and blockage of light to the neighboring homes and that the development will cause an eyesore that degrades the value of the properties in the area.

62. It was his deposition that once the number of blocks/units are built, there will be no green space or playing ground space for the children and that they demanded fresh plans that meet the zoning guidelines of ground +3 Floors and Max 35% GC (ground cover of buildings) and that the new plans include a minimum of 20% green space and children's play area.He stated that in addition to the letter, the residents filled in a public participation questionnaire to express their frustration at the development.

63. Vide a Supplementary Affidavit dated 4th July, 2024, the Petitioner's Secretary and Board Member, deponed that the aforesaid Replying Affidavits confirm their concern touching on the Respondent's project and that the deponents agreed that the project does not comply with the zoning policy and they both advance the argument that the said zoning Regulations are under review, a clear admission that the zoning Regulations stipulating that development within the area should not go beyond four storeys was not followed.

64. According to Mr Zinyuk, the allegation that there is an adjacent building surrounding the proposed project which is higher than four storeys cannot be proffered as a justification for the Respondent's proposed project and that the said building was constructed in defiance of the zoning policy in place.

65. He stated that ignoring the zoning policy stipulating a maximum of four floors to construct 3 blocks with 512 apartments and 3 underground basements with all the environmental and health issues raised predisposes the Petitioner's residents to enormous health concerns and safety hazards which would inevitably lead to poor and miserable living conditions.

66. According to Mr Moshe, they instructed an environmentalist to do a report pertaining to the impact the proposed development would have on the environment and that the report confirms that the project poses grave environmental, infrastructural, health, sanitation and other social-economic hazards to the Petitioner's members.

Submissions_

67. The Petitioner's Counsel submitted that the Respondent's proposed development is irregular, unlawful and contrary to the 1st Interested Party's zoning policy which stipulates that development within the subject area should not go beyond four storeys and that Article 42 as read with Article 69 of *the Constitution* guarantee the right to a clean and healthy environment whereas Article 70 provides for redress in instances of the violation to a clean and health environment aforesaid.

68. Counsel submitted that the Petition has enumerated the numerous negative environmental consequences that the proposed development poses to its members; that they have tabled before the court an environmental audit of the impact of the proposed development which lends credence to the concerns raised by the Petitioner and that the report raises key issues including, a discrepancy between

the project size as indicated in the EIA License and the project EIA Report and grave environmental concerns which have not been addressed by the Respondent.

69. It was submitted that the Court in Mui Coal Basin Local Community and 15 Others vs Permanent Secretary, Ministry of Energy and 17 Others [2015] eKLR set out the parameters of sufficient public participation noting that it must inter-alia, include access to and dissemination of relevant information, and be effective, taking into consideration and in good faith all the views received.

70. Counsel for the Petitioner submitted that as affirmed by the Court in National Environment Management Authority & 3 Others vs Maraba Watingu Residents Association and 505 Others [2020] eKLR, the right to a clean and healthy environment is a public right which outweighs private interest.

71. The Respondent's Counsel submitted that the Respondent's proposed development is consistent with the areas' zoning policy and that the allegations of contravention of the zoning requirements are unsubstantiated since the Zoning Policy in areas under Zone 4 is under review as indicated in the Guide of Nairobi City Development Ordinances and Zones.

72. It was submitted that as guided by the decisions in Kopoa Developers Limited vs Endesk Properties Limited & Another [2024] KEELC 3963 (KLR) and County Government of Nairobi: Kilimani Project Foundation & 21 Others(Interested Parties) Ex-parte Cytonn Investment Partners, the issue of zoning and development permissions fall within the province of the County Government which issued the approvals.

73. Further, it was submitted by Counsel, pursuant to the provisions of the PLUPA, the County Government and by extension the County Physical and Land Use Liaison Committee is mandated to ensure that a development meets the principles of sustainable development and that having not lodged an appeal before the County Physical and Land Use Planning Liaison Committee on its grievances with the approvals issued to the Respondent, the present Petition is an afterthought.

74. It was submitted that as expressed by the Court in University Academic Staff Union(UASU) vs Attorney General and Chief of Staff & Another [2018] eKLR, the fundamental freedoms in the bill of rights shall not be limited except by law and even then to the extent that the limitation is reasonable and justifiable in an open and democratic society and that in the circumstances, having complied with all the relevant laws, the Respondents proprietary rights should be upheld.

75. As to whether the right to a clean and healthy environment had been contravened, Counsel answered in the negative noting that an EIA report was duly undertaken which set out mitigation measures to be undertaken; that the 2nd Interested Party satisfied with the mitigation measures issued the Respondent with an EIA License and that the Petitioner has not adduced any evidence proving that the Respondent's construction will create health hazards alleged.

76. Reliance on the foregoing was placed on several cases including Kopoa Developers Limited vs Endesk Properties Limited & Anor(supra), Hosea Kiplagat & 6 Others vs National Environment Management Authority(NEMA) & 2 Others [2018] eKLR; Githongo vs County Government of Meru[2022]KEELC 3872; Pyramid Builders Limited vs Koome Mwanbie Larson and Jeremy Ngunze(being sued on their on behalf and on behalf of Kunde Road Residents Welfare Association) & 2 Others [2016]eKLR.

77. Counsel also placed reliance on the decisions in Jyoti Hardware Limited vs National Environment Management Authority [2021] eKLR and Sky Africe Holdings Limited vs National Environment Management Authority(NEMA)[2021]eKLR and submitted that the 2nd Interested Party having

issued an EIA License which the Respondent relied on in constructing its building, it cannot be said that the aforesaid building is illegal.

78. Counsel urged that the Respondent conducted adequate public participation which meets the reasonableness test as set out by the Court in Nairobi Metropolitan PSV Saccos Union Limited & 25Others vs County of Nairobi Government & 3 Others[2013]eKLR, to wit, a reasonable opportunity was offered to members of the public and all interested parties to know about the issues and have an adequate say and that the Court is not concerned with the manner adopted in public participation but the same must include access to and dissemination of relevant information.

79. Reliance in respect to public participation was placed on the cases of Republic vs County Government of Kiambu Ex-parte Robert Gakuru & Another [2016] eKLR and Legal Advice Centre & 2 Others vs County Government of Mombasa & 4 Others [2018] eKLR, Mui Coal Basin Community & Another vs Permanent Secretary Ministry of Energy & 17 Others [2015]eKLR and Republic vs Attorney General & Anor Ex-parte Hon Francis Chachu Ganya.

80. Counsel posited that the present Petition primarily stems from the Enforcement Notice serial number 244o initially issued against the development by the Respondent which has since been explicitly revoked and that subsequently, no infringement exists of any of the Petitioner's rights and if it believed any of its constitutional rights were violated, it was incumbent upon it to articulate and substantiate the same. Reliance in this regard was placed on the case of Malonza vs The Nairobi City County & 2 Others [2022]KEHC 13623(KLR).

81. The 1st Interested Party's counsel filed submissions on 26th July, 2024. Counsel submitted that the Respondent underwent the required procedures and obtained the necessary permits from the requisite entities prior to commencing the construction of the proposed development and that it is key to note that the Petitioner has not challenged the validity of any of these approvals and permits nor sought their revocation or cancellation.

82. It was submitted that in the case of Samuel Nyona Otonglo vs Nairobi City County Government; Walter Koni & 4 Others [Interested Parties] [2020]eKLR, the Court, facing a situation where the Petitioners were aggrieved with a development claiming that the approvals thereto were issued in violation of their rights under Articles 10, 27 (1), 40, 42, 47 and 69 of *the Constitution* found that the Petitioners had not demonstrated any illegality or dereliction of duty in the issuance of the development permits and approvals. Reliance in this respect was also placed on the case of Shainaz Jamal & 8 Others vs Abdulrasul Manji & Another [2020] eKLR.

83. Counsel submitted that the Petitioner has not cited with certainty the violations of the 1st and 2nd Interested Parties in the dispensation of their obligations as far as the impugned development is concerned; that the allegation that the proposed project is against the area zoning policy is untrue as the previous limitation of four (4) storeys has been removed to pave way for a revision that meets the current rising demand for housing within Nairobi County and that on the contrary, there are other existing developments in the subject area scaling up to thirteen (13) storeys.

84. It was submitted that the alleged Report dated 17th May, 2024 by one Daniel Wanjuki, EIA/EA Expert Registration No.1818 highlighting the purported negative impacts of the proposed development flies in the face of the 2nd Interested Party's Site Comments for the EIA Study Report submitted by the Respondent which observes that high rise buildings are taking over.

85. It is contended that crucially, the Petitioner did not challenge the issuance of the EIA License under Section 129 of the EMCA or the Development Permission under the provisions of Section 61 of

the *Physical and Land Use Planning Act*, despite vigorously participating in the Respondent's public participation meetings and being aware of the issuance of these approvals and licenses.

86. It was submitted that the Petitioner has failed to show how the development in issue herein has violated or threatens to violate its members' rights to a clean and healthy environment under Article 42 of *the Constitution*, along with the provisions of Articles 10, 27 (1), 40, 47 and 69.

87. The 2nd Interested Party did not file submissions [As at 21st August, 2024].

88. The 3rd Interested Party's Counsel submitted that the impugned development is unlawful for the reasons that it infringes on the Petitioner's rights encapsulated under Article 42 of *the Constitution* guaranteeing a clean and healthy environment and is a direct contravention with the zoning laws and that in Peter K Waweru vs Republic [2006] eKLR, the Court expressed that the right to a clean and healthy environment is primary to all creatures including man and is inherent from the act of creation.

89. He noted that that additionally, the African Commission of Human and People Rights in the case of The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs Nigeria, Communication No 155/96 held that environmental rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. Reliance in this respect was also placed on the case of Adrian Kamotho Njenga vs Council of Governors & 3 others [2020] eKLR.

90. It was posited that international instruments such as Article 24 of the African Charter on Human and People Rights and Article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights all join our Constitution in guaranteeing the right to a clean and healthy environment.

91. According to Counsel, as per the City Council of Nairobi's, A guide of Nairobi City Development Ordinances and Zones, the type of development allowed in the Lavington area are Low-Density Residential One-Family House; that the guide clearly stipulates that the only type of development allowed around the Kilimani area are Four Storeys Max Residential Apartments and that in the case of Phenom Limited vs National Environment Management Authority & Another [2005] EKLR, the Court upheld the zoning laws directing the Appellant to conform to a maximum of four floors before re-submitting the revised plan to Nairobi City Council.

92. Counsel urged the Court to take judicial notice of the high cases of buildings collapsing in Kenya with a report done by the National Construction Authority corroborating this fact and that by allowing the Respondents actualize their development, the zoning laws will have been disregarded thereby jeopardizing effective urban planning.

Analysis and Determination

93. Having considered the Petition, responses and submissions, the issues that arise for determination are:

    i. Whether the Petition meets the specificity test;

    ii. Whether the Petitioner has demonstrated the alleged violations and/or threats of violations of its rights protected under Articles 10, 42, 47 and 69 of *the Constitution*;

    iii. Whether the Respondent's proposed project violates the area zoning policy.

    iv. What are the appropriate remedies, if any?

94. It is now settled that there is a basic threshold that constitutional Petitions must adhere to. The Court in Anarita Karimi Njeru vs Republic [1979] eKLR, set out the test in this regard holding as follows:

> " ...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

95. This principle was affirmed by the Court of Appeal in the case of Mumo Matemu vs Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR where the Court observed that what is needed is not a formulaic approach to the drafting of the pleadings but that the claim of violation must be discernible from whatever pleadings, that have been placed before the court. The Court observed as follows:

> " We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

96. Speaking to the same, the Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR stated as follows:

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

97. The Respondent and the 1st Interested Party have challenged the Petition on the ground that it fails the specificity test. They contend that the Petitioner has failed to plead with precision how the impugned proposed development has violated or threatens to violate its members' rights to a clean and healthy environment under Article 42 of *the Constitution*, as read together with the provisions of Articles 10, 47 and 69 of *the Constitution*.

98. On the other hand, the Petitioner contends that it has set out the numerous negative environmental consequences that the proposed development poses to its members and the constitutional violations in that regard.

99. The Petition has on the face of it enumerated the various constitutional provisions which it claims have been violated. According to the Petitioner, the Respondent has violated its members' right to a clean

and healthy environment protected under Article 42 of *the Constitution* because the proposed project has various adverse effects on the environment, including water, sewerage, air among others.

100. On violation of Article 10 and 47 of *the Constitution*, the Petitioner has averred that its members' views were not taken into consideration in the course of public participation. Additionally, the Petitioner contends that the proposed project has been approved and will be constructed contrary to the 1st Interested Party's zoning policy.

101. These allegations are specific enough to meet the test espoused in the Anarita Kirimi (supra), Mumo Matemu (supra) and Communication Commission of Kenya (supra) cases. The Petitioner has stated which provisions of *the Constitution* it deems have been contravened and how the same have been contravened. The challenge on the failure to plead violations and threatened violations with clarity and specificity must fail.

102. The dispute herein revolves around the use of land vis its effects on the environment. The Respondent, who owns the suit property, proposes to develop housing units thereon. The Petitioner opposes this development alleging a host of constitutional violations. In particular, it cites the contravention of Articles 10, 47 and 69(d) of *the Constitution* in as far they set out participation of the people and the principle of sustainable development as national value and principle of governance.

103. Further, the Petitioner alleges violation of its members' rights to a clean and healthy environment as protected by Article 42. The Court will consider them under the foregoing heads.

104. Article 2, sub-section 4 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 1998 defines the public as follows:

> " means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups."

105. Under Article 10 of *the Constitution*, public participation is a fundamental principle of governance. Article 69 specifically references the public participation in environmental management by requiring the state to encourage public participation in the management, protection and conservation of the environment. Article 47 makes reference to fair administrative action.

106. These constitutional dictates are reinforced by the provisions of the Environment Management and Coordination Act, EMCA and the *Environment and Land Court Act*, both of which require the Environment and Land Court to be guided by the requirements for public participation in development of policies, plans and processes for the management of the environment.

107. Other than *the Constitution* and the EMCA, Principle 10 of the Rio Declaration on Environment and Development, which is applicable by dint of Article 2(5) and 2(6) of *the Constitution*, provides that:

> " Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

108. The High Court in Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others [2014] eKLR, while referring to the South African decision in Doctors for Life International vs Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation:

> "According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10th Edition defines 'consultation' as follows: - "The act of asking the advice or opinion of someone. A meeting in which parties consult or confer."

109. A five-judge bench of the High Court in the case of Mohamed Ali Baadi and Others vs Attorney General & 11 Others [2018] eKLR, succinctly explained the rationale of having public participation as a constitutional imperative as follows:

> "It may be tempting to ask why the law and indeed *the Constitution* generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representatives and also participate in the appointment of most, if not all public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual. We also have no doubt that our local jurisprudence deals at length with why *the Constitution* and statute law have imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation."

110. Setting out the parameters for effective public participation, the Supreme Court of Kenya in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health &amp 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR after considering several judicial pronouncements noted as follows:

> "From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:
>
> Guiding Principles for public participation (i) As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance. (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation. (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the

onus is on the public entity to give effect to this constitutional principle using reasonable means. (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation (v) Public participation is not an abstract notion; it must be purposive and meaningful. (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis. (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process. (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.(ix) Components of meaningful public participation include the following; a. clarity of the subject matter for the public to understand; b. structures and processes (medium of engagement) of participation that are clear and simple; c. opportunity for balanced influence from the public in general; d. commitment to the process; e. inclusive and effective representation; f. integrity and transparency of the process; g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

111. In a more recent exposition, the Court of Appeal in Civil Appeal No E003 of 2023 the National Assembly & Another vs Okiya Omtatah Okoiti & Others delivered on 31st July, 2024, posited thus:

> "Under Article 10(2)(c), the national values and principle of governance include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability. Perhaps we should underscore that the transparency and accountability contemplated in this provision is owed to the people of Kenya in whim sovereign power reposes under Article 1 and it is expected from State organs, State officers, public officers and all persons whenever any of them performs any of the functions listed in Article 10(2)...the values espoused in Article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. It is not by accident that transparency and accountability are among the core values listed in Article 10... accountability, one of the principles in Article 10(2)(c) means that officials must explain the way they have used their power. Transparency, also a requirement in the exercise of public power means openness, which is the opposite of secrecy. Therefore, the constitutional requirement for transparency and accountability imposes an obligation upon State organs to inform the general public and stakeholders why the views of some of the stakeholders were preferred over theirs. Such an approach will not only enhance accountability in the decision-making process by State organs but also it will enhance public confidence in the processes and in our participatory democracy. To suggest otherwise would be a serious affront to Article 10(2).
>
> Public participation is not an inconsequential process or a sheer formality. *The Constitution* embraces a radical form of participatory democracy. For instance, it recognizes the importance of participatory democracy in the context of meaningful public engagement in governance and decision-making processes including enactment of legislation and formulation of policies which affect their rights and day to day lives. It would be strange

> indeed if the principles of participatory democracy and consultation are to operate only when the public are invited to give their views, then they vanish at the crucial stage when the general principles of the original statute are being converted into operational standards and procedures, only to resurface at the stage of implementation of the provisions impacting on specific individuals without any explanation as to why their views were rejected.
>
> If, as we have found to be the case, the justification for public participation is to facilitate public involvement as a crucial aspect of participatory democracy and legitimacy, vesting Parliament arbitrary power to reject or ignore the contribution from the public without explanation or justification is the surest way of undermining public participation. Insulating Parliament from the obligation to give reasons or justification for rejecting the views of the public is the surest way of rendering public participation illusory, cosmetic and a mere formality or public relations exercise, which the Supreme Court and this Court have loudly declared it is not.
>
> Therefore, when determining whether public participation as a prerequisite to the determination of policy by a State organ has been complied with, one must ascertain whether the public participation has been done in a manner that rationally connects the consultation with the constitutional purpose of accountability, responsiveness and transparency...Accordingly we find that Parliament after conducting public participation is obligated to give reasons for rejecting or adopting the proposals received."

112. From the foregoing, it is not enough to simply allege and demonstrate that public participation was conducted. One must go further and demonstrate that the views expressed during this exercise were duly considered and if not, the reasons why.

113. It is the Petitioner's contention, supported by the 3rd Interested Party, that they raised serious reservations about the proposed development with the Respondent and the relevant authorities including the 1st and 2nd Interested Parties; that nonetheless, these views were not adequately considered and that as such, no meaningful public participation can be said to have taken place.

114. The Respondent, supported in this regard by the 1st and 2nd Interested Parties, assert that it duly carried out public participation to the legally acceptable standards.

115. The evidence before the Court shows that on 24th March, 2022, the Respondent was granted approval for a change of user from residential to multi-dwelling units situate on L.R Plot 330/155. The proposed change of user was also duly advertised in the Standard Newspaper of 22nd February, 2024. Considering the Petition, the aspect of public participation for the change of user of the suit property is not challenged and the Court will not venture into an academic exercise in this regard.

116. Section 3(5) of EMCA recognizes the principle of public participation in the development of policies, plans and processes for the management of the environment as one of the key principles of sustainable development.

117. EMCA has set in place a two-tier requirement for public participation to be undertaken during the process leading up to the grant of the EIA License being during the conduct of the EIA study as well as upon publication of the EIA Report.

118. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, requires the proponent of a project to seek views of the persons to be affected after approval of the project report and during the process of the study. The Regulation provides as follows:

> "(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
>
> (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—
>
> (a) publicize the project and its anticipated effects and benefits by—
>
> (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
>
> (ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
>
> (iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;
>
> (b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
>
> (c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
>
> (d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority."

119. In the present circumstances, the 2nd Interested Party vide a letter dated 4th May, 2022 informed the Respondent that it had approved its terms of reference for the EIA Study Report. On 20th May, 2022, the Respondent submitted the EIA Study Report to the 2nd Interested Party for review.

120. As per the report, while it sets out under methodology that inter-alia, public participation and consultation with stakeholders was undertaken. It only annexes the report reference site assessment reports. Section 59 of the EMCA provides that:

> "(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published in

the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state—

a. a summary description of the project;

b. the place where the project is to be carried out;

c. the place where the environmental impact assessment study, evaluation or review report may be inspected; and

d. a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

(2) The Authority may, on application by any person extend the period stipulated in subparagraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

(3) The Authority shall ensure that its website contains a summary of the report referred to in subsection (1)."

121. Upon the publication of the EIA report, the Regulations require further public participation from lead agencies (section 60 and Regulation 21) and the public (Regulation 22).

122. In undertaking this second limb of public participation, the 2nd Interested Party is required to publish for two successive weeks in the Gazette and in a newspaper with a nation-wide circulation and in particular with a wide circulation in the area of the proposed project, a public notice once a week inviting the public to submit oral or written comments on the environmental impact assessment study report; and to make an announcement of the notice in both official and local languages at least once a week for two consecutive weeks in a radio with a nationwide coverage (section 59 and Regulation 22).

123. A public hearing is to be conducted upon receipt of both oral and written comments with date and venue of the public hearing being publicized at least one week prior to the meeting by notice in at least one daily newspaper of national circulation and one newspaper of local circulation and by at least two announcements in the local language of the community and the national language through radio with a nation-wide coverage.

124. The public hearing should be conducted at a venue convenient and accessible to people who are likely to be affected by the project and presided over by a suitably qualified person appointed by the Authority (Regulation 22).

125. The Court has considered the evidence in this regard. There is evidence of the letter of 23rd May 2022 to lead agencies as per (Regulation 20); public notice (Regulation 21(1)) publications through the Standard of 24th June 2024; the Star Newspaper of 24th June 2024(Section 59, Regulation 21); Gazette Notice No 7656 of 1st July 2022(Regulation 21) and 3 day classified ads at Ghetto Radio reserved on or about 4th July 2022 (Regulation 17).

126. There are also notices in the Star Newspaper of 10th August 2022 and Star Newspaper of 17th August 2022 informing the public of the project. While it is indicated to be premised under the provinces of Regulation 17, this was undertaken after the conclusion of the EIA Study Report.

127. Further reference has been made to the invite of 11th August 2022 for the meeting held on 20th August 2022 vide the Star Newspaper; invite of 26th August 2022 vide the Star Newspaper for the meeting

held on 3rd September 2022; minutes of the meeting of 3rd June 2022 presided over by David Omedo, Kilimani Area Chief; meeting of 20th August 2022 presided over by Gitau Muiruri EIA Consultant and; meeting of 3rd September 2022 presided over by Gitau Muiruri EIA Consultant.

128. The evidence before me shows that there was substantial compliance with the public participation requirements of Sections 59 and 60 of the EMCA and Regulation 21, with the only exception being the public hearing anticipated under Regulation 22 by the 2nd Interested Party. The Regulation however state that the Authority may hold the hearings aforesaid. The meetings referenced were done by the Respondent.

129. Second, Regulation 21 requires publication inviting comments to be published in the Gazette and local newspaper of nationwide circulation once a week for two consecutive weeks. The Court has only been shown one Gazette of 1st July 2022.

130. This notwithstanding, it is noted that the Petitioner's members have not alleged being in the dark about the project. They conceded to not only having filled the site questionnaires, but attended the various meetings as published and made their views known. Indeed, they wrote several letters objecting to the project including a formal objection upon the 2nd Interested Party's' publication. By reason thereof, the Court finds that the Petitioner's members were given adequate opportunity to air their views.

131. However, this is not the end of public participation requirement, a critical consideration and the crux of the Petitioner's case is that their views were not considered in the process leading to the issuance of the EIA license. Indeed, as expressed by the Court in British Tobacco Kenya Plc vs Cabinet Secretary for the Ministry of Health and Others (supra) public participation should not be illusory.

132. The Court has looked at the evidence in this respect. In the minutes provided by the parties, the Court has noted that the Petitioner did indeed raise concerns. The minutes of 3rd June 2022 demonstrate issues raised by the Petitioner's members on the likely threats of the proposed project. These are not addressed in the said meeting but in the meeting of 20th August 2022. In particular, it is noted:

> " Zoning-on this issue, Mr, Mugo started by giving a brief history of how the z*oning of 2008* and 2009 had been subjected for review through the sponsorship by JICA. He indicated that Kilimani lies under Zone 4 and that the subsequent reports on the said review have not been acted on to-date.
>
> On air circulation-He indicated that current house designs are based on building Codes and that air moves faster across tall buildings.
>
> On sharing the same bed rock-Eng. Tom Waiharo confirmed they had done a geotechnical report and submitted for approval/review to the relevant authority. He said that at the depth of 10m they found the rock basin and that the basin can support the weight of the proposed development. He however indicated that since the excavation will be down to the depth of 7m, it may affect the neighbourhood structures but through a suitable method statement it can be done without any effect to the neighbouring structures."

133. Considering the minutes of 3rd September, 2022, it was noted therein that the issues of sharing the bedrock, sun-shading and air circulation have not been sufficiently addressed. A design of the plan was suggested to tilt the blocks away from the wall shared with Millennium Gardens.

134. On the height issue, it was indicated that the developer had scaled down the project to ground floor plus 13 floors bringing down the units to 416. This was indicated to be insufficient by a stakeholder who

noted that the basements remained 3 floors and natural justice required that a development should not have adverse effects upon a neighbor.

135. Pursuant to the meetings aforesaid and upon the Petitioner's formal objection upon publication of the EIA Study Report and several letters in that respect, the 2nd Interested Party conducted a site visit on 20th November, 2022. The background of the report provides as follows:

> "The residents of the neighbouring millennium gardens estate have been raising objections to the proposed project majorly because of the number of floors and on how to mitigate the probable effects of the project such as air circulation and sunlight shading, excessive vibrations effect on the structural integrity of the adjacent properties since they share the same bedrock, impacts on utilities: water supply, electricity, sewerage and traffic flow and cutting of existing trees."

136. It was further noted as follows:

> "The site visit discussions with the proponent representative, Ms Gabby indicated the following measures that have been put in place to address the concerns of the residents. 1. The project has been scaled down to 13 storey to match up the neighbourhood skyline. 2. Micro-sitting of the three residential blocks to allow natural circulation of air and sunlight; a geotechnical assessment of the site and statement on the excavation method detailing the impacts on the surrounding developments has been done and appropriate mitigation measures incorporated; the project is planned to connect to the existing 225mm diameter sewer line serving the area; a comprehensive traffic impact assessment has been undertaken and made recommendation for appropriate traffic impact management plan."

137. The 2nd Interested party thereafter wrote to the Respondent requesting them to provide a detailed site layout plan and design drawings drawn to scale indicating the micro-sitting of the three residential blocks within the project site and the separation distances to the adjacent properties, design of the buildings that shall enhance natural circulation of air and sunlight and the plot buildup ratio with provision for greenery and landscaping, entrance and exit points in relation to the Mbaazi avenue.

138. Second, the Respondent was to demonstrate compliance with the physical planning approval requirement number 5 on surrender of the strip of land colored blue to the government free of cost for road expansion and resurvey of the entire plot; and third, the Respondent was to provide the geotechnical assessment of the site and statement on the excavation method detailing the impacts on the surrounding developments and appropriate mitigation measures to be put in place to safeguard structural integrity of the affected developments.

139. The Respondent responded vide the letter of 13th December 2022. The Respondent provided the layout plans. On air circulation and sunlight, the Respondent stated that it is common place that high-rise buildings which are becoming common consequent to imbalances in land availability for new construction reduce access to direct sunlight but the proposed development being in line with county by-laws would in no way hinder any natural light penetration or affect the natural air circulation to the surrounding environment.

140. Finally, the Respondent referred to the geotechnical survey report of 23rd June 2022 by Apex Projects Limited. In its conclusion and recommendations, the report states that:

> "Adequate care should be taken to protect the adjoining property from collapsing, tilting or eroding away. The excavation should be done in such a manner that the soil of

adjoining property will not liable to give away (sic) or should be supported by artificial means. It is therefore necessary for the structural designer to give guidance before the start of construction work as they should give guidance about all precautions before commencement of excavation work. Following are the precautions which help to commence excavation work near existing adjoining property:

Do geotechnical study of excavation area before commencing excavation work near adjoining building, i.e. study type of soil, layers and water table as detailed in this study.

Never do entire excavation at a time. Do diggings of columns one by one, possibly alternate so that the adjoining building foundations have least exposure.

Complete the entire work of excavation, PCC, footing, columns casting, filling and refilling the excavated earth in the least possible time, i.e. one or two days. Complete all the work with minimum vibration.

Do necessary shoting and shuttering to prevent the collapse of excavated materials.

Do not water the excavated pits.

If the existing adjoining building is old wooden framed or load bearing, provide additional supports in it, so as to relieve loads from the foundation, which will also take care if there is minor slippage of earth.

Keep adequate props, shuttering materials and refilling materials like sand, earth etc. ready at the site to take care of emergencies.

In conclusion, carry out excavation work alternately with adequate shoring to the soil of adjacent building and ensure that the construction work is carried out in proper way with minimum vibration in least possible time."

141. The 2nd Interested Party satisfied with the foregoing proceeded to issue an EIA License. The license is subject to several conditions which also take into account the Petitioner's concerns, to wit, provision of an Environmental Audit Report to confirm the efficacy of the Environmental Management Plan; preparation of a geotechnical site investigation and a report detailing the slope, stability, monitoring programs, methods of excavation and its effects on adjacent structures; use of environmentally friendly excavation that safeguard the structural integrity of the surrounding developments; air pollution and control measures during construction.

142. Public participation, as enshrined in law, does not require that every individual's views must prevail or dictate the outcome. Instead, it ensures that all views are considered in good faith.

143. Borrowing from the fifth element as set out in the Mui Coal Basin Case(supra).

> " Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box."

144. Indeed, as expressed by Sachs, J in Merafong Demarcation Forum and Others vs President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; *2008 (5) SA 171 (CC)*; *2008 (10) BCLR 968 (CC)*:

> "The passages from the Doctors for Life majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail"

145. The process in this instance reflects this principle, as the Respondent engaged with the issues raised, made adjustments to the project, and provided detailed responses to the concerns. The 2nd Interested Party interrogated the concerns, and where it deemed necessary, sought further particulars from the Respondent. It further incorporated some of the concerns in the EIA License, and gave conditions to be complied with by the Respondent.

146. This chronology of events demonstrates that the public participation that was undertaken was substantive, respecting the right to be heard while balancing the broader interests at stake, including environmental concerns that were raised by the Petitioner's members.

147. In consideration of the foregoing, the Court is unable to make a finding that the Petitioner's views were not taken into consideration. The Court finds that there was adequate public participation.

148. I will now consider if there was a violation of Article 42, that is the right to a clean and healthy environment. The right to a clean and healthy environment has been recognized to be indispensable for the survival of humanity. The global recognition of the importance of a clean and healthy environment took a significant step forward in 1968, when the UN General Assembly adopted a resolution acknowledging the connection between environmental quality and fundamental human rights.

149. However, it was not until 1972, during the UN Conference on the Human Environment, Stockholm, that the right to a healthy environment was explicitly recognized in an international document, the Stockholm Declaration, 1972. The Stockholm Declaration, which contain 26 principles, placed the environmental issues at the forefront of international concerns.

150. The global recognition of the right to a clean and healthy environment was bolstered by the UN Human Rights Council and General Assembly, which passed in October 2021 and June 2022, respectively, resolutions formally recognizing the right to a healthy environment as an international human right.

151. In the Article by Azadeh Chalabi, "A New Theoretical Model of the Right to Environment and its Practical Advantages" (2023) Human Rights Law Review, he describes the multifaceted nature of the right to a clean and healthy environment as follows:

> "It should be noted that the right to environment is not just an 'umbrella' right, or the sum of the already existing rights but rather a composite right. This is because of the fact that the ecosystem is so intertwined that often any damage in one part can cause damage in other parts of the environment. Adopting a systems approach, the environment as a system can include both non-living and living beings, humans and non-humans, which are interdependent, and their survival depends on biodiversity at different levels from genes to biomes. The key point is that often harm to any aspect of the environment can be seen as harm to the environment as a whole. For example, as the global temperature continues to rise, the glaciers start melting and this will increase the sea levels. Following that, farms will be flooded, and coastal cities may be immersed. Apart from its influence on the level of food

> security, all this may make people migrate to other places and can have negative impacts on economies and their role in sustaining everyone. This could gradually make a habitable place unlivable in the long term, if not in the short term. Biodiversity and sustainable environment are objective needs of both humankind and other species, and thus protecting the environment is where the interest of both overlaps. The intertwining of the elements of the environment implies that any act or omission which contributes negatively to the qualities of the environment and its sustainability over time will be in violation of the right to environment. What is important here is to protect the environment as a system of non-living things (water, soil, air, light and minerals, etc.) and living things (humans, animals, plants, bacteria, fungi, protists, etc.) and its biodiversity (especially ecological diversity) over time."

152. In Kenya, Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations. Article 69, sets outs the state's obligations with respect to the environment, including protecting genetic resources and biological diversity and eliminate processes and activities that are likely to endanger the environment.

153. Article 69 of *the Constitution* further provides for the obligation of every citizen to cooperate with the government and any other person to conserve and protect the environment as well as use natural resources and ensure ecologically sustainable development.

154. In enforcing environmental rights, Article 70 (1) provides that one may apply to Court for redress if the right to a clean and healthy environment under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened. Article 70 (1) thus gives every Kenyan access to the court to seek redress in environmental matters.

155. Article 70 (3) of *the Constitution* provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury before seeking redress for breach of the right to a clean and healthy environment. This provision is replicated in Section 3(3) of the EMCA which allows any person who alleges that the right to a clean and healthy environment has been, or is being infringed or violated to apply to the Environment and Land Court in the public interest.

156. As to what constitutes "environment," the *Environmental Management and Co-ordination Act* (EMCA) states that it includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.

157. The right to a clean and healthy environment transcends and includes the right to life. The Court in Peter K Waweru vs Republic [2006] eKLR speaking to this position noted as follows:

> " The right of life is not just a matter of keeping body and soul together because in this modern age, that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man; it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding. This right and the other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible."

158. And in Adrian Kamotho Njenga vs Council of Governors & 3 Others [2020] eKLR, the Court persuasively stated thus:

> "Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by article 69. The right extends to having the obligations relating to the environment under article 70 fulfilled. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment."

159. When a dispute concerning a threat to the environment is brought before the court, the Court must be guided by certain principles that seek to protect the environment as per section 3(5) of the EMCA. These principles include the precautionary principle, which is defined under section 2 of the EMCA as follows:

> "the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

160. This principle has been applied in a number of disputes touching on the threat to the right to clean and healthy environment. Most expansively in Odando & Another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) vs National Environmental Management Authority & 2 Others; County Government of Nairobi & 5 Others (Interested Parties) (Constitutional Petition *43 of 2019*) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment) the Court held as follows:

> "The precautionary principle has been applied elsewhere in environmental management. The report issued in 1987 on the Second International Conference on the Protection of the North Sea (London Declaration), determined that a precautionary approach was needed in order to protect the North Sea from dangerous substances from the dumping of solid waste into the North Sea. (See the Second International Conference on the Protection of the North Sea, London, Nov 25, 1987, 27 I.L.M 835[1988]. The precautionary approach was also incorporated in the 1987 Pollution Control Guidelines authorised by Article 4(e) of the Agreement on the Protection of Lake Constance against Pollution (Steckborn Agreement). The Guidelines contain obligations for Switzerland, Austria and Germany for the purpose of protecting the drinking water and fishing supplies of Lake Constance. (Harald Hohmann, Precautionary Legal Duties and Principles of Modern International Environmental Law 236-38 [1994].)
>
> The European Union adopted the precautionary principle in its treaty alongside the principle that preventive actions should be taken, that environmental damage should as a priority be rectified at source and the polluter should pay. (See the Treaty on European Union, Feb 7, 1992, 31 I.L.M.285-86). The United States exercised precaution in its food safety and banned imports of beef from some European countries because of the 'mad cow' disease outbreak in the United Kingdom and other countries in 1997 even though there was no evidence that the disease had spread into the US from the contaminated beef. (U.S. Bans Imports of European Meat; Agriculture Dept. to Assess Risk of Mad Cow Disease in this Country, Wash. Post, Dec. 13, 1997, at A8.)

Closer home, the Bamako Convention on Hazardous Wastes Within Africa of 1991 behoves each party to strive to adopt and implement the preventive, precautionary approach to pollution problems which entails preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. (Bamako Convention on Hazardous Wastes Within Africa, Jan. 29, 30 I.L.M. 773 [1991].

The Rio Declaration on Environment and Development, 1992 states that in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation. (Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874 [1992].

Professor Gitanjali Nain Gill in his article 'The Precautionary principle, its interpretation and application by the Indian Judiciary: 'When I use a word it means just what I choose it to mean-neither more nor less' Humpty Dumpty' published in Environmental Law Review 2019, Vol. 21(4) 292–308 described the application of the principle by the Indian courts as follows: "The precautionary principle is invoked and followed by judicial and expert members as a normative commitment. It thereby directs the judges, particularly the technical expert judges, to offer scientifically based structural solutions and policies that respond creatively to weak, ineffective Regulation even in the absence of Regulation. Adoption of a variety of procedures, including investigative, stakeholder consultation and appointment of specialised committees, helps in the application of the precautionary principle. This improves active participation through dialogue, argument and norms for eliciting factual realities and expert knowledge to respond to environmental problems. Expert members by on-spot site inspection can evaluate contradictory claims, positions and reports filed by the parties. The stakeholder consultative process is applicable to cases of wider ramification involving major issues including river cleaning and air pollution. The specialised committees promote the accountability of different authorities for the implementation of the rules under the National Green Tribunal Act 2010.23 Thus, the precautionary principle in India mandates well-judged usage in favour of observing, preventing and mitigating potential threats. Indeed, modern risk factors have become more complex, far reaching and adversely affect public health and environment. The principle is employed as a tool within Indian environmental governance to promote better health and environmental decisions."

In Vellore Citizen Welfare Forum v Union of India (1996) 5 SCC 647 at 658 the court declared that the precautionary principle involved three conditions. Firstly, that the State government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation. Secondly, where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Lastly, that the 'onus of proof' was on the actor or developer or industrialist to show that the actions were environmentally benign.

The case was directed against the pollution caused by the discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu into agricultural fields, roadsides, waterways and open lands. The Indian Court while interpreting the precautionary principle in the context of municipal laws directed the Government to form an authority under their environmental laws to deal with the situation created by the

tanneries and other polluting industries in the State of Tamil Nadu. The court also directed that the authority to determine the compensation to be paid to the affected parties, with part of the funds being applied towards reversing the ecology. The authority which was to be formed had the mandate to direct closure of industries whose owners refused to pay the compensation assessed by the authority. The court fixed timelines for constituting the authority and the time frame within which it was to undertake its task. The court also set up a fund to be used for compensating victims of the pollution and for the restoration of the damaged environment. Tanneries in a different area were to obtain the board's consent to operate the tanneries.

In the court's view, the onus lay on NEMA to prove that it had anticipated, prevented and addressed the causes of environmental degradation. Its contention that the Petitioners should provide a solution and specify which measures the Respondents should have carried out under the precautionary principle is in this court's view misplaced. EMCA is replete with measures and actions which the Respondents are to implement in order to address air and water pollution.

What the precautionary principle implies is that the State has a duty to prevent environmental harm and health risks as well as conduct that may be harmful even where conclusive scientific evidence regarding the harmfulness is not available. The Respondents must take precautionary actions aimed at reducing exposure to potentially harmful substances, activities and conditions to minimise significant adverse effects to health and the environment.

One way of implementing the precautionary principle is by shifting the burden of proof to the polluters and exploring alternatives to the harmful actions such as the Dandora dumpsite. The precautionary approach to be adopted by the State should focus on how much harm can be avoided rather than consider how much can be tolerated.

Under this principle, the State would rather be wrong in acting instead of failing to act at all because the damage the pollution is likely to cause to human health and the environment may take years to be ascertained scientifically. The Respondents should minimise the future costs of being wrong about environmental and health risks posed by air and water pollution in the country. Applying the precautionary principle in stopping air and water pollution will prevent the actual causes of respiratory and other diseases as well as other underlying risks to health. This would entail examining the evidence of risk and uncertainty to determine the possibility of a significant health threat and the need to take precautionary action..."

161. The Court of Appeal in *National Environment Management Authority & another vs KM (Minor suing through Mother and Best friend SKS) & 17 Others (Civil Appeal E004 of 2020* & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (Judgment) observed as follows:

> " The precautionary principle is defined in section 2 of EMCA as the "principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". We are concerned that NEMA's interpretation of the principle is that it permits the taking of risks in unknown cases, whereas to the contrary, the principle requires caution to be taken even when there is no evidence of harm or risk of harm from a project, and that proof of harm should not be the basis of taking action. The proper application of the principle therefore is that scientific analysis of risks should form the core of environmental rules and decisions, notwithstanding the fact that such analysis may be

uncertain. In the alternative, the principle is also used when there are limits to the extent that science can inform actions, and ultimately rules and decisions have to be made having regard to other considerations such as the public perception of the risk and the potential for harm. It is notable that the EIA processes provide opportunity for such analysis and perceptions to be taken into account.

EPZA on the other hand made an economic argument to justify the operations of Metal Refinery (EPZ) Limited, in terms of the contribution thereby to economic development. In this respect there will always be competing values that need to be balanced in environmental Regulation, as well as the costs and benefits of compliance, and it is notable in this respect that this is one of the main objectives of an EIA and that article 69 emphasizes on ecologically sustainable development."

162. What is clear from the foregoing is that at the first instance, the obligation to show that a project is environmentally sound falls on the proponent of the development. This burden can be discharged by satisfactorily going through the EIA process and obtaining an EIA license.

163. The Respondent and the 1st and 2nd Interested Parties argue that an EIA study was conducted, the EIA report published and the public invited to comment on the EIA report, all in accordance with the law. The EIA license was, therefore, issued in accordance with the correct procedures and having taken into account the potential risks and upon satisfaction of the mitigation measures in that respect.

164. On the other hand, the Petitioner, supported by the 3rd Interested Party, avers that the proposed development will have a host of negative effects. In this respect, it adduced an EIA Study Report dated 17th May, 2024 undertaken under its instructions. It is noted in the report that the proposed project design and project EIA Report were reviewed and a physical inspection of the site was undertaken.

165. According to the Report, the Respondent's EIA report was found to be inadequate and containing discrepancies, to wit, a difference in the project size as contained in the EIA report vis the EIA license in the number of units putting into question the license as one cannot tell which of the two is the actual project size.

166. Further, it is noted that the Report contains various inadequacies being that while majority of the members who participated in the public participation expressed reservations on the impact of the project on utilities and light obstruction, the mitigation measures proposed are inadequate as the measures are generic and ambiguous. It calls for a more detailed public participation and detailed impact and mitigation measure analysis.

167. Additionally, it is the Petitioner's contention that the Report does not address some of the major negative impacts as raised in the public participation exercise. These, according to the Petitioner's expert's Report, include the impact of the traffic and accessibility on Mbaazi road, the impact of light obstruction and air circulation on the adjacent building, the alternative design that considers a relatively shorter building, the impact on water resources and sewer infrastructure and the impact of the project construction and excavations on the structural integrity of the adjacent buildings.

168. It is further noted in the Petitioner's Report that the project EMP is inadequate as it recommends traffic impact assessment and a traffic management plan, none of which they claim was provided or annexed to the report. Accordingly, the information provided was inadequate to inform the decision for issuance of the EIA license.

169. Further, the report notes that the buildings along the boundary wall within the neighbouring plot have cracks and that the excavation is almost 100% of the entire plot which is a violation of the provisions

of Building Code by-law 17 (front space), by-law 18 (side space) and by-law 19 (the court yard), the consequence of which is that there will be heavy shading thus interfering with light and ventilation of existing plot due to the proposed building's height of 16 floors contrary to the Nairobi City County zoning rule.

170. The summary of the Petitioner's report is that the proposed development will affect air circulation, obstruct light, affect the structural integrity of the adjacent buildings, affect drainage system due to the sheer number of occupants leading to water scarcity and affect the sewerage system.

171. The EIA Study Report submitted by the Respondent discloses that it was done on the understanding that the proposed development would contain 16 floors comprising 512 units. The contention by the Petitioner that the EIA study report and the EIA license differ on the number of units is, therefore, factual. However, it is noted that there was a concession by the Respondent to scale down the development which accounts for the difference in the Report vide the EIA License.

172. On the contention as to the impossibility of appreciating the size of the proposed project, this also falls by the wayside as the Respondent is and will be bound by the size as contained in the EIA license.

173. The Petitioner has alleged that the development by the Respondent is a threat to the integrity of the neighbouring buildings, and by extension, a threat to the right to a clean and healthy environment.

174. First, the complaint of violation to a clean and healthy environment posited that the sharing of the bedrock is likely to affect the integrity of the neighbouring houses. Further, that the natural rock foundation will require heavy pounding thus compromising the structural integrity of the building. It is noted that the EIA Study Report did not deal with this aspect.

175. The Respondent nonetheless provided a geotechnical report. The report states in part as follows:

> " Adequate care should be taken to protect the adjoining property from collapsing, tilting or eroding away. The excavation should be done in such a manner that the soil of adjoining property will not liable to give away (sic) or should be supported by artificial means. It is therefore necessary for the structural designer to give guidance before the start of construction work as they should give guidance about all precautions before commencement of excavation work. Following are the precautions which help to commence excavation work near existing adjoining property:
>
> Do geotechnical study of excavation area before commencing excavation work near adjoining building, i.e. study type of soil, layers and water table as detailed in this study.
>
> Never do entire excavation at a time. Do diggings of columns one by one, possibly alternate so that the adjoining building foundations have least exposure.
>
> Complete the entire work of excavation, PCC, footing, columns casting, filling and refilling the excavated earth in the least possible time, i.e. one or two days. Complete all the work with minimum vibration.
>
> Do necessary shoting and shuttering to prevent the collapse of excavated materials.
>
> Do not water the excavated pits.
>
> If the existing adjoining building is old wooden framed or load bearing, provide additional supports in it, so as to relieve loads from the foundation, which will also take care if there is minor slippage of earth.

> Keep adequate props, shuttering materials and refilling materials like sand, earth etc. ready at the site to take care of emergencies.
>
> In conclusion, carry out excavation work alternately with adequate shoring to the soil of adjacent building and ensure that the construction work is carried out in proper way with minimum vibration in least possible time."

176. As can be seen above, the geotechnical report provides guidelines on how excavation should be undertaken to ensure preservation of the structural integrity of the neighbouring buildings. The EIA License further provides under condition 2.2 a geotechnical site investigation and report detailing among others the method of excavation and the support systems to be applied thereon. It has not been demonstrated that these measures will not adequately/mitigate address the concerns in this regard.

177. The Petitioner has, in its report, averred that its buildings now have cracks. This has however not been demonstrated. In the end, violation under this head has not been established.

178. The Petitioner contends that the proposed development will lead to blockage of light. The Respondent stated that the building is designed in accordance with the County by laws and will not hinder light penetration nor affect the natural air circulation.

179. It has not been demonstrated that the building design aforesaid will lead to blockage of light nor affect natural air circulation. The Court finds that this plea is unsubstantiated.

180. The other concern by the Petitioner was with regard to sewerage and sanitation as a threat to the right to a clean and healthy environment. The Respondent, through the EIA report, has demonstrated that adequate measures will be put in place to ensure the proposed development is connected to the national sewerage system and there is adequate drainage in this regard. The claim of violation under this head is, therefore, not established. Conditions 2.5 and 2.7 of the EIA License speak to further stipulations in this regard.

181. The Petitioner further contends that the proposed development will affect the quality of air due to the exhaust fumes that will be occasioned by the motor vehicles in the parking facing the Petitioner's members' houses. This claim is intertwined with that of pollution of the Petitioner's borehole by the exhaust fumes of the cars in the basement parking.

182. Whereas the Petitioner is entitled to clean air as an aspect of the right to clean and healthy environment, nothing has been placed before the Court to demonstrate the potential air and water pollution. Nonetheless condition 2.16 of the EIA License mandates the Respondent to strict adherence to the EMCA (Air Quality) Regulations.

183. Similarly claims of interference of ariel communication have not been established.

184. The Petitioner has also raised concerns that the proposed development cannot be sustained and will cause undue strain on the existing infrastructure. Apart from sewerage and drainage, the Petitioner also noted concerns on traffic and water supply. In this respect, the Respondent undertook a Traffic Impact Assessment which set out a traffic management plan. Condition 2.6 of the EIA Licence also mandates the establishment of a concise traffic management plan duly approved by the relevant authorities.

185. On matters water, Condition 2.22 mandates the Respondent to put in place a comprehensive water harvesting and storage scheme to augment the NSWSC supply.

186. It is crucial to reiterate that the issuance of the EIA License report is not the end of the process. The Court notes that the Report by the Petitioner also alleges instances of violations of building codes et

al and even conditions of the EIA License. The Petitioner has due recourse under the EMCA and the relevant statutes in respect of these alleged contraventions.

187. In conclusion, the Court is unable to find the Petitioner has established a viable threat to the enjoyment of its rights to a clean and healthy environment.

188. The Petitioner and the 3rd Interested Party submit that the proposed project violates the area zoning law as set out in Guide of Nairobi City Development Ordinances and Zones.

189. The Respondent, supported by the 1st Interested Party, assert in response that allegations of contravention of the zoning requirements are unsubstantiated since the zoning policy in areas under zone 4 are under review as indicated in the Guide of Nairobi City Development Ordinances and Zones. Further, that further approvals for areas falling under zone 4 are guided by the Nairobi Integrated Urban Development Master Plan (2014). It is also asserted that there are other similar developments around the project which exceed the four-story requirement.

190. The 2010 Constitution of Kenya ushered a new approach to urban planning that recognized the role of planning in promoting sustainable development. In furtherance of this, several pieces of legislation are in place governing land use planning in Kenya.

191. These include the *Urban Areas and Cities Act*, 2011, which stipulate that urban areas must have a physical development plan guiding land use, infrastructure development, and zoning, and the County Government Act, 2012 which provides for County Integrated Development Plan as the instrument for development facilitation and control within the respective city or municipality.

192. Integrated County Development Plans (ICDPs) in Kenya are strategic frameworks developed by county governments to guide development initiatives within their regions. These plans are crucial tools for the devolved governance system established under Kenya's 2010 Constitution, which created 47 county governments, with significant autonomy in managing local affairs. ICDPs are intended to address the unique developmental needs of each county while aligning with national goals.

193. ICDP typically includes a situational analysis of the county, identifying key development challenges and opportunities. It sets out development priorities, objectives, strategies, and projects for the county. Each plan also details the expected outcomes, funding sources, implementation mechanisms, monitoring and evaluation frameworks. In summary, ICDPs are central to Kenya's devolved system, providing counties with a structured approach to planning, budgeting, and executing development initiatives that improve livelihoods and stimulate economic growth locally.

194. The *Physical and Land Use Planning Act*, 2019 provides a framework for planning and regulating land use and development. Section 37 of the *Physical and Land Use Planning Act* provides that:

> " The objects of a County Physical and Land Use Development plan shall be -
>
> (a) "to provide an overall physical and land use development framework for the county;
>
> (b) to guide rural development and settlement;
>
> (c) to provide a basis for infrastructure and services delivery;
>
> (d) to guide the use and management of natural resources;
>
> (e) to enhance environmental protection and conservation;

(f) to identify the proper zones for industrial, commercial, residential and social developments;

(g) to improve transport and communication networks and linkages;

(h) to promote the safeguarding of national security; and

(i) any other purposes that may be determined by the planning authority."

195. Under Section 38(1), it is provided that:

> " At least twenty-one days before commencing the preparation of a county physical and land use development plan, the county executive member shall publish a notice in the Gazette and the notice shall include the intention to prepare a county physical and land use development plan, the objects of the plan and the matters to be considered in the plan and the address to which any comments on the plan may be sent."

196. Section 40 requires public participation in coming up with a county physical and land use development plan. Section 42(1) and (5) on modification of a county physical and land use development plan provides as follows:

> " (2) On the approval of the county government, the County Executive Committee member shall publish a notice in the Gazette, in at least two newspapers of national circulation and through electronic media notifying any interested parties of the proposed amendments to the county physical and land use development plan and the period within which interested parties may make representations to the County Executive Committee member.
>
> (5) During the process of amending a county physical and land use development plan, the county executive committee member shall ensure public participation.
>
> (6) The amended county physical and land use development plan shall be published by the county planning authority in accordance with section 41 of this Act."

197. Section 41(4) provides as follows:

> " On the approval of the county physical and land use development plan by the respective county assembly, the county executive committee member shall publish the approved plan in the Gazette and in at least two newspapers with a national circulation within fourteen days of the approval and no development shall take place on any land unless it is in conformity with the approved plan."

198. While Section 43 provides as follows:

> " (1) A county executive committee member may only initiate the process of revising a county physical and land use development plan after eight years have elapsed since the county plan was published in the Gazette.

(2) The provisions of section 42 of this Act shall apply with the necessary modifications to the revision of a county physical and land use development plan."

199. Section 45(1) and (2) provides:

"(1) A county government shall prepare a local physical and land use development plan in respect of a city, municipality, town or unclassified urban area as the case may be.

(2) A local physical and land use development plan may be for long-term physical and land use development, short-term physical and land use development, urban renewal or redevelopment and for the purposes set out in the Second Schedule in relation to each type of plan."

200. Section 49(1) provides:

"Within thirty days of the preparation of a local physical and land use development plan, a county planning authority shall publish a notice in the Gazette, in at least two newspapers of national circulation and through electronic media informing the public that the plan is available at the places and times designated in the notice for inspection and that an interested person may comment on the content of the plan."

201. Section 51(2) provides:

"Where the county executive committee member intends to amend or revise a local physical and land use development plan, the provisions of section 42 shall apply with the necessary modifications."

202. Finally, Section 56 (e) provides as follows:

"Subject to the provisions of this Act, the *Urban Areas and Cities Act* (Cap. 275) and the *County Governments Act* (Cap. 265) the county governments shall have the power within their areas of jurisdiction to formulate by-laws to regulate zoning in respect of use and density of development."

203. The subject property is situated within Thompson Area which as per the policy falls within zone 4. The "Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones (City Council of Nairobi, 2004), was developed in 2004 by the now defunct City Council of Nairobi. It indicates in this respect the types of development allowed in the area under review as follows: Residential apartments allowed on sewer only-Four Storeys Max. Under remarks/policy issues, it is indicated: Policy under review.

204. The Nairobi Integrated Urban Development Master Plan of December, 2014[NIUPLAN], referenced by the 1st Interested Party is a broad spatial framework to guide urban planning and development within the Nairobi City County for the period 2014-2030.

205. The Plan was enacted by the County Government of Nairobi pursuant to the provisions of Section 108 of the County Government Act. It therefore supersedes the "Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones (City Council of Nairobi, 2004), which the Petitioner is relying on.

206. The Nairobi Integrated Urban Development Master Plan of December, 2014[NIUPLAN], makes reference to the 2004 Nairobi City Development Ordinances and Zones under Section 3.3.3. It indicates at pages 3-43 as follows:

> " The last zoning review was carried out in 2004 and resulted in subdividing 20 zones into smaller zones and prescribed ground coverage ratios (GC) and plot ratios (PR), and definition of the minimum plot size for each zone.
>
> This revision allowed developers a maximum of four floors for apartments in Westlands, Parklands, Woodley, Kilimani, and Kileleshwa. However, the situation in those areas and the current development activities did not seem to follow the revised Regulation much. These can be observed in incidents of high-rise building of more than five floors and land use mixture in residential areas. Actual Regulation may seem to be more ad-hoc than the adopted scheme. Maps indicating the standing Regulations were planned for public reference, but have not been realized. Thus, the zoning itself lacks discipline and strength to control the day-to-day development activities appropriately."

207. Under Section 6.4.2. 'Demand for Land Use', it is noted thus:

> " The maximum capacity of population of NCC is estimated to be approximately five million. This result means that if Nairobi City needs to accommodate more than five million population, the existing Regulation in the Development Ordinance should be revised to change land use, i.e., to convert some non-residential land use to residential use, and also the plot ratio should be changed to higher value to promote higher population density to accommodate future population."

208. Table 6.4.5 of the Master Plan under 'Zonal Considerations' for Zone 4, it provides as follows:

Zone[4]	**Status**	Idea/Consideration
Upper Spring Valley, Kileleshwa, Kilimani, Thompsons, Woodley, etc. Medium-density residential for middle income level	Detached houses are converting to high-rise apartments or office buildings. Some apartments seem not following height Regulation (Regulation states four storeys maximum). Very diverse – mixed characteristics – needs separation Kileleshwa fast growing but no shopping centre	Very diverse – mixed characteristics needs separation to maintain high density mixed with low density

209. In Sessional Paper No. 1 of 2023 on the Kenya National Population Policy for Sustainable Development, developed and launched by the National Council for Population and Development, it is conceded that due to lack of an updated zoning policy, the Nairobi Government County has processed applications using discretion, practice, precedence, and planning justifications advanced by developers, architects and engineers.

210. This court has come across the Nairobi City County Development Policy, December 2021. The said policy provides parameters upon which development applications for land use and development will be evaluated and approval granted with a view of promoting sustainable urban development.

211. The Development policy, 2021 recognizes the NIUPLAN, 2014 and the fact that the development control guidelines were last reviewed in the year 2006, and were to last for ten years (until 2016).

212. According to the development policy, 2021, the development control guidelines were considered based on the following planning variables: population growth trends; legal, policy and institutional framework; land is inelastic; land market value; advanced construction technology; provision of infrastructure; internal urbanization trends and urban dynamics.

213. The development control guidelines in the policy have been annexed as "zonal maps", annexure 2. The suit property falls under "zone 4 B" which provides a skyline/levels of 16 floors, which is within the Respondent's proposed development.

214. It is abundantly clear from the foregoing that the 2004 Zoning Guidelines in question have long been superseded by events that were unforeseen at the time of their formulation. These guidelines, once relevant, fail to account for the dynamic and evolving nature of urban and environmental planning, a phenomenon recognized by the NIUPLAN and Nairobi City County Development Control Policy, 2021.

215. The Court recognizes that the application of these outdated guidelines (2004) without consideration of the current realities and the operative Master Plan (2014-2030) and Nairobi City County Development Control Policy, 2021 may result in unjust outcomes that do not reflect the needs and contexts of contemporary society.

216. Nonetheless, it is clear from the foregoing excerpts that the 1st Interested Party has at all times been alive to the conflict between the 2004 Zoning Guidelines in place and the Nairobi Integrated Urban Development Plan, and Nairobi City County Development Control Policy, 2021 which identified the need for review of the zoning policy.

217. The Petitioner has not shown that the impugned development runs afoul the Nairobi Integrated Urban Development Plan, 2014 and the Nairobi City County Development Control Policy, 2021. Considering that the project has undergone public participation, the concerns of the Petitioner having been addressed within the existing legal and policy framework, it is the finding of the court that the project is not invalid on account of the outdated 2004 Zoning Policy, provided that it continues to comply with the conditions set forth in the EIA License and other relevant Regulations.

218. The Nairobi Integrated Urban Development Master Plan of December, 2014 [NIUPLAN], made pursuant to the provisions of the County Government Act, and Nairobi City County Development Control Policy, 2021 is the operational planning document, which must guide the 1st Interested Party in all the approvals it makes in respect of developments in the County.

219. While the Nairobi Integrated Urban Development Master Plan of December, 2014 and Nairobi City County Development Control Policy, 2021 are the operative documents in guiding the approvals of developments in the county, the Court emphasizes the urgent need for the Nairobi City County to put in place the Nairobi County Physical and Land Use Development plan, envisioned under the *Physical and Land Use Planning Act*, to ensure that development decisions are made in accordance with the development plan, which would have been agreed upon by the residents of the County.

220. For those reasons, the Court makes the following final orders:

a. The Petition be and is hereby dismissed.

b. Considering that the Petition is in the nature of public interest litigation, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kabue for Petitioner

Mr. Chebon holding brief for Otieno for Respondent

Ms Odhiambo for Beko for 1st Interested Party

Court Assistant - Tracy