REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E044 OF 2025

— BETWEEN —

CLAIRE KUBOCHI ANAMI (*Chairman*)
ALEX TITIO MUIRURI (*Secretary*)
KAVIT MEDIRATTA *(Treasurer)*
Suing as officials of
RHAPTA ROAD RESIDENTS ASSOCIATION ..... APPELLANTS

-AND-

COUNTY EXECUTIVE COMMITTEE MEMBER (CECM)
BUILT ENVIRONMENT AND URBAN
PLANNING, NAIROBI CITY COUNTY ..... 1ST RESPONDENT
THE NAIROBI CITY COUNTY ..... 2ND RESPONDENT
DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY ..... 3RD RESPONDENT
NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY ..... 4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT
MAWA DEVELOPMENT COMPANY LIMITED ..... 6TH RESPONDENT
WIMAX HOMES LIMITED ..... 7TH RESPONDENT
SHIMONI RESORTS LIMITED ..... 8TH RESPONDENT
HALE END PROPERTIES LIMITED ..... 9TH RESPONDENT
KANTI NARAN MANJI PATEL, NITABEN KANTI PATEL,
UMESH KALYAN NAVAN PATEL & NARENDRA
KALYAN PATEL ..... 10TH RESPONDENT
KANJI KUNVENJI PATEL, SAPNA MAVIN KERAI ..... 11TH RESPONDENT
HOLLOWAY LIMITED ..... 12TH RESPONDENT
SKY VALLEY VENTURES KENYA CO LTD ..... 13TH RESPONDENT
PATTERSON INVESTMENTS LIMITED ..... 14TH RESPONDENT
RHAPTA ROAD PLAZA LIMITED ..... 15TH RESPONDENT
CENTRAL LINK PROPERTY COMPANY LIMITED ..... 16TH RESPONDENT
GAUFF INGENIEURE GMBH AND COMPANY ..... 17TH RESPONDENT
LOVI VENTURES KENYA COMPANY LIMITED ..... 18TH RESPONDENT
PUNITA JAYANT ACHARYA &
JAYANT RAJNIKANT ACHARYA ..... 19TH RESPONDENT
MEDINA PALM DEVELOPMENT LIMITED ..... 20TH RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal at Nairobi (Musinga (P), Joel Ngugi & Odunga, JJ.A) delivered on 19th September 2025 in Civil Appeal No. E160 of 2025)*

Representation:

Mr. Elijah Mwangi, Ms. Mercy Njagi and Mr. Wanyoike for the Appellants
(Macharia, Mwangi & Njeru Advocates)

Mr. Muganda and Ms. Kinyua for the 1st Respondent
(Sagana Biriq & Muganda Advocates LLP)

Ms. Faith Odhiambo, Mr. Moses Owuor,
Ms. Rebecca Mogire and Mr. Ernest Nyerere for the 2nd Respondent
(Ombok & Owuor Advocates LLP)

Mr. Ngararu Maina for the 3rd & 4th Respondents
(Ngararu Maina Advocate)

Mr. Allan Kamau for the 5th Respondent
(Attorney General's Chambers)

Mr. Makori Ezra and Mr. Alfred Andiwo for the 7th, 13th, 16th, 18th & 20th Respondents
(Hamilton Harrisson & Mathews Advocates)

Mr. Wilfred Lusi for the 9th Respondent
(C M Advocates LLP)

Mr. Adan Mohamed for the 10th Respondent
(Wetangula Adan & Company Advocates)

Ms. Ogola holding brief for Mr. Kithinji Marete for the 14th Respondent
(Kithinji Marete & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal concerns the interpretation and application of various constitutional provisions dealing with planning, governance and management of urban areas and cities with specific reference to the city of Nairobi. The appeal has been brought pursuant to Article 163(4)(a) of the Constitution wherein the appellants are challenging the entire judgment of the Court of Appeal for, among other reasons, *"failing to promote intergenerational equity and environmental and constitutional rights, and overlooking environmental breaches and damages to the environment"* by endorsing the construction of high-rise developments

along Rhapta Road area. The approval of those developments, according to the appellants, was issued in a planning policy vacuum, and in blatant disregard of the law, zoning regulations, and planning framework, thereby contravening Articles 10, 42, and 69 of the Constitution.

[2] In deciding the question in controversy, both the trial and the first appellate courts based their respective decisions on the Nairobi City Development Control Policy, 2021 ***(the 2021 Policy)***, which the appellants themselves introduced in the pleadings, and which was in draft.

B. FACTUAL BACKGROUND

[3] The appellants, residents of Muthangari Sub-location within Kilimani Division, Nairobi County, complained that between July 2023 and March 2024, their neighborhood along Rhapta Road was experiencing a surge of high-rise developments, ranging from 17 to 22 floors, following approvals issued by the 1st to 4th respondents, in contravention of the existing permitted building heights. They were specifically aggrieved by approvals granted to the 6th to 21st respondents, who are the registered owners and developers of some of upcoming buildings. It was their case that their properties and surrounding areas were designated by the Nairobi City Development Ordinances and Zones, 2004 (the ***2004 Zoning Guidelines***), and the Nairobi Integrated Urban Development Master Plan (NIUPLAN), 2016 (***NIUPLAN***), as Zone 4, permitting developments of no more than four (4) floor levels.

[4] Regarding the 2021 Policy, it was the appellants contention that the same had not been approved by the Nairobi City County Assembly or subjected to public participation as required under Article 10 of the Constitution; that in the absence of a valid policy, the County Government had resorted to processing development applications based on discretion, practice, precedence, and planning justifications advanced by the developers, architects, and engineers; and that should this state of affairs continue, the unplanned developments will cause irreparable harm to the environment, by placing strain on the existing infrastructure, which in turn will result in violating the residents' rights to sustainable development and integrated land use under Articles 42 and 60(1) of the Constitution.

[5] Accordingly, it was the appellants' case that the approvals in question were inconsistent with Articles 10, 42, and 69 of the Constitution and therefore unlawful, null and void.

C. LITIGATION HISTORY

i. Proceedings before the Environment and Land Court (ELC)

[6] On account of those complaints, the appellants filed ***ELC Petition No. E030 of 2024***, seeking various conservatory, injunctive and declaratory reliefs against the respondents, jointly and severally. They also prayed for general and exemplary damages against the 2nd and 4th respondents (Nairobi City County and National Environmental Management Authority ***(NEMA)***), and costs of the petition.

[7] In response, all the respondents challenged the ELC's jurisdiction, contending that it had been invoked prematurely in contravention of the doctrine of exhaustion. They argued that, pursuant to Sections 61 (3) and (4) as read with Section 78 (a) of the Physical and Land Use Planning Act, ***(PLUPA)***, the appellants' grievances ought, in the first instance to have been lodged before the Nairobi City County Physical and Land Use Liaison Committee ***(Liaison Committee)***. Regarding the Environmental Impact Assessment ***(EIA)*** licences issued to the 6th to 21st respondents, it was argued that, pursuant to Sections 129 (1) and (2) and 130 of the Environmental Management and Coordination Act ***(EMCA)***, a dispute about such licences ought to be lodged in the National Environmental Tribunal ***(NET)***.

[8] For their part, the 7th, 13th, 18th, and 20th respondents as well as the 1st and 2nd respondents challenged the appellants' *locus standi* to institute the action. It was their case that the 2004 Zoning Guidelines were obsolete and inconsistent with both the Constitution and PLUPA; and that the 2021 Policy reflected the updated demographic realities, rapid urbanization, and the need for vertical housing solutions in the area; that the approvals were granted following technical evaluations, site visits, and compliance with applicable procedural requirements, including public participation. They denied any illegality or irregularity in the approval process. For these reasons, they urged the trial court to uphold the

operative regulatory regime, which emphasizes the County Executive's mandate in planning and zoning.

[9] NEMA, for their part, asserted that all the developers (6th to 21st respondents) duly submitted EIA reports, which were reviewed and licences duly issued; and that no evidence was presented to demonstrate any breach of licence conditions or of actual environmental harm. Accordingly, they argued that any challenge to such licences ought to have been pursued before the NET and not ELC.

[10] The 7th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 18th, 20th, and 21st respondents adopted a common position, namely, that they obtained development approvals lawfully and in full compliance with the law and due process; that they had no notice of any defect in or lack of governing planning policy; that the appellants' objections were rooted in resistance to change and amounted to an attempt to halt urban development, contrary to the constitutional principle of sustainable development. According to these respondents, the character of Rhapta Road has already transformed, with multiple high-rise developments in place, making it unrealistic to insist that the area retain a low profile of four floors. They criticized the appellants' reliance on the 2004 Zoning Guidelines, which in their view, was outdated.

[11] The 9th respondent, in particular, stated that its property lay in Zone 3C, not Zone 4, and that a maximum height of 20 floors was therefore permissible under the 2021 Policy. According to the 9th respondent, the appellants misclassified the area without relying on expert survey evidence to support their claims.

[12] Upon considering these arguments, in a Judgment delivered on 23rd January 2025, the trial court (*Angote, J*) identified five (5) issues for determination: *(i) Whether the ELC had jurisdiction to hear and determine the petition; (ii) Whether the appellants had the locus standi to file the petition; (iii) Whether the Petition met the specificity test; (iv) Whether the development approvals were granted in breach of the zoning guidelines and policies; and (v) Whether the EIA licences granted by the 3rd and 4th respondents in favour of the 6th to 21st respondents were lawfully issued.*

[13] On *jurisdiction,* the court acknowledged the doctrine of exhaustion but found that the Petition was multi-faceted, extending beyond the mandate of the Liaison Committee and the NET. It observed that the Petition raised constitutional questions, including alleged violations of the appellants' right to a clean and healthy environment, as well as the 2nd respondent's constitutional and statutory duty in the planning of Nairobi City County. In the circumstances, the court held that the remedies available before the Liaison Committee and the NET were neither efficacious nor adequate. For those reasons, the court ruled that the petition was properly before it and was exempt from the doctrine of exhaustion.

[14] Regarding *the appellants' locus standi*, the learned Judge held that the evidence established that the appellants are residents within the area affected by the respondents' developments, and therefore had standing to institute the Petition. The court further observed that, even in the absence of such residency, the appellants would still possess the requisite *locus standi* under Article 70 of the Constitution.

[15] As to *whether the Petition satisfied the specificity test*, the court found that the Petition met the standard set in ***Anarita Karimi Njeru Vs Republic*** (No.1) (1979) 1 KLR 154. While the dispute involved an alleged breach of policy, it also raised constitutional claims, including alleged violations of Articles 10, 42, and 69 of the Constitution, which were specifically pleaded.

[16] On *whether the development approvals were granted in breach of the zoning guidelines and policies,* the learned Judge, after undertaking a meticulous review of Nairobi's planning history, arrived at the conclusion that the 2004 Zoning Guidelines were outdated and no longer enforceable or binding under both the 2010 Constitution and the PLUPA; that NIUPLAN, adopted by the County Assembly on 5th July 2016, provided a broad spatial framework for urban planning and development within Nairobi City County, and was intended to be the blueprint guiding the development until 2030.

[17] The court further established that, although the County Assembly had not formally approved the 2021 Policy, the County Executive had consistently applied it in practice. In those circumstances, the court conceded that a policy vacuum

existed. To fill the vacuum, the court treated the Policy as the practical guide, notwithstanding its inchoate status. The court reasoned that draft policies may be relied upon for guidance where no formal policies exist; that such draft policies reflect the government's intent; and that courts may consider such policies when interpreting administrative actions, in order to avoid gaps on critical issues. Accordingly, the learned Judge held that the closest and most applicable framework guiding the 2nd respondent in approving development plans in Nairobi was the 2021 Policy.

[18] Relying further on that Policy, and noting that the exact location of about 10 properties could not be clearly ascertained, while some appeared to fall within different sub-county wards based on the EIA Study reports, the learned Judge turned to Google Maps, from which he found that all the suit properties were situated within Zone 4B, also known as "*Muthangari*". The actual location, according to the learned judge, was between Waiyaki Way, Riverside Drive, Ring Road Westlands, and Mahiga Mairu Avenue.

[19] Guided by the discovery, thanks to the Google Maps, the court held that, in view of their location, the permissible height of the developments undertaken by the 6th to 21st respondents could not exceed 16 floor levels, with a maximum ground coverage of 75% as provided for in the unapproved 2021 Policy.

[20] Lastly, on *whether the EIA Licences granted by the 3rd and 4th respondents in favour of the 6th to 21st respondents were lawfully issued*, the learned Judge was satisfied that they were both procedurally and substantively compliant. In his opinion, the EIA reports adequately addressed the social, economic, and environmental concerns raised by the appellants and incorporated appropriate mitigation measures. For the reasons aforesaid, the trial court concluded that the appellants had failed to prove that the issuance of the EIA licences was unlawful or that it infringed their constitutional right to a clean and healthy environment.

[21] In the end, the court partially allowed the Petition, and issued the following orders:

"(a) A declaration be and is hereby issued that the approvals for development permissions granted by the 1st and 2nd respondents with respect to the properties registered in the names of the 6th to 20th respondents, in so far as the number of floors is concerned, were granted in violation of the zoning provisions set by the 2nd respondent.

(b) A declaration is hereby issued that the development approvals issued to the 6th to 20th respondents by the 1st and 2nd respondents in respect of the suit properties enumerated above are hereby varied, limiting the number of floors to 16, subject to the County Assembly of Nairobi's decision while approving the 2021 Nairobi City Development Control Policy.

(c) A declaration is hereby granted directing the 1st, 2nd, 3rd, and 4th respondents, their agents, and or officers, to henceforth comply with Nairobi City County Development Control Policy, 2021 when granting development permissions to any developer in the Rhapta Road area within the Nairobi City County, pending the approval of the said policy by the County Assembly of Nairobi.

(d) Considering that the Petition is in the nature of public interest litigation, I decline to grant damages.

(e) Each party shall bear their own costs."

ii. Proceedings before the Court of Appeal

[22] Aggrieved by the foregoing decision, the appellants preferred an appeal to the Court of Appeal advancing no fewer than twenty-two (22) grounds, which in their written submissions were distilled into the following four (4) broad clusters:

i. *The learned trial Judge acted without jurisdiction by purporting to promulgate his own preferred development control policy on behalf of the 1st and 2nd respondents despite the finding that there was no such policy in place.*

ii. *The learned trial Judge erred in law and in fact in failing to analyze the evidence adduced at the trial and arrived at erroneous findings, including findings that there was no breach of environmental laws.*

iii. *The learned trial Judge erred in law and in fact in failing to grant orders requiring the 1st to 4th respondents to comply with the law and the Constitution. He erred in condoning a deliberate violation of the duties of the 1st to 4th respondents to comply with the Constitution.*

iv. *The learned trial Judge erred in failing to protect intergenerational equity and to protect the interests of future generations by failing to rein in the errant respondents.*

[23] The 9th respondent filed a Notice of Cross Appeal primarily challenging the trial court's finding that the location of its property was in *Muthangari Zone 4B* as opposed to *Rhapta Road Zone 3C.*

[24] In a judgment delivered on 19th September 2025, the appellate court (*Musinga (P), Joel Ngugi & Odunga JJ.A)* delineated the following (5) issues for determination:

(i) *Whether the ELC properly assumed jurisdiction in light of the doctrines of exhaustion and specialized statutory mechanisms under the PLUPA and the EMCA;*

(ii) *What was the legal status and force of the planning instruments invoked in the dispute?;*

(iii) *Whether the learned judge erred in treating the impugned properties along Rhapta Road as falling within Zone 4, whereas the respondents contend that they properly fell within Zone 3C;*

(iv) *Whether EIA licences issued to the 6th to 20th respondents were lawfully granted or were impugnable on grounds of irrationality, procedural unfairness, ultra vires action, or inadequate public participation; and*

(v) *What is the appropriate relief?*

[25] On the issue of *jurisdiction and doctrine of exhaustion,* the appellate court upheld the trial court's reasoning to the effect that, while the doctrine plays an important role in directing technical disputes to specialised fora, its application does not extend to the determination of constitutional issues; that since the Petition raised broader systemic and constitutional issues, the consideration of

those issues fell outside the jurisdiction of both the Liaison Committee and the NET; and that in the result, the ELC had properly assumed jurisdiction.

[26] Regarding the *status of planning instruments,* the appellate court first observed that the 2004 Zoning Guidelines were a product of the repealed Physical Planning Act; that it applied to the pre-2010 zoning framework; and that it therefore could not have been enacted as county legislation pursuant to Article 185 of the Constitution. As such, the legal force of those Guidelines could not override the post-2010 framework under the Constitution and PLUPA, with the latter vesting zoning and plan-making authority in county assemblies. As for NIUPLAN, 2016, the court noted that it was formally adopted and approved by the County Assembly, and as such enjoys legitimacy, although it remains a strategic, county-wide plan and does not provide parcel-specific zoning rules.

[27] Turning its attention to the 2021 Policy, the Court of Appeal was of the view that, although it was legitimately prepared and applied as a practical guide, it lacked full legal force in the absence of County Assembly approval and gazettement. The court agreed with the trial Judge that the policy could only serve as an operative administrative guide, while, at the same time, accepting the appellants' argument that it was not a consummated legislative instrument. To avoid a lacuna, the appellate court allowed its continued use, albeit on a temporary basis, pending the promulgation of a clear, time-bound sunset framework.

[28] In relation to *zoning classification,* the court faulted the learned Judge for classifying Rhapta Road as falling within Zone 4/4B on the basis of Google Maps and overlooking the 2021 Policy, which explicitly placed Rhapta Road under Zone 3C with a 20-floor cap. Consequently, the court allowed the cross-appeal to this limited extent and varied the 16-floor cap imposed by the ELC to 20.

[29] Concerning the *EIA Licences*, the court found no merit in the appellants' challenge, holding first, that the parties, by consent, agreed on the litigation plan; to go by affidavit evidence rather than oral testimony. Therefore, the court was of the opinion that the appellants could not, after entering into a consent, raise an objection to NEMA's report on the basis that no witness was called to be cross-examined on the report. In any case, the appellate court found that the affidavit of

Ms. Veronica Kimutai, Senior Principal Compliance Officer at NEMA, provided sufficient details about the licensing process; and finally, that the appellants fully participated in the proceedings and did not at any point seek to cross-examine the deponent, nor did they file an affidavit in rebuttal. Accordingly, the appellate court was satisfied that ELC was justified in treating that evidence as credible.

[30] On the substance of the claim of the defect in the EIA licences, the court held that the appellants had failed to demonstrate how NEMA's licensing process was *ultra vires*, procedurally unfair, or irrational under Sections 58 and 59 of EMCA. Although the appellants raised complaints regarding alleged misstatements, they did not show that any specific licence was issued contrary to statutory requirements.

[31] In summation, on the issue of *reliefs,* the Court of Appeal noted that remedies must respect both proportionality and legal certainty; that developers who obtained approvals in good faith following multi-agency review should not be retroactively penalized in the absence of proven illegality; and that the ongoing projects would be subject to any new, lawfully enacted, and generally applicable controls adopted through due process. This, the court found, would balance investment-backed expectations with environmental stewardship and community rights. Concerned that the 2021 Policy was still in draft form and that discretionary approvals employed by the 1st and 2nd respondents risk unevenness, opacity, cumulative environmental harm, and ultimately, loss of public trust in planning governance. In the circumstances, the court found that declaratory reliefs issued by the trial court were insufficient in view of constitutional jurisprudence that recognises that systemic violations of rights or governance obligations require supervisory remedies in terms of Article 23(3) of the Constitution, which empowers courts to issue "appropriate relief" in addition to other specified remedies.

[32] Accordingly, the court issued the following reliefs:

*"a) **Appeal**: Save for the structural interdict order this Court has fashioned, the appeal lodged by the appellants is hereby dismissed. For avoidance of doubt, we affirm the declarations issued by the learned Judge to the effect that development*

approvals must comply with lawful zoning and policy instruments, and with the governing frameworks of the Constitution, the PLUPA, and the EMCA. We affirm that the ELC acted within jurisdiction and within its remedial discretion in issuing the interim variations (subject to our findings and orders on cross-appeal) and directing compliance with the 2021 Nairobi City County Development Control Policy pending approval. The broader calls for cancellation/demolition of approved developments are declined.

*b) **Cross-Appeal**: The Cross-Appeal filed by the 9th respondent is allowed in part. We correct the misclassification made by the trial court by substituting a finding that Rhapta Road and the impugned properties fall within Zone 3C under the 2021 Nairobi City County Development Control Policy, and not Zone 4 or Zone 4B. All references in the trial court's judgment to Zone 4 are, accordingly, varied.*

*c) **Structural Interdict:** In order to cure the systemic governance gap revealed in this litigation, and to secure lawful and sustainable planning for Nairobi, we issue the following structural orders:*

1. ***Timetable for Compliance**: The Nairobi City County shall, within six (6) months of the date of this judgment, adopt through the County Assembly, and gazette the pertinent local physical and land use development and zoning plan(s) under Section 46 Physical and Land Use Planning Act, 2019 (PLUPA) and/or a Nairobi City Development Control Policy (or equivalent development control code) governing the whole city – including Rhapta Road and the broader Westlands corridor, in compliance with the Constitution and PLUPA .*

2. ***Procedure and Paramaters**: Such instruments shall be preceded by meaningful public participation, in keeping with Article 10 of the Constitution and Section 40 of PLUPA, and shall transparently address: plot ratios, site coverage, height envelopes, setbacks, parking and mobility hierarchies, public open space, stormwater management, and infrastructure concurrency (including water, sewerage, power, schools, health, and emergency services), and all other relevant considerations.*

3. ***Interim Report:** Within three (3) months of the date hereof, the County Government shall file in this court a progress report detailing steps undertaken, including initiation of public participation forums,*

preparation of draft bills, regulations or policies, and consultations with professional associations such as the Architectural Association of Kenya, Institution of Planners, and the Law Society of Kenya.

4. ***Final Report**: The Nairobi City County Government shall, within seven (7) days after the lapse of the six-month period, file, in this Court, a Compliance Report attaching the enacted instruments, a participation report, and a capacity-concurrency statement.*

5. ***Liberty to Apply**: Any party to these proceedings, or any interested stakeholder duly served with the Compliance Report, may, on notice, apply for further directions of this Court, including applications for extension of time on cause shown, or consequential relief to secure effective implementation of these orders.*

d) ***Transitional Posture:***

i. *Nothing in these orders invalidates approvals or environmental licences already lawfully issued and acted upon, absent demonstrated illegality. Such projects shall remain subject to compliance with reasonable conditions lawfully imposed during construction and post-completion oversight.*

ii. *Pending development applications not yet finalized shall continue to be processed under the PLUPA and extant Regulations, guided by the 2021 Development Control Policy and any interim administrative policies used consistently and transparently, and subject to the outcome of the instruments to be gazetted pursuant to these orders.*

e) ***Costs**: Given the public interest character of this litigation, the systemic issues ventilated, and the precedent-setting nature of the relief, we direct that each party shall bear its own costs in the Environment and Land Court, in this appeal, and in the cross-appeal".*

iii. Proceedings before the Supreme Court

[33] Again dissatisfied, the appellants have lodged this appeal on nineteen (19) grounds, which they subsequently condensed as follows: *that the learned Judges of the Court of Appeal erred in*:

(a) *Upholding a Draft Nairobi City Development Control Policy 2021 and treating it as good law and legal policy;*

(b) *Engaging in extensive policy-making, promoting and condoning unconstitutionalism, illegalities and abuse of powers by the 1st, 2nd, 3rd, and 4th respondents;*

(c) *Reclassifying the zoning classification of the appellants' residents' properties and locality, increasing the floor levels, thereby usurping the legislative role of the 1st and 2nd respondents;*

(d) *Failing to promote intergenerational equity and environmental and constitutional rights, overlooking environmental breaches and damage to the environment and unfairly treating the evidence adduced by the appellants vis-à-vis the evidence adduced by the 3rd and 4th respondents; and*

(e) *Misapplying structural interdicts to cover for the illegalities and constitutional breaches of the 1st to 4th respondents.*

[34] Accordingly, the appellants have asked the Court for the following reliefs: that,

i. *this appeal be allowed with costs.*

ii. *the Judgment and Decree/order of the Court of Appeal made on 19th September 2025 be varied and/or set aside in part to the extent below: THAT:*

(a) *the reliefs sought in the Petition dated 12th August 2024 filed in the Environment and Land Court at Milimani; ELC EP Case No. E030 of 2024 Milimani; be granted as prayed.*

(b) *the Approvals for Development and Environmental Impact Assessment Licences granted and more particularized in the prayers contained in the Petition dated 12th August 2024, granted by the 1st to 4th respondents in favour of the 6th to 21st respondents be declared unlawful, null and void.*

(c) *the developments and constructions, whether partial and or completed, undertaken by the 6th to 21st respondents with respect to the properties listed and set out in the Petition dated 12th August 2024 filed in ELC EP Case No. E030 of 2024 Milimani; be declared illegal, unlawful, null and void and the same demolished within such time as the Supreme Court shall set.*

(d) *a mandatory injunction be granted directing 1st, 2nd, 3rd, and 4th respondents, their agents, servants, and/or employees and/or officers, to forthwith issue restoration orders directed at the 6th to 21st respondents, as the case may be, to restore all properties registered in their respective names as listed in Petition dated 12th August 2024 filed ELC EP Case No. E030 of 2024 Milimani; to the former ordinary state with flora and fauna before the development permissions were granted, and before the demolition, construction and/or other building activities were undertaken following grant of permissions by the 1st, 2nd, 3rd, and 4th respondents.*

(e) *the rezoning by the Court of Appeal for planning purposes by the Nairobi City County, of the appellants' properties, and classification from Zone 4 under the 2004 Guidelines and under the NIUPLAN situated at Muthangari in the "Area between Waiyaki Way, Riverside Drive, Ring Road Westlands and Mahiga Mairu Avenue" to Zone 3C under the Draft Nairobi City Development Control Policy 2021, situated in the "Area between Chiromo Road, Kolobot Drive, State House Road, Sate House Arboretum edges, Ring Road Kileleshwa and Rhapta Road"; be set aside.*

(f) *the re-planning of the appellants' zoning and restriction for purposes of approvals for development and the construction levels increased by the Environment and Land Court from 4 Floor levels to 16 Floor levels; and further increased by the Court of Appeal from 16 Floor levels to 20 Floor levels, be set aside altogether.*

(g) *in addition to the Structural Interdicts issued by the Court of Appeal in the Judgment dated 19th September 2025, the 1st to 4th respondents be required to comply with the requirements of Article 10 in so far as there is public participation and approval of any new developments and that the rights of the appellants and other residents of the Nairobi City County under the Constitution and the Physical and Land Use Planning Act, 2019 and any other written law be reserved, including the right to challenge the proposed Local Physical and Land Use Planning Plans.*

iii. *Costs of the appeal be borne by the respondents.*

iv. *Any other or further relief that this Court may be pleased to make in the circumstances.*

[35] The 1st respondent (CECM Urban Development), in a Notice of Preliminary Objection dated 14th November 2025, contends that this Court lacks jurisdiction to hear the appeal under Article 163(4)(a) of the Constitution, as the appeal rests purely on statutory and factual issues. The 1st respondent professes that the appeal instead introduces new constitutional arguments that were not pleaded, argued or determined before the Court of Appeal, and that mere reference to constitutional provisions does not, by itself, confer jurisdiction. At any rate, Article 163(4)(b) of the Constitution would not apply since no certification has been granted to the appellants to bring the appeal as being one involving a matter of general public importance.

D. PARTIES' SUBMISSIONS

i) Appellants' submissions

[36] The appellants have submitted on the question of *jurisdiction of the ELC and this Court,* stating that the appeal arises from clear constitutional issues litigated before the ELC and Court of Appeal. Indeed, the Petition went beyond planning laws, breaches of environmental and governance duties, but also embraced constitutional obligations of the 1st to 4th respondents. That being the case, the issues involved were beyond the scope of the Liaison Committee or NET. The superior courts below correctly ruled that the correct forum was the ELC. In support, the appellants have relied on our judgment in ***Nicholus Vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)*** [2023] KESC 113 (KLR). On the second part of the framed issue, the appellants have submitted that, since constitutional questions were implicated, right from the trial court all through to this Court, the appeal has been brought as of right under Article 163(4)(a) of the Constitution.

[37] On *whether the ELC and Court of Appeal erred in purporting to promulgate and/or adopt a policy not approved by the 2nd respondent's County Assembly*, the appellants avow that the 2021 Policy did not exist in law as it was merely a draft; that it was in error on the part of the two superior courts below to purport to

promulgate it; and that it was equally erroneous for the appellate court to permit the 9th respondent to build up to 20 floors on the basis of the draft policy.

[38] Regarding the *9th respondent's cross appeal*, the appellants maintain that the Court of Appeal wrongly varied the ELC's judgment by rezoning the area to Zone 3C. They submit that the assistant Chief's letter, the 2004 Zoning Guidelines, NIUPLAN, and the 2021 Policy consistently placed the area in Zone 4 or 4B, and that the learned Judges lacked the expertise and relevant information to redefine zoning without public participation.

[39] On *intergenerational equity and protection of future generations*, the appellants argue that the superior courts disregarded the ongoing environmental degradation; that despite empirical discrepancies in the EIA reports highlighted by the appellants, which demonstrated breaches of environmental laws, they were not granted an opportunity to cross-examine the witnesses who swore affidavits on behalf of NEMA. As a result of this failure, their case on intergenerational equity and future environmental rights was undermined; and instead, the appellate court prioritised the rights of the developers over intergenerational rights. The court also ignored the fact that the 1st and 2nd respondents had failed in their constitutional duty under Article 10 to exercise good governance and transparency in their decision-making.

[40] On *failure to issue enforcement/demolition orders as sought in addition to structural interdicts*, the appellants contend that structural interdicts are not substitutes for constitutional and statutory obligations. They attest that such interdicts should have been preceded by clear findings of breaches by the 1st and 2nd respondents. Instead, the ELC and Court of Appeal issued broad, general, and perfunctory interdicts that applied to the entire county, disregarding the appellants' specific prayers. The effect of the approach adopted by the Court of Appeal was to excuse the 1st to 4th respondents from performing their functions, diverting attention from cancelling unlawful approvals or ordering the demolition of the illegal constructions. By treating structural interdicts as a substitute for accountability, the court overlooked clear violations, leaving the appellants with

only a pyrrhic outcome despite a proven case of constitutional and statutory breaches.

ii) The Respondents' Submissions

[41] The respondents, in substance, opposed the appeal and urged the Court to uphold the decision of the Court of Appeal. Their submissions centred on four principal issues: *the jurisdiction of this Court and of the ELC; the legal status and use of the 2021 Policy; the validity of the development and environmental approvals; and the propriety of the reliefs granted by the superior courts.*

[42] *On the jurisdictional challenges*, the respondents submit that the appellants' case before the ELC was incompetent *ab initio* for failure to exhaust the available statutory dispute-resolution mechanisms. They contend that the grievances concerning change of user, development permissions, zoning, building-height restrictions and planning approvals fell within the primary jurisdiction of the relevant Liaison Committee, while challenges relating to EIA approvals fell within the jurisdiction of the NET. They consequently maintain that the ELC improperly assumed original jurisdiction. In this Court, the respondents argue that no question concerning the interpretation or application of the Constitution has been raised; hence, the Court lacks jurisdiction under Article 163(4)(a) of the Constitution. The respondents further submit that the appellants have not demonstrated how Articles 10, 22, 23, 42, 69 or 159 of the Constitution have been implicated, violated, misinterpreted or misapplied to warrant this Court's intervention. They assert that the core issue in the dispute concerns the statutory framework for development and planning of the City of Nairobi and the interpretation of the relevant statutes.

[43] *On the 2021 Policy*, the respondents generally maintain that the Court of Appeal did not treat the draft Policy as binding legislation or purport to promulgate it as law. Rather, they submit that, in the absence of an operative local physical and land-use plan, the Policy was properly regarded as an interim or persuasive administrative framework to guide the exercise of statutory discretion and avoid a regulatory vacuum. The 1st respondent further invoked the doctrine of approbation and reprobation, contending that the appellants themselves had introduced and

relied upon the 2021 Policy in their pleadings before the ELC and therefore cannot, having invited the trial court to consider it, subsequently challenge its use by the superior courts.

[44] The 2nd respondent similarly posits that its statutory authority to exercise development control is derived from the Constitution, PLUPA and the applicable regulations, notwithstanding the absence of a finalized Local Physical and Land Use Plan. It maintains that it has made deliberate efforts to develop the requisite plan, but that its formal approval had not yet been secured. In its view, the absence of an approved plan did not leave development control without a statutory foundation. The 2nd respondent nevertheless acknowledged that the 2021 Policy did not have the force of binding law, but contended that it could nonetheless properly serve as a persuasive administrative guide during the transitional period. The 9th, 10th and 14th respondents substantially adopted this position, submitting that reliance upon the Policy did not amount to legislation, rezoning or an unlawful assumption of the functions of the planning authorities.

[45] The respondents further assert that the *development approvals* issued to the developers were lawful and did not confer an unconditional right to undertake development. According to the 1st and 2nd respondents, the approvals were subject to statutory conditions and continued regulatory oversight, including compliance with environmental requirements. The approvals had been processed through the relevant administrative and technical mechanisms and were neither arbitrary nor capricious. NEMA, for their part, defend the EIA licences issued to the relevant developers, explaining that they were granted following technical assessment of the projects, the adequacy of proposed mitigation measures and evaluation of their potential environmental impacts. They deny any deliberate violation of their constitutional or statutory obligations.

[46] The developers, namely the 7th, 13th, 16th, 18th and 20th respondents, similarly contend that there was no evidence that they had breached the conditions attached to their respective approvals or EIA licences. They maintain that any alleged administrative or regulatory lapses were attributable, if at all, to the relevant public authorities and not to the developers, who had acted lawfully, transparently and in

good faith without notice of any omission by 1st, 2nd or 3rd respondents. They further support the Court of Appeal's finding that the developments fell within Zone 3C and contend that the appellate court was entitled, in the exercise of its appellate jurisdiction, to correct the trial court's misapprehension of the applicable zoning classification.

[47] The respondents also oppose the appellants' prayer for revocation of approvals and demolition of the developments. Such relief, they argue, would be disproportionate and inequitable, particularly where the developers had obtained approvals from the competent authorities and had acted in reliance upon them. The 14th respondent, in particular, contended that, since the developments fell within Zone 3C and were therefore permissible within the applicable development framework, demolition in the absence of demonstrated illegality would unjustifiably interfere with the developers' property rights under Article 40 of the Constitution. The respondents generally regard the structural orders issued by the Court of Appeal as an appropriate and forward-looking relief intended to address any regulatory deficiencies without visiting disproportionate consequences upon parties who had acted in good faith.

[48] The 2nd respondent, on its part, has given an undertaking in terms of the structural orders that, within eighteen months, a by-law would be enacted to resolve any remaining uncertainty regarding city planning and development control within the City of Nairobi. It acknowledges the constitutional basis upon which such orders are issued and gives the example of ***Mitu-Bell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KLR*)* ***(Mitu-Bell)***. The 14th respondent similarly supports the direction requiring the finalisation and gazettement of lawful zoning instruments.

[49] The 5th respondent, the Hon. Attorney General, adopts a materially different position from the other respondents on the legal status of the 2021 Policy. The Attorney General expressly concedes that the Policy did not have the force of law and ought not to have been used as the legal basis for processing the impugned development approvals. The Attorney General submits that policies and plans fall

within the statutory framework governing statutory instruments and, since the 2021 Policy had neither been approved by the Nairobi County Assembly nor gazetted, it remains a proposal without binding legal effect under PLUPA. On that basis, the Attorney General contends that approvals granted on the strength of the unapproved Policy were illegal, null and void.

[50] The Attorney General further submits that, in the absence of an operative policy, the 2004 Zoning Guidelines and the NIUPLAN constituted the applicable guiding instruments. Having regard to the governance deficiencies identified by the Court of Appeal, the widespread reliance on the unapproved 2021 Policy and the fact that developments had proceeded pursuant to approvals improperly based on the 2021 Policy, the Attorney General urges the Court to fashion appropriate relief under Article 23 of the Constitution. In particular, the Attorney General supports directions requiring the 1st and 2nd respondents to formulate and secure approval of a lawful Physical Plan and Land Use Policy. These submissions are fortified by our decision in ***Cabinet Secretary for the National Treasury and Planning & 4 others Vs Okoiti & 52 others; Bhatia (Amicus Curiae)*** [2024] KESC 63 (KLR), on the Court's power to suspend a declaration of invalidity where appropriate.

[51] In the result, the combined effect of the respondents' case, save for the distinct position taken by the Attorney General concerning the legal force of the 2021 Policy, is that the 2021 Policy was a proper guide in the absence of an approved and gazetted policy; that the impugned developments had been subjected to the applicable approval and environmental processes, and that the circumstances did not warrant the drastic remedies of revocation and demolition. They urge the Court to dismiss the appeal.

E. ISSUES FOR DETERMINATION

[52] Having considered the pleadings, the impugned judgment, and the parties' respective written submissions and oral arguments by counsel before the Court, it is our view that five main questions fall for the final consideration and determination in this appeal:

(i) *Whether the jurisdiction of this Court has been properly invoked*;

(ii) Whether the ELC properly assumed jurisdiction in light of the doctrines of exhaustion and specialized statutory mechanisms under the PLUPA and the EMCA;

(iii) Whether the courts below properly interpreted and applied the Articles of the Constitution upon which the petition was brought in determining the mandate of the county government of Nairobi in matters of county planning and development;

(iv) Whether the reliefs granted by the Court of Appeal were appropriate under Article 23(3) and consistent with the constitutional allocation of county planning functions; and

(v) What reliefs should issue?

F. ANALYSIS AND DETERMINATION

i) Whether the jurisdiction of this Court has been properly invoked?

[53] The 1st respondent has, by a Notice of Preliminary Objection, challenged this Court's jurisdiction to entertain the appeal, contending that, notwithstanding the appellants' reliance on constitutional provisions, the dispute is essentially founded on statutory and factual issues; that the mere invocation of constitutional provisions is insufficient, without more, to clothe this Court with jurisdiction under Article 163(4)(a) of the Constitution; that the appeal does not involve any genuine question of constitutional interpretation or application; and that the appeal introduces new constitutional arguments that were not canvassed before the Court of Appeal.

[54] It is now firmly settled as a jurisprudential norm in this country that jurisdiction is fundamental to the exercise of judicial power. In ***Macharia & another Vs Kenya Commercial Bank Ltd & 2 others*** [2012] KESC 8 (KLR) and the seminal decision in ***Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd*** [1989] KECA 48 (KLR), among a long line of decisions, this principle has been applied and recapitulated enough times to obviate the need for further restatement in this appeal.

[55] Applying the principles enunciated by this Court in ***Nduttu & 6000 other Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR) to the present appeal, we observe that the appeal is expressed to be brought pursuant to Article 163(4)(a) of the Constitution, which confers a right to appeal the decision of the Court of Appeal directly to this Court in any matter involving the interpretation or application of the Constitution.

[56] In their petition before the trial court, the appellants cited Articles 10, 42, 60, 66, 69, and 186(1) of the Constitution as the basis of their grievance. Those Articles apportion obligations to the State and state agencies named as the respondents in this appeal to regulate land use and planning; undertake county planning and development control; establish systems for environmental impact assessment, environmental audits and environmental monitoring to ensure its protection for a clean and healthy environment. The appellants pleaded that the approvals issued by the 1st to 4th respondents constituted a serious breach of their (the 1st to 4th respondents') respective constitutional and statutory duties and a violation of the appellants' constitutional rights to a clean and healthy environment, for which the latter sought an order to declare the approvals unconstitutional.

[57] It is common factor that the appellants' case involved the interpretation of both constitutional and statutory provisions. Those very provisions remained the anchor of both the ELC and the Court of Appeal judgments, where Articles 10, 42, and 69 of the Constitution remained a constant subject.

[58] Likewise, before us, the character and nature of the dispute hold steady. We are satisfied that the appellant's case from the ELC up to this Court has revolved around the interpretation and application of Articles 10, 42 and 69 of the Constitution, all of which were not only pleaded and specifically argued but also formed the basis of the reasoning in the judgments of both superior courts below. Although the dispute was primarily determined through the application of statutory framework, principally the PLUPA and EMCA, those statutes give effect to, and are underpinned by, the constitutional imperatives governing land use, planning, environmental protection, sustainable development, and the right to a clean and healthy environment, all of which were pleaded and fully canvassed. In

light of the foregoing, and consistent with this Court's jurisprudence, we are satisfied that the appeal falls squarely within the scope of Article 163(4)(a) of the Constitution. Consequently, we find no substance in the objection and accordingly overrule it.

ii) Whether the ELC properly assumed jurisdiction in light of the doctrines of exhaustion and specialized statutory mechanisms under the PLUPA and the EMCA

[59] As a preliminary issue before the ELC, all the respondents challenged the jurisdiction of the court, on the grounds that the Petition had been filed prematurely in contravention of the doctrine of exhaustion; that, pursuant to Section 61(3) and (4), read together with Section 78(a) of PLUPA, the appellants' grievances concerned the legality of the change of user and the grant of planning approvals. Those claims ought, in the first instance, to have been presented before the Liaison Committee. And insofar as the Petition challenged the legality of the EIA licences, the respondents have asked us to find that Sections 129(1) and (2), read together with Section 130 of the EMCA, vest original jurisdiction in the NET to determine such issues. For these two reasons, the respondents maintain that the appellants were required to exhaust those statutory dispute resolution mechanisms before approaching the ELC.

[60] This Court has stated in the past regarding the doctrine of exhaustion that, even where superior courts have jurisdiction to determine questions of law, the first opportunity has to be given to relevant bodies, tribunals or any other quasi-judicial authorities and organs to consider and determine the dispute in the first place as provided for in the relevant parent statute. It has equally stressed that the availability of an alternative remedy does not automatically bar a party from seeking constitutional relief, especially when such a relief is contingent upon the adequacy of an existing alternative means of redress. See ***Albert Chaurembo Mumba & 7 others Vs Maurice Munyao & 148 others*** [2019] KESC 83 (KLR), ***NGOs Co-ordination Board Vs EG & 4 others; Katiba Institute (Amicus Curiae)*** [2023] KESC 17 (KLR) and ***Nicholus Vs***

Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR),

[61] It is common ground in this appeal that the dispute was multi-faceted. The appellants raised grievances, which on one hand relate to the change of user, permissible building heights, and the EIA licences. A challenge to any of these questions can, in terms of Section 78 of PLUPA and Section 129(1) of EMCA, be instituted, in the first instance, before the specialized statutory bodies, namely the Liaison Committee and the NET, respectively. On the other hand, the Petition raised broader constitutional and systemic issues, including the alleged violation of the appellants' right to a clean and healthy environment and the alleged failure by the 2nd respondent to discharge its statutory and constitutional obligations in the planning and development of Nairobi City County. These questions could only be determined by the ELC.

[62] Both superior courts below were therefore correct in their determination of this question and properly rejected the objection to the jurisdiction of the ELC on the basis of the doctrine of exhaustion. The jurisdictions of the Liaison Committee and the NET were inadequate to address the appellants' grievances, especially those anchored on Articles 10, 42 and 69 of the Constitution. As a result, this objection similarly fails, and we uphold the decision of both courts on this point.

iii) Whether the courts below properly interpreted and applied the Articles of the Constitution upon which the petition was brought in determining the mandate of the county government of Nairobi in matters of county planning and development.

[63] This question is the centrepiece of this appeal, for only questions involving the interpretation and application of the Constitution fall for the Court's consideration and resolution under Article 163(4)(a) of the Constitution. We have expressed satisfaction while answering Issue No. 1 above that this appeal passes muster on that score; that on the face of the Petition originating the cause before the trial court, Articles 10, 23, 42, 60(1), 66, 70 and 183 of the Constitution were

cited, though inconsistently. The appellants sought declaratory, conservatory and injunctive reliefs, as well as damages, which are indeed constitutional remedies.

[64] In their Petition to the trial court, the appellants claimed that Articles 10, 42, 60(1), 66, 69, (1)(g), 186(1) as read with Section 8 of the Fourth Schedule Part 2 of the Constitution were violated by the 1st to 4th respondents. We have said that the Articles of the Constitution cited are not consistent. Those cited on the face of the petition are themselves not consistent. There are also inconsistencies in the provisions relied on in the body of the petition. However, nothing really turns on that as it does not affect the conclusion we ultimately reach on this point. In any case, all six Articles have been cited throughout the petition.

[65] It was the appellants' case that the zoning classification formulated by 1st to 4th respondents violated Article 10 with respect to transparency and good governance; that by granting the impugned approvals and licences to the 6th to 21st respondents, the 1st to 4th respondents were in breach of Article 42 of the Constitution as the rights of the appellants to a clean and healthy environment were compromised; that the Ministries concerned with matters of environment and land were also in breach of Articles 60 and 183 as read with Section 8 of the Fourth Schedule for failing to supervise the 2nd to 4th respondents; and that by deliberately interfering with the character, ambience, serenity, clean and healthy environment, the respondents collectively were in breach of Article 42. For these violations, the appellants sought reliefs provided for under Article 23 of the Constitution.

[66] To address these questions, the trial court, in the first instance, entertained no doubt that the 2021 Policy had not been approved and gazetted by the County Assembly as required by PLUPA, and that the policy was, in fact, only a draft. That conclusion notwithstanding, the court went ahead to adopt the policy on the ground that in the circumstances surrounding it, the draft policy could nonetheless be used as an interpretative aid to fill a legislative or policy vacuum. In any case, the court held, the policy represented and reflected the government's clear intention.

[67] Based on that view, and while the court declared that the approvals for development granted by the 1st and 2nd respondents in favour of the 6th to 21st respondents were in violation of the zoning provisions set by the 2nd respondent, the violation was only in so far as the number of floors was concerned. In that regard, the court varied the approvals by limiting the number of floors to 16, "*subject to the County Assembly of Nairobi's decision while approving the 2021 Nairobi City Development Control Policy*". Going forward, the court directed the 1st to 4th respondents to immediately comply with the 2021 Policy when granting development permissions, pending the approval of a new policy by the County Assembly.

[68] Upholding the conclusion of the learned trial Judge, the Court of Appeal agreed that without formal approval and gazettement by the County Assembly, the 2021 Policy lacked formal status of law; that under Article 185 of the Constitution and Section 45 of PLUPA, the County Assembly is the only body that can imbue such a policy with binding legal effect. Like the trial court, the appellate court, having found that the 2021 Policy was but only a proposal, justified its continued use by the County Government to approve developments in the city on the basis that "*the law does not permit a vacuum*".

[69] Article 184 of the Constitution provides that:

> **"184. (1) National legislation shall provide for the governance and management of urban areas and cities and shall, in particular—**
>
> > **(a) establish criteria for classifying areas as urban areas and cities,**
> > **(b) establish the principles of governance and management of urban areas and cities; and**
> > **(c) provide for participation by residents in the governance of urban areas and cities.**
>
> **(2) National legislation contemplated in clause (1) may include mechanisms for identifying different categories of urban areas and cities, and for their governance."**

[70] Section 8 of the Fourth Schedule to the Constitution, on the other hand, provides that the functions and powers of the county governments are, among others:

> **"County planning and development, including—**
>
> **(a) statistics;**
>
> **(b) land survey and mapping;**
>
> **(c) boundaries and fencing;**
>
> **(d) housing; and**
>
> **(e) electricity and gas reticulation and energy regulation".**
>
> (Our emphasis).

[71] We are of the view that by using the word "including" in Section 8 the framers did not intend to have an exhaustive list of what county planning and development consists of. Land survey, mapping and housing are illustrations of the broader constitutional function of county planning and development. It is PLUPA, enacted pursuant to Article 184, that gives content to that constitutional competence. For example, it defines land-use planning as the process of designating, regulating, evaluating, zoning, and organizing present and future land use, while physical planning involves organizing infrastructure and determining spatial plans for sustainable land utilisation. See Section 2 of PLUPA. It must follow that zoning and building-height controls are part of a much broader county-planning function assigned by the Constitution, no less, to the county governments.

[72] The express constitutional reference to "land survey and mapping" demonstrates that zoning must rest upon an empirical and spatial planning exercise. Section 48 of PLUPA requires a local physical and land-use development Plan to contain a survey report and Geographical Information System (GIS)-based maps. The survey report must equally contain technical annexes and analysis of gradient, environment and infrastructure to determine appropriate locations for development. The inclusion of housing in the list emphasizes the fact that zoning decisions must take into consideration not only the interests of existing residents but also of broader housing needs. It is on that basis that PLUPA requires planning analysis to consider housing occupancy rates, accommodation density, housing

requirements and types of residential areas. See Paragraph 8(g) of the Second Schedule to PLUPA.

[73] First to be enacted in 2011 pursuant to Article 184 was the Urban Areas and Cities Act. It was made specially to provide for the classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas; and to provide for the principle of governance and participation of residents. Then came in 2012 the County Government Act, whose object was to provide for county governments' powers, functions and responsibilities to deliver services.

[74] PLUPA, which was enacted in 2019, repealed the Physical Planning Act, 1996. Its stated purpose is to make provision for the planning, use, regulation and development of land and for connected purposes. Though our focus in this appeal is PLUPA, it is important to note the common denominator in the three statutes. They emphasise proper planning in the counties, by implementing a well-balanced system of settlements, productive use of land, water and other resources; by providing a system that will ensure maintenance of green and open spaces for a functioning eco-system; by protecting the historical and cultural heritage within the county; and by providing for public security.

[75] Section 36 of PLUPA requires that once every ten years, a county government prepares a county physical and land use development plan for the county. The purpose of a Local Physical and Land Use Development Plan, according to Section 46, includes:

> **"(a) zoning, urban renewal, or redevelopment;**
> **(b) guiding and co-ordinating the development of infrastructure;**
> **(c) regulating land use and land development;**
> **(d) providing a framework for coordinating various sectoral agencies; and**
> **(e) providing a framework and guidelines on building and works development in the city, municipality, urban area, or**

other smaller urban centres including local centres, and market centres."

[76] The process of making a land use development plan concludes with the county executive committee (the 1st respondent in this case) submitting the plan to the county governor, who in turn causes it to be placed before the County Assembly for approval. It is common factor that the 2021 Policy only went so far as the desk of the governor. The governor, and not the County Assembly, approved it. The approval by the County Assembly was the stamp required for the county executive committee member (the 1st respondent) to:

> **"...publish the approved plan in the Gazette and in at least two newspapers with a national circulation within fourteen days of the approval and no development shall take place on any land unless it is in conformity with the approved plan".** (Emphasis supplied). See Section 41 (4) of PLUPA.

[77] The words *"no development shall take place on any land unless it is in conformity with the approved plan"* establish conformity as a statutory condition for development. Similarly, Section 41(5) of PLUPA further demands that the county physical and land use development plan "*shall be the basis for the preparation of sectoral programmes and projects in the county and sub-county levels"*. To emphasise the centrality of the plan in urban and city planning and development decision-making, Paragraph 2 of the Third Schedule to PLUPA directs every county government to follow and be bound by approved physical and land use Plans when considering a development application. In other words, plans are substantive standards expressly and intrinsically tied to the determination of development applications.

[78] In view of the foregoing, we respectfully agree with the concurrent conclusions reached by the two superior courts below to the effect that the 2021 Policy had no legal force, being a draft document that did not meet the constitutional and statutory threshold. However, the two courts, after making that insightful statement of the law, went off track and wandered away from their stated conclusions. They went ahead to apply the very document they had found to have

no legal force to determine the question of zoning and building heights. They justified this course on the ground that in the absence of a plan contemplated by the Constitution and in PLUPA, there was a vacuum. According to the Court of Appeal, law abhors a vacuum. The two courts were unanimous that in the twilight period pending the gazettement of the 2021 Policy, the 1st and 2nd respondents were justified to resort to it as the operative tool for the approval of developments in the city.

[79] Like the two courts, and for historical context, we are bound to consider the three successive planning instruments around which this litigation revolves; the 2004 Zoning Guidelines, NIUPLAN, 2016, and the 2021 Policy. To begin with, there is absolute truth in the holding that the 2004 Zoning Guidelines were legally obsolete; that they were made under the repealed Physical Planning Act and could not be applied post-2010 constitutional framework. In addition, the document was not a county legislation contemplated by Article 185 of the Constitution or PLUPA. Regarding NIUPLAN 2016 we are satisfied that although it enjoys legitimacy in view of the process of its adoption, it is a county-wide integrated master plan which provides a broad development policy intent and does not descend to the granularity of parcel-specific zoning contemplated under Section 46 of PLUPA.

[80] That leaves the 2021 Policy, and the central constitutional question is whether a court can enforce as normative source of binding planning standards an instrument that does not exist in law. Asked slightly differently, can a court of law convert itself into a legislative body and endorse a policy that has not been adopted by the County Assembly in order to fill a vacuum? The "law abhors a vacuum" is not a general principle. It has limits and cannot be a source of legislative power. It cannot be resorted to by courts as authority to convert a draft policy into binding law. Who was responsible for the regulatory gap? The 1st and 2nd respondents are the organs responsible for the promulgation of the plan. They proudly submitted that they have been using the draft policy for years as an operative administrative tool or guide for approval of development applications in the county. The broader public-law principle and concern is that the two respondents could not enlarge their discretion through their own failure to establish the framework prescribed by

Parliament. It follows necessarily that the absence of the County Assembly-approved plan suspended the 2nd respondent's ability to determine development applications on their merits. With respect, we agree with the appellants' and the Attorney General's position that the 2021 could not be the authority for the 1st and 2nd respondents' zoning and controlling building heights in Nairobi. The courts below, therefore, erred in relying on a document that had not acquired the legal status of a policy or development plan capable of providing a binding basis for zoning classifications and building-height limits.

[81] To the second error. The two superior courts below descend into the law-making arena. Having arrived at the conclusion that the absence of lawful planning instruments created systemic governance problems, the two courts engaged their judicial supervisory gear. The trial court reclassified Rhapta Road as Zone 4. This was set aside by the Court of Appeal upon a determination that, as a matter of fact, the area fell under Zone 3C and not Zone 4, in which case the number of floors would be 20 and not 16 as ruled by the trial court.

[82] Planning decisions belong primarily to planning authorities, while the court's role is limited to reviewing the legality rather than planning merits. Zoning classifications, building heights control and density standards are technical matters that courts are not fully equipped to determine without the help of experts. The learned trial Judge, at one point, had to resort to Google Maps for the location of the suit properties. For this, he was faulted, correctly, in our estimation by the Court of Appeal when the latter observed that:

> ***"First, the reliance on Google Maps in the face of contested boundaries, without calling for expert surveyor's evidence, was a methodological misstep. Zoning classifications are not a matter of impressionistic geography but of statutory instruments and gazetted plans".***

[83] We must stress, for our part, that zoning is not a simple choice of a location in an area or what we imagine should be the right building height in a given area. PLUPA sees it differently. It is a whole exercise to address the physical, economic and social efficiency, health and other aspects of the well-being of communities

and sustainable use of land. For instance, in the dispute before us, to assign an area as Zone 3C, 4 or 4C, or to decide that the height of buildings should be 16 or 20 floors, many planning factors are taken into consideration. These considerations are to be weighed against the Constitution, particularly Article 10 on sustainable development, participation, transparency and accountability; Article 42 to ensure a clean and healthy environment as guaranteed is achieved; Article 66 on regulation of land use in the public interest, environmental obligations provided for under Article 69; and finally, the framework for county planning under Articles 174, 185 and the Fourth Schedule.

[84] By concluding that the suit property was situate in Zone 3C and by prescribing the maximum height of the buildings in the area as 20 floors, it is doubtful the Court of Appeal took the aforementioned factors into account. From the text of the judgment, we cannot discern considerations like sewerage capacity, water supply, road capacity, traffic, density, plot coverage, parking, neighbourhood character, public facilities and other infrastructure, which are the statutory criteria for prescribing zoning. Whereas a court of law can lawfully compel a body charged with planning to undertake zoning, it cannot itself undertake the task and prescribe the zone and limit building height, especially in a contested situation. As a result, we fault the two courts for their involvement in technical matters without applying the guiding principles.

[85] Before we consider the forms of relief available in this appeal, it is apposite that we determine whether there was proof of breach of the Constitution or whether the appellant's individual constitutional rights were violated. The question is critical because a party alleging breach of the Constitution or violation of individual constitutional rights must do more than simply cite constitutional provisions. The party must identify the specific right, particularise the manner of violation, and provide the material facts constituting the breach by evidence. The appellants' case before the ELC was twofold: that the 2nd respondent had failed to discharge its constitutional and statutory obligation to prepare, approve, and gazette a local physical and land use development plan. Secondly, they argued that, in the absence of such a planning framework, the 1st to 4th respondents granted the

impugned development approvals and EIA licences on the basis of discretionary and inconsistent criteria. According to the appellants, by so doing, the 1st to 4th respondents abdicated their constitutional and statutory obligations relating to land use planning and environmental protection, thereby violating the national values and principles of governance under Article 10, as well as the appellants' rights to a clean and healthy environment, sustainable development, and integrated land-use planning guaranteed under Articles 42, 60(1), and 69 of the Constitution.

[86] In paragraphs 181 and 182 of the ELC judgment, it is recorded that the appellants' principal complaint was that high-rise buildings would stretch water supply, sewerage, solid-waste systems, parking and traffic infrastructure; alter the character, flora and fauna of the area, not to mention that the value of their properties would be adversely impacted. All these would in turn undermine intergenerational environmental rights and sustainable development. The appellants specifically cited Articles 10, 42, 60(1), 66, 69(1)(g), 186(1) as read with Section 8 of the Fourth Schedule of the Constitution as the provisions violated by the 1st to 4th respondents.

[87] Regarding Article 10 on national values and principles of governance, we have found in the preceding paragraphs that there was proof of governance failure. Failure of planning governance was demonstrated in the manner the 2nd respondent approved development plans without any guiding planning instrument, contrary to Article 185, the Fourth Schedule of the Constitution and Section 45 of PLUPA. Did this failure directly or indirectly violate the rights of the appellants? There is a doctrinal distinction to be drawn. Article 10 articulates national values and principles; it does not spell out an individual right capable of being breached. Its breach may be regarded only as unconstitutional conduct of the 1st and 2nd respondents without violating the appellants' rights, for which they would ordinarily be entitled to relief.

[88] Was there proof of violation of the appellants' individual right to a clean and healthy environment under Article 42 of the Constitution? It was the appellants' case that the developments in question would create adverse environmental

consequences through increased pressure on sewerage, water, waste management and traffic infrastructure; that this would in turn adversely change the character of the area. From the record, and particularly the Petition before ELC, the alleged breaches are presented in considerable detail. But was any evidence adduced to establish those allegations: how did the approved developments cause, or threaten to cause, the environmental degradation in the manner alleged: how, specifically, did the developments affect the appellants' rights to a clean and healthy environment? The two superior courts below did not find any direct or indirect evidence in support of those allegations. We do not see any ourselves.

[89] The ELC, in its final orders, declared that only the development approvals by the 2nd respondent were unlawful, and again only *"in so far as the number [of] floors is concerned"*. It did not invalidate the EIA licences issued by NEMA. Consequently, it found no basis in issuing an order for environmental restoration, or to award damages, or grant any of the environmental remedies sought by the appellants. The court summarized its conclusion on this issue stating;

> ***"447. On the basis of the documentary evidence adduced by the Respondents, this court is satisfied that the EIA licenses were procedurally and lawfully issued to the 2nd to 6th Respondents. Further, the EIA Study reports adduced addressed all the social, economical and environmental concerns that were raised by the Petitioners.***
>
> ***448. The Petitioners have thereby not established that the issuance of the EIA licenses was done unlawfully, or was in breach of their right to a clean and healthy environment. The said licenses therefore remain valid provided that the Respondents comply with the conditions provided therein".***

[90] The Court of Appeal, for its part, held that a person challenging environmental licensing is duty bound to demonstrate that the licensing process was *ultra vires*, procedurally unfair or irrational; and that a developer who obtains approvals in good faith through the multi-agency process cannot be penalised without proof of illegality. It said;

> ***"...no specific licence was shown to have been issued without compliance with statutory steps. More importantly, the gravamen of this litigation was always zoning and planning governance, not environmental licensing per se. The ELC, therefore, properly treated the EIA claims as incidental to, rather than constitutive of, the real controversy."***

[91] Those are concurrent conclusions, first by the trial court before which evidence was presented, and then by the Court of Appeal, upon analysis and re-evaluation of that evidence and agreeing with those conclusions. No additional material has been placed before us to warrant our interference with the ultimate conclusions on this point by the two courts. It is important to point out that environmental governance is a multi-layered process. In this case, the four agencies, Nairobi City County Government, NEMA, Water Resources Authority (WRA) and National Construction Authority (NCA) played distinct but complementary roles. It is apparent from the record that for NEMA, the licensing process for each of the impugned developments followed the statutory procedure. The project reports were submitted; public notices were issued seeking any objections; review was conducted by technical officers; and conditional licences were granted subject to compliance with other statutory approvals by the other agencies. The central legal point to make is that these approvals are cumulative. Nothing was presented to the two courts below and before us to contradict the evidence of the 1st, 2nd, 3rd, 4th respondents and the developers that the licences were lawfully and procedurally issued.

[92] The complaint that the appellants did not have the opportunity to cross-examine the witnesses was raised after the horse had bolted. By consent of the parties, it was agreed that parties would rely on affidavits without the necessity of calling oral evidence. Consequently, the appellants could not belatedly attack the probative value of the evidence in the affidavit. We have cautioned a few times of the need to consider oral testimony over affidavit evidence in highly contentious disputes. See ***Fanikiwa Ltd & 3 others Vs Sirikwa Squatters Group & 17***

others [2023] KESC 105 (KLR). Like the two courts below, we too reject the appellants' arguments in this ground.

[93] Without giving greater details or analysis of the other Articles of the Constitution allegedly breached, it is enough to state that we find no evidence that Article 60(1), which requires land to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, was breached. Article 66(1), on the other hand, provides that:

> **"The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning."**

[94] This is plainly, from the language, an enabling provision, requiring the State to regulate land use. Unlike Article 42, which guarantees every person the right to a clean and healthy environment, Article 66(1) provides general principles of land policy and does not create any individual rights capable of being violated. But the question that may arise from the application of Article 66(1) is whether the 2nd respondent properly and lawfully exercised its regulatory authority under Article 66. Sections 60 and 61 of PLUPA are the operative provisions of Article 66(1). It requires relevant planning agencies to consider matters such as roads, health, public utilities, environment and urban development before approving development plans. Whereas the 2nd respondent may have failed to discharge its constitutional and statutory obligations regarding land-use planning, as we have found earlier, that failure we also find, did not violate appellants' individual rights. Article 66 of the Constitution does not confer any rights.

[95] Regarding Article 69(1)(g), we note that it imposes a constitutional duty on the State to eliminate processes and activities that are likely to endanger the environment. There must be a factual foundation to demonstrate that the State has failed to discharge this duty for a court to find a violation of this Article. Like the two courts below, we cannot see anything on record to suggest how this Article was infringed.

[96] We turn to consider whether Article 186(1), on the allocation of powers and functions of both levels of government, national and county, was applicable. The relevant part is sub-article (1) and Part 2, Section 8 of the Fourth Schedule to the Constitution, which assigns to county governments the responsibility to plan and develop counties. This function includes, among others, land survey and mapping, boundaries, fencing and housing regulation. From its plain language, Article 186 does not create a personal constitutional right but allocates governmental functions. The appellants did not show how Article 186 violated their constitutional rights. However, the relevant constitutional question is whether the 1st and 2nd respondents properly discharged their planning function under Article 186 as read with the Fourth Schedule. The question turns on the determination and classification of zones and building-height standards.

[97] Apart from the failure by the 1st and 2nd respondents to promulgate planning and zoning governance instruments, under Articles 10, 183, 185 and 186, as read with Section 8 of the Fourth Schedule, the rest of the claims over the violation of the appellants' individual rights were not proved. The infractions proved were primarily institutional failures by the 1st and 2nd respondents, to which we now turn.

iv). Whether the reliefs granted by the Court of Appeal were appropriate under Article 23(3) and consistent with the constitutional allocation of county planning functions

[98] From the summary of the case before the ELC as set out at the beginning of this judgment, the court declared the approvals concerning the number of floors a violation of the zoning provisions. It ordered the variation of the approvals by limiting the number of floors to 16 and ordered the 1st to 4th respondents to henceforth "*comply with Nairobi City County Development Control Policy, 2021*" when granting development permissions to any developer in the Rhapta Road area, "*pending the approval of the said policy by the County Assembly of Nairobi*".

[99] The Court of Appeal, on the other hand, made two significant declarations in dismissing the appeal. It affirmed the declarations issued by the learned Judge to

the effect that "*development approvals must comply with lawful zoning and policy instruments, and with the governing frameworks of the Constitution, the PLUPA, and the EMCA*". Secondly, on the status of the 2021 Policy, it declared that the plan lacked the formal status of law; and that under Article 185 of the Constitution and Section 45 of PLUPA, only the County Assembly could enact such a policy with binding legal effect. But having so correctly decided, the court found a vacuum which it proceeded to fill by issuing comprehensive structural interdicts directing the 1st and 2nd respondents to:

i. *Complete, adopt and gazette within six (6) months of the date of the judgment, the pertinent local physical and land use development and zoning plan(s) under section 46 of PLUPA and/or a Nairobi City Development Control Policy (or equivalent development control code) governing the whole city – including Rhapta Road and the broader Westlands corridor, in compliance with the Constitution and PLUPA.*
ii. *Ensure the development of the instruments is preceded by meaningful public participation, "and shall transparently address: plot ratios, site coverage, height envelopes, setbacks, parking and mobility hierarchies, public open space, stormwater management, and infrastructure concurrency (including water, sewerage, power, schools, health, and emergency services), and all other relevant considerations".*
iii. *The 1st and 2nd respondents to file an interim progress report within three (3) months of the date of the judgment. The report to detail steps undertaken by the two respondents, "including initiation of public participation forums, preparation of draft bills, regulations or policies, and consultations with professional associations such as the Architectural Association of Kenya, Institution of Planners, and the Law Society of Kenya.*
iv. *The final compliance report was to be filed within seven (7) days after the lapse of the six-month period.*

[100] The above interdicts have been challenged on two fronts: they were issued *in vacuo* as the appellants never sought them either in the petition in ELC or

prayed for them in the first appellate court; and that the only reason the court introduced them was to cover for the illegalities and constitutional breaches committed by the 1st to 4th respondents. The second challenge was that the interdicts were issued without the Court of Appeal first making a finding as to the constitutional or statutory breach or that some fundamental rights were infringed. Starting with the latter, it is on record that the appellants relied on numerous constitutional provisions to support their claim that the developments in question were the result of unlawful planning approvals that in turn violated their constitutional rights. The appellate court readily accepted the invitation and considered the question but failed to specifically determine it. Instead, and without a declaration of violation of rights or a demonstration of the specific rights alleged to have been breached, the court dived directly to appropriate relief by crafting structural remedies. That was in error. Proof of violation of a constitutional right and a declaration to that effect by the court must precede the award of a remedy.

[101] On the first challenge, the appellants' argument that the Court of Appeal erred in granting structural orders when they were not pleaded or sought lacks merit. The High Court, and by deductive reasoning the Court of Appeal, while exercising its appellate jurisdiction, by virtue of Article 23(3) of the Constitution, are clothed with the authority to;

> **"grant appropriate relief, including—**
> **(a) a declaration of rights;**
> **(b) an injunction;**
> **(c) a conservatory order;**
> **(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
> **(e) an order for compensation; and**
> **(f) an order of judicial review."**

[102] The foundation for applying structural interdicts in this jurisdiction has been identified as the highlighted part of Article 23(3): a court may "**grant appropriate relief, including…."**. The six listed reliefs are not exhaustive, but

illustrative from the use of the term "including," and the expression of the phrase "appropriate relief" is, in our view, deliberately wide. The fact that the phrase is broad does not give a court unlimited discretion. Article 23(3) provides for some remedies (listed) and others (under appropriate relief) for proceedings brought under Article 22. The word "including" in Article 23(3) creates flexibility of reliefs, not just a schedule of six orders. By providing for "appropriate" reliefs, the framers essentially meant an effective constitutional remedy; a relief capable of securing effective protection and vindication of constitutional rights. Circumstances may arise where there is a proven constitutional violation, and none of the six reliefs under Article 23(3) are efficacious; where damages are not sufficient; and even where a declaration alone may be inadequate. In such situations, the court is not helpless. It must fashion a remedy, which must vindicate the right breached without the court assuming legislative, executive or technical policy functions.

[103] In ***Mitu-Bell,*** this Court identified the scope and purpose of structural interdicts:

i. to redress the violation of fundamental rights guaranteed in the Bill of Rights;
ii. to be interim in nature;
iii. to be applied on a case-by-case basis and only in cases of proven constitutional violation or continuing constitutional breach; and
iv. to be resorted to where other constitutional reliefs would be inadequate.

[104] The Court cautioned that the orders issued ought to be carefully and judicially crafted:

> ***"...interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be***

couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them". (Our emphasis).

[105] The limits drawn in that case, we may emphasise, are central because they define where judicial supervision ends and executive or legislative authority begins, since structural interdicts have constitutional constraints. ***Mitu-Bell,*** like the two South African Constitutional Court's landmark decisions in ***Minister of Health and Others Vs Treatment Action Campaign and Others*** (No 2) (CCT8/02) [2002] ZACC 15 and ***Republic of South Africa Vs Grootboom*** (CCT11/00) [2000] ZACC 19, underscore the fact that courts can issue structural interdicts only to compel constitutional compliance but not for the court to itself prescribe the detailed content of government policy.

[106] A further restraint on the grant of the relief of structural interdicts concerns separation of powers. In ***Parliament of Kenya & another Vs Okoiti & 2 others,*** (Petition E016 & E017 of 2025 (Consolidated)) [2026] KESC 28 (KLR), this Court cautioned against courts purporting to supervise;

"...the legislative process itself by requiring progress reports to the courts. This raises separation-of-powers concerns taking into account that Articles 94(1) and 124(1) of the Constitution vest legislative authority and procedural autonomy exclusively in the Houses of Parliament, including the power to regulate their internal proceedings through Standing Orders".

[107] This was restated by this Court in ***Speaker of the Senate & Another Vs Attorney-General & Another; Law Society of Kenya & 2 Others (Amicus Curiae)*** [2013] KESC 7 (KLR) **(*Speaker of the Senate Case)*** and ***Mate & Another Vs Wambora & Another*** [2017] KESC 1 (KLR). The Court in the former decision declared that;

"...while courts retain authority to determine whether constitutional obligations have been met, they must exercise

restraint and avoid directing other arms of government on how to perform their constitutional mandate".

[108] These pronouncements also establish that the remedy of structural interdict will be justified only in narrowly defined circumstances. Specifically, where duty bearers have demonstrated incompetence, intransigence, or sustained inattentiveness in the discharge of constitutional obligations. See **Kent Roach & Geoff Budlender**, "*Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?*", (2005) 122 South African Law Journal 325, which this Court relied on in ***Parliament of Kenya & another Vs Okoiti & 2 others****, (supra)*. The learned authors emphasise that courts have power not merely to declare rights but, where necessary, to grant mandatory orders and retain supervisory jurisdiction to make constitutional rights effective. They caution, however, that the existence of this power does not mean that supervisory relief should routinely be granted. The remedy must be justified by the circumstances of the particular case. The preconditions serve as principled constraints, ensuring that the court's supervisory remedies remain exceptional rather than routine, with the critical question being whether Parliament or a state agency was unwilling, incapable, or persistently indifferent to its constitutional duty.

[109] Before we apply these principles to this appeal, we need to explain one more thing. The remedy of structural interdict did not certainly originate in Kenya. Its modern form that the courts in Kenya have followed was developed by the Constitutional Court of South Africa, which gave the remedy its distinctive constitutional form, although it has important antecedents in the United States where it is called structural injunctions. India has the equivalent but differently named as continuing *mandamus*. Before ***Mitu-Bell,*** the Civil Procedure Act and its Rules had long recognized and provided for a practice of determining rights while leaving further proceedings before final disposal. The established terminology was a preliminary judgment resulting in a preliminary decree; or "interlocutory judgment" and, occasionally, "interim judgment." The ***Mitu-Bell*** *case* was perhaps the first case to constitutionalize the remedy in Kenya through

the interpretation of Article 23(3) "appropriate relief". It was the High Court in that case that triggered the discourse regarding the place of structural interdicts as forms of relief in the case of alleged human rights violations. The trial Judge granted interim orders requiring the respondents to furnish the court with information regarding policies and programmes on provision of shelter and access to housing. The Court of Appeal disagreed with the interdict, holding the view that the High Court did not retain any powers to exercise after its judgment because it had become *functus officio*. It is this point of divergence that drew this Court into developing the principle when the dispute reached it.

[110] The key issue for us to consider in this appeal is whether the Court of Appeal crossed the constitutional boundary between supervising compliance with the Constitution and the law and itself making planning policy. We already observed that the Court of Appeal did not identify and declare the nature of violations before issuing structural orders. It was enough to require the 1st and 2nd respondents to adopt, approve and gazette lawful planning instruments in terms of the Constitution and PLUPA. The first order of the interdicts would have been sufficient. It directed the 1st and 2nd respondents to:

> ***"Complete, adopt and gazette within six (6) months of the date of the judgment, the pertinent local physical and land use development and zoning plan(s) under section 46 of PLUPA and/or a Nairobi City Development Control Policy (or equivalent development control code) governing the whole city – including Rhapta Road and the broader Westlands corridor, in compliance with the Constitution and PLUPA".***

[111] However, the appellate court did not stop there. It waded into planning norms and outcomes of the City of Nairobi. It directed that the planning policy or plan should address: "*plot ratios, site coverage, height envelopes, setbacks, parking and mobility hierarchies, public open space, stormwater management, and infrastructure concurrency (including water, sewerage, power, schools, health, and emergency services), and all other relevant considerations*". In requiring an interim report to be presented to it, the court decreed that it must

detail steps undertaken by the 1st and 2nd respondents, including consultations with professional associations "*such as the Architectural Association of Kenya, Institution of Planners, and the Law Society of Kenya*".

[112] Those directions were, no doubt, beyond the jurisdiction of the court in terms of its constitutional and statutory authority. They were also contrary to the principles enunciated in ***Mitu-Bell***. The Court concludes that the interdicts went beyond the permissible scope of structural remedies and amounted to judicial overreach.

[113] Whereas we entertain no doubt, from what we have said, that, in the circumstances, supervisory remedy was absolutely necessary in view of the fact that for nearly five years the 1st and 2nd respondents sat, literally on this draft policy and doled out approvals as a matter of absolute discretion. The interdicts issued by the appellate court were therefore intended to provide constitutional oversight of planning only to the extent that the 1st and 2nd respondents were to develop, adopt and gazette the policy or plan within six (6) months of the date of the judgment in accordance with the Constitution and PLUPA.

[114] We reiterate, as we conclude this point, that legislative authority of a county, in terms of Article 185 and Section 8 of the Fourth Schedule of the Constitution, is vested in, and exercised, by its County Assembly. That authority entails receiving and approving plans and policies for, among other things, the development and management of the county's infrastructure and institutions. This fortifies the position we took at the beginning of this judgment that city and urban planning is a constitutional question. The Court's role under Article 163(4)(a) of the Constitution is to determine whether the Court of Appeal properly applied Article 185.

[115] In terms of Article 23(3) of the Constitution, the remedies available to the appellants against the 1st and 2nd respondents will, for the reasons we have stated, be limited only to proven violations. This is in consonance with the central objective of the reliefs provided for under Article 23(3); to make constitutional rights practical and effective. The judgment of the South African Constitutional Court in ***Fose Vs Minister of Safety and Security*** (CCT14/96) [1997] ZACC

6; 1997 (3) SA 786) has persuasively articulated how the courts ought to interpret "appropriate relief", as a relief that is required to protect and enforce the Constitution; that courts ought to fashion new remedies to secure the protection and enforcement of constitutional rights.

[116] One of the reliefs sought by the appellants is to the effect that, if the buildings in question are found to have been constructed against the law, in terms of height and other factors, they should be demolished. Demolition is an exceptional and most intrusive remedy, in the sense that, ordinarily, it is a last resort remedy and courts are usually slow to make such orders. The effects of demolition are permanent and cannot be reversed. Its effect may go beyond the parties in a litigation and extend to the broader public. It is likely to permanently affect property rights guaranteed by Article 40. It may have ruinous financial effects on innocent third parties such as purchasers, tenants and financiers.

[117] The relief of demolition must be tested against the Constitution's remedial architecture, which requires that for a court to grant any remedy, it has to be satisfied that, in a given situation, the remedy is effective, necessary, rational, proportionate, just, equitable and consistent with the rule of law, property and environmental rights. See ***Mitu-Bell***. This is the underlying concern against demolition as a primary choice for relief. We may add, however, as a qualification of the above statement that, in appropriate cases, the court may order demolition. See ***Mutisya Vs Mwanzia*** [2022] KEELC 3806 (KLR). Where a building is proved to pose a real threat to the environment and a danger to human life and health, an order of demolition or modification will be justified. An order of demolition will also be issued where it is demonstrated that the approval was unlawfully obtained, or the developer acted fraudulently or in defiance of the law or a court order, or where the building is incapable of being regularised under any lawful planning framework.

[118] In contrast, courts will also consider whether a developer acted in good faith and lawfully obtained approvals from the responsible governmental agencies; whether the developer constructed in reliance on those approvals; whether there are alternative remedies that are less restrictive or intrusive for the constitutional

violation in question; and whether demolition will impose a disproportionate burden on innocent third parties in contrast with the constitutional harm proved.

[119] The only constitutional violation that we, like the other two courts below, have found is that the 2nd respondent lacked a valid planning framework. The primary failure was institutional and not attributable to individual developers. An order of demolition, in our considered view, therefore may not address this institutional failure. In the circumstances, the Constitution will be vindicated by orders directing the 2nd respondent to comply with the Constitution and planning law instead of demolition. Just like the trial court and the first appellate court, we neither have the jurisdiction nor the competence to determine how many floors of the buildings are to be demolished.

[120] Constitutional reliefs serve as a vindication of the right infringed and aim to deter future infringement. Any of the remedies listed in Article 23(3) should be sufficient to vindicate the violation. Those remedies include declaration of rights, compensation, conservatory orders, injunction, judicial review or other appropriate remedies. A court may consider issuing an injunction, a mandatory order or structural interdict where the infringement is continuing in order to stop the violation and prevent its recurrence in future.

[121] Relevant to this appeal, constitutional remedies are also intended to correct systemic constitutional failures. Some violations result from defective systems, policies or generally institutional failures. Therefore, structural interdicts will direct the responsible body to devise a constitutionally compliant solution and report to the court, without the court extending the relief beyond constitutional limits.

[122] We reiterate, only to emphasise that what was proved was principally a systemic failure by the 2nd respondent: failure to develop and maintain a legally valid planning framework. The appropriate constitutional remedy, in such a case, should be one that can correct the identified institutional failure.

[123] We take judicial notice, pursuant to Sections 59 and 60 of the Evidence Act, of the fact that subsequent to the hearing and reservation of judgment in this

appeal, the 2nd respondent passed the Nairobi City County Development Control Policy, 2026 on 18th June 2026 and published it in the Kenya Gazette Vol. CXXVIII-No. 103 GN No.9163 of 19th June 2026. The notice we take of this new development is limited solely to our recognition of a supervening event. Since the validity, substantive provisions and legal effect of that instrument were not matters before the courts below or canvassed before us, we say no more, save only to surmise that the promulgation of the new policy may have been made pursuant to the structural orders issued by the Court of Appeal, wherein the 2nd respondent was ordered to, within six months;

> "*complete, adopt through the County Assembly, and gazette the pertinent local physical and land use development and zoning plan(s) and/or a Nairobi City Development Control Policy*".

[124] We have faulted the detailed manner with which the structural order was crafted. We have said it amounted to judicial overreach. By Article 185 (1) of the Constitution, the legislative authority of a county is vested in, and exercised by, a County Assembly. A County Assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government. We reiterate what we said in ***Parliament of Kenya & another Vs Okoiti & 2 others*** *(supra)*; the ***Speaker of the Senate Case;*** and ***Mate & Another Vs Wambora & Another*** *(supra),* that courts must exercise judicial restraint by avoiding to purport to supervise law-making bodies, for example, by requiring those bodies to make progress reports to the courts, or directing other arms of Government on how to perform their constitutional functions. The only exception to that edict is where it is demonstrated that the duty bearer has shown incompetence, persistent indifference, unwillingness, intransigence, or sustained inattentiveness in discharging constitutional obligations.

[125] In view of the fact that the 2021 Policy has been on the shelf of the 1st and 2nd respondents for nearly five years, the Court of Appeal properly directed itself when it directed the County Assembly of Nairobi City County to make the policy within six months and to present a status report to it. It has taken the Assembly

exactly one year from the date the interdicts were issued to approve the Nairobi City County Development Control Policy, 2026.

[126] Based on this view, the relief that commends itself to us in this appeal is to remit the Nairobi City County Development Control Policy, 2026 to the Court of Appeal pursuant to its order made in the judgment of 19th September 2025 and in its exercise of the supervisory jurisdiction retained under the structural interdict. The matter is remitted strictly for the limited purpose of the appellate court formally receiving and considering the Nairobi City County Development Control Policy 2026 and determining its effect, if any, upon the implementation of the structural orders in accordance with the limits imposed in this judgment.

[127] On the principle of intergenerational equity, our short answer is this. Although the statutory framework of the principle is EMCA and the EIAs are the primary mechanisms through which these obligations are implemented, the principle is anchored in Articles 42 and 69(1)(a) of the Constitution. The former guarantees every person the right to a clean and healthy environment, while the latter obligates the State to ensure the sustainable exploitation, utilization, management and conservation of the environment and natural resources.

[128] Section 58 of EMCA requires a proponent of any project to undertake a full environmental impact assessment study and submit an environmental impact assessment study report to NEMA prior to being issued with a licence by NEMA. The two superior courts below concurrently found as a matter of evidence that the 6th to 21st respondents duly submitted EIA reports, which were reviewed, approved and licences duly issued by NEMA. On the basis of that conclusion, the two courts concluded that the appellants did not discharge the burden of proving that the EIA licences were unlawful or unprocedurally issued, or that it infringed their constitutional right to a clean and healthy environment.

[129] We come to the conclusion on this ground that both courts were correct in their concurrent determinations that development approvals must comply with lawful zoning and policy instruments, and with the governing frameworks of the Constitution, the PLUPA, and the EMCA; that the 2021 policy lacked the formal

status under Article 185 of the Constitution and Section 45 of PLUPA; and finally, that only the County Assembly could enact such a policy.

G. CONCLUSION

[130] These proceedings underscore a responsibility that Nairobi City County, and county governments generally, can no longer afford to neglect. Development planning is a constitutional and statutory duty. Its discharge cannot be postponed until disputes arise between developers and residents, or left to courts to resolve through successive challenges to individual projects. Cities and urban areas must develop within a lawful, coherent and publicly accessible planning framework that provides certainty to residents, investors and public authorities alike. Planning must also be kept under review. Population growth, housing needs and changing urban conditions may justify greater density or revised building heights, but those changes must be pursued transparently and within the law. Residents are entitled to a meaningful voice in that process; developers are entitled to clear, predictable and consistently applied requirements. The central plank throughout this judgment is that the law demands only developments which are in conformity with the relevant approved plans.

[131] The adoption of a planning framework must therefore be followed by effective inspection, monitoring and enforcement. County authorities and the relevant regulatory agencies must discharge their respective mandates diligently and coordinate their interventions so that gaps in oversight do not expose the public to avoidable danger. County officials must remain alive to the fact that this obligation carries personal criminal liability under PLUPA.

[132] For the reasons we have given in this judgment, we come to the ultimate conclusion that this appeal partially succeeds to the limited extent that the Court of Appeal erred in relying upon the 2021 Policy as the basis for the granting of development permit by the 1st and 2nd respondents. The remaining proffered grounds in this appeal have no merit and are dismissed.

We summarize the findings in this judgment as follows;

i) This Court has jurisdiction to entertain this appeal as it falls squarely within the scope of Article 163(4)(a) of the Constitution.

ii) The ELC was properly seized of the appellants' petition as the jurisdiction of the Liaison Committee, and the NET was inadequate to address the appellants' entire grievance, especially those anchored on the provisions of the Constitution.

iii) The appellants failed to prove any ongoing environmental degradation that threatened or violated their rights to a clean and healthy environment. The only constitutional violation that was established is that the 2nd respondent lacked a valid planning framework.

iv) The structural interdicts issued by the appellate court provided constitutional oversight of planning to the extent only that the 1st and 2nd respondents were ordered to develop, adopt and gazette the policy or plan within six (6) months of the date of the judgment in compliance with the Constitution and PLUPA.

H. COSTS

[133] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), like both superior courts below, we take note that the appeal is of a public interest nature and the order that commends itself to us is to direct parties to bear their own costs.

I. ORDERS

[134] In the premises, we issue the following Orders;

a) The Petition of Appeal dated 22nd October 2025 and filed on 23rd October 2025 partially succeeds to the extent that we set aside the Court of Appeal's reliance on the Nairobi City County Development Policy 2021 as the basis for granting development permission by the Nairobi City County in the Rhapta Road area. The rest of the grounds of the Petition of Appeal fail and are accordingly dismissed.

b) The structural interdicts issued by the Court of Appeal are upheld only to the extent explained in this judgment, namely, that the 1st and 2nd respondents were ordered to develop, adopt and gazette the requisite planning policy or plan within six (6) months of the Court of Appeal's judgment, in compliance with the Constitution and the Physical and Land Use Planning Act.

c) The matter is remitted to the Court of Appeal for the limited purpose of receiving the respondents' compliance report and, upon hearing the parties, determining whether the Nairobi City County Development Control Policy 2026 satisfies the requirements of the appellate court's structural interdicts as defined and upheld in this judgment, and making such consequential orders as may be necessary to secure compliance with those requirements.

d) Each party will bear their own costs of the appeal before this Court.

e) We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** Day of **October, 2026.**

.....
M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original.

REGISTRAR
SUPREME COURT OF KENYA