Nothern Block Residents Limited & another v National Environment Management Authority & 2 others (Environment and Planning Judicial Review E001 of 2023) [2024] KEELC 7196 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7196 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING JUDICIAL REVIEW E001 OF 2023

AA OMOLLO, J

OCTOBER 17, 2024

BETWEEN

NOTHERN BLOCK RESIDENTS LIMITED ..... 1ST APPLICANT

CAROLINE WANGARI MURIUKI, HENRY CHEGE NJOROGE, JATIN PATEL, LUCY MUTHONI NJOROGE (SUING FOR AND ON BEHALF OF KITSURU RESIDENTS ASSOCIATION) ..... 2ND APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

CITY COUNTY OF NAIROBI ..... 2ND RESPONDENT

MAKANJAWA COMPANY LIMITED ..... 3RD RESPONDENT

JUDGMENT

1. The Ex parte Applicants have moved this court vide a notice of Motion application dated the 11th of March, 2024. The application is brought under the provisions of Order 53 Rule 3 of the Civil Procedure Rules, 2010. The Applicants are seeking for orders;

    i. An Order of Certiorari to remove into the Court and quash, forthwith, the Environmental Impact License No. NEMA/EIA/*PSL/2471*4 dated 21st March, 2023 issued by the first Respondent to the third Respondent.

    ii. An Order of Certiorari to remove into the court and quash, forthwith, the Environmental Impact Assessment Report dated 28th October, 2022 submitted by the third Respondent to the first Respondent.

iii. An order of Certiorari to remove into the Court and quash, forthwith the Notification of approval dated the 13th January, 2023 bearing application number PLUPA-COU-000533N in favour of the 3rd respondent herein for the change of user and development on LR No. 17/261 (Nairobi Block 218/770) with coordinates – 1.2369, 36.7813 situated in Kitisuru, in Westlands sub-county, along Kitisuru road.

iv. A Declaration that the third Respondent's Environmental Impact Assessment License dated 21st March, 2023 violate the provisions of Articles 42 and 47 of *the Constitution* of Kenya, 2010; the Fair Administrative Actions Act, 2015, and the provisions of Regulation 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

v. An Order of Prohibition to issue against the third Respondent stopping the third respondent from commencing, carrying out, and or continuing with, any or any demolitions, renovations, and or construction works on the property known as L.R No. 17/261 (Nairobi Block 218/770) with coordinates – 1.2396, 36.7813 situated in Kitisuru, Kitisuru in Westlands Sub-county, along Kitisuru road.

vi. A Declaration that the second Respondent's decision to issue the Notification of Approval dated 13th January, 2023 permitting a change of user from residential to residential hotel on LR No. 17/261 (Nairobi Block 218/770) with coordinates – 1.2396, 36.7813 situated in Kitisuru, Kitisuru in Westlands sub-county along Kitisuru road was made ultra vires, and in violation of Article 42 and 47 of *the Constitution* of Kenya, 2010, the *Fair Administrative Action Act*, 2015, Sections 36, 37, 40, 42, 43, 45, 46, 51, 56, 57 and 61 of the *Physical and Land use Planning Act* (No. 13 of 2019) and the Nairobi City County Zoning Guide;

vii. A mandatory injunction to issue to the Third Respondent compelling it to restore the property LR No. 17/261 (NAIROBI BLOCK 218/770) with coordinates – 1.2396, 36.7813 situated in Kitisuru, Kitisuru in Westlands sub-county along Kitisuru road its original status prior to the commencement of construction works on or about September, 2022.

viii. An order of general damages be issued against the Respondents for the violation of the ex-parte applicants' rights guaranteed under Articles 42 and 47 of *the Constitution* of Kenya, 2010.

ix. The costs of this application be provided for.

2. The application is premised on several grounds listed on its face ranging from (a) to z and (aa) to (II). Some of the grounds stated that;

i. The ex-parte applicants further discovered that the third respondent had filed with the first respondent an Environmental Impact Assessment report dated 28th October, 2022.

ii. Regulation 17 of the Environmental (Impact Assessment and Audit Regulations), 2003 stipulates in mandatory terms of requirements for public participation during the conduct of an environmental impact study and demands that the proponent, in consultation with the first respondent, shall seek the views of persons who may be affected by the project. The proponent, in this case, the third respondent, is required to;

a. Publicize the project and its anticipated effects and benefits by-

i. Posting posters in strategic 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 coordinator is appointed to receive and record both oral and written comments and any transactions thereof received during all public meetings for onward transmission to the Authority.

iii. The third respondent failed, ignored, and or neglected to publicize the project and its anticipated effects and benefits at all, or in the manner stipulated under regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003, that is, by failing ignoring and or neglecting to;

i. Post 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. Public a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

iii. Make 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.

iv. 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.

3. That at an informal meeting held on the 13th of October 2022 between the third respondent and the ex-parte applicants to shed light on the proposed project, the ex-parte applicants made clear their objections to the said project on account, inter alia, of the zoning restrictions which zoned the area as residential only permitting developments for single-family dwellings. Their objections were ignored by the third respondent, who failed to share the same with the first respondent for consideration of its application for the Environmental Impact Licence No. NEMA/EIA/*PSL/2471*4 dated 21st March, 2023.

4. That the proceedings relating to the acquisition of the Environmental Impact Licence No. NEMA/EIA/*PSL/2471*4 dated 21st March, 2023 having been maliciously and secretively the 1st Respondent commenced and concluded without the knowledge and or involvement of the ex parte applicants. Hence the statutory 60 days period within which an appeal may be preferred against that decision having quietly elapsed, the ex-parte applicants are/were left with no other or recourse but to invoke the supervisory jurisdiction of this honourable court for a suitable relief.

5. The Applicants impleads the role of the 2nd Respondent under section 36 and 38 – 43 of PLUPA of the process of preparation of county physical and land use development plan, including the timelines for publication of notices relating thereto. They added that whether the development plan is for

modification or review, the law puts a mandatory requirement for public participation under section 42 of the Act.

6. It is the Applicants' case that the suit property LR. No. 17/261 (NBI Block 218/770) situated in Kitisuru is located under zone 5 of the current Nairobi City Development Ordinances and zoning guide which reserves the area for low-density residential family houses. That the notification approval dated 13th January, 2023 bearing application number PLUPA-COU-000533N granted in favour of the 3rd Respondent was granted irregularly and in violation of PLUPA *Act No. 13 of 2019* in so far as it allowed a residential hotel in an area expressly zoned for single density family dwelling.

7. The ex-parte applicants are aggrieved by the construction of a residential hotel in a purely residential area, part of which forms the greater Karura Forest and averring that it is one of the few remaining areas that has maintained its greenery and tree cover. That proliferation of construction of commercial blocks and parking spaces will inevitably lead to the degradation of the environment in Kitisuru area and Nairobi County. They argue Article 42 and 69 of *the Constitution* enjoin the State to preserve the environment including the tree cover of the county. By allowing the third Respondent to construct a residential hotel in a Zone that is meant for single Family Residential Dwelling will pose a threat to the environment and lead to the potential sacrifice of the environment to pave the way of commercial spaces and concrete jungles.

8. The third respondent failed, ignored, and or neglected to publicize the application for development permission at all, or in the manner stipulated under Section 58(7) of and (8) of the *Physical and Land Use Planning Act* and Regulation 15(2) of the Physical and Land Use Planning (Development Permission and Control) (General) Regulations, 2021. That is, by failing, ignoring and or neglecting to:

    i. Publish a notice of the proposed application for development for at least fourteen days before the application is submitted.

    ii. Erect an on-site notice inviting comments from the members of the public.

9. That the failure of the Third Respondent to adhere to the relevant legal provisions has resulted in a lack of transparency and public participation in the development approval process. This failure the Applicants aver has prejudiced the rights and interests as they were not given the opportunity to raise legitimate objections or concerns regarding the application for development permission.

10. The application is opposed by the 2nd and 3rd Respondents through their respective replying affidavits filed. I didn't find any response lodged by the 1st Respondent. The 2nd Respondent vide the Replying Affidavit of Mr. Wilfred Masinde, deposes that the application is premature because;

    a. The relevant legal framework establishes a specific timeframe of 14 days within which appeals against the decision on an application for development permission can be lodged. The applicant failed to initiate any legal action within this prescribed period, indicating a lack of diligence on their part.

11. That the application lacks specific grounds that warrant judicial review inter alia; Procedural Impropriety, illegality, unreasonableness/Irrationality, Error of Law, Error of Fact, Procedural Fairness/Natural Justice, Failure to Consider Relevant Factors, Abuse of Discretion among others. The decision-making process and subsequent actions were conducted in accordance with the relevant laws and regulations. He avers that Judicial review is an extraordinary reserved for cases where there is a clear showing of illegality, irrationality, or procedural impropriety in administrative decisions. The Applicants have not presented compelling evidence to demonstrate such grounds.

12. The 2nd Respondent stated that Applicants' claims of potential harm are speculative and lack the requisite urgency and severity to justify immediate judicial intervention. Further, that the Applicants have not provided substantive legal or factual grounds to justify quashing the decision to issue the Notification of Approval. Since they have failed to establish a violation of their legal rights. Mr. Masinde reiterated that the decision to change the land use and issue the Notification of Approval was made within the framework of the applicable laws, and the Applicants have not shown how their rights were unlawfully infringed.

13. The 2nd Respondent continued to depose that it adhered to the applicable laws governing the Land Use Planning and development within the City County of Nairobi and in particular adherence to section 36, 37, 40 – 46 and 56, 57 and 61 of PLUPA. That the 2nd Respondent duly considered the zoning of LR No. 17/261 in Zone 5 for low density residential family houses. They deny all allegations of irregularity, negligence or wrong doing.

14. The 3rd Respondent filed a replying affidavit sworn by Nicholas Kayu Muigai Kenyatta on 24th April, 2024 who deposed inter alia that the 3rd Respondent adhered to due process and procedures when obtaining the necessary permits. He states that there exists on record a notification of approval of development permission dated 18th November, 1999 approving change of use from residential to a health club on plot L.R No. 17/126 issued in accordance with the Physical Planning *Act (No. 6 of 1996)* and issued by the Nairobi Council as per copy marked as NKM-1.

15. That the Kitisuru manor has operated as a commercial hotel/health & fitness club since 18th August, 2000 when the property's proposed plan for public building additions and alterations to the health club was successfully approved on the 18th August, 2000 on L.R NO. 17/261 in accordance with the local government (adoptive by laws) (building) order 1968 L. N 15/1969. City of Nairobi building by-law 1948 G. N 313/1949. The said Plan registration was Number DL 727 and a copy was annexed as NKM -2.

16. It is stated that the NEMA E.I.A license dated 21st March, 2023 recognised that there was already an existing facility on plot LR No. 17/261 before. That in relation to public participation in drafting the environmental impact assessment report for submission to NEMA, under the authority of the lead export James Karori. That they obtained a number of filled questionnaires by the Kitisuru area residents expressing their views and support of the implementation of the proposed renovation works project for the Kitisuru Nanor hotel. The same questionnaires were filled in September, 2022 before the environmental impact comprehensive assessment report was submitted on 23rd October, 2022. Copies thereof were annexed to the replying affidavit marked as NKM – 12.

17. They contended that in compliance with the relevant laws and procedures they undertook a baseline noise survey report dated February, 2023, for the proposed facility project. That the baseline noise survey report indicated that the overall background ambient noise in the vicinity of the proposed facility project site was above normal daytime background levels, owing to the fact that the site is close to the public Kitisuru road and that is impacted by noise from moving traffic. The analyst in the report noted several external noise sources during the course of the measurements taken including, noise impact from passing traffic, continuous noise from birds, visitors driving in and out from the proposed site and noise impact from neighbouring homes.

18. The 3rd Respondent also averred that they held a meeting on 13th October, 2022 and 7th February, 2023 with residents of Kitisuru to obtain their views regarding the renovations on plot LR No. 17/261 as shown in the minutes annexed as NKM – 16. Further they provided questionnaires with Kitisuru Estate Ltd and Kitisuru Estate Office to boost public participation.

19. They added that both offices were notified of the urgency of the issue but the said offices and their membership ignored the 3rd Respondent's call. This necessitated the writing to County Director of environment for their intervention to avert their losses as shown in the letter dated 26th October, 2022. The 3rd Respondent acknowledges few grievances raised by members of the community which they state was addressed to the satisfactory of the 1st Respondent.

20. The 3rd Respondent also deposes that the Applicants are guilty of lances. It also denies that the area is zoned as purely for single family dwelling since Kitisuru Manor has operated as commercial entity (Hotel, health and fitness club) since the year 2000 when the property was changed from residential to commercial vide building order 1968 L.R 15/1969 and by-laws 1948 *GN 33/1949* plan registration No. DL 727. It emphasized that there is nothing new they are changing in the premises.

21. That the fact that the Applicants' assert and admit that they were unable to appeal to the National Environment Tribunal within the stipulated timelines provided and that is why they have approached this honourable court, shows that they are aware of the right channel to address their grievances to yet they have blatantly ignored this as they presume they are above the law. That the NET allows for extension of time within which a person can lodge an appeal and the aggrieved party must formally apply to the tribunal for that to happen. Thus the applicants have not approached this honourable court with clean hands and as such are not deserving of the court's judicious time.

22. They aver Applicants are hell-bent to dissuade them from enjoying quiet and undisrupted possession of their hard-earned and legally owned property which they intend to utilize for commercial purposes as has been since time immemorial. That the Application lacks merit and is only intended to waste the court's judicious time and ought to be dismissed with costs to us.

Submissions:

23. The exparte applicant submitted on three issues for determination;

    a. Whether the Environmental Impact License No. NEMA/EIA/*PSL/2471*4 dated 21st March, 2023 was issued in contravention of Articles 10 and 47 of *the Constitution*, *Fair Administrative Action Act*, and Regulation 17 of the Environmental (Impact Assessment and Audit Regulations).

    b. Whether the Notification of approval dated the 13th January, 2023 bearing application number PLUPA–COU-000533N and was issued in contravention of Article 10 and 47 of *the Constitution*, the *Physical and Land Use Planning Act* (No. 13 of 2019) and the *Fair Administrative Action Act*).

    c. Whether the Application for Judicial Review has merit.

24. The Applicant cited the provisions of article 10, 20 and 47 of constitution. They also cited the provisions of section 5 (1) of the Fair Administrative Actions Act which states thus;

> "(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-
>
> (a) issue a public notice of the proposed administrative action inviting public views in that regard;
>
> (b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts and;

(d) where the administrator proceeds to take the administrative action proposed in the notice-

(i) give reasons for the decision of administrative action as taken.

25. They further cited Regulation 17 of the Environmental (Impact Assessment and Audit Regulation) 2003 which has been quoted in paragraph *2*(ii) of this judgment. The Applicants aver that the 3rd Respondent failed to comply with the said regulation arguing that the meeting of 13th October, 2022 alleged by the 3rd Respondent as forming part of the public participation was a private meeting as expressly noted in the minutes. Further that the meeting of 7th February, 2023 took place in a hotel in Gigiri many Kilometers away from the suit plot. Lastly that regulation 17 requires 3 public meetings which in this case was not conducted.

26. It is further submitted that the 3rd Respondent, selectively presented questionnaires for the EIA Report that predominantly supported the project. This selective presentation was designed to create the misleading impression that the majority of Kitisuru residents were in favour of the proposed project. Notably, among the questionnaires submitted to the 1st Respondent was one completed by Nick Kayu, who according to the 3rd Respondent's own affidavit, is a director within the 3rd Respondent Company as shown in page 111 of the annexture marked KRA-1 annexed to the affidavit of Caroline Wangari Muriuki. That this highlights the biased and non-impartial manner in which the questionnaire process was conducted hence undermining the legitimacy of the public participation exercise.

27. On items (b) of notification of approval no PLUPA-COU 000533N, the Applicants relied on the provisions of Section 61 of PLUPA. Section 61(d) states that;

(1) When considering an application for development permission, a county executive committee member-

"d). shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought."

28. That Notification of approval dated the 13th January, 2023 bearing application number PLUPA-COU-000533N granted in favour of the third respondent herein for the change of user and development on LR No. 17/261 (nairobi Block 218/770) was therefore issued/granted irregularly and in violation of Section 61 of the *Physical and Land Use Planning Act*, in so far as it allows the development of a residential hotel in an area expressly zoned for development of low single density family dwelling.

29. It is there argument that the 2nd Respondent didn't comply with the provisions of Section 58 (7) and (8) of PLUPA Act and Regulations 15(2) 2021 as neither the 2nd Respondent nor the 3rd Respondent gave any evidence of the public notification, nor the copy of the notice published in at least one newspaper of nationwide circulation. That the 2nd and 3rd Respondent did not produce the caption of an on-site notice inviting comments from the members of the public that was used towards the issuance of the impugned development approval as mandated by Regulations 15(2) of the Physical and Land Use Planning (Development Permission and Control) (General) Regulations, 2021.

30. The Applicant cited the case of Nabatkhanu Karim H.P & 12 Others vs. Hwaock IM. and another, NEMA (Interested party) (2021) eKLR which held thus;

> " There is no dispute that the law requires notice of the application for change of user to be published in newspapers of nationwide circulation and also on the suit property. Once again, the burden was on the Respondents to demonstrate that they complied with the law on publication of the notice of the application before the approval was granted to them. Apart from approval itself, the Respondents placed no evidence in the form of newspaper advertisements of the application or evidence showing that a notice of the application was posted on the suit property. In the absence of evidence that the notice of the application for change of user was advertised in the newspapers and also placed on the suit property, the Petitioners contention that there was no public participation in the issuance of approval for change of user of the suit property is well founded. The Respondents had called upon the court to presume that the approval for change of user was lawfully issued because it was administrative action. I can see no reason why I should make such presumption. The law required the Respondents to conduct public participation with regard to their application for change of user of the suit property. whether they conducted public participation as by law required is a matter of fact to be established by evidence. The court cannot presume that public participation was conducted merely because the act was administrative."

31. It is their submission that the action by the 2nd Respondent of granting approval to the 3rd Respondent's application for change of use was unlawful, unreasonable, procedurally unfair, and therefore a violation of Article 47 of *the Constitution* of Kenya and provisions of the *Fair Administrative Action Act*.

32. In arguing that this Judicial Review proceedings is merited and should succeed the Applicants placed reliance in the case of R vs. County Commander of Police, Marsabit County and 3 Others, Saku Boda Savings and Credit Co-operative Society Ltd (Exparte) (Judicial Review E001 of 2022) KEHC 14863 (KLR) where the court reiterated the grounds for judicial review as stated in the case of Pastoli v. Kabale District Local Government Council and Others (2008) EA 300 where it was stated;

> " In order to succeed in an application for judicial review, the application has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is for example illegality, where the Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission ...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision such a decision is usually in defiance of logic an acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercise jurisdiction to make a decision."

33. The 2nd Respondents submissions are dated 8th July, 2024 submitting that the Applicant has failed to demonstrate the illegality, irrationality or procedural impropriety of the 2nd Defendant. The 2nd Respondent submit that while granting the re-development permission to the 3rd Respondent, it;

    a. Responsibly exercised its development control power under Section 55, in receiving the Application for approval from the 3rd Respondent based on approval plans and public comments and per section 61;

    b. Considered the zoning of LR No. 17/261 for Low-density Residential Family Houses indicative in the 2nd Respondent's Internal Memo dated 21st May, 2024.

    c. Issued the Notification of Approval dated 13th January, 2023 in accordance with the relevant provisions of the *Physical and Land Use Planning Act*; and

    d. Conducted the process in a transparent manner and averment to the contrary is meant to mislead the Court.

34. The 2nd Respondent submits that they imposed conditions that the approval was subject to no total redevelopment meaning that the developer was required to maintain the existing residential house and convert it to a residential hotel with minor alterations and additions to the existing structure. The Applicants' page 266 of annexture KRA-1 clearly indicates that the 3rd Respondent was granted permission to carry out change of use from residential to residential hotel. They added that the Applicants have not provided any evidence to prove that the 3rd Respondent has not adhered to the stipulations set by the 2nd Respondent.

35. According to the 3rd Respondent, the proposed development would have little impact on the environment and the value of the neighbouring plots as alleged by the Applicants. It is trite law that he who alleges must prove and it is their submissions that the Applicants have neither established that the process of approval was below statutory standards nor have their established or clearly demonstrated how their rights have been voilated. The 2nd Respondent urges the court to find that the application is an abuse of the court process and should dismiss it with costs.

36. The 3rd Respondent also filed submissions dated 8th July, 2024. It submitted that it held public meetings with the affected parties and residents to explain the project and its effects, and to receive their oral or written comments. That the meetings were held on the 13th of October, 2022 and on the 7th February, 2023. The 3rd Respondent therefore submits that they complied with public participation requirements as stipulated by Article 10 of *the Constitution* of Kenya and Regulation 17 of the Environmental (Impact Assessment and Audit *Regulations of 2003*).

37. The minutes of the meeting held on the 7th of February, 2023, indicates that the meeting was attended by Kitisuru residents and an attendance sheet of the said residents is attached to the minutes of the meeting held on the 7th of February, 2023. It is their submissions that the location of the meeting does not invalidate the legitimacy of the meeting as it was duly attended by Kitisuru residents who shared their views. The allegations that the 3rd Respondent selectively presented questionnaires for the EIA Report that predominantly supported the project have not been proven by the applicant arguing the same are mere allegations to taint the public participation process they undertook.

38. In support of their submissions, the 3rd Respondent cited inter alia the case of Mui Coal Basin Local Community & 15 Others vs. P. S. Ministry of Energy & 17 Others (2015) EKLR which held thus;

> " Public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs..." The court further held that: "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."

39. They submitted that any order directing the property on LR No. 17/261 (Nairobi Block 218/770) be restored to its original status prior to the commencement of construction works on or about September, 2022 would defeat the ends of justice as the same would cause serious prejudice to the 3rd respondent because the 3rd respondent has invested serious financial resources after the acquisition of the required permits and licences from the 1st and 2nd Respondent, following compliance with the relevant laws and procedures. The 3rd Respondent urged the court to dismiss the suit.

Analysis and Determination:

40. I have reviewed the pleadings filed by the parties as well as the written submissions rendered in support and against the application. From the pleadings, the issue in contention for which the Ex parte Applicants want the development permits quashed is on account of non-compliance of laws and regulations providing for public engagement/participation.

41. The Applicants argued that there was no public participation undertaken and if there was any than the same was not adequate. This court's role therefore is to determine whether or not the developments approvals (decision) contravened the law and should be cancelled by way of issuing the order of certiorari sought for in the application.

42. There is no doubt that the right to public participation is enshrined in *the constitution* under article 10 and 69 as well as the statutory provisions. Principles 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 participation of all concerned citizens, at the relevant level."

43. The Supreme Court of Kenya in the case of British American Tobacco Kenya PLC (formerly BAT Kenya Limited) versus Cabinet Secretary for the Ministry of Health & 2 Others; Mastermind Tobacco Kenya Ltd (affected party), (2019)eKLR after consideration of several judicial precedence held that;

> " Guiding principles of public participation(
>
> i) as a constitutional principle 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 "fulfil" a constitutional requirement. There is need for both quantitative and qualitative components in public participation

(v) Public participation is not an abstract nation; 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 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 process (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."

44. The 3rd Respondent pleaded and submitted that it is not true the area is purely single family dwelling as the development being challenged is not new. That there was already in existence a health club as evidenced by the change of user approval granted in the year 2000. In support of this averment, they annexed a copy of the Notification of approval of development permission issued to Mrs M. W. Muigai on 18th August, 2000 for plan DL 727 for proposed public building – additions and alterations to a health club to be erected on plot L.R No. 17/261.

45. The Applicants contested that if indeed there existed a health club then why was the present application referring to change of user from residential to residential – hotel and not from a health club to residential hotel. The burden of proof rest on the applicants to demonstrate the irregularity in the manner the EIA PLUPA licenses were issued to the 3rd Respondent by the 2nd Respondent.

46. In a bid to prove the irregularity, the Applicants pleaded that the license No. PLUPA-COU-000533N was granted in violation of the Physical Land Use and Planning *Act No. 13 of 2019* and in particular Section 42, 43 and 61 of the Act. Secondly, that the change of use ought to have been from health club to something else and not residential to residential hotel. That if the 3rd Respondent has been operating a hotel in the suit premises, the same is illegal because the change of user was for a health club.

47. Section 42 of the Act refers to modification of a County Physical and Land use Development Plan. Section 43 provides for revision of a County Physical and Land use Development Plan. What is before the court is not a County Physical and Land Use Plan whether for modification and or revision. Rather

it is development notification approval issued to a developer and so the two sections cited are not applicable.

48. Section 61 is the application section for the purposes of this application as it sets out what a County Executive Committee member ought to consider an application for development application: These include;

    i. Bound by the relevant approved national, county and local area plans

    ii. Comments made on the development permission by other approving authorities.

    iii. Comments made by members of the public on the application for development permission made by the person seeking to undertake the development in a certain area. (underline mine for emphasis)

49. Thus section 61 (d) provides for seeking view from the public and in this case the Applicants. It also provides that the person to facilitate receiving comments from the public and or community is the developer/proponent of the project. Section 58 (7) & (8) of the PLUPA provides;

> "A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe."
>
> (8) The notification referred to under sub-section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration.

50. From the annextures in the 3rd Respondents' affidavit, I note activities relating to public participation undertaken were in respect to the E.I.A license. The impugned PLUPA license application was submitted on 8th November, 2022 and approval granted on 13th January, 2023. There is no evidence of a publication placed in the local dailies or notice on the site inviting commence from members of the public/residents of the area.

51. The 2nd Respondent deposed that the Applicants have not specified grounds of procedural impropriety or illegality. Section 61 requires them to consider the views of the community before approving development permission. The 2nd Respondent has not annexed copies of the development permission they approved which contained views of the public/residents so that they can say the approval was procedurally done. No mention is made of the date of any sort of publication carried out by the 3rd Respondent.

52. Article 47 of *the Constitution* provides that every person has the right to an administrative action that is lawful, reasonable and procedurally fair. It means that while undertaking the decision of granting the development permission the 2nd Respondent had a duty to ensure the development application complied with the procedures which in this case would have allowed the participation of the Applicants. Under this heading, I find merit on the application.

53. The second limb of the prayer challenged the E.I.A license again on the ground of want of public participation. In this instance, the 3rd Respondent through its representative called two meetings and shared out questionnaires. The Applicants have not denied that the people who attended the meeting of 7th February 2023 were residents of Kitisuru. They take issue with the fact that the meeting was conducted in a hotel far away from the project site.

54. The High Court in Robert N. Gakuru & Others Vs. Governor of Kiambu County 3 Others (2014) EKLR cited the South African case in Doctors for life International vs. Speaker of the National Assembly & Others (CCT 12/05) (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, meaning 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 process 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."

55. The decision cited takes the view that public participation process may take different forms. In this case, whether the meeting took place in the hotel or not does not take away the fact that the people who attended the meeting comprised part of the residents of Kitisuru, who were engaged and their views received. Both the lead expert and the 3rd Respondent's representative responded to their concerns and how they were going to mitigate those concerns.

56. The 3rd Respondent also deposed that they shared questionnaires to the estate office of the Applicants. In the cases of BAT Kenya PLC supra, the supreme court stated that public participation is not necessarily a process consisting of oral hearings but include written submissions. The questionnaires for the E.I.A process having been shared with the Applicants' membership through the estate office, they had the opportunity to share their views in writing. Failure on their part to be proactive/non-responsive cannot be visited on the 3rd Respondent and or the approving authority.

57. Consequently, I hold that the public participation for the E.I.A process was sufficiently carried out through the two meetings and the questionnaire. For this reason, I am not persuaded by the arguments put forth by the Applicants that the law was contravened in so far as the issuance of the E.I.A licence is concerned. There is no proof of irregularity to warrant quashing the EIA licences issued to the 3rd Respondent.

58. The Applicants had sought an order of mandatory injunction compelling the 3rd Respondent to restore the impugned property to its original status prior to the commencement of the Construction works on or about September, 2022. This suit was commenced by way of judicial review whose effect is that no evidence was adduced. This court was not made aware by way of evidence of the status of the property obtaining as at September 2022 and or the status obtaining as at the time of filing the application one and a half years post when the alleged construction began. I am therefore hesitant to grant any such orders which may be ambiguous on what was the status according to either of the parties.

59. The Applicants also prayed for general damages for violation of the rights of the Applicant under article 42 and 47 of *the Constitution*. The Court of Appeal in the case of Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd (1992) KLR 177 stated thus:

> " The law of damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of

a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it.

60. Guided by the above decision, the Applicants were required to prove that they had suffered damages as a result of the infringement of the law. In this instance, although there was infringement of the law as regards the approval of the change of user process, there was no evidence led to prove the nature of loss suffered. This is in view of the fact that there was already in existence a commercial facility on the impugned premises. A breach of violations of the law does not per se demonstrate an injury suffered. For instance, the Applicants pleaded that proliferation of construction of commercial blocks and parking spaces will inevitably lead to degradation of the environment in Kitisuru area. This kind of statement required to be supported by evidence and the matter having proceeded under the judicial review, I cannot conclusively find that there will be degradation of the environment or devaluing of the neighbouring properties.

61. In conclusion, the judicial review application partially succeeds only under the heading on breach of the decision-making process for the issuance of the change of user license. In this regard, I enter judgement in the following terms:

    i. An order of Certiorari be and is issued removing into the Court and quashing forthwith the Notification of approval dated the 13th January, 2023 bearing application number PLUPA-COU-000533N in favour of the 3rd respondent for the change of user and development on LR No. 17/261 (Nairobi Block 218/770) with coordinates – 1.2369, 36.7813 situated in Kitisuru, in Westlands sub-county, along Kitisuru road.

    ii. An Order of Prohibition is issue against the third Respondent stopping the third respondent from continuing with, any or any demolitions, renovations, and or construction works on the property known as L.R No. 17/261 (Nairobi Block 218/770) with coordinates – 1.2396, 36.7813 situated in Kitisuru, in Westlands Sub-county, along Kitisuru road unless and until a change of user license is procedurally obtained.

    iii. Each party to bear their respective costs of the application/suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

A. OMOLLO

JUDGE