REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO 13 OF 2016

JOHN KABUKURU KIBICHO (CHAIRMAN)……1ST PETITIONER

MICHAEL G KARIGO (TREASURER) .....2ND PETITIONER

(Suing on their own name and on behalf of the

MILIMANI RESIDENT (NAKURU) WELFARE ASSOCIATION)

AND

COUNTY GOVERNMENT OF NAKURU….....1ST RESPONDENT

MERATI INVESTMENT LIMITED…….....…….2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....3RD RESPONDENT

JUDGMENT

(Suit to stop the development of flats within a residential area; claim that the change of user was irregularly granted; claim that approval from NEMA was improper; property initially planned as a single dwelling unit; developer applying for change of user to multiple dwelling units; petitioners having made an objection to the change of user; the objection never considered by the County Government before granting approval for change of user; EIA report not indicating who was among the residents interviewed; the objection of the petitioners needed to be heard; licences improperly issued and cancelled; development stopped until the objection is properly heard and a proper EIA conducted)

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a Constitutional Petition that was filed on 21 March 2016 and amended on 11 April 2016. The Petitioners have sued on their own behalf and on behalf of the Milimani Resident (Nakuru) Welfare Association, which is a society registered under the Societies Act (CAP 108) Laws of Kenya. Its members are said to be registered owners, tenants, and licencees of various properties situated in Milimani Estate within the Municipality of Nakuru in Nakuru County. The 1st respondent is the County Government of Nakuru. Its mandate includes planning and approval of developments within Nakuru County. The 2nd respondent is a limited liability company, in the real estate

development business; whereas the 3rd respondent, the National Environmental Management Authority (NEMA) is the body established by the Environment Management and Coordination Act, 1999 and vested with the responsibility inter alia of management of the environment. Part of its mandate is to issue Environmental Impact Assessment Licences (EIA licences) to projects.

2. What prompted this petition is the decision by the County Government of Nakuru and NEMA to issue planning and an EIA licence respectively, to the 2nd respondent to commence a multiple storey development (flats) within the Milimani residential area of Nakuru. The site where the project is situated is within the land parcel Nakuru Municipality/ Block 11/ 53 (hereinafter the suit property) which land had initially been planned to accommodate a single dwelling unit and which did have a single residential house. The said land is currently owned by the 2nd respondent.

3. On 27 October 2014, the 2nd respondent made an application for change of user to the 1st respondent so as to change the user of the said land from a single residential dwelling unit to multiple storey residential units. The plan was to develop 32 flats accommodated in four storeys. On receipt of the application, the 1st respondent proceeded to place an advertisement of the application for change of user in the Standard Newspaper of 16 April 2015. The said advertisement called for any objections to be made within 14 days.

4.The petitioners aver that this is the first time they came to know of the said development. They were not happy with the proposed development, on the contention that the Milimani residential area has always been a low density residential area. They also argued that the sewer system in place cannot sufficiently contain the intended increase in residences and that there would be further nuisance from noise and pollution. On 17 April 2015, the petitioners wrote to the 1st respondent making a formal objection to the proposed change of user. In the letter they hoped that the proposed change of user would be rejected and sought that communication on the same be copied to them. A further objection was also made on 15 June 2015 by one David Karanja, the owner of the land parcel Nakuru/Municipality Block 11/54, which from the numbering of the land parcel numbers, I believe is the land parcel that abuts the suit property.

5. The petitioners claim that despite their objections, the project was approved by the 1st and 3rd respondents. They aver that the decision was made in gross violation of various of their constitutional rights.

6. In this petition, the petitioners have sought the following orders :-

(a) A declaration that the decision in approving the change of user by the 1st respondent of plot number Municipality Block 11/53 Milimani Nakuru County was opaque, clandestine, capricious, whimsical and contrary to Article 42, 47, 66, and 68 of the Constitution of Kenya hence unconstitutional consequently null and void.

(b) A declaration that the approval by the 3rd respondent of the re-development of the aforesaid property by the 2nd respondent amounted to dereliction of its obligations and was therefore a violation of Article 42 of the Constitution of Kenya.

(c) A declaration that the actions above of the respondents contravened Articles 10, 42 24, 47 and 73 of the Constitution.

(d) A declaration that the 1st respondent has abdicated its duty to respect and uphold the Constitution of Kenya in its administrative actions contrary to Article 47 (1) and (2) of the Constitution.

(e) An order by the Honourable Court under Article 70 of the Constitution cancelling the licences, approvals and or permits issued by the 1st and 3rd respondents to the 2nd respondent in respect of the re-development of Nakuru Municipality Block 11/53 and directing the 2nd respondent to discontinue to project (sic) altogether and take restorative steps in respect of the plot and the environment.

(f) Costs incidental to this Petition.

(g) Any other reliefs that this court may deem fit.

7. The 1st respondent in its replying affidavit sworn by Robert Kiprono Rutto, the County Director of Land and Physical Planning, has averred that no valid or legally grounded objection was raised by the petitioners within the 14 days period provided in the newspaper advertisement. However, he does admit the objection of the petitioners dated 17 April 2015 and that of David Karanja dated 15 June 2015. The latter was argued to have been made out of time. He has averred that the County Technical Committee, which is the body within the County Government of Nakuru that reviews development applications, met on 13 May 2015 and approved the application for change of user subject to submission of building plans. A copy of some minutes were attached. In compliance, the 2nd respondent did submit the building plans, and the application for change of user was formally approved on 8 July 2015. He has deposed that he was mandated by the Technical Committee to inform the petitioners of the approvals and the basis informing the decision which responsibility he maintains he carried out.

8. He has pointed at an annexture RKR IV, which are copies of minutes. He has deposed that the Committee observed that the objection of the petitioners was based on the first zoning plan for Nakuru prepared in the year 1929 through which the lower Milimani area was classified as low density and planned as a single dwelling area. He has stated that all physical development plans have a specific scope of five, ten, fifteen and twenty years meaning that planning regulations do change depending on development trends. He has averred that currently the 1st respondent relies on the Nakuru Strategic Structure Plan which was prepared in the year 1999 and approved on 4 April 2000. He has mentioned that the plan has a span of 20 years which will expire in the year 2020 and that according to the Plan, the Lower Milimani area is planned for densification. It is his view that the suit property is located in the Lower Milimani area. He has contended that the objection of the petitioners had no legal basis as the zoning of Nakuru Town relies on the Strategic Structure Plan of 1999. He has further contended that they did follow the provisions of the Physical Planning Act, in approving the development. He raised an objection to the jurisdiction of this court on the ground that the petitioners did not invoke the provisions of Section 10 of the Physical Planning Act, and first make a complaint to the National Physical Planning Liaison Committee or its equivalent.

9. On its part, NEMA, through the replying affidavit of Omondi Were, the County Director of Environment in Nakuru County, deposed inter alia that on 15 July 2015, it was furnished with an EIA Project Report for consideration. NEMA then wrote to lead agencies for their comments, through a letter dated 27 July 2015, but none of the lead agencies responded. He has deposed that the officers of the 3rd respondent reviewed the EIA report and found that it provided comprehensive and adequate measures to mitigate any negative impacts on the environment. After being satisfied, they did issue an EIA licence to the project. He stated that they did follow all laid down rules and procedures before issuing the EIA licence.

10. The 2nd respondent on its part, has opposed the petition through the replying and supplementary affidavits sworn by Jayesh Motichand Dodhia, a Director of the 2nd respondent company. He has stated that the company is already in the process of putting up the proposed apartments and that prior to commencing construction, it did follow the law in obtaining all regulatory approvals. He has pointed out that the application for change of user was advertised in the Standard Newspaper of 16 April 2015. He

has deposed that he was advised by the 1st respondent that no objection was raised and the application was later approved.

11. The 2nd respondent engaged an expert to carry out an EIA report which was done and he annexed the same to his affidavit. He has averred that the report notes that no neighbour raised any objection and that the majority of the neighbours are of the view that it is a good project. An EIA licence was then issued. The 2nd respondent also applied for approval of the National Construction Authority which was granted. Approval was also given from the 1st respondent's Physical Planning Department and Public Health Department. According to him, at no time were objections ever raised by the petitioners or any other person and none was brought to their attention.

12. In November 2015, they commenced construction and did place an advertisement in the Daily Nation newspaper of 9 November 2015 that they would be conducting a ground breaking ceremony. No objection followed the said advertisement. He has averred that the company has procured financing of about Kshs. 230 Million from a bank; that the construction is advanced and this is prone to bring in a legal tussle with the contractor; that some of the apartments have already been booked and this petition may plunge him to a legal tussle with the purchasers; and that it was unconscionable for the petitioners to wait this late to bring the petition six months after the ground breaking ceremony. He has argued that the development is not unique in Milimani as there are other flats in the neighbourhood and other storied developments. He has stated that the issue of sewer and drainage is addressed and the same was found fit. He has stated that the construction is only of 3 storeys, the ground floor and two upper storeys. He has also questioned the capacity of the petitioners and believes that they are not speaking for the majority of the members of Milimani residents. He annexed some letters from persons who own properties in Milimani area and who have no objection to the project.

13. In this petition, the petitioners have cited violations of Articles 10 (2) (b), 10 (2) (c) ,35, 42, 47 (1), 47 (2), 48, 50, 60 (1), 66 (1), 69 (1) (d), and 70 (1) of the Constitution.

PART B: SUBMISSIONS OF COUNSEL

14. In his submissions, Mr. Kisilah, learned counsel for the petitioners, inter alia submitted that the petitioners have locus standi and has cited Section 3 (4) of EMCA. On jurisdiction, he submitted that this court has jurisdiction and the issues raised here go beyond the Physical Planning Liaison Committee. He submitted that the objection of the petitioners to the change of user, was tendered within 14 days of the advertisement, but the same were nonetheless ignored. He submitted that no opportunity was granted to the objectors to be heard and neither were they responded to. To him, the change of user was not legitimate and he argued that there was violation of Sections 41 (3) as read together with Section 52 of the Physical Planning Act. He underlined that the same provide for notice in at least two local daily newspapers, one in English and the other in Kiswahili, and that copies of the application for change of user were to be served on every owner of property adjacent to the land to which the application relates. He submitted that there was no compliance with these provisions. He relied on the case of ***Republic vs Town Planning Committee of the City Council of Nairobi & 2 Others, Misc. Civil Case No. 753 of 2007***. He recalled that these provisions give life to the Constitutional right of Fair Administrative process provided for in Article 47 of the Constitution.

15. He maintained that no response was given to the objections of the petitioners and they were denied the right to be heard. He asserted that it was important for there to be public participation and that this right was violated. He relied on the case of ***Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) (2006) ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)*** as cited in the case of ***Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others***

(2014) eKLR; and ***Commissioner of Lands vs Kunste Hotel Limited (1997) eKLR***. He submitted that the minutes annexed by the 1st respondents are not even witnessed by the Chair. He argued that there is no evidence that the strategic plan annexed by the 1st respondent is in use and that the same was a mere proposal. He submitted that the Physical Planning Act, requires that such plan be gazetted and there was no proof of this.

16. Counsel expounded that the project was out of character with its surroundings and needed an EIA to be done, but one was only done after approval of the project contrary to Section 36 of the Physical Planning Act. He maintained that it was a blatant lie, that the views of the adjacent land owners were sought during the EIA exercise, and argued that the exercise was only done as a formality. He submitted that there would be noise pollution due to additional traffic and also air and soil pollution. He was of the view that the existence of other similar projects is no justification to allow the project to stand. He asked this court to uphold the principles of sustainable development and the precautionary principle.

17. Mr. Kisila further submitted that the petitioners' right to a clean and healthy environment were violated and also the right to fair administrative action. He further argued that there was a breach of legitimate expectation. He asked that the petition be allowed.

18. On the part of the 1st respondent, Mr. Munene Chege, learned counsel, submitted inter alia that this court has no jurisdiction as the Physical Planning Act, establishes a mechanism for resolving such disputes. He pointed me to Section 7 of the Act, which establishes Physical Planning Liaison Committees. He explained that under Section 13, a person aggrieved by a decision concerning any development plan has a right of appeal within 60 days to the respective liaison committee. He relied on the case of ***International Centre for Policy and Conflict vs AG & 4 Others*** (full citation not given and copy not annexed) as authority that the court ought to exercise restraint and first give opportunity to other relevant bodies or state organs to deal with the dispute. On the right to be heard, he maintained that the objection by David Karanja was out of time. He submitted that the objection of the petitioners was based on a plan of 1929 which has been overtaken by that of 1999. He was of the view that Section 41 of the Physical Planning Act, provides for publication of notice of change of user and service on adjacent property owners only, when there is opinion that the change of use would have an important impact on contiguous land or does not conform to conditions registered against the title of the property. He pointed out that the petitioners have not annexed any report to show that the project has an impact on adjoining land. He submitted that all approvals were properly given. He was of the view that there is no law which requires an EIA before a change of user is given. He submitted that the petitioners have failed to show how the project violates their constitutional rights and cited the case of ***Anarita Karimi Njeru*** and ***Trusted Society of Human Rights Alliance vs AG & Others, High Court Petition No. 229 of 2012*** (copies not annexed). He closed by stating that the petitioners are guilty of undue delay given the time lapse.

19. For the 2nd respondent, Mr. Matiri, learned counsel, submitted inter alia that the petitioners had a duty to show that they are legally constituted. He stated that a letter written by them to the Registrar of Societies elicited no response. He asserted that the 2nd respondent as proprietor has the right to deal with its property as it desires subject to obtaining the requisite approvals. It was his view that there was adequate public participation; and that the approvals were properly given after due compliance with the law. He pointed out that the authorities actually scaled down the project from 5 to 3 storeys. He submitted that the Government passed a policy authorizing change of user of the area from single density to medium density in the year 2005 and that the residents of Milimani have severally applied for change of user. He thought there is nothing unique in the development of the 2nd respondent. He was of the opinion that the petitioners have not demonstrated how their constitutional rights have been violated. He supported Mr. Munene's submissions that the petitioners first ought to have complained through the

Liaison Committees provided for in the Physical Planning Act. He maintained that the 2nd respondent complied with all statutory provisions.

20. I have not seen any submissions filed by the 3rd respondent.

PART C: SITE VISIT

21. After the submissions of the parties, I retired to write this judgment. It however occurred to me, after going through the petition and the responses, that it was necessary for me to visit the suit premises. A site visit was organized and I did have occasion to visit the site in issue. The visit did give me a good visual of the nature of the project and the surrounding environment. It was explained to me that the initial project was to have 32 flats in four storeys but this was scaled down to 24 units in three storeys. They are designed to be in four blocks, two facing each other. The units are three-bedroomed with an attached servant quarter (popularly known with the abbreviations DSQ).

22. From what I could see, it is correct to state that the project is out of character with its sorroundings. The area where the project is situated is enveloped by single dwelling units within large compounds, about one acre or so, in my estimation. Across the road after about one block, is a storey building housing a hotel by the name of Graceland Hotel, and a block of apartments about 3 storeys high. Apart from this block, every other development, as far as the eyes could see, are single dwelling units in fairly elaborate compounds. There was mention of a Capital Hill Hotel, which was said to be multistoreyed and within the vicinity, but this was not visible from the project site. The neighbours to the left and right of the project are single dwelling bungalows. I took a bit of time to have a visual of these bungalows, viewed from the project site, and it was clear to me that their privacy is completely lost, for the project towers over these houses. The boundary between these compounds and the project is stone walled. From the edge of the blocks to the wall is a very narrow strip, which is not enough to plant trees to shield these bungalows from view. To the front of the project is a dust road, and to the rear is the water treatment plant owned by the Nakuru County. That is the nature of the project that the petitioners are opposed to.

23. I also took in some submissions on site from Mr. Kisilah and Mr. Matiri. Mr. Kisilah explained that the multiple storey building across the dirt road, where Graceland Hotel is situated, is a unique development, for this is where the shopping center for Milimani area is situated. He stated that it was a one off development. He wondered what would happen if a project such as this is allowed and argued that the home owners here have paid a premium to have the area maintained as it is. Mr. Matiri, did not think that the Graceland Hotel site is a shopping centre. He was of opinion that the project therein is even of much higher density than the proposed project. He submitted that the developers have taken care of all concerns including the sewer system. I was actually informed that there would be a biodigester within the site of the project.

PART D: ANALYSIS AND DECISION

24. Having considered all factors, the following issues are open for consideration.

(*i) Whether this court has jurisdiction to entertain this petition.*

(ii) Whether the petitioners have locus standi.

(iii) Whether a proper EIA was conducted.

(iv) Whether the process of planning approval was lawfully adhered to.

(v) Whether there was a violation of the petitioners' constitutional rights.

ISSUE 1: Whether this court has jurisdiction.

25. I think it is necessary that I first deal with the issue of jurisdiction. It has been argued that this court does not have jurisdiction and that the petitioners ought to have channeled their complaint to the Liaison Committees established by the Physical Planning Act. There can be no dispute that the Physical Planning Act does have Liaison Committees that handle appeals from planning decisions. At national level, there is the National Physical Planning Liaison Committee; for Nairobi, there is the Nairobi Physical Planning Liaison Committee; for each District, there is the District Physical Planning Liaison Committee; and for each Municipality, a Municipal Physical Planning Liaison Committee. Their functions are set out in Section 10 of the Act which provides as follows :-

Functions of Liaison Committees

(1) The functions of the National Physical Planning Liaison Committee shall be—

(a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee;

(b) to determine and resolve physical planning matters referred to it by any of the other liaison committees;

(c) to advise the Minister on broad physical planning policies, planning standards and economic viability of any proposed subdivision of urban or agricultural land; and

(d) to study and give guidance and recommendations on issues relating to physical planning which transcend more than one local authority for purposes of co-ordination and integration of physical development.

(2) The functions of other liaison committees shall be—

(a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;

(b) to enquire into and determine conflicting claims made in respect of applications for development permission;

(c) to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land;

(d) to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguarding areas; and

(e) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.

26. Under Section 13 of the Physical Planning Act, a person has a right to appeal a planning decision to the relevant Liaison Committee "within 60 days of receipt by him of notice of such decision." Under Section 15, any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed. The National Liaison Committee has the right to reverse, confirm or vary that decision.

27. The substantive issue in this suit concerns a planning permission that allowed a change of user of the suit property. I agree with the respondents on the argument that a person faced with a planning decision, has a right to appeal that decision to the Liaison Committees. However, I do not agree with the contention that the petitioners herein ought to have channeled their grievance to the Liaison Committees. They had absolutely no opportunity to do so. In as much as the 1st respondent deposed that the petitioners were informed of the decision allowing the change of user, I have no proof of such. I have not seen any letter or any form of communication from the 1st respondent to the petitioners, informing them that their objection against the change of user was rejected. If there was such communication, then the issue of the petitioners not channeling their grievance through the Liaison Committees would probably have had some weight.

28. But how did the respondents expect the petitioners to pursue an appeal to the Liaison Committees when they had no notice of the decision approving the change of user " The respondents cannot be allowed to use their own failure to communicate their decision, to shut out the petitioners from accessing this court, yet their failure to communicate, effectively barred the petitioners from appealing their decision to the Liaison Committees within the stipulated time. Having not been notified of the decision, the petitioners could clearly not have accessed the Liaison Committees within the statutory period. I therefore do not agree with the respondents that the petitioners had the avenue of presenting their grievance to the Liaison Committees and I cannot allow the respondents to use their own omissions to slam shut the door of justice in the face of the petitioners. I do hold that the petitioners had a right to access this court.

29. I do not think there is serious argument that this court cannot hear a dispute such as this. This dispute is before the Environment and Land Court which is the court established on the strength of Article 162 (2) (b) of the Constitution, with mandate to hear disputes concerning land and the environment. The jurisdiction is elaborated in the Environment and Land Court Act, 2011 which at Section 13 sets out the jurisdiction of this court. Section 13 (2) of the said statute provides as follows :-

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

30. The dispute herein is related to land use planning, or land administration and management, or is otherwise a dispute relating to environment and land. It follows that this court has jurisdiction to try the subject matter of this suit.

31. I am therefore of the view that this court has jurisdiction to try this suit and I dismiss the arguments that this court has no jurisdiction over this matter.

ISSUE 2: Whether the Petitioners have locus standi

32. The second preliminary issue raised is that the petitioners lack *locus standi* to present this suit. This point has been raised in the replying affidavit of the 2nd respondent and counsels addressed it in their submissions. From the petition, it is discernible that the petition has been brought by John Kabukuru Kibicho and Michael G. Karigo suing on their behalf and on behalf of Milimani Resident (Nakuru) Welfare Association which is a society. The two individuals are Chairman and Treasure of the Society. Now, there can be no question that the two individuals are capable of presenting a petition as they are persons in law. I also do not see the contention raised by the respondents on the capacity of the society. Societies have no legal personality of their own and ordinarily sue through their officials. That is exactly the scenario here and I see no problem with that.

33. On the issue of whether or not the Milimani Resident (Nakuru) Welfare Association is a registered society, I have seen the Certificate of Registration No. 32770 issued by the Deputy Registrar of Societies. It shows that the society was registered on 3 September 2010. I have seen the letter written by Mr. Matiri, counsel for the 2nd respondent, to the Registrar of Societies asking for particulars of the Association herein. It is in the affidavit of the 2nd respondent that the Registrar refused to give particulars on the basis that the petitioner has not filed Annual Returns since 2011. I have no proof of any such allegation as there is no such communication from the Registrar annexed to the affidavit of the 2nd respondent. What cannot be in doubt is that one of the petitioners is a registered society and it has sued through its officials who have legal capacity. My view is that the petitioners are properly before this court.

34. The petitioners are residents of Milimani estate where the development is taking place and the society is comprised of some persons who have an interest in land situated in this estate. To me they *have locus standi* to present this petition as they are the persons who feel most affected by the development. But it would not even matter if they were not personally affected by the development. This petition could as well have been filed by a person who is not even a resident of Milimani estate or even a resident of Nakuru County. This is because in our current law, it is not necessary for one to demonstrate that he stands to be directly affected by a project, or any other matter, which such person considers to be a threat to a clean and healthy environment. This is brought out by Articles 70 (3) of the Constitution and Sections 3 (4) of EMCA.

35. So that the context of Articles 70 (3) of the Constitution and Section 3 (4) of EMCA may be appreciated, I will set out the whole of Article 70 of the Constitution and Section 3 of EMCA. They are drawn as follows :

70. Enforcement of environmental rights

(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

EMCA Section 3: Entitlement to a clean and healthy environment

(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.

(3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—

(a) is not frivolous or vexatious; or

(b) is not an abuse of the court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—

(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of intergenerational and intragenerational equity;

(e) the polluter-pays principle; and

(f) the pre-cautionary principle.

36. As can be seen from the above, it is not necessary for one to demonstrate any personal loss or injury, before such person can be allowed to present a suit for the enforcement of environmental rights. So long as an individual is of opinion that a certain project or certain action or inaction, or certain acts or omissions, threaten or have potential to harm the environment, such person is free to approach the courts for redress.

37. It is therefore my view that the petitioners have *locus standi* to present this petition.

38. Having put away the two preliminary issues, I can now proceed to deal with the substance of the petition.

ISSUE 3: Whether a proper EIA exercise was conducted

39. The main quarrel of the petitioners is that despite raising objections to the project, which they consider to be harmful to the environment, their objections they were not given a hearing and were not considered before the decision to allow the project was made. They have also attacked the manner in which the EIA licence was issued as they state that they were not consulted. I choose will start with this latter issue of the EIA licence

40. I have seen the EIA report and have gone through it. I get the impression that it is a casually done report and not one done with keenness and finesse. I will just highlight one or two points which have lead me to this conclusion. At page 36 of the report is Chapter 8 and note 8.2.1 is the "No action alternative". It partly reads as follows :-

8.2.1 No Action Alternative

The selection of the "no action alternative" would mean the discontinuation of the project designs and

result in the site being retained in its existing form. Physically the site is unlikely to undergo any major changes from its condition at present since it will mainly be ranching based, as is the current local land practice…"

41. Now clearly, the site in issue was never a ranch. The site had a single dwelling house which was the original user of the property. Where the environmental "expert" got the idea that this was a ranch is strange to me. The issue of the site being a ranch , is also repeated at page 10 of the report.

42. Secondly, and this is important, is the questionnaires issued by the "expert". There are three questionnaires annexed to the report. They have no date. They bear no names of the persons interviewed. They bear no indication of the occupation of these persons or their years of settlement in the area. There are blank spaces where these details are supposed to be noted. It is therefore not known who was interviewed and when they were interviewed. There is no hint that the neighbours who live next to the project, or around the project, were ever consulted or what their opinions were. This lends credence to the assertion by the petitioners that they were not consulted and their views were not taken into account by the person who prepared the EIA report.

43. That is not the way in which an EIA report is to be conducted. It is a requirement that the persons around the project be consulted and their views be taken into account. This is specified in Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2013, which provides as follows :-

17. Public participation

(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—

(a) publicize the project and its anticipated effects and benefits by—

(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

(d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public

meetings for onward transmission to the Authority.

44. There is no indication that Regulation 17 above was complied with at all. It has not been suggested by the respondents, especially the 2nd respondent who is the proponent of the project, that there were any posters in strategic public places in the vicinity of the project, affixed so as to alert the public of the upcoming project during the EIA exercise. Neither was there any public advertisement in the newspaper inviting comments. Most importantly, there is no intimation of any meeting held with the surrounding community or the recording of any oral or written comments by any person who is within the vicinity of the project.

45. I get the impression that the EIA report was done clandestinely and was shrouded in secrecy. I am afraid that I cannot consider the three undated and anonymous questionnaires annexed to the EIA report as being compliant to Regulation 17 above. This was no doubt a major project that was out of character with its existing environment and it was absolutely necessary for the surrounding public to be well informed of the project during the EIA exercise and for their comments to be sought and considered in the report. I find that there was a violation of Regulation 17 in the manner in which the EIA report was done.

ISSUE 4: Whether the process of planning Approval was lawfully adhered to

46. The other point raised by the petitioners concerns the process of planning approval. It is not in question that the 2nd respondent did apply for a change of user of the site in issue. An advertisement was placed in the Standard newspaper of 16 April 2015. Save for the advertisement, nothing else was put up to inform the public of the project. It was argued by the petitioners that this contravened Sections 41 (3) and 52 of the Physical Planning Act. These provide as follows :-

41(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.

52. Publication of notice in newspapers

Every notice published in the Gazette under any of the provisions of this Act, except the notices published under sections 49 and 50, shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the Chiefs.

47. It was submitted on behalf of the petitioners, that there was no compliance with the above provisions. On behalf of the 1st respondent, it was argued that the petitioners have not annexed any report to demonstrate that the project had any impact on adjoining land.

48. My take on the provisions of Section 41 (3) is that if the project does not conform to the conditions attached to the title deed, then it is necessary that the application for approval, be served on every owner or occupier of adjacent property. A change of user is applied for because the intended use of the land is not in conformity with the conditions attached to the holding of the title. It is therefore among the applications that need to be served on owners or occupiers of adjacent property. A further notice also needs to be placed in the Gazette, and that being the case, and following the provisions of Section 52, a further notice needed to be done in two local dailies, one in English and the other in Kiswahili, and

another notice also be served on the Chief. That is what the law requires.

49. Even if we assume that the matter is based on the subjective opinion of the local authority, I do not see how it can be argued that a reasonable person addressing his mind to the issues, would have any other opinion, other than that there is potential for contiguous land to be affected. There has to be effect on adjoining land because the use of the land is now going to be different from the manner in which the neighbours are permitted to use their land. I already mentioned that at the site, it was obvious that the privacy of the neighbouring land was going to be severely curtailed, and there did not seem to me to have been placed any measures, such as planting of trees between the two compounds, if at all it is possible, to minimize this visual impact. The abutting land was clearly going to be affected.

50. There was only one advertisement in an English newspaper, but there needed to be two advertisements. The other needed to be placed in a Kiswahili newspaper. Neither was there a notice to the Chief. It is therefore my holding that there was a breach of Sections 41 (3) and 52 of the Physical Planning Act.

51. Moreover, I do not see how the respondents can argue that the objection raised by the petitioners, on the change of user, was ever considered. The view of the petitioners is that the area where the project is situated is zoned for single dwelling units. I think that point needed to be addressed by the respondents and the respondents needed to consider it by giving the petitioners a hearing. There was absolutely no consideration of their objection. The 1st respondent virtually threw before me some so called minutes, which are unsigned and unauthenticated, in an attempt to demonstrate that the objection of the petitioners was considered. First, I cannot consider what was placed before me to be authentic minutes of the 1st respondent for they are unsigned and uncertified. But even if I were to take them as proper minutes, I have not seen anywhere where the objection was debated and a decision reached as to why the objection was not valid. The nature of the objection also required that there be communication made to the petitioners so that they can consider whether to appeal the decision, for there is a right of appeal built within the Physical Planning Act, as seen earlier. I do not think that such objection was permissible to be dealt with and to be dismissed so casually. It was almost as if it was an irritation meant to be ignored.

52. It was mentioned that the petitioners have based their objection on a plan of 1929 that has already been overtaken. That needed to be advised to the petitioners upon receipt of their objection, so that they can argue whether or not the plan of 1929 still exists or not. I was shown an extract of a strategic structure plan developed by the former Municipal Council of Nakuru said to be of 1999. I was given only two pages of it, yet I can see from what was given to me, that the document is over 39 pages long. I am unable to comprehend how the 1st respondent thought that I can appreciate the document without the whole of it being tabled. Be as it may, there is no indication that the same was deliberated upon and approved in any forum, or that the same is the actual plan for Nakuru County. No Gazette Notice of the approved plan for Nakuru Town was ever shown to me by the 1st respondent. I am for the above reasons unable to consider the same as being the document that sets out the plan for Nakuru County.

52. I do hold the opinion, that there was a serious breach of the right of the petitioners to be heard when the 1st respondent dealt with the question of change of user.

ISSUE 5: Whether there was violation of the petitioners' constitutional rights

54. I have certainly found breaches of various statutory provisions. The question that I need to address myself is whether these breaches of statutory provisions also led to breaches of the Constitution for what is before me is a Constitutional Petition. The petitioners have sought a specific declaration that the

actions of the respondents violated Articles 10, 42, 24, 47, 66, 68 and 73 of the Constitution.

Article 10 holds the national values and principles of governance. Article 42 establishes the right to a clean and healthy environment. Article 47 provides the right to fair administrative action. Article 66 touches on regulation of land use and property. Article 68 deals with legislation on land. Article 73 inter alia provides that the authority assigned to a public officer is a public trust and involves accountability to the public for decisions and actions. I have not seen the relevance of Article 24 which sets out the limitations to the exercise of fundamental rights and freedoms, and Mr. Kisilah did not elaborate in his submissions, on why the said provision was thought relevant in this case.

55. On my part, I think there was a breach of the right to fair administrative action in the manner in which the objection of the petitioners was casually brushed away. I also hold the view that the authorities failed in the executing their tasks as required of Article 73 of the Constitution. There is no evidence that the objection was debated or even given thought. The nature of the project that was at hand required that there be public participation. There was none in this case. Public participation is one of the key tenets that underpin our national values and principles of governance as outlined in Article 10 (2) of the Constitution. The whole of Article 10 of the Constitution is drawn as follows :-

10. National values and principles of governance

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

56. It will be observed from the above that while interpreting the Constitution, we are to consider these national values and principles of governance. These principles include participation of the people as well as good governance, integrity, transparency and accountability. These values are supposed to be in the DNA of public officers and are to be applied when making decisions in the course of their duties. I do not see how it can be argued that the cavalier and indifferent manner in which the petitioners' objection to the project was handled can be said to pass the test of Article 10 of the Constitution.

57. Participation of the people is key in safeguarding the environment. This is indeed emphasized in international instruments and practice. The same is emphatically pronounced in Principle 10 of the Rio

Declaration on Environment and Development (1992) which is drawn as follows :-

"Environmental issues are best handled with 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 process. 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."

58. The above is also echoed in the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters. Of significance to our situation is Guideline 11 which is drawn as follows :-

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

59. It is imperative that those in administration be keen when faced with objections to projects, where the objectors hold the view that the project may compromise the environment. This court cannot permit authorities to deal so nonchalantly with such objections. Such objections need to be taken seriously and need to be considered. Public participation especially when it comes to EIAs is extremely critical and cannot be treated as a formality or inconvenience. It is at the very core of any EIA exercise.

60. In the case of ***Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others, Nakuru ELC Constitutional Petition No. 50 of 2013,*** I held the opinion that *"where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment."*

61. I am still of the above opinion. In the circumstances of this case, the petitioners have demonstrated breaches of procedures both in EMCA and in the Physical Planning Act. Given these breaches, I do not see how it can be submitted that the 1st and 3rd respondents have properly convinced themselves that the project is one that is in conformity with the law or is one that is not harmful to the petitioners' right to a clean and healthy environment.

62. For the above reasons, I am of the opinion that the petitioners have demonstrated that the project is one, that at the very least, has potential to cause harm to their right to a clean and healthy environment.

PART E: FINAL ORDERS

63. Before I go to the final orders which I think are fit for this case, I think it is important for me to dispel one issue which I thought the 2nd respondent based a lot of its reply on. The 2nd respondent went to great lengths to demonstrate that a lot of people in Milimani have no objection to the project. However, the issues herein cannot be simplified to be a contest of numbers between those who are for, and those who are against the project. I have not taken a vote on this, but even if those who are for the project outnumbered those who are against the project, or vise versa, that does not mean that the project must proceed or not proceed, based solely on that reason. It is not a contest to be won if a majority root for the project or a majority do not root for the project. Every project must be independently assessed on its merits following the law and procedures that have been outlined. There should be no short cut. Personal opinion is not the sole component upon which projects are to be approved. Even my own opinion, on whether or not the project herein should proceed, is not relevant. What is important is whether the law

was followed before allowing the project to proceed and I am of the view that the law was not followed, and because of that, the petitioners, however few they may be, and however unpopular in the neighbourhood they may be, have demonstrated that their right to a clean and healthy environment is in danger.

64. What orders therefore should I give " I have taken note of the various declarations that the petitioners have sought. Apart from these, there is a specific order seeking the cancellation of the licences, approvals, and or permits issued by the 1st and 3rd respondents to the 2nd respondent. There is also the order directing the 2nd respondent to discontinue the project and take restorative steps. I have considered all these.

65. I do hold the view that the petitioners are entitled to the declarations that they have sought, save that I will not declare a violation of Article 24 of the Constitution. On the question of cancellation of the licences, from the foregoing dicussion, of which I have spelt out my reasons, I am of the opinion that the EIA licence and the licence for change of user were not properly issued. There was breach of the provisions of EMCA, and the Physical Planning Act, as outlined in my discourse above. Having not been issued in accordance with the law, I am unable to allow these licences to remain in place. They are hereby cancelled.

66. I did observe that the development on the site has commenced. If the 2nd respondent is still keen on proceeding with the development, he must apply afresh for the licences that I have cancelled, within 3 months from the date hereof, and the 1st and 3rd respondents must hear all objections and all views of concerned residents and comply fully with the provisions of EMCA, the Physical Planning Act, the current plan of the area, and then make a proper, legitimate and reasonable decision, properly communicated, on whether or not the project should continue. If the 2nd respondent does not proceed as ordered above, within the time frame specified, then the 2nd respondent must restore the environment to the manner that it was before the project commenced.

67. The last issue is costs. I think all respondents were at fault in one way or another. The 1st respondent was wrong in not following the provisions of the Physical Planning Act and in not considering the views of the petitioners before allowing the change of user. The 3rd respondent was also wrong in issuing an EIA licence before being convinced that there was full compliance with the provisions of EMCA. The ultimate responsibility of ensuring that the project was in conformity with the law rested upon the 2nd respondent. The respondents will therefore shoulder costs jointly and/or severally.

68. I believe that I have dealt with all issues and now make the following final orders :-

(i) That a declaration is hereby issued, that the actions of the respondents in granting an EIA licence, and a Physical Planning licence for change of user, and allowing the project envisaged by the 2nd respondent in the land parcel Nakuru Municipality/ Block 11/53 contravened Articles 10, 47 and 73 of the Constitution.

(ii) A declaration is hereby issued that the failure by the respondents to fully comply with the provisions of the Environmental Management and Coordination Act, Chapter 387, Laws of Kenya, and the provisions of the Physical Planning Act, Chapter 286, Laws of Kenya, before issuing an Environmental Impact Assessment Licence and a change of user licence respectively, had the effect of breaching the rights of the petitioners' to a clean and healthy environment, or at the very least, had the potential to breach the petitioners' right to a clean and healthy environment as safeguarded by Article 42 of the Constitution and as given effect by Article 70 of the Constitution.

(iii) The Environmental Impact Assessment Licence and the Change of User licence issued to the 2nd respondent in respect of the land parcel Nakuru Municipality/Block 11/53, having been issued in contravention of the law, are hereby cancelled.

(iv) The 2nd respondent is at liberty to renew applications for the above licences within 3 months and, if such is made, the 1st and 3rd respondents are hereby ordered to ensure full compliance with the Constitution and all relevant statutes, and further ensure that the views and interests of the petitioners, and the owners and/or occupiers of contiguous land, are fully taken into consideration and any decision made be communicated to them with full reasons being declared.

(v) That if the 2nd respondent does not move as ordered above, an environmental restoration order will issue, directing the 2nd respondent to restore the site to the manner that it was before the commencement of the project.

(vi) The respondents shall bear the costs of this petition jointly and/or severally.

69. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of October 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence:

Mr. Chege for the 1st respondent

Ms. Ndungu holding brief for Mr. Matiri for the 2nd respondent

No appearance on part of the 3rd respondent

No appearance on part of M/s Sheth & Wathigo Advocates for the petitioners.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

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