



REPUBLIC OF KENYA



**Kassam & 12 others v JW Archplans Limited & 16 others (Environment & Land
Petition E007 of 2024) [2024] KEELC 7212 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E007 OF 2024
OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

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

AND

JW ARCHPLANS LIMITED 1ST RESPONDENT
TERRA CONSULT 2ND RESPONDENT
SPEKTRA CONSULTING ENGINEERS 3RD RESPONDENT
CHALBAK CONSTRUCTION COMPANY LIMITED 4TH RESPONDENT
NAIROBI CITY COUNTY GOVERNMENT 5TH RESPONDENT



PATRICK ANALO AKIVANGA	6 TH RESPONDENT
STEPHEN GATHUITA MWANGI	7 TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	8 TH RESPONDENT
CATHERINE THAITHI	9 TH RESPONDENT
SHANTILAL RAYCHAND SHAH	10 TH RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY	11 TH RESPONDENT
WATER RESOURCES AUTHORITY	12 TH RESPONDENT
GREENDIME CONSULTANTS LIMITED	13 TH RESPONDENT
ROBINSON MAINA KIMARI	14 TH RESPONDENT
BENJAMIN N OMBATI	15 TH RESPONDENT
ZAMIL REALTORS LIMITED	16 TH RESPONDENT
JUSTUS MWAURA	17 TH RESPONDENT

RULING

1. The Petitioners have filed a Notice of Motion application dated 28th March 2024, under Section 3, 4, 13 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 3 of the *Environmental Management and Co-ordination Act* and Section 3 and 10 of the *Environment and Land Court Act*, in which they have sought the following orders:
 - a. That a conservatory order of temporary injunction be and is hereby given stopping, halting, discontinuing and preventing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, their servants/ agents/ proponents or any other person from undertaking any further construction and development activities on the properties known as L.R. No. 209/871/14 and 209/871/11- City Park Drive, Parklands, pending the hearing and determination of the Petition hereof.
 - b. That a conservatory order of temporary injunction be and is hereby given compelling the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th Respondents to take immediate measures to stop, prevent or discontinue any act or omission deleterious to the environment, including arresting and prosecuting any person or equipment being used to undertake further construction and development activities on the properties known as LR No. 209/871/14 and 209/871/11- City Park Drive, Parklands, pending the hearing and determination of the Petition hereof.
 - c. Spent.
 - d. That costs be in the Petition.
2. The application is based on the grounds set out in the Supporting Affidavit sworn by Karim Sherali Kassam, the 1st Petitioner, who deponed that the Petitioners are residents of apartment units erected and developed on the property known as LR No. 871/13 (Nairobi/Block 37/27) City Park Drive, Parklands Nairobi, which lies between LR No. 209/871/14 on the upper side and LR No. 209/871/11 on the lower side.



3. The 1st Petitioner deponed that the Petitioners purchased their respective units intending that the same be their retirement homes having established that the area has all the facilities to enable the residents to enjoy quiet and peaceful life in a clean and healthy environment.
4. Karim Sherali Kassam deponed that the Applicants' right to life and to a clean and healthy environment is threatened and has been denied, violated and infringed upon by the 1st to 8th Respondents, who are constructing several residential apartments on the subject properties and that the proposed developments are illegal, irregular and unprocedural.
5. It is the Petitioners' case that the approvals, licenses or permits purportedly issued by the 9th, 12th, 14th and 15th Respondents are null and void, specifically the Nairobi City County approval as NCC-CPF AV-209, NEMA/EIA/[PSL/11617](#), EIA/[PSL/16056](#) and NCA Project Ref. No.s 53127415710469, 53127415710417, 53127415710860 and 80894/B/1223 and the change of use of the properties.
6. It is their case that the construction has been negligently and illegally undertaken, which works have completely blocked sunlight and natural air to the Applicants' residential units; that the Petitioners are now forced to rely on electricity to light their respective rooms during the day and that the fire escape facility previously built on the outer wall of the Applicant's apartment building has been consumed and subsumed by the ongoing projects.
7. It was deponed by the 1st Petitioner that the entire construction works on the subject properties has interfered with the drainage and sewerage system of the area, with toilet and bathroom effluent from the Petitioners' residences now freely flowing to Mathare River; that these actions have been aided and assisted by the failure of the 9th-17th Respondents to perform and undertake their statutory duties and mandates and that the 9th, 10th and 11th Respondents continue allowing development on the two properties on the riparian land of Mathare River, contrary to the provisions of [Physical and Land Use Planning Act](#).
8. It was deponed that further, the construction violates the rules, regulations and by-laws on ground average, skyline limits, plot ratios and land use and that the 12th and 13th Respondents have ignored their statutory duties to prevent, stop or discontinue any act or omission deleterious to the environment as provided under the Environment Management and Coordination Act (EMCA), National Construction Act and the [Water Act](#).
9. They argue that unless stopped by way of conservatory orders, the 1st to 8th Respondents will continue with their acts and omissions that are deleterious to the environment and that violate the Petitioners' rights to life and to a clean and healthy environment.
10. Through a Replying Affidavit sworn on 22nd April 2024, Ali Hussein Sugule, director of the 4th Respondent, raised a preliminary objection on the grounds that this court lacks original jurisdiction to hear and determine this suit and application by dint of Section 61(3) and 61(4) of the [Physical and Land Use Planning Act](#) 2019, Section 129(1) and 130(1) of the [Environmental Management and Coordination Act](#) 2012 and Section 121 and 124 of the [Water Act](#). He also argued that the applicants have not given their authority and consent to the 1st Petitioner to file this suit.
11. Hussien Sugule further deponed that the supporting affidavit and affidavit in support of the Petition were sworn by the 1st Petitioner on behalf of the other twelve Petitioners without their authority and consent.



12. The deponent asserted that the 4th Respondent purchased LR No. 209/871/14 and LR No. 209/871/11 from Berkshire Properties Limited on 21st December 2020 and 22nd June 2021, and that the properties were transferred and registered in the 4th Respondent's name.
13. According to the 4th Respondent, it commenced construction of apartments on LR No. 209/871/14 in July 2021, which is complete and apartments on LR No/ 209/871/11 which commenced in January 2022 and is at the 7th floor. It argues that although the suit property borders Mathare River, it is more than fifty meters away from the river while the recommended minimum distance by the Water Resources Authority is ten meters.
14. It is the 4th Respondent's case that the constructions have been undertaken in strict compliance with the laws and that the same are legal, regular and procedural, and all approvals, licenses and permits were issued by the relevant authorities; that the 4th Respondent has not blocked access to light and air and that the 4th Respondent is not aware of any complaints and concerns lodged with any relevant authorities regarding the construction on the subject properties.
15. The 4th Respondent's Director deposed that the date stamp on all the photographs is between 14th February and 28th March 2024, despite construction having been ongoing for more than three years and that the photographs by the Petitioners are only photographs of buildings and houses and have no relations to this case.
16. It was deponed that the photographs prove that the 4th Respondent has complied with all development requirements; that a declaration of nullity of approvals and licenses is a preserve of quasi-judicial institutions and that the 4th Respondent's apartments have not blocked access to lights and air.
17. It is thereby their case that the Petitioners have not met the threshold for the grant of conservatory order. They urge that the Petitioners have not established a prima facie case as they have not proved any of their allegations and that the 4th Respondent will suffer great prejudice and irreparable loss as the apartment units have already been bought and the handover of possession is to take place within 6 months of the date they swore their affidavit. They assert that the balance of convenience favors the 4th Respondent.
18. The 9th, 10th and 11th Respondents opposed the application vide Grounds of Opposition dated 26th April 2024. These grounds are that the application has been made in bad faith, is an afterthought and is an abuse of court process, and that the application has no merit and should be dismissed in the first instance with costs.
19. The 9th – 11th Respondents did not file Replying Affidavits to controvert the Petitioners' factual averments, especially on the allegation the process pertaining to change of user and approval of the developments was never complied with.
20. The 12th Respondent, through a Replying Affidavit sworn on 2nd May 2024 by the Director General of the National Environment Management Authority (NEMA), deposed that NEMA received from the 1st Respondent an Environmental Impact Assessment Report for LR No. 209/871/14 dated 9th March 2021 as required under Section 87 and 88 of the Environment Management and Coordination Act (EMCA).
21. They state that NEMA sent a letter to the 1st Respondent dated 4th April 2021 highlighting that it has reviewed the report and noted that the following issues needed to be addressed: to provide approved architectural drawings; show relationship between Shantilal, Hirdi Shah and Bharat Premchand and to provide wider evidence of public participation and provide change of user.



22. According to the 12th Respondent, it carried out an inspection of the site on 20th May 2021 and rendered a report in which it was observed that the area is characterized by mixed use developments, mainly high-rise apartments and townhouses; that there exists an apartment, Anahita Apartments, of similar magnitude and character next to the site and that the proposed site is not in, near or surrounded by any sensitive ecosystem.
23. It was deposed that NEMA recommended that the proponent should obtain approvals from Nairobi City County Government for the proposed project, obtain a change of user approval from relevant authorities before commencement of the project, and traffic during transport of construction materials be managed well throughout the project cycle, and the proponent to strictly adhere to the Waste Management Regulations 2006, on how waste debris will be managed and handled.
24. The Director General of NEMA, the 12th Respondent, denied that the Petitioners were not given sufficient opportunity to air their views, as the project is a medium risk project which only required either questionnaires or minutes of meetings as proof of public participation, as per Section 59 of EMCA and Part 3 of the EIA/EA Regulations.
25. He deposed that NEMA carried out public participation by way of questionnaires to various residents in the surrounding environment.; that NEMA thereupon issued an Environmental Impact Assessment license number NEMA/EIA/[PSL/11617](#) for plot No. 209/871/14 on 28th May 2021; and that no appeal challenging the issuance of the license has ever been lodged at the National Environment Tribunal.
26. The 12th Respondent's Director General deposed that a Project Report was submitted for development on LR No. 209/871/11 on 28th September 2021 by Xeonics Ltd and that the 1st Respondent, through a letter dated 4th October 2021, sought the views of various lead agencies on the project.
27. According to the 12th Respondent, it also carried out a site visit on 15th October 2021 and made the following recommendations through a site visit report: that the proponent obtains approvals from Nairobi City County Government for the proposed project and a change of user approval for the proposed project; that the proponent shall ensure to provide a pegging report from Water Resources Authority; and the proponent to ensure that traffic is managed well to and from the site throughout the project site, and strict adherence to the EMP and all approval/ license conditions.
28. After meeting all requirements, it was deposed, the 12th Respondent issued an EIA license number NEMA/EIA/[PSL/16056](#) and that the 12th Respondent later received a letter from the Water Resources Authority on 20th February 2023 regarding encroachment on riparian land on LR No. 209/871/11 stating that the proponent, Xeonics Limited had complied with the conditions imposed upon it.
29. It is the 12th Respondent's case that it wrote a letter dated 9th March 2023 to the Sub- Basin Area Co-Ordinator, Nairobi Sub-Region in the Water Resources Authority, requesting them to carry out a site verification exercise to determine complaints from members of the public regarding encroachment on riparian land by Xeonics Limited.
30. It was deposed by the 12th Respondent's Director General that the site was revisited on 4th April 2024 following complaints from AN Ndambiri & Co. Advocates in a letter dated 14th March 2024 purporting that the information provided by the EIA expert was wrong and misleading, citing issues such as the name of the proponent, size of the plot, nature of public participation; encroachment on the NSWSC sewer line and the development having interfered with a foot path linking Parklands and Muthaiga.



31. The observations of the site visit, it was deposed, were that the development had not encroached on the riparian reserve; that the manhole near the river was overflowing and the issue was reported to the Nairobi City water & Sewerage Company on the same day; that the footpath is still usable and that the proponent had authorization from the County to repair it.
32. The deponent further asserted that NEMA issued an Environmental Restoration Order on 4th April 2024 to Shantalal Raychand Chah of Xeonics Limited which stated that the Authority had issued the proponent with a license for construction of 98 units yet the proponent had constructed 112 units, and that the proponent is yet to make clarification on the excessive number of units constructed versus the number licensed.
33. The 14th Respondent opposed the application vide a Replying Affidavit dated 3rd May 2024 and sworn by Arch. Stephen Mwilu, the Manager Compliance of the National Construction Authority, who deposed that the 14th Respondent received a letter from the Petitioners dated 19th February 2024, informing it about its concerns regarding the subject matter development and that the 14th Respondent responded vide a letter dated 26th February 2024 indicating that the development had satisfied the requirements of the project registration.
34. According to the 14th Respondent, upon been served with the Petition, the 14th Respondent's compliance officers conducted a site inspection on 19th April 2024 and observed that the construction works on LR No. 209/871/14 were on the 16th floor; that the site had been hoarded to prevent access by unauthorized people and that the project is registered by NCA and had been issued a Compliance Certificate Registration No. 53127415710417.
35. With respect to LR No. 209/871/11, it was deposed by the 14th Respondent that construction was on the 18th floor and walling was ongoing; that the initial approval was for a 17 storey building, which was amended to 18 floors and that the project is duly registered by NCA and had been issued with a Compliance Certificate Registration No. 53127415710 469.
36. Arch. Mwilu deposed that the 14th Respondent fulfilled its mandate under the National Construction Authority Act 2011 and the National Construction Authority Regulations 2014; that the Petitioners have not demonstrated that the 14th Respondent has failed to fulfill its legal duty and mandate and that the Petitioners' application constitutes matters of environment, zoning and planning, to which the 14th Respondent is not a regulator and is not mandated to approve development plans.
37. The 15th, 16th and 17th Respondents also opposed the application through a Replying Affidavit dated 9th May 2024 and sworn by Robinson Kimari, Sub-Basin rea Coordinator, Nairobi Sub-Region of the 15th Respondent. Mr. Robinson Kimari deposed that on 13th April 2021, Berkshire Properties Limited wrote to the 15th Respondent informing it of its intention to develop the property by constructing apartments and sought the 15th Respondent to carry out marking and pegging so as to determine the riparian reserve to safeguard the river and its riparian reserve.
38. It was deposed that the 15th Respondent visited the site on 3rd May 2021 and observed that LR No. 209/871/11 abuts Gitathuru river on the right bank; that the proponent intended to demolish the old existing houses and develop modern apartments and that the stretch of the river along the parcel of land is approximately 50 metres.
39. The sub-basin area coordinator, Nairobi sub-region, deposed that after the site visit, 10 metres was marked and pegged as the riparian reserve as prescribed under Rule 116 of the Water Resources Management Rules 2007 (now repealed), and that the 15th Respondent informed Berkshire Properties



- Ltd on the findings of the site visit and the proscribed activities within the riparian reserve and the need to comply with the same.
40. The deponent indicated that in 2023, the 15th Respondent received a letter from the 12th Respondent with a complaint that there had been encroachment on the riparian reserve and that a team of officers from the 15th Respondent thereafter visited the site on 13th March 2023 and found that the developer had at that time complied with the conditions imposed upon them in the pegging report.
 41. It was further deposed that the 15th Respondent received another complaint from the Petitioners on 19th February 2024, complaining of the alleged encroachment on the riparian reserve adjacent to the suit property and that the 15th Respondent informed the Petitioners of the marking and pegging request of the previous owner of LR No. 209/871/11 culminating in the determination of a 10 meters riparian reserve and placing of two beacons within the property.
 42. It was deposed by the sub-basin rea coordinator, Nairobi sub-region, that a further site visit was conducted on 11th March 2024 in the presence of the Petitioners' advocates; that it was observed that LR No. 209/871/14 does not abut neither does it have a river frontage to Gitathuru river as alleged; that the riparian reserve beacons placed by the 15th Respondent are still intact; that there was no indication of encroachment and that the allegation that the 15th Respondent is aiding and colluding with the developer to undertake illegal developments are misguided and false.

Submissions

43. In their submissions dated 13th August 2024, Counsel for the Petitioners submitted that the definition of a 'conservatory order' is set out in *Invesco Assurance Co. Ltd v MW (Minor suing through next friend and mother (HW))* (2016) eKLR, *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others* (2014) eKLR, *Judicial Service Commission vs Speaker of the National Assembly & Another* (2013) eKLR and *Wilson Kaberia Nkunja vs The Magistrates and Judges Vetting Board & Others* (2016) eKLR.
44. Counsel submitted that these principles relate to the grant of injunction orders enunciated in the case of *Giella vs Cassman Brown* (1973) EA 358, *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR and *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR
45. The Petitioners' Counsel submitted that the construction on LR No. 209/871/14 is complete and LR No. 209/871/11 is on 7th floor; that the registration approvals appearing on the signboards next to the subject properties are fraudulent and illegal and that the 4th Respondent has not produced any evidence to show or prove that the 1st to 8th Respondents were ever granted approval for change of user nor development permission for the two properties.
46. Counsel submitted that the document marked AHS-3 is an approval for application for proposed additional level for previously approved plan CPF AV-209 on LR No. 209/871/14, and was not approval for development permission and that there is no evidence that the conditions stipulated in the document had been met.
47. It was Counsel's submission that no approvals or development permissions were issued by the 9th, 10th and 11th Respondents before commencement, and that the Certificates of Compliance by NCA were issued on 30th January 2024 and 14th February 2024, yet construction work on the two properties commenced on January 2021 and October 2021.
48. It was submitted that it would be fraudulent for the 9th, 10th and 11th Respondents to have given approvals for development permissions for two separate properties under the same registration number



- CPF AV-209 and that the illegalities on the development are confirmed by the 12th Respondent who upon a site visit noted several illegalities and irregularities including encroachment on the riparian reserve, blockage of the sewer line and construction of 121 units as opposed to 98 units on LR No. 209/871/14.
49. Counsel submitted that despite a Restoration Order being issued, the Respondents have failed to enforce the Restoration Order and the construction on the two properties continued, yet the order has never been lifted.
 50. Counsel submitted that the allegations by the 4th, 15th, 16 and 17th Respondents that there was legal and procedural pegging of the riparian land of Mathare River bordering LR No. 209/871/11 is fraudulent; that the 4th Respondents' evidence is that pegging was done on Gitathuru River yet the property borders Mathare River as confirmed in the Deed Plan and that the annexure KSK-4 and KSK-5 shows that the 15th, 16th and 17th Respondents do not know the physical location of Gitathuru River where the alleged pegging is located.
 51. Counsel submitted that the 9th, 10th and 11th Respondents continue allowing development on the two properties contrary to the provisions of PLUPA and have deliberately refused or failed to issue any Enforcement Notice as prescribed under Section 57 of PLUPA and that the Respondents have also deliberately refused to exercise their power and authority provided under Section 56 of PLUPA.
 52. Counsel submitted that the Petitioners have made a prima facie case warranting grant of the orders sought and that the balance of convenience tilts in their favor. Counsel urged the court to employ the pre-cautionary principle and to grant conservatory orders. Counsel relied on the cases of Chebii Kipkoech vs Barnabas Tuitoek Bargoria & Another [2019] eKLR, Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR, and Centre for Human Rights and Democracy & Another vs the Judges and Magistrates Vetting Board & 2 others [2012] eKLR.
 53. Counsel for the 4th Respondent relied on the definition of a conservatory order adopted by the Supreme Court in Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR, Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR, and Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR.
 54. The 4th Respondent's counsel submitted that the Petitioners had failed to establish a prima facie case, as the construction and development being challenged commenced on July 2021 on LR No. 209/871/14 and on January 2022 for LR No. 209/871/11, and both are nearly completed if not completed.
 55. Counsel submitted that the Petitioners were at all times aware of the construction, which has been undertaken in compliance with all laws and safety regulations to the satisfaction of the relevant authorities and that the 4th Respondent has supplied this court with all the permits and approvals from the relevant authorities, who have also confirmed that the 4th Respondent was issued the relevant approvals.
 56. It was Counsel's submission that this suit ought to have been filed as a civil suit because the Petitioners' main challenge is that the 4th Respondent was not issued with the necessary approvals and that the matters in the main Petition ought not to be dealt with at the interlocutory stage. Counsel relied on the case of Muslim for Human Rights (Milimani) & 2 others vs Attorney General & 2 others (2011) eKLR.
 57. According to Counsel, if the conservatory orders are not granted, the Petition will not be rendered nugatory; that no prejudice will be suffered by the applicants if the orders sought are not granted and



that it is the 4th Respondent who will suffer great prejudice if the orders sought are granted as it had already sold all the constructed units and the purchasers are ready to enter occupation.

Analysis and determination

58. The Petitioners have through this application sought for conservatory orders of temporary injunction restraining the 1st-8th Respondents from continuing with the construction on the suit properties pending the determination of the Petition.
59. The 4th Respondent had raised a preliminary objection on the grounds that this court lacks original jurisdiction to hear and determine this suit and application by dint of Sections 61(3) and 61(4) of the *Physical and Land Use Planning Act* 2019, Section 129(1) and 130(1) of the *Environmental Management and Co-ordination Act* 2012 and Section 121 and 124 of the *Water Act*.
60. This preliminary objection was the subject of the ruling by this court dated 31st July 2024, in which the court made a finding that that the Petitioners were within their rights to file the instant Petition even though, some of their claims could have been adjudicated in other forums.
61. Having already dispensed with the raised preliminary objection, this court shall now deal with the issue of issuance of conservatory orders. While the Petitioners' counsel has opted to adopt the phrase 'conservatory order of temporary injunction', there is indeed a difference between conservatory orders and temporary injunction.
62. This distinction was well set out by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR as follows:
- “Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory stay orders therefore are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the Applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
63. The court in *Invesco Assurance Co. Ltd vs MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR defined a conservatory order as follows:
- “A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”
64. In *Judicial Service Commission vs Speaker of the National Assembly & Another* [2013] eKLR the Court had the following to say about the nature of conservatory orders:
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”



65. The conditions for consideration by the court in granting conservatory orders were persuasively set out in the case of Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others (2015) eKLR as follows:
- “a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
 - b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - c) Thirdly, the Court should consider whether, if an interim conservatory orders is not granted, the Petition or its substratum will be rendered nugatory.
 - d) The final principle for consideration is whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.”
66. The Petitioners herein have argued that their right to life and to a clean and healthy environment is threatened and has been denied, violated and infringed upon by the 1st to 8th Respondents, who are constructing several residential apartments on the subject properties; that the proposed developments are illegal, irregular and unprocedural, and that the approvals, licenses or permits purportedly issued by the 9th, 12th, 14th and 15th Respondents are null and void, specifically the Nairobi City County approval NCC-CPF AV-209, NEMA/EIA/[PSL/11617](#), EIA/[PSL/16056](#) and NCA Project Ref. No.s 53127415710469, 53127415710417, 53127415710860 and 80894/B/1223 and the change of user of the properties.
67. In their claim, the Petitioners have challenged the legality of the construction on the grounds that:
- a. The licenses and approvals issued are null and void. Specifically, Nairobi City County approval NCC-CPF AV-209, NEMA/EIA/[PSL/11617](#), EIA/[PSL/16056](#) and NCA Project Ref. No.s 53127415710469, 53127415710417, 53127415710860 and 80894/B/1223 and the change of use of the properties;
 - b. The construction has been negligently and illegally undertaken, which works have completely blocked sunlight and natural air to the Applicant’s residential unit.
 - c. The entire construction work on the subject properties has interfered with the drainage and sewerage system in the area, with toilet and bathroom effluent from the Petitioners’ residences now freely flowing to Mathare River.
 - d. The development on the two properties is on the riparian land of Mathare River, contrary to the provisions of the [Physical and Land Use Planning Act](#); and
 - e. The 12th and 13th Respondents have ignored their statutory duties to prevent, stop or discontinue any act or omission deleterious to the environment as provided under the Environment Management and Coordination Act (EMCA), National Construction Act and the [Water Act](#)
68. In support of their application, the Petitioners have annexed photographs of the notice boards with respect to the construction on LR No. 209/871/14 and on LR No. 209/871/11 and a letter by the Petitioners’ advocate to Nairobi City County Government and copied to NEMA, NCA and WRM



- dated 19th February 2024, seeking confirmation of the development approvals granted with respect to the development.
69. Further, the Petitioners have also exhibited requests to NEMA dated 19th and 22nd February 2024 seeking a copy of NEMA Licence No. NEMA/EIA/[PSL/11617](#) and the Environmental Impact Assessment Study Report and a response from NEMA dated 6th March 2024 providing a copy of the EIA license as requested.
 70. It is the Petitioners' case that the EIA licence was for the construction of a fifteen-level residential building comprising approximately 98 residential units and that the EIA project report was submitted by Shantilal Raychand Shah and prepared by Greendime Consultants Ltd.
 71. The Petitioners have also attached a letter to NEMA dated 14th March 2024, raising several issues with the license issued to the Respondents; a response from the National Construction Authority dated 26th February 2023 indicating the proponents of the project had satisfied the requirements of project registration and that a Certificate of Compliance was issued on 10th August 2021 and photographs of the construction and of the overflowing sewerage.
 72. In their Replying Affidavit, the 4th Respondent annexed Sale Agreements with respect to LR No. 209/871/11 and LR No. 209/871/14, between the 4th Respondent as the purchaser and Berkshire Properties Limited; transfers of LR No. 209/871/14 and LR No. 209/871/11; Certificate of compliance with respect to LR No. 209/871/11 issued to Xeonics Limited and an EIA license issued by NEMA to Shantilal Raychand Shah with respect to the construction of a 15 level building comprising 98 residential units on LR No. 209/871/14.
 73. The 4th Respondent also annexed a letter from the water Resources Authority to Berkshire Properties Limited dated 4th April 2021 which contained a report on the pegging of Gitathuru River on the section bordering on LR No. 209/871/11; development approval from the Nairobi City County dated 7th April 2021 for 14 levels for the proposed 98 apartments; further approval to develop an additional level on LR No. 209/871/14 dated 30th August 2023; and photographs of the developments.
 74. The 12th Respondent, NEMA, have annexed an EIA Report for the proposed development on LR No. 209/871/14, in which the proponent is Shantilal Raychand Shah; EIA licence that was issued to Shantilal Raychand Shah dated 28th May 2021 with respect to the development on LR No. 209/871/14; a site visit report for the development on LR No. 209/871/14 which visit was conducted on 20th May 2021; an EIA report for the proposed development on LR No. 209/871/11 whose proponent is Xeonics Limited and a site visit report for the proposed development on LR No. 209/871/11, which visit was conducted on 15th October 2021.
 75. The 12th Respondent also annexed on its affidavit an EIA License issued to Xeonics Limited with respect to LR No. 209/871/11 for construction of a 15-level apartment comprising 98 units dated 20th December 2021.
 76. The 12th Respondent also exhibited the letter from Water Resources Authority to NEMA dated 20th February 2023 confirming that the riparian reserve of 10 meters was marked and pegged upon the request of Berkshire Properties, and a site visit conducted on 13th March 2023 confirming that Xeonics Limited was in compliance with the same and a report from Catherine Thaithi, County Director of Environment to NEMA's director of Legal Services dated 29th April 2024, in which she indicated that there was no encroachment on the riparian reserve.
 77. The 14th Respondent also annexed an Environmental Restoration Order issued to Shantilal Raychand Shah and Xeonics Limited with respect to construction of 112 units rather than 98 units on the



- suit properties and the indication of Zamir as the proponent yet the licence was issued to Shantilal Raychand Shah.
78. The Petitioners have indicated that there have been irregularities in the procurement of the EIA Licenses with respect to the two developments. They also produced photographs of the board on site indicating that the 4th Respondent, Zamil Realtors Limited, is the developer on the two properties.
 79. However, the EIA Project and License for LR No. 209/871/14 is in the name of Shantilal Ranchard Shah, the 1st Respondent, while the EIA Project and License for LR No. 209/871/11 is in the name of Xeonics Limited, which is not a party to this suit.
 80. This issue of the identity of the developer was raised by the National Environment Management Authority in its Environmental Restoration Order, which sought to know why the notice board shows that Zamir Realtors, the 4th Respondent, is the development proponent, yet the license was issued to Shantilal Raychand Shah. The outcome of this meeting has not been presented to this court.
 81. Consequently, at this juncture, the linkage or relationship between Shantilal Ranchard Shah, Xeonics Limited and Zamir Realtors Limited is not clear. This is especially considering that in the Indenture attached to the EIA Report for LR No. 209/871/14, the sale of the property was between Mutual Properties (City Park) Limited and Hirji Dharamshi Shah, Nileshkumar Hirji Shah and Bharat Premchand Shah, yet Shantilal Ranchard Shah and Liladhar Vardhaman Shah have executed the Indenture as the purchasers.
 82. Further, the 4th Respondent has annexed sale agreements which indicate that they purchased both LR No. 209/871/14 and 209/871/11 from Berkshire Properties Limited, which has no relation to the 1st Respondent.
 83. The Petitioners have also established prima facie that the units and floors constructed on the suit properties have exceeded the number the Respondents were licensed to construct. Through the issued Restoration Order, NEMA sought an explanation as to why the developer had constructed 112 units rather than the licensed 98 units on the suit properties, which is what they had been licensed to construct. There is no proof that this explanation has ever been afforded by either the 1st or the 4th Respondents.
 84. Further, the 14th Respondent has averred that during a site inspection conducted on 19th April 2024, it was observed that the development on LR No. 209/871/14 was at the 16th floor, while that on LR No. 209/871/11 was on the 18th floor. This is despite the approvals allowing 15 floors for each of the developments. While the deponent asserts that the construction on LR No. 209/871/11 was issued further approvals to construct 18 floors, such additional approvals have not been adduced before this court.
 85. Even if such approvals exist, the question that will have to be answered is whether a fresh EIA License was required.
 86. The Petitioners have also claimed that the construction of the developments have interfered with the drainage and sewerage system of the area, with effluent from the Petitioners' residences freely flowing to Mathare River. A site visit by NEMA on 4th April 2024 indeed confirmed that that the manhole near the river was overflowing and the issue was reported to the Nairobi City water & Sewerage Company on the same day. It is not clear whether this issue has since been resolved.
 87. As to the claim that the construction of the developments has illegally encroached on riparian land, this has been refuted by NEMA and the Water Resources Authority following their respective visits to the property.



88. The Petitioners have additionally asserted that the construction undertaken by the 1st-8th Respondents have completely blocked sunlight and natural air to the Applicant's residential unit and that the Petitioners are now forced to rely on electricity to light their respective rooms during the day. The Petitioners have annexed photographs which show that light has been obstructed in the Petitioners' properties.
89. In Kenya, access to light is an easement, regulated under Section 32 of the *Limitation of Actions Act*, which provides that the right to access and use of light or air to and for any building as an easement only becomes absolute and indefeasible where such access has been enjoyed peaceably, and openly as of right and without interruption for twenty years.
90. In this matter, the Petitioners have not presented any evidence as to the age of the building they are in occupation of, whether before the construction of such building there was another building and whether access to light has been enjoyed by such building or previous construction for a period of at least twenty years. This issue can only be apparent once the Petition has been heard.
91. Considering that the Nairobi County, which has not filed a response to the application, has and continues to be plagued with irregular developments which have been undertaken without due regard to the impact on the existing infrastructure and the environment, the public interest in this matter is apparent.
92. Considering the analysis in the preceding paragraphs, it is the finding of this court that the Petitioners have established a prima facie case with a likelihood of success. Granting conservatory orders will enhance the objects of the right to property as prescribed under Article 40 of *the Constitution*.
93. On the other hand, declining to grant conservatory orders will undoubtedly cause prejudice if this court were to order for partial or whole demolition of the developments, by which time the unit owners will be in occupation.
94. In conclusion, this court is persuaded that the Petitioners' application is merited and the following orders do hereby issue:
 - a. An interim conservatory order is hereby given stopping, halting, discontinuing and preventing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, their servants/ agents/ proponents or any other person from undertaking any further construction and development activities on the properties known as L.R. No. 209/871/14 and 209/871/11- City Park Drive, Parklands, pending the hearing and determination of the Petition hereof.
 - b. A conservatory order is hereby given compelling the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th Respondents to take immediate measures to stop, prevent or discontinue any continuing development or occupation of the suit property including arresting and prosecuting any person or equipment being used to undertake further construction and development activities on the properties known as LR No. 209/871/14 and 209/871/11- City Park Drive, Parklands, pending the hearing and determination of the Petition hereof.
 - c. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE



In the presence of;

Mr. Ndambiri for Petitioners

Mr. Daib for 4th Respondent

Mr. Gitonga for 12th and 13th Respondents

Mr. Wanda for Juma for 9th, 10th and 11th Respondents

Court Assistant: Tracy

