THE SUPREME COURT OF KENYA

MILLENIUM GARDENS MANAGEMENT LIMITED VS METRICON HOME NAIROBI COMPANY LIMITED & 3 OTHERS

SC PETITION NO. E047 OF 2025

DATE OF JUDGMENT: 30TH OCTOBER 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: Appeal partially allowed

Background

The appeal concerns the legality of high-rise residential development on Mbaazi Avenue, Nairobi, particularly the applicable zoning and building height restriction. It also considers the reliance on the unpleaded Nairobi Development Policy 2021, its validity, and whether the appellant, Millennium Gardens Management Limited's right to a fair hearing and to a clean and healthy environment was violated.

The appellant, Millenium Gardens Management Limited, manages a 28-unit property on Mbaazi Avenue in Nairobi's Thompson area: 24 three-bedroom and 4 four-bedroom units. It shares a boundary with L.R. No. 330/155, where the 1st respondent, Metricon Home Nairobi Company Limited, began constructing three 16-storey apartment blocks on one acre. The development comprises 512 units—336 one-bedroom, 144 two-bedroom, and 32 three-bedroom—plus a two-level underground car park and ground-level parking. It is this construction that prompted the appellant to file the instant suit at the Environment and Land Court (ELC).

The ELC (*O.A. Angote J*) found substantial compliance with EMCA Sections 59 and 60 on public participation, noting that the appellant's members had an adequate opportunity to express their views, which informed mitigation measures and project adjustments. The ELC also held that the appellant had failed to show that these measures would not address their concerns or that the project posed a viable threat to their right to a clean and healthy environment. On height restrictions, the court found that the property was in Thompson Area, Zone 4 within Nairobi County. The 2004 Nairobi City Development Ordinances and Zones Guide limited development in that area to residential apartments of up to four storeys, but marked the policy "under review." The court noted in that regard that the Nairobi Integrated Urban Development Plan (NIUPLAN 2014–2030) superseded the guide. The judge also held that he had come across the Nairobi City County Development Policy 2021 and found that it sets the criteria for evaluating and approving

development applications. Under that policy, the suit property was in Zone 4B, allowing a 16-floor skyline.

He further held that the appellant had failed to show that the development violated the NIUPLAN 2014, or the 2021 Policy and therefore found that the project was not invalid on account of the outdated 2004 Zoning Policy, provided it continued to comply with the conditions set out in the EIA License and other relevant Regulations. For the above reasons, the trial court found no merit in the petition before it and dismissed the same.

The Court of Appeal (*Musinga (P), Nyamweya and Odunga JJ.A.*) proceeded on the basis that the approvals were validly issued, as they were not challenged. While the Court of Appeal agreed that the 2021 policy was neither expressly pleaded nor submitted as evidence by any party, it held that government policies in operation cannot be disregarded by the court, even if unpleaded. Further, that being a public document, the ELC rightly took judicial notice of it, and was within its powers to rely on it. It further examined the document and concluded that it was approved by the National Assembly on 10th February, 2022, and found no contrary evidence to this fact.

The court upheld the trial court's findings on height restrictions, which it held were supported by evidence, and agreed that the appellant and interested party had not shown the proposed mitigation measures were inadequate. It also held that, although the Nairobi City County Development Control Policy, 2021 was the applicable planning document, the County must comply with all laws governing development and planning. The court ordered the County to put the Nairobi County Physical and Land Use Development Plan, or an equivalent, in place within 12 months of judgment.

Undeterred, the appellant filed the instant appeal, challenging the Court of Appeal's decision on five grounds. The Court delineated the following five (5) issues for its determination:

i. *Whether the appeal meets the constitutional threshold under Article 163 (4)(a) of the Constitution.*
ii. *Whether the Court of Appeal erred in law in applying the unpleaded draft Nairobi City County Development Control Policy, 2021.*
iii. *Whether the Court of Appeal erred in law in declining to review the record to determine whether or not the ELC had misapplied the height restriction for Zone 5 or translocated the project to a different Zone 4.*
iv. *Whether the petitioners' rights to a clean and healthy environment under Article 42 were violated.*
v. *What Reliefs should issue?*

Upon consideration, the Supreme Court determined the appeal as follows:

1. **Issue 1:** The Court finds that questions concerning public participation and substantial compliance with the statutory requirements had not been raised in the appeal and therefore the findings of the Court of Appeal on those issues were sustained. However, on the jurisdiction of the Supreme Court to hear and determine the appeal, the Court finds that the Court of Appeal's reliance on the unpleaded draft Nairobi City County Development Control Policy, 2021; the incorrect enforcement of the height restriction for the contested project; the reclassification of the project to a different zone; the environmental damage caused by the project; and the alleged infringement of the appellant's right to a clean and healthy environment constitute constitutional

controversies arising under Articles 10, 42, 50, and 69 of the Constitution. These issues therefore satisfy the constitutional muster under Article 163 (4) (a) of the Constitution.

2. **Issue 2:** The trial and appellate courts erred not only because the policy was not pleaded but also by relying heavily on it without giving the appellant a fair opportunity to respond or to properly consider its impact on the issues that had become clearly defined for decision. This approach violated the principle that courts should generally focus on the case as presented by the parties, as well as the constitutional requirement of a fair hearing. In addition, the policy, being in draft form, failed to meet the requirements of the Physical and Land Use Planning Act and could not form the basis of area zoning or building height regulations. Therefore, we find that, on this point, both the trial and appellate courts erred in applying the unpleaded draft Nairobi City County Development Control Policy, 2021, without affording the appellant an opportunity to be heard.

3. **Issue 3:** Having already determined that the 2021 Policy could not have formed the basis for area zoning or building height restrictions, we similarly find that the Court of Appeal erred by failing to review the record and by further applying the Policy in its assessment of the height restrictions in the manner that it did.

4. **Issue 4:** Relying on the uncontested approvals issued and an objective consideration of the environmental impact at the material time, we find that the trial and appellate courts properly assessed the question of violation of the appellants' rights and arrived at a proper conclusion that no rights were violated as alleged.

5. **Issue 5:** It is within the 3rd respondent's purview to ensure conformity with duly enacted policies without further input of this Court. We find that the 3rd respondent is properly placed to undertake a fresh review of the project in line with the now-enacted City County Physical Development Plan 2026. In our view, this appropriately reconciles the competing considerations before us. It vindicates the appellant's right to a fair hearing under Article 50 and recognises zoning as an integral component of the State's obligation to protect the environment under Article 42, while respecting the statutory mandate of the planning authorities, including the enforcement framework contemplated under section 78 of the Physical and Land Use Planning Act. At the same time, it does not punish the 1st respondent for having relied on approvals issued by public bodies by permanently foreclosing the project. Rather, it requires that the development's legality be tested afresh against the planning regime that now governs the area.

Consequently, the final orders were as follows:

a. The Appeal is partially allowed only to the extent that we hereby set aside the Court of Appeal findings on its reliance on the Nairobi City County Development Policy 2021 as a ground for dismissing the appeal before it.
b. For avoidance of doubt, the Judgment of the Court of Appeal is hereby upheld.
c. Each party shall bear its costs of the appeal.
d. We hereby direct that the security for costs deposited in the appeal be refunded to the depositor(s).

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