Ndambiri & another v Nairobi Metropolitan Services & 19 others (Environment & Land Petition E026 of 2022) [2024] KEELC 13649 (KLR) (10 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13649 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E026 OF 2022

OA ANGOTE, J

DECEMBER 10, 2024

BETWEEN

DAVID ALFRED NJERU NDAMBIRI ..... 1ST PETITIONER

TITUS KITONGA ..... 2ND PETITIONER

AND

NAIROBI METROPOLITAN SERVICES ..... 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT ..... 2ND RESPONDENT

MOHAMED BADI ..... 3RD RESPONDENT

STEPHEN GATHUITA MWANGI ..... 4TH RESPONDENT

STEPHEN MWADIME ..... 5TH RESPONDENT

RICHARD MUMO ..... 6TH RESPONDENT

FREDRICK OCHANDA ..... 7TH RESPONDENT

ATTORNEY GENERAL ..... 8TH RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY ..... 9TH RESPONDENT

ENG MAURICE AKETCH ..... 10TH RESPONDENT

STEPHEM MWILU ..... 11TH RESPONDENT

ENG BOWEN KANDA ..... 12TH RESPONDENT

CO-OPERATIVE SOCIETY LIMITED ..... 13TH RESPONDENT

SOLUTIONS LIMITED ..... 14TH RESPONDENT

ALI IBRAHIM HAMAMED ..... 15TH RESPONDENT

AMEEY HOMES LIMITED ..... 16TH RESPONDENT

ARCH SALIM KOMORA ..... 17TH RESPONDENT

WILSON LEPARTOBIKO ..... 18TH RESPONDENT

KOCH CONSTRUCTION COMPANY LIMITED ..... 19TH RESPONDENT

MAIN CONTRACTOR CONSTRUCTIONS COMPANY LIMITED .... 20TH RESPONDENT

JUDGMENT

1. Vide an Amended Petition dated 6th November, 2023, the Petitioners seek the following reliefs as against the Respondents jointly and severally:

   a. An order of permanent injunction compelling the 1st, A 1st, 2nd, 3rd , 4th, 5th , 6th and 7th Respondents jointly and severally to stop and enforce any further construction activities on L.R No 209/7549 (now Nairobi/Block/37/11) City Park Drive Parklands by the 12th , 13th , 14th , 15th , 16th , 17th , 18th and 19th Respondents, their agents and/or servants or any other person.

   b. A declaration that the Petitioners, the residents of Taza Lane and the general publics' right to access information on the development being undertaken on L.R No 209/7549(now Nairobi/Block/37/11) by the 12th -19th Respondents, their agents/servants was, is and has been denied, infringed upon and violated by the 1st, A 1st, 2nd , 3rd , 4th, 5th , 6th , 7th, 8th, 9th , 10th and 11th Respondents herein singularly, jointly and or /severally.

   c. A declaration that the following documents did not originate from the 1st and 2nd Respondents office and that the said documents are not genuine or authentic, are false and misleading:

      i. Letter dated 10th September, 2020(REF UP/PCEED/03133/4857/125) authorizing Ameey Homes Limited to carry out demolition works on L.R No 209/7549 over approval plan no CPT AQ 183.

      ii. Notification of approval of development permission submitted for approval under no PPA-CU-AAB803 on 8th January, 2019 and approved on 17th September, 2020.

      iii. Construction permit over plan Reg no CPF-AU 165 dated the 15th October, 2020, (Ref CPD/DC/L.R 209/7549/JK.

      iv. Construction permit invoice.

      v. Copy of architectural drawing by Salcohm Studios with Reg No CPF-AU 165 alleged to be approved on the 15th October, 2020.

   d. A declaration that the Petitioners, Taza Lane Residents and persons who live reside/next to the property known as L.R No 209/7549(now Nairobi Block 37/11) Taza Lane were not given an opportunity to give their views/comments on the proposed change of user of the said property from single residential to multi-residential apartments by its owner/developer/proponent.

   e. A declaration that there was no public participation before the 13th Respondent was issued with License No NEMA/EIA/PSL/9860 dated the 23rd December, 2020 by NEMA, approving/allowing the development of multi-residential apartments on L.R No 209/7549(now Block 37/11)-Taza Lane off City Park Drive.

f. A declaration that there is no existing Nairobi City Water and Sewerage Company(NCW& SCO)Sewer Line next to, or serving the Taza Lane area and in particular, the property known as L.R No 209/7549(now Block 37/11).

g. A declaration that the license number NEMA/EIA/PSL/9860 dated the 23rd December, 2020 is illegal, irregular, null and void.

h. A declaration that the Certificate of Compliance dated 18th March, 2021 issued by the 8th Respondent to the 13th Respondent was issued without full compliance with the provisions of the *National Construction Authority Act* and the Regulations made thereunder.

i. A declaration that the Certificate of Compliance dated the 18th March, 2021 issued by the 8th Respondent to the 13th Respondent is illegal, irregular, null and void.

j. A declaration that the construction/development work undertaken on L.R 209/7549 from September, 2020 was and is in breach and is in contravention of Section 57 of the *Physical and Land Use Planning Act*.

k. A declaration that the building and other structures constructed and/or developed on L.R No 209/7549(now Block 37/11) from January 2021, were and have been constructed and developed in breach and in contravention of the *National Construction Authority Act*.

l. A declaration that the 13th Respondent is not the owner of the property known as L.R No 209/7549(now Block 37/11)-Taza Lane City Park Drive.

m. A declaration that the 12th Respondent did not, and has never legally transferred the property known as L.R No 209/7549(now Block 37/11)-Taza Lane to the 13th Respondent herein.

n. A declaration that the construction and development of any building or structure on L.R No 209/7549(now Block 37/11)-City Park Drive from the 1st September, 202o was not approved by the 1st , A 1st , 2nd and 3rd Respondents and any resultant construction or development on the said L.R No 209/7549(now Block/37/11) is illegal, irregular null and void ab inito.

o. A declaration that the 1st , A1st, 2nd , 3rd , 4th , 5th , 6th , 7th , 8th , 9th , 10th and 11th Respondents have singularly, jointly and/or severally abused their respective offices and were and are in dereliction of the constitutional and statutory duties by knowingly and deliberately failing and/or refusing to reasonably discharge their respective constitutional and statutory duties and obligations as provided under Section 57 of the Physical and Land Use Planning, Sections 3, 108 and 138 of EMCA AND Sections 23 of the NCA Act.

p. A declaration that the 1st , A 1st , 2nd , 3rd , 4th , 5th , 6th and 7th Respondents have singularly, jointly and/or severally denied, breached, violated and infringed on the Petitioners, Taza Land residents and the general public rights and fundamental freedom to a clean, safe and healthy environment and/or have and are continuing to threaten, deny, breach, infringe and violate the Petitioners, Taza Lane residents and the general public's right and fundamental freedom to a clean, safe and healthy environment as provided under Article 42 of the *Constitution* of Kenya, 2010.

q. A declaration that the 12th , 13th , 14th , 15th , 16th , 17th , 18th and 19th Respondents have singularly, jointly and/or severally denied, breached, violated and infringed on the Petitioners, Taza Land residents and the general public rights and fundamental freedom to a clean, safe and healthy environment and/or have and are continuing to threaten, deny, breach, infringe and violate the Petitioners, Taza Lane residents and the general public's right and fundamental freedom

to a clean, safe and healthy environment as provided under Article 42 of the *Constitution* of Kenya, 2010.

r. A declaration that the 8th Respondent, its employees and officers, including the 9th , 10th and 11th Respondents have singularly, jointly and/or severally denied, breached, violated and infringed on the Petitioners, Taza Lane residents and the general public's right and fundamental freedom to life and/or have, and are continuing to threaten, deny, breach, infringe and violate the Petitioners, Taza Lane Residents and the general public's right and fundamental freedom to life as provided under Article 26 of the *Constitution* of Kenya, 2010.

s. A declaration that the 12th -19th Respondents have singularly, jointly and/or severally denied, breached, violated and infringed on the Petitioners, Taza Lane Residents and the general public's right and fundamental freedom to life and/or have, and are continuing to threaten, deny, breach, infringe and violate the Petitioners, Taza Lane Residents and the general public's right and fundamental freedom to life as provided under Article 26 of the *Constitution* of Kenya, 2010.

t. An order compelling the 1st , A1st , 2nd , 3rd , 4th , 5th, 6th , 7th 8th, 9th , 10th and 11th Respondents jointly and severally and/or together with the 12th ,13th , 14th , 15th , 16th , 17th , 18th and 19th Respondents to demolish the building and structures erected on L.R No 209/7549(now Nairobi/Block 37/11)from January, 2021 and to restore the site to its original condition or as near to its original condition as it was before the 1st September, 2020 within a period of ninety 90 days from the date of the order.

u. An orders that the costs of the demolition of the buildings and restoration of the site to its original condition be personally met by the A1st to 11th Respondents and/or jointly/severally with the 12th -19th Respondents.

v. A permanent injunction be and is hereby given restraining and stopping the 1st, A1st and 8th Respondents from issuing and/or granting any licenses, permits or approvals for any development on L.R No 209/7549(now Block 37/11)-Taza Lane, off City Park Drive including an occupational license to the 13th, 14th and 15th Respondent, their agents/servants/ nominees, until and unless prayers (f) and (g) herein are fully complied with.

w. General Damages.

x. Punitive Damages.

y. Costs of the Petition.

z. Any other order that this Honourable Court deems fair, just and appropriate in the circumstances.

The Petitioners' Case

2. The Petition is supported by the Affidavit of the 1st Petitioner, David Alfred Neru Ndambiri sworn on 22nd June, 2022 and the Further Affidavit of 6th November, 2023. The 1st Petitioner deponed that he and his co-petitioner are Kenyan Citizens and owners of properties situate along Taza Lane off City Park Drive, Parklands developed on L.R No 209/7546 and L.R No 209/7548.

3. He deposed that they have instituted the Petition on their own behalf, on behalf of members of an informal residential association known as Taza Lane Residents Association whose members are

owners, occupiers and residents of properties along Taza Lane City Park Drive developed on parcels 209-7544, 7545, 7546, 7547, 7548 and 7550, and on behalf of the general public.

4. He deponed that in early September 2021, they noticed that people unknown to them were carrying out unusual developments on LR. No. 209/7549 (the suit property), to wit, demolition of the three 4-bedroomed maisonettes and servants' quarters thereon and cutting down of century old trees, flora and fauna and that after discussions, and being aware that these developments were counter to the fact that the suit property was undergoing sub-division into three separate units by the 12th Respondent, they decided to inform the Nairobi Metropolitan Services(NMS) and the National Construction Authority(NCA) of the aforesaid activities.

5. The 1st Petitioner stated that the aforesaid sub-division, which was still on-going, was a policy decision by the 12th Respondent informed by the need to control over-development and limited infrastructure and taking into account the fact that the properties along Taza Lane and adjacent areas are not connected to the existing Nairobi City Water & Sewer Co (NCW&S CO) sewer line and rely on septic tanks for disposal of toilet and bathroom effluents.

6. It is the Petitioners' case that after their complaint vide the letter of 25th September, 2020, the 8th Respondent visited the suit property after which it compiled a report dated 1st October, 2020 - Reference No. NCA 1/14G/Vol 00 titled 'City Park Drive Complaint'. In the report, it was deposed, the 8th Respondent noted that demolition works of existing developments had been completed and that there were intentions to develop, 91 residential apartments on a 12th floor building on the subject property.

7. According to the Petitioners, the 8th Respondent thereafter suspended all activities on the subject property and issued a suspension notice SN. C 067831, and recommended inter alia, that the developer stops any works on site and obtains (i) all approvals including structural drawings, (ii) provide NCA registered contractor, (iii) register the project with NCA, (iv) provide a letter from the residents' association allowing him to proceed with works and (v) after full compliance, obtain a lifting notice before resuming work.

8. According to Petitioner, despite the suspension order, the demolition went on and by December 2020, all the buildings, structures, flora and fauna had been demolished and that he learned that Ameey Homes Limited, the 15th Respondent, was responsible for the demolition and claimed to have been permitted and authorized to do so by the 1st Respondent.

9. On 3rd January 2021, the Petitioners contend, persons who declined to identify themselves continued with development on the property and on the same day erected a signboard on the suit property indicating that the proposed project is the development of luxury apartments by the 15th Respondent as the Client, the 18th Respondent as the Contractor, Eric Cheruiyot Sitienei as the Structural Engineer and Arch Steve Gome as the Architect.

10. The 1st Respondent deponed that they thereafter wrote another complaint to the 8th Respondent who sent its officers to the subject property on 5th January 2021; that the 8th Respondent carried out investigations and established that the works being undertaken were not approved and/or licensed by it and subsequently issued another suspension notice Serial No. 0851.

11. He contended that despite the said 2nd suspension notice, excavation work continued leading to them making further complaints resulting in another visit by the 8th Respondent on 18th January 2021 wherein a 3rd suspension notice serial No. C 0884 was issued; that works thereafter stopped for eight weeks but resumed on or about 25th March, 2021 and that the suspension of activities was never

communicated or made available to Taza Lane residents and other members of the public neither was any "X" or other type of mark placed on the subject property by the 8th Respondent.

12. It is his position that pursuant to the suspension notices Nos. C 067831, C 0851 and C 0884, the 13th, 15th and 18th Respondents were required to within 14 days ensure the developer provides a letter from the residents' association allowing him to proceed with the works, obtain lifting notices before resuming any works on the subject property and provide an excavation methodology report of the said subject property and that the notices were also to be served upon the OCS Parklands Police Station on the day they were issued to the 13th, 15th and 18th Respondents.

13. He opines that none of the conditions aforesaid were met; that they did not consent to any continued work on the subject property and he is unaware of any lifting order against the suspension notices 067831 and 0851; that the notices were similarly not served upon the OCS Parklands and that despite the fact that none of the aforesaid conditions were met within the stated period, no action, legal or otherwise was taken against the 13th, 15th and 18th Respondents.

14. Mr Neru contends that in March 2021, excavation works resumed and upon inquiry, they were informed that the 13th Respondent had been issued with a certificate of compliance authorizing construction dated 18th March 2021; that similarly, another site board had been erected next to the property showing the 15th Respondent as the client, 16th Respondent as the Architect, 18th Respondent as the contractor, and Eric Sitienei as the structural engineer and that he obtained a copy of the certificate of compliance which showed the 18th Respondent as the project contractor, contradicting the earlier signboard of April, 2021 which did not mention the 13th Respondent.

15. According to the deponent, the 13th Respondent, deliberately failed to provide correct and truthful information and particulars about the identity, description and the interest (if any) their respective companies had on the subject property when applying for the certificate of compliance which the 8th Respondent knew or ought to have known and that the professionals cited as being part of the project including Eng Eric Sitienei, QS Kennedy Odhiambo and Arch. Steve Gome, disassociated themselves with the project.

16. He avers that further, the certificate was issued when the suspension notices 067831 and 0851 were still in force and the conditions therein having not been met and that apart from the professionals aforesaid, the 18th Respondent, described as the project Contractor on the certificate of compliance and on the site signboard alleges that he has never been the project contractor having de-registered from the project in January 2021.

17. According to the deponent, they raised several complaints on the illegal and irregular manner construction activities were being undertaken and on the flawed issuance of the certificate of compliance and that vide its report titled, A Brief on the Proposed Apartments on Plot L.R No 209/7549 at Parklands by Sustainable Building Solutions Limited, the 8th Respondent conceded that works on the subject property had been suspended in April, 2021.

18. He opines that they undertook investigations which revealed that on 21st May, 2021, the 10th Respondent wrote an email to the 11th Respondent, notifying him of their complaints and the 11th Respondent wrote an email to the 8th Respondent's employees and officers instructing them to suspend the works on the subject property "until they get an engineer" but these instructions were ignored.

19. He asserts that they also established that Engineer Eric Sitienei named in the report dated 16th April 2021 and on the site signboard as the Structural Engineer had informed the 8th Respondent, its employees and officials of his withdrawal/termination of any relationship he may have had with the

13th, 14th 15th, 16th and 18th Respondents long before the 8th Respondent issued the certificate of compliance dated the 18th March, 2021 and that they also learned that the Architect named in the report of 16th April, 2021 and on the site signboard had not been involved in the architectural design until 15th September, 2021.

20. Further, he contended, they learned that in the letter dated 15th September, 2021, the 16th Respondent requested the 8th Respondent to update the main contractor on site but the same was not done until 16th March, 2023; that following the 8th Respondent's employees' failure to discharge their duties, the 11th Respondent wrote them an email dated 8th September, 2021 castigating them and vide an email sent to him on the 16th September, 2021, the 8th Respondent confirmed that construction on the property remains suspended and any ongoing activity is illegal and the site will be declared a notorious site.

21. According to the deponent, they undertook even further investigations prompted by renewed construction works which revealed that NEMA had issued the 13th Respondent with a license-NEMA/EIA/PSL/9860 dated 23rd December, 2020 on the basis of an EIA Report-NEMA/PR/5/2/23826/PSR 17457 dated 4th November, 2020 which stated inter-alia that there was a sewer line running at the periphery of the project site.

22. He asserted that that was untrue, as they and other residents of Taza Lane have always discharged their bathroom and toilet effluents to a septic tank situate on the lower side of Taza Lane there being no sewer line next to or adjacent to the project site and that this position was affirmed by correspondence from the Nairobi City Water and Sewerage Company.

23. The 1st Petitioner stated that confirming the non-existence of the sewer line, is the fact that the owner of the suit property applied for approval to construct a privately developed sewer extension(PDS)to connect the project site to the existing NCA& SC sewer line; that one of the conditions for the approval was that the developer seeks consent from owners of adjacent parcels of land to be granted wayleave from where the PDS extension would pass and that as per the proposed PDS Extension design, the extension was to traverse several properties including L.R Nos 209/7548, 7546 and 7547 before crossing over Mathare River, on the Muthaiga side before joining the existing sewer lie.

24. He opined that despite the applicant having been granted approval to construct the PDS extension, no consent has been sought from the owners of the adjacent parcels, except from the 12th Respondent who was not made aware of the project and that similarly, construction of the sewer line has not begun.

25. The 1st Petitioner stated that further perusal of the license shows that only 13 people responded to the questionnaire for consultation and public participation who alleged to be situate within a 10-50 meter radius of the project site; that it is obvious that the aforesaid persons are not members of Taza Lane Residents Association nor are they located on properties near the suit property and that in fact, one Yusuf Asker, a respondent to the questionnaire is a Director/Shareholder of the 15th Respondent.

26. He asserts that neither he nor any of the Taza Lane Residents were ever requested to respond to any questionnaires nor invited to any public participation by the 13th Respondent; that the EIA Report does not contain the information required to show that the proposed project had been approved by the 1st Respondent on the basis of ownership, and capacity of the current existing infrastructure such as architectural, structural and civil drawings, title, deed plan etc.

27. According to Mr Neru, they requested NEMA to conduct a monitoring and environmental audit on the subject property and to suspend any development activities pending completion thereof; that NEMA refused to undertake the exercise leading to him filing an appeal against NEMA at the NET

and that as the appeal was ongoing, NEMA informed them that it had undertaken a compliance monitoring inspection on the 2nd November, 2021 and had observed, inter alia, that the project site had manholes which NCWSC officers confirmed to be a sewer line serving the project.

28. The 1st Petitioner averred that on 1st December, 2021, NET issued interim orders restraining the Respondents from undertaking any development or construction on the property pending determination of the application; that the Tribunal ordered the 1st Respondent to further ensure compliance with Section 129(4) of EMCA; that none of the Respondents, 12th -19th respected the order despite having been served with the same and construction continued and that the appeal did not however proceed to full trial having been struck out on 14th July, 2022 for want of jurisdiction on the part of the Tribunal

29. He noted that they wrote a complaints to NEMA who sent a team to the site on the 15th December, 2021 which noted in its report of an even date that there is need for the developer to engage project affected persons as regards aspects of development of the PDS extension; that after another visit by NEMA on the 28th March, 2022 NEMA issued orders suspending construction activities and directing that they put in place adequate measures to control dust and falling debris and call environmental inspectors for a re-inspection and that NEMA noted that failure to adhere to the order would lead to prosecution without further reference to the Respondents.

30. He opines that despite the foregoing construction continued; that neither him, his co-petitioner or other members of Taza Lane were ever informed of any re-inspection or any arrests of the 13th -19th Respondents for their failure to obey NEMA orders; that the construction continuous to interfere with structural and the sewer disposal system; that in July, 2022, the sewer overflow in the manhole next to his gate made the stench unbearable and that when they visited the site on 27th August, 2022, NSCW confirmed that the manhole and the entire sewer system was not theirs and advised him and other residents to find their own solution.

31. On 10th September, 2022, he states, officers from NEMA confirmed that there was no existing sewer line serving any of the proposed developments; that it did not however issue any directions suspending activities and that he has established that NEMA has operated on the erroneous belief that their complaints as regards the suit property are related to an ongoing case-Kerugoya ELC 36/18 which is incorrect.

32. The Deponent maintained that the documents used by the 13th -19th Respondents as proof that the development on the subject property has the requisite approvals are forgeries and that vide their letter of 8th February, 2022 to the Office of the Ombudsman, the 8th and 9th Respondents confirmed they were not in possession of the same.

33. He averred that the 3rd and 6th Respondents admitted that the letter of 10th September, 2020 alleging the 1st Respondent had approved demolitions of the suit property was a forgery; that the 13th Respondent instituted CMCC No 146 of 2022 where he alleged corruption and solicitation by the 1st -8th Respondents which allegations have not been denied and that the 1st, A1st and 8th Respondents have been relying on a court order given on the 19th April, 2022 restraining them from interfering with the developments on the subject property yet this order lapsed and/or was vacated and another order given on 4th May, 2022 maintaining the status quo stopping further activities on the site which order is still in force.

34. The 1st Petitioner stated that he and the 2nd Petitioner applied to be enjoined in the aforesaid suit and to that end conducted a search on the 13th Respondent at the Registrar of Companies and that the resultant CR12 revealed that the company registered under number PVT/2016/010348 is known

as Property Sustainability and Services Solutions Limited-PVT/2016/010348 and not Sustainable Development Solutions Limited and is under the directorship/shareholding of Ali Ibrahim Hahamed(Kenyan), Abakare Mealen Mohamed(Ethiopian) and Fadumo Ahmed Barkadle(Kenyan).

35. On its part, it is contended, Sustainable Development Solutions Limited was registered on 17th July, 2008 and is under the directorship of Philip Karuri Thuku, and Dorothy Thuku Wanjiru with Stella W Nyamu as its secretary; that they followed up on whether or not the 12th Respondent transferred the suit property to the 13th Respondent and the answer was in the negative and that in any event, Property Sustainability and Services Solutions is a foreign company that cannot in law hold freehold interest parcel of land in Kenya.

36. It is the Petitioners' case that consequently, the title document showing the 13th Respondent's ownership is not genuine; that the secretary whose names appear on the 13th Respondent's CR-13 has denied knowledge of the company and that these revelations were made known to the 1st and 8th Respondents as well as NEMA.

37. It was deposed that on 8th November, 2022, Taza Lane Residents Association wrote to the A1st and 8th Respondents as well as NEMA complaining about the ongoing illegalities/irregularities at the suit property; that vide their response on the 28th November, 2022, the 8th Respondent stated that they had no reason to impede development on the property; that in their response of 5th December, 2022, they gave detailed information on the alleged illegalities and that there was no response to their letter aforesaid despite reminders of 23rd January, 2023, 21st February, 2023, 28th February, 2023 and 11th February, 2023.

38. The 1st Petitioner opined that the 1st -11th Respondents have jointly and severally aided and abetted the 12th -19th Respondents in destroying and degrading the environment; that the building has gone above what NEMA allowed in its license-NEMA/EIA/PSL/9860 which was the construction of 11 stories and that the additional levels and major changes if at all were made without public participation involving the Petitioners.

39. It was deponed that the 1st, A1st , 2nd , 3rd , 4th , 5th , 6th and 7th Respondents have refused to inform them whether the developments have the requisite statutory and administrative approvals from the 1st , A1st , 2nd and 3rd Respondents and under what terms and conditions; that they have also refused to give access to information on whether or not the documents employed, used, uttered and displayed by the 12th -19th Respondents are genuine and that as a result of the foregoing, they have been unable to lodge an appeal with the County Physical and Land Use Planning Liaison Committee and any other body dealing with appeals in respect of County Planning and Land Use.

40. In further breach of their right to information, he contends, the 8th Respondent did not inform them of suspension notices issued stopping activities on the suit property; that the 12th -19th Respondents committed offences under the PLUPA, NCA Act and EMCA and further infringed rights to a clean and healthy environment by undertaking developments that were not approved by the 1st and/or the A1st Respondent and suspended by the 8th Respondent and that the alleged lifting order 100704 dated 17th December, 2021 was illegal, irregular, null and void having been issued when an order restraining all construction had been issued by NET in NET Appeal No 24 of 2021.

41. He urges that the 12th -19th Respondents refused to adhere to a stop order of 28th March, 2022 and the 1st -11th Respondents refused to enforce the same or to arrest the 12th -19th Respondents for offence under PLUPA and EMCA; that the 1st, A1st to 11th Respondents have failed to discharge their offices in good faith; that their rights to privacy have similarly been violated; that it is obvious that the building

by the 12th -19th Respondents pose great risks to the lives of the Petitioners now and in the years to come and that the building must be demolished and the land restored to its original condition.

The Respondents' Case

42. The 1st, 3rd , 4th , 5th and 6th Respondents replied to the Amended Petition vide an Affidavit by Patrick Analo Akivaga, the Chief Officer, Urban Development and Planning of the 1st Respondent sworn on 20th September, 2024.

43. The Chief Officer, Urban Development and Planning of the 1st Respondent, Mr. Akivanga, deponed that pursuant to Section 58 of the PLUPA, 2019, the 1st Respondent only issues development permissions on application by any person and upon provision of all necessary (already approved) documents, plans, particulars and purpose of the proposed development.

44. According to Mr Akivaga, the 13th -15th Respondents failed to display the board indicating the name of the project, developer and/ or contractor, the architect of the project and details of the approvals issued by the NCA and NEMA leading to the 1st Respondent issuing it with an enforcement notice dated the 21st June, 2023.

45. He stated that the aforesaid enforcement notice was waived on the grounds that the 13th Respondent followed all the requisite steps under the PLUPA, 2019 including putting up all the advertisements and posters at the site and the application passing through the Technical Evaluation Committee of the County; that on 18th September 2020, the Nairobi Metropolitan Services City Planning Department approved the change of user application after confirming that all statutory requirements had been met.

46. Further, it was deposed, the 13th Respondent applied for development permission, from the Nairobi Metropolitan Services (now the Nairobi City County) for the subject constructions works which involved erection of multi-storey building, and ancillary facilities which was granted on the 4th August, 2022 after NMS confirmed that all the legal and procedural requirements had been satisfied and that the 1st Respondent also approved the architectural designs and site plans.

47. Mr Akivaga deponed that the proposed project by the 13th Respondent is not out of character with the neighboring structures and does not contravene or change the nature of the area; that the Nairobi City County's' technical experts evaluate every application submitted to ensure compliance with current zoning policies and regulations and that the current zoning policy is under review at the County Assembly, and the technical committee, composed of experts, is duly mandated to approve proposed projects ensuring they meet all legal, technical standards and after assessing the need for additional residential and commercial structures and/ or spaces to accommodate the ever-growing population of Nairobi City County.

48. He contends that the 13th Respondent made considerable steps and effort to engage the neighbors of Taza Lane as they were duly invited to submit their comments in respect of the proposed change of user via a public notice which was displayed near the proposed building so as to invite any objections or comments from the neighbors of Taza Lane and that no objections were tendered by the Petitioners and/or neighbours within the prescribed timelines under of the *Physical and Land Use Planning Act*, 2019.

49. It is his position that the approvals granted to the 13th Respondent were based on a thorough evaluation process that included environmental impact assessments, technical reviews, and public participation and includes strict conditions to ensure ongoing compliance with all relevant laws and regulations during the construction and operational phases of the project and that the 1st Respondent is keen on accomplishing and exercising its full capacity under the *Physical and Land Use Planning Act* , 2019 and

the *Urban Areas and Cities Act*, 2011 and has never neglected and/ or failed to accomplish its statutory duties and mandates under the stated Acts.

50. He urged that as advised by Counsel, the *Constitution* places the responsibility of County Planning and Development to County Governments in accordance with Articles 185(2), 186 (1) and 187 (2) of the *Constitution* and that further, the *Physical and Land Use Planning Act* (PLUPA) establishes the office of the planning authority setting out its functions and powers and outlining a mechanism for development control and permission.

51. The Chief Officer, Urban Development and Planning of the 1st Respondent, deposed that PLUPA provides for the County Physical and Land Use Planning Liaison Committee (hereinafter the County Committee) with the functions and mandate to receive and hear complaints and claims made in respect to applications for and issuance of development permissions by the planning authority and that the County Committee is well equipped with technical expertise, resources and the requisite quasi-judicial expertise to hear , investigate and determine the complaints lodged.

52. He averred that he is also aware that any person aggrieved by the Planning Authority's decision to issue any development permission is required to first of all lodge and file a complaint with the County Committee which shall in exercise of its quasi judicial powers in Section 79, 80 , 81, 82 & 83 hear and determine it and that pursuant to Section 61 (4) of the PLUPA, 2019 any applicant or an interested party who files an appeal and who is aggrieved by the decision of the County Committee may appeal against that decision to the Environment and Land Court.

53. According to Mr. Analo, as advised by Counsel, the PLUPA requires exhaustion before invoking the jurisdiction of this Court and that in light of the foregoing, the Amended Petition is premature, constitutes an abuse of court process and is aimed at frustrating a legitimate and lawfully approved development project that serves public interest.

54. The 8-11th Respondents, through the 8th Respondent's Manager Compliance, Stephen Mwilu swore a Replying Affidavit on 12th August, 2024. He deponed that the 8th Respondent is a state corporation established under Section 3(1) of the *National Construction Authority Act* with the objection of overseeing the construction industry and coordinating its development; that its mandate includes registration of contractors and projects as required by Section 5(2)(d) and (i) of the Act and that further, pursuant to Section 5(2) (g) of the Act, the 8th Respondent promotes and ensures quality assurance in the construction industry.

55. According to Mr. Mwilu, the 9th -11th Respondents are duly appointed employees of the 8th Respondent and are pursuant to Section 37(1) of the *National Construction Authority Act*, shielded from personal liability on actions taken in the course of their employment and that as the Petition involves the mandate of the 8th Respondent and not the personality of the 9th -11th Respondents, the Petitioners claim against the 9th -11th Respondents offends the immunity enjoyed by them under the Act and is contra to the law.

56. The 8th Respondent's Manager Compliance, Stephen Mwilu, averred that pursuant to the National Construction Authority Regulations, 2014, the proprietor of a construction project is required to make an application for registration in writing to the 8th Respondent within 30 days of an award of tender of construction to a contractor registered under the Act.

57. He stated that during the project registration, the developer is required to submit the following: the contractor and sub-contractor registered by the NCA who must have a current or valid NCA practicing license; project consultants such as the Engineer, Architect and Quantity Surveyor who must be registered by their professional bodies, namely the Engineers Board of Kenya and the Board of

Registration of Architects and Quantity Surveyors(BORAQS) and must have a valid practicing license; approved architectural and structural drawings for the project and County Government approval permits, letters and form PP. A2 as per the Physical Land Use and Planning Act, 2019.

58. Further requirements include, where necessary, other regulatory approvals or licenses form agencies such as the National Environment Management Authority(NEMA) Energy Regulatory Commission(ERC), Water Resources Authority(WRA), and the Kenya Civil Aviation Authority(KCA); bill of quantities summary page duly and stamped by a Quantity Surveyor; the Developers Kenya Revenue Authority(KRA)PIN and the signed contract/tender form/signed agreement between the developer and their consultants.

59. He deponed that upon successful application for project registration and submission of relevant documentation, the 8th Respondent, after verification and confirmation will issue a developer with a certificate of compliance.

60. According to Mr Mwilu, the 8th Respondent is empowered under Sections 5(2)(g) 23A and 23(2) of the Act to make mandatory inspections and enter into any constructions site where construction works are being carried out and make such enquiry or inspections to ascertain whether the provisions of the Act or any regulations are being complied with.

61. Speaking to the circumstances of this case, he noted that that they received a complaint from the 1st Petitioner regarding the demolition/construction works on the suit property; that pursuant thereto, they proceeded to inspect the site on the 1st October, 2020 during which they observed the following, demolition works had been completed, the developer had erected a change of use notice at the gate; the works were not ongoing at the time of inspection and no workers were on site and the developer had demolition approvals from the Nairobi City County Government.

62. Mr Mwilu stated that after their site inspection, they found the site to be non-compliant in six key areas being lack of an NCA compliance certificate; lack of NCA registered contractor with a valid license, lack of NCA accredited skilled workers and site supervisors, lack of site board showing all approvals and the professionals engaged in the project and lack of personal protective equipment on site and that subsequently they issued a suspension of works order S/NO 067831 dated the 1st October, 2020 subject to compliance with suspended items,.

63. It was his deposition that on 28th December, 2020, they received an application for project registration from Sustainable Development Solutions Limited, the 13th Respondents herein; that on 29th December, 2020, the 1st Petitioner reported that the developer had illegally proceeded with construction works and that the authority communicated the complaint to the developer on the 4th January, 2021 vide the online project registration system.

64. He stated that the authority's compliance officers further visited and inspected the project site on the 5th January, 2021 and issued a suspension of works order C0851 and again on the 18th January, 2021 and issued a suspension of works order C0884; that the construction on the site was suspended and the developer was required to comply with the suspension of works orders; that on the 18th January, 2021, the project developer Mr Yusuf Askar Mohamed was arrested and booked at City Park Police Post under OB No 07/18/01/2021.

65. Further, it was deposed, on 20th January, 2023, the 8th Respondents wrote to the site contractors and professionals namely Koch Construction Limited, Eng. Sitenei Eric Cheruiyot, Arch. Gome Steve Odhiambo and Qs Kennedy Odhiambo and advised them that the site had been marked notorious and suspended due to lack of a signboard showing all approvals and professionals engaged in the project, lack of an NCA compliance certificate, and lack of NCA accredited skilled workers and site supervisors,

and that the consultants were advised to comply with the suspension of works and only resume upon the lifting of the suspension order.

66. He stated that on the 1st February, 2021, the Authority received a copy of a letter from MCM and Associates Advocates, who were acting on behalf of the residents of Taza Lane in which they expressed their reservations about the project NEMA License issuance citing a fraudulent process; that the letter was addressed to NEMA and copied to the 8th Respondent and that while processing the developers application, the developer was notified about the issues raised by the area residents and the application was rejected.

67. According to the 8th Respondent's Manager Compliance, Stephen Mwilu, the developer re-submitted the application on the same day, 1st February, 2021 and on the 2nd February, 2021 it was returned to the developer and he was advised to resolve the issues raised by the area residents; that on the 2nd March, 2021, the developer submitted minutes of a meeting between themselves and the neighbours of the subject property on 28th February, 2021 in which the 1st Petitioner was in attendance.

68. He opines that in the said minutes, there was no indication that the issue had been resolved and they asked the developer to submit a letter of no objection from the residents on the project registration process which they received on 8th March, 2021.

69. It is his position that the developer having resolved the issues and obtained the requisite documentation, the authority conducted a due diligence exercise on the 17th March, 2021 and issued them with a certificate of compliance reg no 53127415710362 on the 18th March, 2021 and that subsequently, the certificate of compliance was issued after the developer fulfilled the project registration criteria in line with the NCA Act and its Regulations.

70. According to Mr Mwilu, on the 23rd April, 2021, the residents along Taza Lane, through MCM & Associates Advocates, sent a letter to the 8th Respondent lodging complaints against Koch construction limited, Ameey Homes Ltd, Arch Salim Komora, and Engineer Eric Cherotich Sitienei; that the Respondent visited the site on the 28th April, 2021 and suspended the same vide Suspension of Works Order Serial No 103730 and the contractor/developer was advised to address the raised issued.

71. He stated that on the 8th May, 2021, through Wageni & Company Advocates, the owners, occupiers and/or residents of the properties adjacent to the suit property raised a complaint to the Board of Registration of Architects and Quantity Surveyors (BORAQS) against Arch Salim Komora; that Arch Komora wrote to the 8th Respondent on 30th August, 2021 informing them of his resignation from the project, and that on 15th September, 2021 he noted that he had been retained as the project architect contrary to the previous letter.

72. Mr Mwilu contended that the 8th Respondent plays an independent but complementary role with other agencies including the A1st Respondent and NEMA; that the Petitioners have through their Counsel raised issues outside the mandate of the 8th Respondent in their previous correspondences such as the authentication of architectural building plans and structural drawings, authentication of demolition and construction permits and matters concerning sewerage and sanitation.

73. It was deposed that the Petitioners, in breach of data protection law, attached and forwarded the 8th Respondent's internal communication which they were not a party to and have failed to disclose how they obtained the same.

74. According to the deponent, the 8th Respondent was indeed served with MCELC/E146 of 2022 but the case was withdrawn entirely against all the Defendants including itsef; that notably, the 8th Respondent has also been served with several suits regarding the suit property including ELC 115 of 2021: David

Njeru Ndambiri vs NCA & 3 Ors withdrawn on 20th May, 2021, HCCC E234 of 2021-Ameey Homes Limited vs David Ndambiri; ELC Pet E032 of 2023-Francis Owino & Other and 1st Interested Party which is ongoing and that they have at all times responded to the Petitioners concerns accordingly as per their mandate and functions.

75. It is his position that the certificate of compliance issued to the 13th Respondent was pursuant to compliance with its Act and regulations which was communicated to the Petitioners vide its letter of Ref: NCA6/164/VOL.I/6 dated 8th October, 2021 after the Petitioners letter of 4th October, 2021 inquiring about the same and that in response to the letter dated 15th October, 2021 on the same issue, vide the letter dated the 25th October, 2021, they maintained that the issuance of the certificate of compliance was as per its Act and regulations.

76. It was deponed that the 8th Respondent received another letter dated 8th November, 2022 from Taza Lane Residents Associations regarding the alleged illegal development activities on the suit property and in their response of 28th November, 2022, they noted that they had no reason to impede development based on matters that affect it; that they further received letters dated 23rd May, 2023 from Wageni & Co Advocates stating that the developments on the parcel were not approved and a letter dated 15th August, 2023 inquiring whether they authorized, permitted the ongoing development.

77. He urges that the 8th -11th Respondents fulfilled their mandate under the NCA Act and its Regulations; that the Amended Petition does not disclose any cause of action against the 8th-11th Respondents and should be dismissed.

78. In response to the Amended Petition, the 12th Respondent through its Chief Executive Officer, Dr George Ochiri, swore a Replying Affidavit on the 17th October, 2024. He deponed that the Amended Petition is defective in substance and form and constitutes an abuse of the process of the Court as the mandatory orders sought to compel the 1st -7th Respondents to stop the 12th -16th Respondents from further developing the suit property is the same issue pending determination before the National Environment Tribunal in NET E24 of 2021-David Alfred Njeru Ndambirii vs Director General NEMA.

79. Dr Ochiri deponed that the 12th Respondent has been wrongly joined as a Respondent as it does not have an identifiable stake in the proceedings neither will it be affected by the decision of the Court and that it sold the suit property to the 13th Respondent on the 10th October, 2016, subsequently relinquishing all rights and liabilities pertaining to the property.

80. The 14th Respondent, Ali Ibrahim Hahamed, on his own behalf and on behalf of the 13th Respondent, as its Director swore a Replying Affidavit to the Amended Petition on the 24th October, 2024. He deponed that the 13th Respondent is a limited liability company duly registered in Kenya bearing company registration no PVT/2016/010348; that the 13th Respondent's directors are himself, Ali Ibrahim Hahamed, Fadumo Ahmed Barkadale and one Ethiopian Abakare Mealen Mohammed.

81. According to Mr Hahamed, the 13th Respondent is the bona fide legal owner of the suit property; that pursuant to Section 12(1) and 47 of the *Land Registration Act*, the 13th Respondent being a company incorporated in Kenya and having over 50% of its shareholding in Kenya can hold and/or own land in Kenya and that Article 40 as read with Article 260 of the *Constitution* provides for the protection of each person's right to acquire and own property of any description in any part of Kenya.

82. Mr Hahamed contends that the 13th Respondent, while initially incorporated as Sustainable Development Solutions Limited, has since changed its name to Property Sustainability and Services

Solutions Limited and that the change was necessitated following the digitization of company records pursuant to which it was discovered that another company had been incorporated with a similar name.

83. It was deponed that the 13th Respondent, is in a joint venture agreement with the 15th Respondent to develop residential apartments on the suit property; that the development is valued at approximately Kshs 600 million as evinced by the approval from the National Construction Authority and thus far, the 13th Respondent has obtained the requisite licenses and approvals under the statutory laws to wit Section 58 of EMCA and Section 59 of the PLUPA.

84. He asserted that the approvals for the development of the suit property were obtained prior to the change of name and thus inadvertently bear the name Sustainable Development Solutions Limited; that on or about the 10th January, 2019, in contemplation of the proposed development, and in accordance with Section 24 and Section 21 of the PLUPA, they made an application for change of user from single dwelling unit to multi-dwelling units and that in accordance with PLUPA, 1996, they placed a notice of the proposed change of user at the gate of the site to inform neighbors and they had placed a notice in the newspaper inviting comments and objections, none of which were received.

85. It was deposed that on or about 18h September, 2020, their application PPA-CU-AAB803 submitted on the 10th January, 2019 for a change of user was approved by the County Planning Committee and that following the approval of change of user and prior to the commencement of the subject project, the 13th Respondent undertook a comprehensive assessment of the impact of the development on the environment which is documented in the EIA Project Report submitted to NEMA on the 4th November, 2020 and that in line with EMCA Regulations, the 13th -15th Respondents conducted public participation and the report included the views of various neighbors who listed their concerns but were generally not opposed to the development of the project.

86. According to him, the EIA was done in accordance with Section 58 of EMCA as read with Legal Notices No 31 and 32 of 30th April, 2018, published in the Kenya Gazzette Supplement No 62 dated 30th April, 2019 and the Environmental (Impact Assessment and Audit) Regulations, 2003 and that as per the aforesaid gazette, multi-dwelling housing developments not exceeding one hundred units are classified as medium risk projects which requires an EIA project report which was undertaken.

87. He asserts that NEMA, having reviewed the EIA Project Report received from the 13th Respondent, issued the EIA License dated 23rd December, 2020; that vide its letter dated the 4th November, 2021, NEMA wrote to the Petitioners Counsel clarifying that the aforesaid EIA License was issued following a review of the 13th Respondents EIA Report and in conformity with the law.

88. According to Mr Hahamed, vide NET Appeal No 24 of 2011, the Petitioners challenged the propriety of the EIA License and averred that that project posed significant negative environmental effects; that their argument in that regard was on the disposal of toilet and bathroom effluents which is an issue herein as well; that the NET Appeal was dismissed and the Petitioners lodged ELCA No E056 of 2022: David Njeru Ndambiri vs Director General National Environment Management Authority(NEMA)& 4 Others which was dismissed for being sub judice having been filed after the instant Petition.

89. Mr. Hahamed deponed that on or about the 27th October, 2022, NEMA allowed their application to add an additional two floors on the ongoing project and issued them with an EIA License in that regard. As regards the project registration, he contends that on 28th December, 2020, they made an application for project registration to the 6th Respondent pursuant to the National Construction Authority, Act, 2011; that it was initially rejected due to complaints by the area residents including the Petitioners

and that they resubmitted their application on the 1st February, 2021 but were advised that the project would not be registered without a no objection letters from the complainants.

90. It is his position that after a meeting on the 28th February, 2021 between the 15th Respondent's Director and the complainants, in which the 1st Petitioner was present, the complainants sent a no objection letter to the 8th Respondent and that on the 18th March, 2021, the 8th Respondent after conducting due diligence and upon satisfaction that their application satisfied the requirements of Section 31(1) and (2) of the NCA and Regulation 25 of the NCA, issued the 13th Respondent with a certificate of compliance.

91. Equally, it was deposed, pursuant to Section 58 of PLUPA, the 13th Respondent applied for a development permission from the planning authority responsible for constructions works within Nairobi County: that having evaluated the proposed development, the 1st Respondent, (previously Nairobi Metropolitan Services) approved the subject construction works under Construction Permit dated 24th September 2020.

92. Minded of the need to ensure proper waste management, the deponent states that the 13th Respondent, sought and obtained additional approval to erect and construct a Privately Developed Sewer (PDS) line from the Nairobi Water and Sewerage Company Limited (NCWSC), as confirmed by the approval letter dated 8th June 2021 and ref NCWSC/TEC/ENG/ 23/vol.xi/56/JMM/ewm.

93. Mr Hahamed deponed that the 13th - 15th Respondents have diligently commenced and undertaken the development of sewer line works, which were subject to inspection from engineers from the Nairobi Water and Sewerage Company Limited; that vide its letters of 25th October, 2024, Nairobi Water Sewerage Company satisfied itself that the works were satisfactorily carried out.

94. It was contended that the Petitioners' allegations as regards potential negative impacts of the developments such as high human and vehicular traffic were identified by the NEMA EIA lead expert and were all addressed in the EIA Project Report and adequate mitigation measures were proposed and found acceptable by the regulator, NEMA and that nonetheless, any party displeased with the licensing process is enjoined to appeal to the NET.

95. Mr Hahamed posits that the allegation that the construction works including demolition were undertaken without approval is untrue; that undertaking a development without authorization or contrary to license conditions exposes a developer to an enforcement notice absent which an appeal may be lodged before the Physical and Land Use Planning Liaison Committee.

96. It is his position that the claims of breach of their right to access information are unwarranted; that Section 21(f)of the *Access to Information Act* provides that the Commission on Administrative Justice will hear and determine complaints and review decisions arising from violations of the right to access information and that it is apparent that the Petitioners claims are in the first instance vested in the aforesaid Tribunals and this Court has no jurisdiction to determine the same; that alleged failures by the adversely names public institutions and officials does not oust the respective Tribunals' jurisdiction.

97. He urges that ultimately, not only is there demonstrable compliance with the law, but the law avails adequate alternative dispute resolution mechanisms which the Petitioners have not exhausted; that the Petition is misleading, misconceived and self-serving and only seeks to punish the 13th and 15th Respondents who have constitutionally protected right to own property and have peaceful and quiet enjoyment of the same.

98. In response to the responses aforesaid, the Petitioners filed a Further Affidavit on the 5th November, 2024. He deposed that no legal, or procedural Joint Venture Agreement was entered into between the

13th and 15th Respondent to 'collaborate and develop residential apartments' on the subject property as required under PART Ill of the National Construction Authority Regulations No. 74 of 2014, rendering such claims and allegations of joint venture ship between the two Respondents illegal, irregular and fraudulent.

99. According to the 1st Petitioner, contrary to the Respondents assertion, no letter of no objection was issued by them or Taza Lane Residents; that the letter of 8th March, 2021 was signed by one Charles Mwalimu as an individual who has affirmed his position is this regard through an Affidavit and that the lifting order dated 17th December, 2021 was illegal, irregular, null and void.

100. As regards the PDS extension, he deponed that there have been several crude attempts by the 11th -16th Respondents to construct the sewer line without the authority and/or knowledge by NCW & SC which they and other neighbors managed to stop albeit with some of them receiving injuries during one of the attempts and which attempts they recorded on CCTV and that these attempts were in disregard of the court orders of 25th May, 2023, restraining any developments on the property and the purported authorities having been issued when the aforesaid court orders were in existence are null and void.

101. It is his position that NET Appeal 4 of 2021 was struck out for having been filed outside the 60-day statutory limit; that ELCA No. E056 of 2022 was dismissed; that they have CCTV evidence that the 1st and A1st officers have been receiving money from the Respondents to facilitate the on-going construction; that the Amended Petition does not seek to deny any party the right to own property but raises concerns about the acts and omissions of offices, officers and citizens who have failed to uphold and defend the *Constitution* of Kenya.

102. The 2nd, 7th, 15th, 16th, 17th, 18th and 19th Respondents did not file any response to the Amended Petition. The parties filed detailed submissions and authorities. The submissions and authorities will be considered in the analysis.

Analysis & Determination

103. The Amended Petition dated 6th November, 2023, excluding the annextures, is 109 pages long, and seeks for 27 prayers. Having considered it, the responses and submissions, the issues that arise for determination are as follows:

    i. Whether the Amended Petition is competent?

    ii. Whether the 14th Respondent's Replying Affidavit is fatally defective?

    iii. Whether the 13th Respondent's title to the suit property is fraudulent?

    iv. Whether the Petitioners have demonstrated breach of statutory duties by the 1st -11th Respondents?

    v. Whether the Petitioners have demonstrated the alleged violations and/or threats of violations of its rights protected under Articles 10, 26, 31, 35 and 42 of the *Constitution*;

    vi. What are the appropriate remedies, if any?

104. Vide their respective responses, the Respondents contest the competency of the Amended Petition. Their arguments in this respect are that, the Court is divested of jurisdiction to entertain this matter on account of existing alternative resolution mechanisms; the Amended Petition does not meet the specificity test; the Petition is sub judice and that there has been misjoinder of parties.

105. Beginning with the claims that the Petition does not pass the specificity test, and the allegation that the matter is sub judice on account of the NET Appeal E024 of 2021- David Njeru Ndambiri vs Director General, NEMA & 4 Others, the Court notes that it substantially dealt with these issues in its Ruling of 23rd May, 2023. The Court will not venture into a reconsideration of the same and considers them moot.

106. The 13th -15th Respondents contend that the Amended Petition is fatally defective. It is their position that the Petitioners' recourse to their claims touching on land use and planning, sustainable use of the environment, access to information and breach of statutory duties lies in the relevant statutory tribunals to wit the NET, Nairobi Physical and Land Use Planning Liaison Committee and the Commission on Administrative Justice.

107. This position is supported by the 1st, 3rd , 4th , 5th and 6th Respondents who claim that having been aggrieved by the development permission, the Petitioners first recourse should have been with the County Liaison Committee and the 8th Respondent who asserts that in view of their allegation of breach of chapter 6 of the *Constitution* and Section 9 of the *Leadership and Integrity Act*, the Petitioners should have availed themselves to the procedure set out in Section 42 of the *Leadership and Integrity Act* so that investigations can be carried out and where appropriate, recommendations made in accordance with Section 43 of the Act

108. In response, the Petitioners stated that this question is moot, having already been determined by this Court vide its Ruling of 23rd May, 2023. In any event, they contend, the 1st, A1st , 2nd , 3rd , 4th , 5th , 6th and 7th Respondents having not given them access to the relevant information, to wit, whether the developments have the requisite statutory and administrative approvals and whether the documents uttered by the 12th -19th Respondents are genuine to enable them lodge an appeal with the County Physical and Land Use Planning Liaison Committee and any other body dealing with appeals in respect of County Planning and Land Use, cannot accuse them for not having filed appeals.

109. The Court has considered the Ruling of 23rd May, 2023, and whereas it indeed discussed its jurisdiction to entertain this matter vis the jurisdiction of the NET Tribunal, the Court did not discuss the other aspects alleged by the Respondents. The Court will proceed to consider the same.

110. As a principle, the doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to Courts. Speaking to the ambit and rationale for this doctrine, the Court of Appeal in Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR observed as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

111. In the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR, a five-judge bench held as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

112. The Court went on to outline the exceptions to the rule as follows:

> " As observed above, the first principle is that the High Court(read ELC) may, in exceptional circumstances consider and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
>
> In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion..."

113. In the present case, the Petitioners are aggrieved by the developments undertaken on L.R 209/7549 (Nairobi/Block 37/11). They opine that the same constitute an illegality having been commenced without the relevant approvals from the NCA, the NCC and NEMA and that if any approvals and permissions were issued, the same are irregular and illegal having been issued on the basis of false and misleading information. Further, the Respondents responsible for issuance of the permissions and licenses breached their statutory duties in this regard.

114. They opine that that no public participation was undertaken before commencement of the development or at any stage thereof contrary to Articles 10, and 69. They further claim violations of their rights to life as guaranteed under Article 26, right to a clean and healthy environment as set out under Article 42 and breach of their right to access information secured by Article 35 of the *Constitution*.

115. It is trite that issues of development control and planning within the County fall under the purview of the Physical Land Use Planning Act, 2019 (PLUPA). Section 76 provides for the County Physical and Land Use Planning Liaison Committee whose mandate as under Section 78 includes to;

a. hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;

b. hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

c. advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and

d. hear appeals with respect to enforcement notices.

116. Section 61(3) and (4) of the Act establishes an appeal mechanism for any person aggrieved by the decision of a County Executive Committee member in respect of a development permission within 14 days of the said decision. An appeal from the decision of the Committee lies to this Court.

117. As regards claims of breach of access to information, Section 21(i)(f) of the *Access to information Act* sets out, as one of the functions of the Commission on Administrative Justice, to:

> " hear and determine complaints and review decisions arising from violations of the right to access to information."

118. The Petitioners are equally concerned with the environmental impacts of the proposed development and in this regard have recourse under Sections 31, 32 and 33 of the EMCA which establishes the NECC and outline its functions and powers. Its functions as set out under Section 32 include:

a. to investigate...

i. any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya;

> " on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendations thereon to the Cabinet Secretary."

119. Similarly, the *Leadership and Integrity Act*, No 19 of 2012 provides under Section 42 that:

> " A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint."

120. The Court agrees that the Petitioners had multiple avenues open them However, it also seeks redress for constitutional violations which can only be granted by this Court pursuant to Article 162(2)(b) of the *Constitution*, Section 13 of the ELC Act and Section 3 of the EMCA. It is clear that the claim by the Petitioner is multi-faceted.

121. The Apex Court has had the opportunity to weigh in on the doctrine of exhaustion in light of multi-faceted claims as herein. In Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR, the Court stated as follows:

> "
>
> " 51. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The

point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court "in the interests of justice." It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.

52. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

.....

54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the *Constitution* was protected."

122. In the more recent decision, the Supreme Court in Nicholas Abidha vs AG & 7 others, (Petition E007 of 2023) (2023)KESC113 (KLR) stated as follows:

"...the resolution of environmental issues before NEMA has been the subject of prior decisions by our superior courts and two schools of thought have emerged in that regard. On one hand, there is a series of decisions that have taken the position that, even though the ELC has original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under EMCA, by first referring a matter to NET before an appeal can lie to the ELC.

There is however another school of thought that has posited that, if the complaints and prayers by a petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacks the jurisdiction to determine the constitutional issue hence the provisions of Section 129 of EMCA are inapplicable to such claims.

.....

[100] In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions

to the appellant's claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. ..

As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

[102] In the above context, what was in issue in the appellant's petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant's rights under Articles 40 and 42 of the *Constitution*.

[103] The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.

[104] Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of the *Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the *Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR...

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

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

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

[108] It was therefore sufficient that the appellant alleged that a right in the *Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of the *Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why Section 3 of EMCA provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment."

123. Whereas the Supreme Courts in Benson Ambuti (supra) and Nicholas Abidha vs AG & 7 Others, (Petition E007 of 2023) (2023)KESC113 (KLR) both addressed the question of a multifaceted claims, in Benson Ambuti the Court decided that the ELC is to defer to the established statutory authorities, while in Nicholas Abidha, it held that a Petitioner could choose an appropriate forum as between the Court and the alternative process.

124. From the foregoing binding decisions of the Apex Court, the principles that can be deciphered in dealing with an objection on jurisdiction on the basis of failure to exhaust alternative avenues are that first, the disputes must be determined on a case by case basis. The Court is also called upon to consider the efficacy of the alternative remedies and must be satisfied that constitutional claims are not a smoke screen meant to escape strictures of alternative process.

125. In the circumstances, the allegations discussed above are all intricately tied to the alleged constitutional violations falling within the ambit of this Court such that none of the aforementioned tribunals and administrative bodies would be able to adequately and holistically resolve them. In the end, the Court finds that this objection is unmerited.

126. It is the 8th Respondent's position that the 9th -11th Respondents are improperly joined to the proceedings as the Amended Petition relates to the statutory functions of the 8th Respondent and not the personality of its office holders. It asserts that pursuant to the provisions of Section 37 of the *National Construction Authority Act*, its officers are incapable of being sued for actions arising from the execution of their duties.

127. Similarly, the 12th Respondent deposed that it does not have any interests in the suit property, having sold the same to the 13th Respondent and that the decision of the Court will have no bearing on it. Accordingly, it argues, it is an improper party to these proceedings.

128. In response, the Petitioners assert that the 9-11th Respondents claim of immunity is unwarranted noting that they did not undertake their functions, powers and duties in good faith; that they must, like the institutions they work for, bear the liability for their failure to undertake their statutory duties.

129. Section 37 of the National Construction Act provides as follows:

1. No matter or thing done by a member of the Board or any officer, employee or agent of the Authority shall, if the matter or thing is done bona fide for executing the functions, powers or duties of the Authority under this Act, render the officer, employee or agent or any person acting under their direction liable to any action, claim or demand whatsoever.

2. The provisions of subsection (1) shall not relieve the Authority of the liability to pay compensation or damages to any person for any injury to him, his property or any of his interests caused by the exercise of the powers conferred on the Authority by this Act or by any written law or by the failure, whether wholly or partially, of any works."

130. In Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others [2019] eKLR the court held as follows:

> "The Respondents are correct that when sued as a result of discharging one's duties or functions, the proper course is to sue the Attorney General or the office and not the individual officer in their personal capacity. However, there are times when a particular Petitioner may feel that a public officer conducted himself so flagrantly that they were acting on their own; on their own frolic so to speak. In such circumstances, the Petitioner is at liberty to sue the public officer on their own in addition to suing the Government."

131. In view of the above it is apparent that the immunity provided to the 9th -11th Respondents can be impeached if the Petitioners successfully mount a claim for personal liability against the 9th to 11th Respondents. In this respect, the Petitioners must demonstrate that the said public officers acted outside their mandate or authority.

132. It is not enough that the public officer made a wrong decision. Evidence must be adduced to demonstrate bad faith. In Tom Ojienda t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commission & 5 others [2016] eKLR, the court while addressing itself to a similar provision within the Anti-Corruption and Economics Crime Act (ACECA) held that:

> "I should also quickly dispose of one issue that cannot be contested; that the 2nd – 4th Respondents are officers of the 1st Respondent and cannot be sued for conduct in that capacity. Section 7 of the 2nd Schedule to ACECA provides as follows in that regard;
>
> (1) No action or proceeding for compensation or damages shall be brought against a member of the advisory Board or any other person authorized by the Advisory Board, in respect of anything done or omitted in good faith under this Act
>
> (2) This paragraph shall not relieve the Advisory Board of any liability."

There are no facts placed before me to indicate that any of the officers named have acted, personally, in any way that should attract personal sanctions against them. That includes the 2nd Respondent and the allegations of perjury made against him. If such an offence may have been committed, this Court is not the right forum to initiate such a complaint."

133. And in Peter Solomon Gichira vs Attorney General & another [2020] eKLR it was stated thus:

> "The 2nd Respondent as provided by section 15 of the IEBC *Act No. 9 of 2011*, is not only a member of the commission but the chairman of the commission, for him not to be protected from personal liability for things done it has to be demonstrated he acted in bad faith; for whenever where he acts in good faith for the purpose of executing the powers, functions or duties of the commission under the *Constitution* or the IEBC Act he is protected from personal liability for things done in good faith. In the instant petition, I find the 2nd Respondent has legal immunity for things done in good faith. It has not been shown that the 2nd Respondent acted in bad faith in this suit and as such the 2nd Respondent is protected and insulated against personal or individual liability under section 15 of the IEBC *Act No. 9 of 2011*."

134. The claim against the 9th to 11th Respondents is that they failed to discharge their constitutional and statutory duties as per the PLUPA, EMCA and NCA Act; that they have violated the Petitioners' right to access information, right to life, with the consequent prayer that they should be compelled to demolish and personally meet the costs of demolition of the structures erected on the suit property.

135. As the Petitioners claim bad faith, the Court will consider their evidence in that regard and as such, will not dismiss the 9th -11th Respondents at this stage.

136. Regarding the contention by the 12th Respondent that they have been wrongly joined to the suit, the Court has looked at the amended petition and the prayers sought. Prayer (d)(k) in the amended Petition seeks a declaration that the 12th Respondent never legally transferred the suit property to the 13th Respondent.

137. It is undisputed that the title to the suit property rests with the 13th Respondent and not the 12th Respondent. For this reason, it is the 13th Respondent to defend its title, and not the 12th Respondent to defend the transfer of the title to the 13th Respondent, especially when the Petitioners are not claiming the suit property from the 12th Respondent or at all.

138. For this reason, the Court finds that the 12th Respondent is not a proper party to these proceedings and its name is hereby struck out. The issue of the transfer of the suit property would be adequately addressed by the 13th Respondent.

139. Another preliminary issue, albeit one brought by the Petitioners, touches on the legitimacy of the 13th Respondent's Replying Affidavit sworn by one Ali Ibrahim Hahamed on the 24th October, 2024.

140. According to the Petitioners, the 13th Respondent company was incorporated on the 17th July, 2008 as company C. 158037 under the Directorship and Shareholding of Dorothy Thuku Wanjiru and Philip Karuri Thuku with Stella W Nyamu as its Secretary and that Ali Ibrahim Hahamed is not a Director or shareholder of the 13th Respondent company neither does he have the requisite authority to swear the affidavit on its behalf.

141. On his part, the 14th Respondent deponed that whereas the 13th Respondent was initially incorporated as Sustainable Development Solutions Limited, it has since changed its name to Property Sustainability

and Services Solutions Limited, a change necessitated by the discovery that another company had been incorporated prior with a similar name.

142. The Court has keenly considered the evidence in this regard. The Petitioners have adduced into evidence the CR12 for Sustainable Development Solutions Limited dated 1st November 2024 and Property Sustainability and Services Solutions Limited dated 21st April 2022. Also relied on is an incorporation certificate for Sustainable Development Solutions Limited registration number PVT/2016/010348 issued on the 25th April 2016.

143. The Petitioners also rely on the email dated 25th July 2022 that confirms the company known as Sustainable Development Solutions Limited and registration number PVT/2016/010348 changed its name to Property Sustainability and Services Solutions Limited. This email however notes that there exists another company known as Sustainable Development Solutions Limited with registration number C.158037.

144. In response, the 13th Respondent has adduced a CR12 for Property Sustainability and Services Solutions Limited dated 24th July 2024 and for company registration number PVT/2016/010348. A certificate of change of names issued on the 11th December 2018 for company registration number PVT/2016/010348 shows Sustainable Development Solutions Limited changed its name to Property Sustainability and Services Solutions Limited.

145. According to the document, the company was initially registered as Sustainable Development Solutions Limited before changing its name to Property Sustainability and Services Solutions Limited.

146. From the foregoing, it is clear that Sustainable Development Solutions Limited, registration number PVT/2016/010348, lawfully changed its name to Property Sustainability and Services Solutions Limited under registration number PVT/2016/010348.

147. The directors of this company are Ali Ibrahim Hamamed, Abakare Mealen Mohamed and Fadumo Ahmed Barkadale. This is the company that the 14th Respondent asserts he is a Director of and which is the 13th Respondent. The fact of there being two different companies with the same name does not without any further evidence, mean that the 13th Respondent does not exist in law.

148. On lack of a resolution by the 13th Respondent, this issue is now well settled. As stated by the Court of Appeal in Spire Bank Limited v Land Registrar & 2 others [2019]eKLR:

> " ...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

149. Similarly, the Court of Appeal in Smartshop Limited *vs Mutitu (Civil Appeal 76 of 2019*) [2023] KECA 737 (KLR) (16 June 2023) (Judgment)held:

> "In this case, Susan Gathoni Maina swore an affidavit in which she stated that she was a director of the appellant company. She deponed that she was duly authorised to make the affidavit in support of the Originating Summons. Furthermore, she made reference to the law firm of Messrs Kinoti & Kibe Advocates as being the advocates for the company. By necessary implication, the said firm had been instructed by the company."

150. No evidence has been adduced by the Petitioners to demonstrate that Ali Ibrahim Hamamed did not have authority to swear the affidavit on behalf of the 13th Respondent. Consequently, the Court is unable to make a finding that the 14th Respondent's Replying Affidavit is fatally defective.

151. The Petitioners seek to impugn the 13th Respondent's ownership of the suit property. They contend that neither the 13th Respondent, nor Property Sustainability Solutions Limited is the legitimate owner of the property; that in 2016, the 12th Respondent entered into an agreement with Stephen O Ambani, a surveyor, to sub-divide the property and have separate titles for each maisonettes, which agreement is still in force and that the 13th Respondent, being a foreign company by virtue of its directorship, is barred from owning the property whose interest is freehold.

152. In response, the 14th Respondent contends that the fact that the 13th Respondent was registered in Kenya renders it a Kenyan company notwithstanding the fact that one of its directors is a foreigner.

153. The evidence shows that the suit property is registered in the name of the 13th Respondent, Sustainable Development Solutions Limited, having been so registered on 12th April, 2017, pursuant to the provisions of the *Land Registration Act*. Subsequently, the law applicable to the title is the *Land Registration Act*, 2012.

154. The provisions of Section 24(a) and 25(1) of the *Land Registration Act*, 2012 outlines the rights and interests of a registered proprietor as follows: Section 24(a) provides:

> "Subject to this Act—
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

155. Whereas Section 25 (1) states as follows:

> "The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...."

156. Section 26(1), while affirming the principles of indefeasibility of title, also sets out the circumstances in which a party's title is amenable to challenge. The section states:

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except—

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

157. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

158. The Court has already found that Sustainable Development Solutions Limited duly changed its name to Property Sustainability and Services Solutions Limited and the same refers to the same entity. The certificate of title cannot therefore be impugned on the basis that it bears the name Sustainable Development Solutions Limited rather than Property Sustainability and Services Solutions Limited.

159. In any event, the certificate of title exhibited by the 14th Respondent shows the said change of name at entry number 2. The said change was endorsed on the title on 24th June, 2021.

160. As to the contention that Property Sustainability and Services Solutions Limited, being a foreign company cannot own property, the provisions of Article 65(3)(a) of the *Constitution* are clear on the nature of a corporation partly owned by non-citizens. It provides:

" For purposes of this Article—a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens."

161. However, the fact that a company is not wholly owned by a citizen does not deprive such a company from acquiring property. Article 65(1) and (2) of the *Constitution* are to the following effect:

" 1. A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.

3. If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more."

162. Thus, the challenge on the 13th Respondent's right to own property cannot succeed as the 13th Respondent can own property and if indeed the Directors/shareholders are foreigners, which was not proved, the title will be regarded as conferring a ninety-nine-year lease.

163. As to the assertion that complaints regarding the 13th Respondent's acquisition of the property have been made to the EACC and investigations are ongoing, nothing much falls on the same. The mere fact of investigations is not sufficient basis to make a finding of fraud with regard to the 13th Respondent's acquisition of the suit property.

164. The Petitioners contends that the 1st -11th Respondents, being entities and their employees responsible for various aspects of development and/or environmental permissions have breached their statutory duties. The Respondents on their part maintain that they duly carried out their duties as per their lawful mandates and the allegations to the contrary are unwarranted.

165. It is thus appropriate to examine the various acts complained of vis a vis the legal and regulatory requirements. First, regarding the 1st, A1st to 6th Respondents, Section 57 of the *Physical and Land Use Planning Act* provides:

> "(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
>
> (2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.
>
> (3) A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.
>
> (4) Where a person who is required to do so fails to comply with the provisions of subsection (3), the relevant county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.
>
> (5) A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.
>
> (6) A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause."

166. Section 58 then provides:

> "(1) A person shall obtain development permission from the respective county executive committee member by applying for development permission from that county executive committee member in the prescribed form and after paying the prescribed fees.
>
> (2) An applicant for development permission shall provide documents, plans and particulars as may be required by the respective county executive committee member to indicate the purposes of the proposed development.
>
> (3) An applicant for development permission shall indicate the proposed uses to which the land shall be put, the population density to which that land shall be subjected and the portion of the land the applicant shall provide for easements as a consequence of the applicant's proposed development.
>
> (4) Where an applicant is not the registered owner of the land for which development permission is being sought, that applicant shall obtain the written consent of the registered owner of that land and the applicant shall

provide that written consent to the respective county executive committee member at the time of applying for development permission.

(5) The development permission granted by a county executive committee member shall be subject to compliance with the provisions of any other written law.

(6) Where an applicant does not receive written response for development permission within sixty days, such permission shall be assumed to have been given in terms of this Act.

(7) 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 subsection (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."

167. From the foregoing, before any construction commences, development permission is mandatory. The Petitioners contend that there was no permission before the construction on the suit property began. The 13th -15th Respondents on their part assert that they were duly issued with the approval.

168. The 13th to 15th Respondents deposed that they obtained a change of user on or about the 18th September 2020. The approval for the change of user from single units to multi dwelling dated 18th September, 2021 has been annexed on the 1st Respondent's Replying Affidavit. Applications and approvals for change of user, demolition and development are three distinct things.

169. The 1st Respondent acknowledges this distinction and depones that it issued a development permission on the 4th August 2022, with the application having been made on the 26th July 2022 while the approval for the change of user was granted on 18th September 2020.

170. Under Regulations 4 and 15 of the Physical and Land Use Planning (General Development Permission and Control) Regulations 2021, an application for change of user and development permission are distinctly provided for respectively. The court is quick to add that the Regulations became effective on the 10th December 2021. The provision is used to buttress the fact that the various development permissions are distinct and separate.

171. The 1st Petitioner deposed that in early September 2020, they noticed that people unknown to them were "carrying out unusual developments on LR. No. 209/7549 (the suit property), to wit, demolition of the three 4-bedroomed maisonettes and servants' quarters thereon and cutting down of century old trees." On this basis, the Petitioners have argued that the development on the suit property began before the 1st Respondent gave its approval for development on 4th August, 2022.

172. For a start, there is no evidence before me to show that the development on the suit property commenced in early September, 2020, especially considering that approval for the change of user was granted on 18th September, 2020.

173. I say so because demolishing the existing structures on the suit property, or clearing the site is not the same as development. Going by the 1st Petitioner's depositions, what happened in September, 2020 was demolition of the then existing structures, and clearing of the fauna and flora.

174. This position is supported by the Petitioners' averment "that after their complaint vide the letter of 25th September, 2020, the 8th Respondent visited the suit property after which it compiled a report dated 1st October, 2020. In the report, the 8th Respondent noted that the demolition works of existing developments had been completed and that there were intentions (emphasis) to develop 91 residential apartments on a 12th floor building on the subject property."

175. The report by the 8th Respondent dated 1st October, 2020 shows that it stopped the intended development. What the 8th Respondent stopped therefore on two occasions, after receiving complaints, according to its own report, was the intended development of the suit property.

176. The report by the 8th Respondent further states the when they visited the site on 1st October, 2020, the developer had erected a change of use notice at the gate; the works were not ongoing at the time of inspection and no workers were on site and the developer had demolition approvals from the Nairobi City County Government.

177. The 1st Respondent's case is that the 13th Respondent applied for development permission, from the Nairobi Metropolitan Services (now the Nairobi City County) for the subject constructions works which involved erection of multi-storey building, and ancillary facilities which was granted on the 4th August, 2022 after NMS confirmed that all the legal and procedural requirements had been satisfied and that the 1st Respondent also approved the architectural designs and site plans.

178. In my view, and from the site visit report of the 8th Respondent, other than the allegation that demolition of the existing structures and excavation works went on in the later part of the year 2020 and 2021 without approval, the Petitioners did not adduce any evidence to show that what was happening on the suit property during that period was not just preparatory work in preparation for construction, but was actual construction.

179. The actual date of construction was confirmed by the ever-vigilant Petitioners at paragraph 50c and 50d of the Amended Petition where they averred as follows:

> "On 13th October, 2022, construction work on the subject property started at 6:00am with suppliers of construction materials delivering the same using among others vehicle registration number KDG 316 and in the presence of tens of casual workers who were operating a variety of construction equipment....On 21st October, 2022, again construction work went on beyond licensed hours...

180. Therefore, on the basis of that averment, and in the absence of any other contrary evidence, it is the finding of this court that the construction works, contemplated under Section 58 of the PLUPA, and which required 'development permission, commenced on the suit property in October, 2022.

181. Considering that the certificate of compliance was issued to the 13th Respondent on 18th March, 2021 by the 8th Respondent and the development approval by the 1st Respondent having been issued on 4th August, 2022, way before the construction commenced, I decline to find that the said development commenced before the 1st and 8th Respondents granted their approvals as provided under section 58 of the PLUPA.

182. The 1st Respondent deponed that it issued an enforcement notice on the 21st June 2023, and did adduce the enforcement notice. According to the 1st Respondent, the enforcement notice was necessary because the project owner had failed to comply with the requirement of displaying the board indicating details of professionals involved in the subject construction as well as approvals from the 8th Respondent, NEMA and itself.

183. The 1st Respondent states that the enforcement notice was subsequently lifted because the project owner had in the past complied with relevant procedural requirements including the application and receipt of development permission in 2022. The enforcement notice alluded to therefore did not have anything to do with the lack of approvals, which, as I have stated above, were given in March, 2021 and August, 2022 by the 1st and 8th Respondents respectively.

184. The next contest is on the certificate of compliance and its regularity. The 8th Respondent issued a certificate of compliance on18th March 2021, confirming the project complied with section 31(1) and (2) of the NCA Act and regulation 25 of the National Construction Authority Regulations 2014. This was after its officers went to the suit property, issued directives for compliance and which according to the 8th Respondent, the project owner complied with.

185. The Petitioners are aggrieved by the manner in which the Certificate of Compliance was issued, and allege impropriety in the issuance of the certificate. Regulation 17 (6) and (7) of the National Construction Authority Regulations provides as follows:

> "(6) The Authority shall, within thirty days from receipt of the duly completed application form in terms of paragraphs 10(2) and (3) register the construction works contract or project and issue a compliance certificate.
>
> (7) The owner shall in relation to construction works registered in accordance with this regulation submit to the Authority in a prescribed form, within thirty days of such registration, information relating to—
>
> (a) the issuance of a completion certificate;
>
> (b) whether the contract is renewed or the contract period extended;
>
> (c) whether the contract is cancelled or terminated; and
>
> (d) whether all payments owing to the contractor have been settled."

186. Thus, a certificate of compliance is issued once a project owner satisfies the conditions imposed by the Regulations. According to the Petitioners, the certificate was issued while the suspension notices no C067831 and 0851 were still in force as the conditions given by the 8th Respondent had not been met. However, the 8th Respondent has argued that the certificate of compliance was issued on 18th March 2021 after satisfying itself that the conditions it had issued had been met.

187. In particular, the 8th Respondent was satisfied that the project owner had provided proof of registered NCA contractor on site, signboard showing approvals and project professionals, safety signs, personal protective equipment on site, sufficient boarding and fencing, NCA compliance certificate and accredited skilled workers.

188. The related allegation is that the certificate of compliance was irregularly obtained because the information given to obtain the certificate was false. In particular, that the names and particulars of professionals and contractor of the proposed project were incorrect.

189. In my view, the issue of whether the proposed professionals gave their consents before the certificate of compliance was issued or not can only be raised by them, or their professional bodies, and not the Petitioners. In any event, some of these professionals resigned after the certificate had been issued, and were replaced.

190. By way of example, Arch. Komora wrote to the 8th Respondent on 30th August, 2021 informing it of his resignation from the project, and that on 15th September, 2021 he noted that he had been retained as the project architect contrary to the previous letter. Eng. Cheruiyot Sitienei resigned from the project on 21st May, 2021 and was replaced by Eng. Lepartobia on 16th September, 2021.

191. In fact, the evidence on record shows that the Petitioners did complain to the professional bodies of the named individuals. According to the 8th Respondent, through the firm of Wageni & Company Advocates, the owners, occupiers and/or residents of the properties adjacent to the suit property raised a complaint to the Board of Registration of Architects and Quantity Surveyors (BORAQS) against Arch Salim Komora.

192. If it is true the said professionals were not involved during the issuance of the certificate, or the subsequent development of the property, the issue can only be raised in a different forum, and not in this court. To the extent that the said complaint has not been raised in any other forum, including to the 8th Respondent, with a view of having the certificate cancelled by the 8th Respondent, and the said professionals having not been joined in this Petition to support the Petitioners' allegations, it is not within the mandate of this court to investigate that issue.

193. For those reasons, I decline to order that the certificate of compliance that was issued by the 8th Respondent was issued irregularly or unlawfully.

194. On the allegation that the lifting of the suspension notice of 22nd March 2021 was issued before the project owner had procured a letter from the Residents' Association allowing the developer to proceed with the works, there is a letter dated 8th March 2021 by MCM & Associates Advocates communicating their non-objection to the registration of the project.

195. The Petitioners contend in their further affidavit that this letter was written by Charles Mwalimu as an individual and not on behalf of the Petitioners or residents of Taza Lane Residents Association. The Petitioners have admitted that the Association is informal, meaning that it is not registered. Indeed, the Petition has not been filed by the officials of the Residents' Association.

196. That being the case, and considering that the said law firm had previously written letters to the 8th Respondent on behalf of the residents, including the letter of 1st February, 2021 addressed to NEMA and copied to the 8th Respondent, it was not possible for the 8th Respondent to differentiate between people who were acting in their individual capacities or on behalf of the residents.

197. Indeed, in the letter dated 23rd April, 2021 annexed on the 8th Respondent's Replying Affidavit, the said law firm did write a letter to the 8th Respondent on behalf of the 'residents along Taza Lane, where they were complaining about the signboard that had been erected on the suit property by the developer. Therefore, the allegation that the said law firm was not acting for the residents fails.

198. The Petitioners further state that the construction on the suit property continued despite the suspension notice that stayed the construction pending the appointment of an engineer. I have already stated that although the 8th Respondent purported to stop ongoing construction twice, no evidence was presented to me to show that construction on suit property commenced before 13th October, 2022.

199. Therefore, the emails of 21st May 2021 and 8th September 2021 by the 8th Respondent asking that the construction be suspended until the 13th Respondent got another engineer were not factual.

200. For emphasis, if indeed there was ongoing construction on the suit property as at 21st May, 2021, the same ought to have been proved by the Petitioners. To the contrary, the Petitioners averred in their petition that the construction started on 13th October, 2022.

201. The various misconduct alleged against NEMA and its officers cannot be determined in this Petition as NEMA was not made a party. To make any substantive determination against NEMA would be to condemn the Authority without hearing them. Consequently, the court will not determine the proprietary of the EIA License that was issued by NEMA dated 23rd December, 2020 for the construction of 11 storey and the license of 27th October, 2022 for the additional 2 floors.

202. On claims of non-compliance with PLUPA Regulations, the Petitioners have not pointed out to the court the specific regulation that was breached by the 1st Respondent. As was held in the case of Samuel Nyona Otonglo & 4 others vs Nairobi City County Government & 5 others (2020) KELC 2360 (KLR), it was incumbent on the Petitioners to demonstrate how each of the Respondent failed to comply with the law, which they failed to do.

203. As regards the liabilities of the individual Respondents sued in their individual capacities, to wit, the 3rd, 4th , 5th, 6th , 9th , 10th and 11th employees, it is clear from the Petition that the Petitioners' grievance against them relate to their performance of their official duties or public functions.

204. While damning allegations have been made against some of the Respondents, such as the claims of bribery as against the 1st and 6th Respondents, the Court considers that these are criminal matters outside its purview. The Court is not convinced that the aforenamed Respondents had any special interest or have acted in such a manner as to have them held personally liable.

205. I will now deal with the issue whether the Petitioners have demonstrated the alleged violations and/or threats of violations of their rights protected under Articles 10, 26, 31, 35 and 42 of the *Constitution*. It is trite that for a party to succeed in a claim of violation of a constitutional right, such a party must set out clearly the violation in respect of which it seeks redress.

206. By way of brief background, the Petitioners are aggrieved by development being undertaken on the suit property. They aver that the development is being undertaken without the requisite approvals/ permissions from the relevant authorities and/or with illegally and irregularly obtained permissions. They contend that the development violates a host of their constitutional rights, in particular, Articles 10, 26, 35 and 42 of the *Constitution*.

207. I have already stated above that the 13th and 14th Respondents obtained the requisite approvals from the 1st and 8th Respondents. Further, and although not sue, NEMA also issued to the 13th and 14th Respondents EIA licenses.

208. It has been argued by the Petitioners that these approvals were given without public participation. 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:

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

209. Under Article 10 of the *Constitution*, public participation is a fundamental principle of governance. Article 47 of the *Constitution* makes reference to fair administrative action, providing that the public is entitled to be informed of any administrative action that is likely to affect their rights.

210. 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 this Court to be guided by the requirements for public participation in development of policies, plans and processes for the management of the environment.

211. 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."

212. 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."

213. A five-judge bench of the High Court in the case of Mohamed Ali Baadi and others v 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 representative 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."

214. 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 consideration of several judicial pronouncements noted:

> "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."

215. The burden to prove compliance with the requirement for public participation is on the person claiming that public participation was conducted. Where it is alleged that public participation was not conducted, it is not enough to simply allege that public participation was conducted. One must go further and demonstrate that public participation actually took place, with evidence to support the conduct of public participation.

216. Starting with the issuance of the EIA License, as I have already stated, the Petitioners did not join in this Petition the body that issued the two EIA Licenses to the 13th Respondent. The non-joinder of NEMA in this Petition was fatal to the extent that the Petitioners cannot question the legality or otherwise of the two licenses that were issued by NEMA.

217. Consequently, I will not venture into the issue of whether public participation was conducted or not before the issuance of the said licenses. I say so because the issuing body, NEMA, had a right to respond to the allegations that it issued the two licenses before being satisfied that the public had been heard.

218. The Petitioners have averred that the certificate of compliance was issued by the 8th Respondent (NCA) without public participation. There is no legal requirement that public participation should be conducted before a certificate of compliance is issued by the 8th Respondent.

219. That notwithstanding, the evidence adduced by the 8th Respondent shows that when the 13th Respondent submitted its application to the 8th Respondent for a certificate of compliance, the 8th Respondent was notified of the issues that had been raised by the residents. On 2nd February, 2021, the 8th Respondent informed the 13th Respondent to address those issues.

220. On 2nd March, 2021, the 13th Respondent submitted minutes of a meeting held on the 28th February 2021 which was attended by the 1st Respondent. The 13th Respondent contends that the said meeting led to the issuance of a letter of no objection by Charles Mwalimu of MCM & Associates Advocates dated 8th March 2021. The author of the said letter states as follows, in part:

> "We wish to confirm that we do not have any objection to the registration of the aforementioned project by Sustainable Development Solutions."

221. In answer to this, the Petitioners are forceful that the author of the said letter was not acting on their behalf or on behalf of the residents of Taza Lane. They have adduced an affidavit sworn by the said Charles Mwalimu on 26th October 2024.

222. However, there are other letters on record showing that Charles Mwalimu advocate's law firm was acting for the residents living around the suit property, including the letter dated 23rd April, 2021 addressed to the 8th Respondent. He cannot therefore run away form the contents of those letters, and specifically the letter dated 8th March, 2021.

223. On the allegation that the change of user was not subjected to public participation, the Respondents have adduced a newspaper cutting evidencing advertisement of the proposed change of user and inviting members of the public to submit their views. Together with the newspaper advert, there is a photograph taken on the suit property with a banner informing the public of intended change of user.

224. There is, however, no mention of the comments made by the public if at all. The public was however afforded an opportunity to make their views known. The claim that the change of user was done without public participation is not supported by evidence.

225. The Court therefore finds that the Petitioners have not established violation of the right to public participation as protected under Article 10 of the *Constitution* and other relevant statutes.

226. The right to 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.

227. 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.

228. 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.

229. 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."

230. 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.

231. 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.

232. 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."

233. The right to a clean and healthy environment transcends and includes the right to life as protected under Article 26 of the *Constitution*. The Court in Peter K Waweru vs Republic [2006] eKLR speaking to this position noted:

> " 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."

234. When a dispute concerning a threat to environment is brought before 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."

235. This principle has been applied in a number of disputes touching on the threat to the right to clean and healthy environment. 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) stated:

> " 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."

236. What is clear from the foregoing is that at the first instance, the obligation to demonstrate that a project is environmentally sound falls on the proponent of the development. This burden can be discharged

by proving that an EIA study was conducted in compliance with the law and in scrutinizing the consequential EIA study report.

237. The issuance of an EIA license is not an end in itself, as the process leading to its issuance can be looked into, especially where violation of the constitutionally protected rights is alleged to be the consequence of the process.

238. The Court has had sight of the letter from NEMA dated 4th November 2021 confirming that an EIA report was submitted on 4th November 2020 and complied with the law because lead agencies were involved, public participation was conducted and technical review was undertaken to confirm compliance with zoning policy and impact mitigation was complied with. The Court has equally looked at the EIA report dated 4th November 2020.

239. The Court is aware of the doctrine of regularity. The Court of Appeal in Kibos Distillers Limited (supra) had this to say:

> "In the instant case, applying the presumption of regularity, the starting point is that the 4th respondent acted lawfully and procedurally in issuing the various EIA Licences to the three appellants. The burden of proof to rebut the presumption of regularity is upon the respondents. The evidence required to rebut the presumption of regularity must be cogent, clear and uncontroverted. In the instant case, the respondents seek to rebut the presumption of irregularity through interpretation of Section 58 (2) of EMCA and Regulation 10 (2) and (3). Both the appellants and respondents have submitted their versions of conflicting interpretation and application of Section 58 (2) of EMCA and Regulation 10 (2) and (3) aforestated. I make a finding that the presumption of regularity cannot be rebutted through conflicting interpretation of a statutory or regulatory provision. Liability for any action cannot be founded on conflicting interpretation of statute."

240. NEMA derives its authority to issue licenses from Section 63 of the EMCA which provides that:

> "The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management."

241. Therefore, the Court will presume that licenses issued pursuant to section 63 of EMCA are issued regularly unless evidence is adduced to the contrary. The question then is, have the Petitioners provided enough evidence to rebut the presumption of regularity in the issuance of the NEMA licenses?

242. The Court has found that the failure to join NEMA in this Petition, the body whose main functions include coordinating the various environmental management activities being undertaken by the lead agencies, is fatal, in so far as establishing that NEMA did not comply with environmental laws and procedures while issuing the EIA licenses, and especially on the principle of public participation.

243. There is a contention that the project is likely to affect the environment because of lack of a sewer system within the concerned area. In answer, the 13th Respondent avers that it has received approval to construct a Privately Developed Sewer (PSD) extension which will connect to the main Nairobi City Water & Sewerage Company (NWSC) Ltd sewer line.

244. The Petitioners however contend that the sewer line has never been constructed because none of the residents have given consent or wayleave for the sewer line to be constructed on their property, despite

the drawing of the sewer line showing it will have to pass through several neighboring properties. The Petitioners allege that it is only the 12th Respondent's consent is shown to have been sought.

245. The evidence on record shows that vide the letter of 8th June 2021, the NWSC approved the construction of a sewer system. This approval was extended vide the letter of 24th May 2023 renewing the sewer line application. Finally, the letter of 25th October 2024 confirms that upon supervision by NWSC, they were satisfied that the sewer line construction works had been done satisfactorily. The claim of violation of the right to a clean and healthy environment on the basis of lack of a sewerage system has thus been disproved.

246. Additionally, the Petitioners appear to be introducing new contests through their further affidavit. In the Amended Petition, the Petitioners had stated that the sewer line had not been constructed as there was no consent that had been granted for its construction through the Petitioners' or members of Taza Lane resident association.

247. When confronted with the approval, the Petitioners now say construction was done contrary to an existing order, forcefully and that the sewer line is affecting their property. The Court will disregard this argument and all the related evidence as the claim is at variance with the Amended Petition.

248. The next contention is that the NEMA violated the Petitioners' right to a clean and healthy environment by failing or refusing to recall and/or cancel Licence No NEMA/EIA/PSL/9860. On this, again, the Court notes that NEMA was never made a party to the proceedings. NEMA has, therefore, not been given an opportunity to defend its actions. To make any findings, adverse or otherwise, against NEMA would be contrary to trite law that a party should not be condemned unheard. This ground is thus disregarded.

249. On the allegation of violation of the right to life protected under Article 26 of the *Constitution*, the Petitioners contend that the structure and building developed and constructed on the subject property is big and an obvious risk to the lives of the Petitioners, Taza Lane residents and the general public now and in the many years to come.

250. Further, that by undertaking the construction of the building on the subject property in breach and in contravention of the *Physical and Land Use Planning Act*, EMCA and NCA Act, the 12th to 19th Respondents have denied, violated or infringed and continue denying, violating and infringing on the Petitioners, Taza Lane residents and the general public's right to life.

251. This claim, on its own, cannot succeed. The right to life is intrinsically associated with the right to a clean and healthy environment. The court has found that infringement of the aright to a clean and healthy environment has not been proved. Further, the Petitioners have not adduced any independent report to show the dangers that the construction poses to the residents of Taza Lane, and the public.

252. The Petitioners contend that their right to information has been violated, infringed and breached and continues being denied, violated, infringed and breached by the 1st, and A1st to 11th Respondents' failure to provide them with information that would have assisted them file the relevant complaints and appeals before the relevant authorities.

253. According to the Petitioners, vide their letter of 14th October 2021, the Petitioners sought to know from the 1st, A1st, and 2nd Respondents the authenticity of the documents which were said to have originated from the Respondents. The documents that needed authentication included the construction permit over plan no CPF-AU 165 dated 15th October 2020; architectural plans for construction of residential apartments on the suit property approved and numbered CPF0-AU 165; letter dated 10th September 2020 granting authority to carry out demolition works on the suit property;

notification of approval of development permission PRN: PPA-CU-AAB803; and a construction permit invoice no INV 30131.

254. Further, the Petitioners say that the 1st Respondent responded to them through their response of 3rd November 2021, where the 1st Respondent confirmed that the letter dated 10th September 2020 granting authority to carry out demolition works on the suit property did not originate from them. Other requests were not granted to the Petitioners until the Office of the Commission on Administrative Justice was involved.

255. In a letter dated 7th April 2022, the 1st Respondent confirmed that the architectural plans had been approved on 13th September 2020 and in a subsequent letter of 14th April 2022, advised the Petitioners to visit its offices to have access to the approved architectural plans. The 1st Respondent has proceeded to adduce evidence that demonstrates that the project owner advertised the change of user and erected signages on the suit property.

256. Regarding the 8th Respondent, the Petitioners requested information from the Authority on whether the documents the project owner was using to conduct the project construction were authentic. It is only when the office of the Commission on Administrative Action got involved that the 8th Respondent, through the letter of 8th February 2022, confirmed to the Petitioners that they did not have the documents and that they relied on the documents in possession of the 1st Respondent.

257. The 8th Respondent has demonstrated that it responded to the Petitioners' concerns as and when they were raised. For instance, in response to the Petitioners' letter of 4th October 2021 on, inter alia, legality of the compliance certificate, the 8th Respondent replied through theirs of 8th October 2021 informing the Petitioners that the project was registered in compliance with the law.

258. Under Article 35 of the *Constitution*, the right to access information is provided as follows:

> " Every citizen has the right of access to-
>
> (a) information held by the State; and
>
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

259. The *Access to Information Act* was enacted in 2016 to give effect to Article 35 of the *Constitution*. Section 4 thereof provides as follows:

> "(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
>
> (a) the State; and
>
> (b) another person where that information is required for the exercise or protection of any right or fundamental freedom.
>
> (2) Subject to this Act, every citizen's right to access information is not affected by—
>
> (a) any reason the person gives for seeking access; or
>
> (b) the public entity's belief as to what the person's reasons are for seeking access.

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

(5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information."

260. Section 5 requires public bodies such as the 1st and 8th Respondents to provide access to information in the following words:

"(1) Subject to section 6, a public entity shall—

(a) facilitate access to information held by such entity and which information may include—

(i) the particulars of its organization, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision-making process, including channels of supervision and accountability;

(iv) salary scales of its officers by grade;

(v) the norms set by it for the discharge of its functions;

(vi) guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; and

(vii) a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person;

(b) during the year commencing on first January next following the first publication of information under paragraph (a), and during each succeeding year, cause to be published statements updating the information contained in the previous statement or statements published under that paragraph;

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in

particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;

(d) provide to any person the reasons for any decision taken by it in relation to that person;

(e) upon signing any contract, publish on its website or through other suitable media the following particulars in respect of the contract entered into—

(i) the public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference;

(ii) the contract sum;

(iii) the name of the service provider, contractor or individual to whom the contract has been granted; and

(iv) the periods within which the contract shall be completed.

(2) Information shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used.

(3) At a minimum, the material referred to in subsection (1) shall be made available —

(a) for inspection by any person without charge;

(b) by supplying a copy to any person on request for which a reasonable charge to cover the costs of copying and supplying them may be made; and

(c) on the internet, provided that the materials are held by the authority in electronic form.

(4) Subsection (1)(a) shall come into operation twelve months after the commencement of this Act.

261. Further, section 9 provides for timelines of responding to a request for information as follows:

"(1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty-one days of receipt of the application.

(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.

(3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if—

(a) the request is for a large amount of information or requires a search through a large amount of inf ormation and meeting the stipulated time would unreasonably interfere with the activities of the information holder; or

(b) consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating—

(a) whether or not the public entity or private body holds the information sought;

(b) whether the request for information is approved:

(c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

(d) if the request is declined, a statement about how the requester may appeal to the Commission;

(5) A public officer referred to in subsection (1) may seek the assistance of any other public officer as the first mentioned public officer considers necessary for the proper discharge of his or her duties and such other public officer shall render the required assistance.

(6) Where the applicant does not receive a response to an application within the period stated in subsection (1), the application shall be deemed to have been rejected.

262. From the foregoing legal obligations, a request for information must be acted on with promptitude, with the law giving timelines for responding to requests for information. Where the requests are not acted on either with expedition or at all, then the right to access information has been violated.

263. In the case of Katiba Institute vs Presidents Delivery Unit & 3 Others [2017] eKLR it was stated thus:

> " In the present petition, although the letter seeking information was written on 17th August 2017 and delivered immediately thereafter, no response was received from the respondents, either giving access to information, or declining to disclosure and giving reasons for that. Section 9 of the Act states in no uncertain terms that the state or state organs should give information within 21 days or respond to the request within that period. This clear legal provision notwithstanding, no access to information was given or reason given; either that the respondents did not have the information or that they would not disclose the information and give justification for it...

From the facts of this petition precedents and the law, it is uncontroverted that the petitioner sought information in exercise of its constitutional right under Article 35. It is also clear that even though the law requires the public entity to respond to the request within twenty one (21) days on whether or not it is in possession of the information and will or will disclose, the respondents ignored the law.

The respondents were under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public. This is an inviolable constitutional right and that is clear from the language of Article 35 of the *Constitution*, and any limitation must meet the constitutional test and only then can one raise limitation as a ground for non-disclosure.

The Court of Appeal addressed the issue of respecting constitutional rights in the case of Attorney General v Kituo cha Sheria & 7 others [2017] eKLR and stated;

> " The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."

The above statement captures the essence of the petition before me that the respondents were under obligation to obey the law and allow the petitioner access information or where not possible give reasons for that. They failed in both instances thus violated the petitioner's rights under the *Constitution* and the law.

We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused.

From my evaluation and analysis of the facts and evidence in this petition, and submissions by counsel for the parties and bearing in mind precedent and the law, I come to the inescapable conclusion that the respondents violated the petitioner's right of access to information and that no effort was made to justify this violation. For that reason, I am equally satisfied that the petitioner has proved its case to the required standard and must succeed."

264. The Petitioners formally requested for information from the 1st, A1st and 2nd as well as the 8th Respondents. However, contrary to the explicit requirement of the *Constitution*, the said Respondents did not adequately respond to the Petitioners either in time or at all.

265. This is a clear violation of the right to access information which the Petitioners required so as to exercise their right to challenge the proposed developments in the right forum. However, to the extent that the Petitioners have been allowed by this court to ventilate their case, based on the documents that had not been availed to them, the denial of those documents has not prejudiced their case herein

266. The Petitioners aver that their right and fundamental freedom to privacy has been denied, violated, infringed and breached and continues being denied, violated, infringed and breached by the 12th to 19th Respondents singularly, jointly and/or severally.

267. The Petitioners have however not demonstrated how their right to privacy has been violated or is threatened by the 12th to 19th Respondents against whom they claim.

268. Equally, the claim that NEMA has violated the Petitioners' right to privacy by aiding and abetting the construction of a multi-residential apartment building has no basis on two counts. First, NEMA is not a party to these proceedings. Second, nothing has been adduced to demonstrate how NEMA's actions or inaction have violated the Petitioners' right to privacy.

269. In conclusion, I find the Amended Petition unmeritorious. Considering that the Amended Petition is in the form of a public interest litigation, I shall not award costs.

270. For those reasons, the Amended Petition dated 6th November, 2023 is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF DECEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Wageni for Petitioners

Mr Bashir for 13th, 14th, 15th and 16th Respondents

Mr. Bashir for Ms Njenga for 17th and 18th Respondent

Ms Ogolla for 8th – 11th Respondents

Ms Mwangi for Mr. Baka for 1st, 3rd, 4th, 5th and 6th Respondents

Ms Jepchirchir for Ms Gichuhi for 12th Respondent

Court Assistant - Tracy