



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E047 OF 2025

BETWEEN

MILLENIUM GARDENS MANAGEMENT LIMITED APPELLANT

AND

METRICON HOME NAIROBI COMPANY LIMITED..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY 2ND RESPONDENT

NAIROBI CITY COUNTY 3RD RESPONDENT

MBAAZI AVENUE RESIDENTS' ASSOCIATIONINTERESTED PARTY

*(Being an Appeal from the Judgment and Order of the Court of Appeal at Nairobi
(Musinga (P), Nyamweya and Odunga JJ.A.) delivered on 3rd October, 2025 in Civil
Appeal No. E1010 of 2024)*

Representation

Mr. Ochiel Dudley for the appellant & interested party

(Bond Advocates LLP)

Mr. Brian Otieno & Mr. Duncan Chebon for the 1st respondent

(Brian Otieno & Co. Advocates)

No Appearance for the 2nd respondent

Mr. Jamal Bake & Ms. Munguti for the 3rd respondent

(*Jamal Bake & Associates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Physical planning is essential to the growth of any city in today's world. How land is used, buildings are constructed, and public infrastructure such as roads, walkways, and sewerage are created raise questions of public safety and environmental health that have now become common subjects of litigation. These issues alongside the enactment and implementation of relevant policies are at the centre of the present appeal.

[2] The appeal, dated 14th November 2025 and filed on 20th November 2025, is grounded in Article 163(4)(a) of the Constitution. It challenges the Court of Appeal's judgment in ***Civil Appeal No. E1010 of 2024***, dated 3rd October 2025, which dismissed the appellant's appeal and affirmed the Environment and Land Court's judgment in ***Petition No. E121 of 2023***, which found the appellant's petition unmerited.

B. FACTUAL BACKGROUND

[3] The appellant, Millenium Gardens Management Limited, manages a property situated along Mbaazi Avenue in the Thompson area of Nairobi City County. The property comprises 28 units, made up of 24 three-bedroom units and 4 four-bedroom units. The property adjoins and shares a common boundary with L.R. No. 330/155, where the 1st respondent's development is situated.

[4] The 1st respondent commenced construction of three 16-storey blocks of apartments on the suit property, comprising 512 units: 336 one-bedroom units, 144 two-bedroom units, 32 three-bedroom units, a two-level underground car park, and one ground parking area, all on a one (1) acre piece of land. It is this construction that

led to the institution of the instant suit at the Environment and Land Court (ELC) in Nairobi.

C. LITIGATION HISTORY

i. Proceedings at the Environment and Land Court

[5] The appellant instituted a petition dated 12th October, 2023 against the 1st respondent in ***Environment and Land Court Petition No. E121 of 2023***. The Nairobi City County Government, the 3rd respondent herein, was named as the 1st interested party; the 2nd respondent, the National Environment Management Authority (NEMA), was joined as the 2nd interested party; while the present interested party, Mbaazi Avenue Residents Association (MARA), was the 3rd interested party, before the ELC. The appellant sought the following reliefs:

- a) A declaration that the intended development by the 1st respondent on L.R. No. 330/155 (ORIGINAL NO. 330/39/8) along Mbaazi Avenue, Thompson area, Nairobi County infringes on the appellant's members right to a clean and healthy environment.*
- b) A declaration that the development being undertaken by the respondent is contrary to the provisions of Article 10 of the Constitution to the extent that no proper and/or qualitative public participation was undertaken.*
- c) An order of permanent injunction restraining the respondent either by itself, servants, agents and/or employees from carrying on the proposed development on L.R. No. 330/155 (ORIGINAL NO 330/39/8) along Mbaazi Avenue, Thompson area, Nairobi County.*
- d) An order directing the Officer Commanding Station (OCS) Kilimani Police Station to enforce and ensure compliance with the orders issued herein.*
- e) General damages.*
- f) Costs of the petition.*
- g) Any other or further relief that the Honourable Court may deem just and fit to grant.*

[6] The appellant's case was that the 1st respondent's development was irregular, unlawful, and contrary to the 3rd respondent's zoning policy, which provided that property developments within the subject area ought not to exceed four (4) storeys. It contended that due to the height of the proposed development, natural sunlight to its apartments, air circulation, reception of TV/DSTV and other aerial communication devices would be affected. It further argued that the intended development, cramming 512 housing units on a one-acre parcel of land, disregarded and compromised the scarce amenities, water resources, drainage, sanitation, ecosystem, infrastructural and socio-economic setting in the area, thereby infringing on its members' rights to a clean and healthy environment under Article 42 of the Constitution.

[7] The appellant went on to aver that, since the two properties mentioned above shared a common underground rock, the proposed construction of a 2-level underground and 1-level ground parking would compromise the structural stability, weaken the integrity of their buildings and contaminate the underground water source from a borehole relied upon by its members. Further, that exhaust fumes emitted from the parking area would cause immense pollution, rendering their property uninhabitable.

[8] It was also contended by the appellant that, prior to the commencement of the development, its views were not considered, in violation of Articles 10, 47, and 69 of the Constitution, and sections 4 and 5 of the Fair Administrative Action Act, which require transparency and public participation in the management, protection, and conservation of the environment. It added that the project was shrouded in secrecy and began without a project signboard, making it difficult to determine whether the necessary approvals had been obtained. It averred that, although they had registered reservations on the construction with the 2nd respondent, the latter proceeded to issue a licence to the 1st respondent without taking their concerns into account. Furthermore, an enforcement notice was issued by the 2nd respondent but the 1st respondent refused to halt construction and ignored it.

[9] In support of its case, the appellant annexed a report by an expert, Mr. Daniel Wanjuki, setting out the negative impact of the proposed project. The report noted discrepancies in the project size and the Environmental Impact Assessment (EIA) License, which indicated that the project involved the construction of three 13-storey blocks, comprising 416 residential apartments. It also stated that there were various inadequacies in the project EIA Report and pointed out the environmental concerns it had identified.

[10] The interested party, an association of owners and residents of Mbaazi Avenue, supported the appellant's case. It urged that, under the relevant zoning laws and rules, any construction along Mbaazi Avenue is limited to four-storeys, and that notices to this effect were placed at prominent positions within the locality. It posited that, if the 1st respondent was allowed to proceed with its project, it would violate the zoning provisions for Kilimani Ward, and the neighbourhood would experience highly stressed public infrastructure, including inadequate sewerage support, a high level of water shortages, and heavy traffic on the two-lane road.

[11] In response to and in opposition to the petition, the 1st respondent averred that in the year 2022, it sought to develop its property on Mbaazi Avenue by constructing residential apartments. That prior to the submission of the change of user application, an advertisement was published in local daily newspapers inviting members of the public to submit their comments or objections to the proposal. Its application for change of user from residential to multi-dwelling use under the Physical Planning and Land Use Act, 2019 was subsequently approved by the Nairobi County Planning Committee. A change of user approval was issued on 20th July, 2022, and a second approval was issued on 30th August, 2023, following amendments to the initially approved plan.

[12] The 1st respondent urged that, after various meetings with the Mbaazi Avenue residents, it conducted an EIA Study and submitted a report to NEMA that provided for mitigation measures. Subsequently, NEMA placed advertisements in local daily newspapers, the Kenya Gazette, and radio on various dates, requesting the submission

of comments from members of the public on the EIA Study report for the proposed project. It averred that public participation meetings were also held, during which the issues raised were discussed at length, in line with Section 58 of the Environmental Management Coordination Act. It stated that it also issued social site assessment questionnaires and put up posters publishing its intention to commence the project. It therefore averred that it adequately and actively engaged Mbaazi Avenue residents, stakeholders and the general public before commencement of the project.

[13] The 1st respondent further contended that it conducted a traffic impact assessment and a geotechnical investigation to ascertain the land's suitability for the proposed project. Concerning the water resource, it averred that it received an approval from the Nairobi City Water and Sewerage Company Limited stating that the sewer line in the area had adequate capacity to transmit sewer within the project area and Mbaazi Avenue generally. It further stated that it adhered to the Physical Land Use Planning Act, 2019, and the Environmental Management Co-ordination Act, 1999, in preparing for the commencement of the project. It added that it was issued with an Environmental Impact Assessment License No. NEMA/EIA/PSL/23286, upon fully complying with all the requirements set out in the relevant law, was issued with a Certificate of Compliance by the National Construction Authority, having followed due procedure and satisfied all the requirements in respect of the proposed development.

[14] Concerning the Enforcement Notice, the 1st respondent argued that, upon receiving the notice, it immediately stopped work at the site. Subsequently, NEMA permitted the 1st respondent to resume construction, and it insisted that it only commenced works upon obtaining the relevant licenses and approvals for the project, and it complied with the prevailing zoning laws and regulations, the Environment Management Co-ordination Act, and Regulation 4, 7, 16, 17, 18, 22 and 29 of the Environmental (Impact Assessment and Audit) Regulations, 2003. It further urged the court to dismiss the petition with costs on the ground that the appellant's allegations were unsubstantiated, citing the decision in **Anarita Karimi Njeru Vs Republic (Misc. Crim Appl. No. 4 of 1979) [1979] KEHC 30 (KLR)**.

[15] The 2nd respondent, NEMA, in opposition to the petition, contended that, prior to the commencement of the project, the 1st respondent submitted copies of the terms of reference for the EIA Study Report. Upon receipt and review of the application, the terms of reference were approved. Subsequently, on 20th May, 2022, the 1st respondent submitted an EIA Study Report for review and, in accordance with applicable law, it identified the project's relevant stakeholders and sought their review and submission of comments. It averred that the 1st respondent, vide a letter dated 23rd May, 2022, issued a public notice in the Kenya Gazette and in two national newspapers on 24th June, 2022 seeking comments on the project.

[16] The 2nd respondent averred that, upon receiving complaints from the appellant regarding the 1st respondent's pending application, it directed the 1st respondent to undertake public meetings and provide the minutes of meetings held; a traffic impact assessment report; and provide legible design drawings for the project. It further averred that this information was subsequently submitted to it by the 1st respondent, and it also undertook a site visit to confirm the contents of the report received. It was its case that it was satisfied that the proposed project was within the law and the set standards, and therefore proceeded to issue it with an EIA License. It urged that the License was issued after assessing the possible impacts of the proposed project and being satisfied that no likely negative impact would be occasioned to the environment. It also wrote to the appellant, detailing the steps undertaken in the review of the 1st respondent's application, and informed it of its right to appeal to the National Environment Tribunal. No such appeal was preferred, so it contended. It averred, in addition, that it subsequently conducted a site inspection for monitoring purposes and made recommendations for remedial measures to safeguard the site and prevent harm to neighbouring plots of land including the appellant's parcel.

[17] The 3rd respondent, the Nairobi City County Government, averred that the 1st respondent submitted its application for change of user from residential to multi-dwelling units. It approved this application subject to conditions set out therein, and that the said approval was never challenged at the County Physical and Land Use

Planning Liaison Committee under Section 78 of the Physical and Land Use Planning Act.

[18] The 3rd respondent's case in summary was that: the 1st respondent duly obtained development approvals and complied with the conditions therein; periodic inspections of the site were conducted to ensure compliance of all necessary conditions by the 1st respondent; approval from the Water Resources Authority was obtained; and there being other high-rise developments within the same project site, none reported the obstruction of sunlight, air circulation and aerial communication devices. It asserted that the appellant had failed to demonstrate contravention or infringement of the Constitution, and that in the absence of any challenge to the approvals issued by the 2nd and 3rd respondents, the project ought to be allowed to proceed. Concerning the zoning policy, the 3rd respondent averred that the Nairobi Area Zoning Policy was then under review to meet the rising demand for housing in Nairobi.

[19] The hearing proceeded by way of affidavit evidence and written submissions, a matter we shall address later in this judgment. In the judgment dated 19th September, 2024, the ELC (*O.A. Angote J*) framed four (4) issues for determination: *whether the petition meets the specificity test; whether the appellant demonstrated the alleged violations and/or threats of violations of its rights under Articles 10, 42, 47 and 69 of the Constitution; whether the 1st respondent's proposed project was in violation of the area zoning policy; and the appropriate remedies, if any.*

[20] *On the first issue*, the court determined that the allegations made by the appellant were specific enough to meet the test set out in the **Anarita Karimi case (supra)** as well as the Supreme Court decision in **Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others** [2014] eKLR. The challenge on that issue by the 1st and 3rd respondents therefore failed.

[21] *On the second issue*, the court held that there was substantial compliance with the public participation requirements set out in Sections 59 and 60 of the Environmental Management and Conservation Act and Regulation 21 thereof, with the

only exception being the public hearing anticipated under Regulation 22 by NEMA. It, however, noted that the Regulation provides that NEMA may hold hearings, which were in fact organized and held by the 1st respondent. It further noted that only one Gazette Notice dated 1st July, 2022 was provided to the court, contrary to Regulation 21, which requires that the publication inviting comments be published in the Gazette and in a local newspaper of nationwide circulation once a week for two consecutive weeks. It, however, found that despite the said anomalies, the appellant's members were well aware of the project, having conceded to filling on site questionnaires, attending meetings, and writing letters objecting to the project. The court therefore found that the appellant's members were given an adequate opportunity to air their views, and that there was adequate public participation. The appellant's members' right to be heard was respected, and a balance was struck between the broader interests at stake, including the environmental concerns raised by the appellant's members.

[22] *On the allegations that the appellant's views were not considered*, the ELC examined correspondence and minutes of the meetings held between the parties. It found that the 1st respondent engaged with the issues raised, made adequate adjustments to the project and provided detailed responses to the concerns raised. It further noted that some of the concerns were incorporated in the EIA Licence, which gave certain conditions that had to be complied with by the 1st respondent. On the allegations that the development was a threat to the integrity of the neighbouring buildings, and by extension, a threat to the right to a clean and healthy environment, the court observed that the EIA Licence provided a geotechnical site investigation and report detailing, among others, the method of excavation and the support systems to be applied thereon to ensure preservation of the structural integrity of the neighbouring buildings. The trial court therefore found that it had not been demonstrated that these measures would be inadequate to mitigate the concerns raised by the appellant. On the appellant's allegation that their buildings developed cracks during the excavation exercise, the court found the allegation unproven; thus, no violation was committed by the 1st respondent.

[23] *Concerning the alleged blockage of light*, the court found that neither was it demonstrated that the building design would lead to a blockage of light nor would it affect natural air circulation, and therefore found the claim unsubstantiated. *On the concern raised regarding sewerage and sanitation*, it found that the 1st respondent, through the EIA Report, demonstrated that adequate measures would be put in place to ensure that the proposed development would be connected to the national sewerage system, and there was therefore adequate drainage for effluence generated from the proposed site. Consequently, it found that no violation in that regard was established.

[24] *On the effects to the quality of air due to exhaust fumes from the parking area and pollution of the appellant's borehole*, the court found that nothing was placed before it to demonstrate potential air and water pollution. It also found that the claims of interference with aerial communication were not established either. Regarding allegations that the proposed development would cause undue strain on the existing infrastructure, the court noted that a Traffic Impact Assessment, including a traffic management plan, was undertaken. On matters of water, it found that the 1st respondent was required, under the EIA Licence, to implement a comprehensive water harvesting and storage scheme to augment the Nairobi Sewerage and Water Supply Company supply. In sum, the court found that the appellant had failed to demonstrate that the mitigation measures put in place would not adequately address the concerns raised, and failed to establish a viable threat to its rights to a clean and healthy environment.

[25] *Lastly, on whether the 1st respondent's proposed project violates the area zoning policy*, the court noted that the property, situated within Thompson Area, fell within Zone 4 in the policy. It also established that, under the *Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones* (City Council of Nairobi, 2004), the development allowed in the area was residential apartments of only a maximum of four storeys, and under remarks, it was indicated as a '*policy under review*'. The court further noted that the Nairobi Integrated Urban Development Master Plan of December 2014 (NIUPLAN), which provided a broad spatial framework to guide urban

planning and development within the Nairobi City County for the period 2014-2030, superseded the 2004 Guide.

[26] The learned Judge further noted that he “*came across the Nairobi City County Development Policy, December 2021*” which policy provides for the parameters upon which development applications for land use and development would be evaluated and approved. He therefore found that, pursuant to the said policy, the suit property fell on Zone 4B which provides a skyline/levels of 16 floors. He also observed that the 2004 Zoning Guidelines were superseded by events unforeseen at the time of their formulation and failed to account for the dynamic, evolving nature of urban and environmental planning in Nairobi City.

[27] According to the trial court, the appellant had failed to show that the impugned development ran afoul of the Nairobi Integrated Urban Development Plan, 2014 and the Nairobi City County Development Control Policy, 2021. It further found that, considering that the project had undergone public participation and the concerns of the appellant having been addressed within the existing legal and policy framework, the project was not invalid on account of the outdated 2004 Zoning Policy, provided that it continued to comply with the conditions set forth in the EIA License and other relevant Regulations.

[28] The court emphasized that, while the Nairobi Integrated Urban Development Master Plan of December, 2014 and Nairobi City County Development Control Policy, 2021 were the operative documents in guiding the approval of developments in Nairobi County, there was need for the Nairobi City County government to enact the Nairobi County Physical and Land Use Development Plan, envisioned under the Physical and Land Use Planning Act, to ensure that development decisions are made in accordance with the said development plan.

[29] For the above reasons, the trial court found no merit in the petition before it and dismissed the same. Each party was ordered to bear its costs as the petition was characterized as being public interest litigation.

ii. Proceedings in the Court of Appeal

[30] Aggrieved by the decision of the Environment and Land Court, the appellant and the interested party filed **Civil Appeal No. E1010 of 2024**. The appeal was premised on the grounds that the learned Judge erred in law and in fact:

- 1. In ignoring the admitted position of all parties that the 2004 Zoning Policy as reviewed in 2006 was still under review. Instead, the ELC decided the case on the unpleaded Nairobi City County Development Policy, 2021; outside the Odd Jobs exceptions and without inviting parties to comment on the applicability of that policy. In turn the court mistakenly applied a draft policy which all parties agreed was under review and which was long overtaken by Sessional Paper No 1 of 2023- Nairobi City County Development Control Policy, 2023 laid before the County Assembly on 6 June 2023 (before the case was filed on 12 October 2023).*
- 2. By ‘translocating’ the appellants from Mbaazi Avenue (Benard Estate, Lavington) in Zone 5, to the far away Muthangari, in Zone 4B. By this error, the court misjudged the applicable height restriction from a 0.1 (single dwelling house) to a 16-floor skyline - even if the Nairobi City County Development Policy, 2021, were applicable.*
- 3. In failing to find from the facts on record that Metricon had exceeded the plot ratio of 50 by planning to pile up three blocks of 16-floor apartments with 512 units on a one-acre plot.*
- 4. In finding that Millenium and MARA had failed to establish a viable threat to a clean and healthy environment. Further, the ELC’s analysis glossed over the significant environmental and health hazards evidenced by Millenium’s expert Environmental Impact Assessment report (MZI) placed on record.*
- 5. Misdirected itself on the public participation law in finding that Metricon conducted sufficient public participation before embarking on the development project. The court ignored the parameters of adequate public involvement, which must include, inter alia, considering and acting in good faith on all the views received. The ELC erred in law by validating public participation despite*

finding that NEMA never conducted the session under Regulation 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

6. *By overlooking the pleadings, evidence, and submissions that the planned construction would forever shade out the appellants' access to natural sunlight. The ELC further erred by disregarding the pleadings, evidence and submissions that since the project was not preceded by an expansion in the supporting infrastructure, the construction would cause adverse environmental impacts in the locality, such as the bursting of overstretched sewers.*
7. *Its approach contradicts the precautionary principle, which requires precautionary measures to avoid harm in the face of uncertainty regarding potential environmental impacts. The court thus failed to evaluate the project's threats to the appellants' rights and fundamental freedoms.*

[31] In a judgment dated 3rd October 2025, the Court of Appeal (*Musinga (P), Nyamweya and Odunga JJ.A.*) framed four issues for determination. At the outset, the court noted that neither the appellant nor the interested party had challenged the approvals issued to the 1st respondent by the 2nd and 3rd respondents. It therefore proceeded on the basis that they were validly issued. This finding will be revisited later in this judgment.

[32] On *whether the ELC applied the unpleaded Nairobi City County Development Control Policy, 2021 which had since been replaced by another draft policy, the Nairobi City County Development Control Policy, 2023*, the court noted that it was uncontested that the 2021 policy was not expressly pleaded nor submitted as evidence by any party. Its view was, however, 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 furthermore examined the document and deduced that it was approved by the National Assembly on 10th February, 2022, and there was no contrary evidence to this fact. Concerning the draft Nairobi City County Development Control Policy, 2023, it was its

finding that, since it was still undergoing public participation, it could not be relied upon by the court to be deemed as replacing the 2021 policy. This finding will form the gist of our judgment.

[33] On *whether the ELC misjudged the applicable height restriction from 0.1 (single-dwelling house) for Zone 5 areas to a 16-floor skyline for Zone 4B areas*, the court noted that the trial court found, as a fact, that the suit property fell under Zone 4B in Nairobi's building policy which provides a skyline/level of 16 floors. It therefore found no fault in the trial court's finding on that issue as it was based on evidence properly presented before the court.

[34] On *whether the ELC overlooked pleadings, evidence and submissions on Metricon project's adverse environmental impact*, the appellate court found that this complaint was unwarranted. It was satisfied instead that the findings by the trial court were informed by evidence placed before it, particularly the EIA License and its stipulations, including the appellant's expert report by Daniel Wanjuki dated 17th May, 2024. It also found that, whereas the learned ELC Judge did not expressly state his views on the report, it was clear that the contents of the report were juxtaposed with those in the EIA Report and EIA license, and that he was entitled to believe the veracity of the EIA Report and EIA License.

[35] On *whether the ELC's approach was in contradiction to the precautionary principle, requiring precautionary measures to avoid harm in the face of uncertainty regarding potential environmental impacts*, the court agreed with the ELC and found no merit in the appellant's complaint. On *the issue of public participation*, the appellate court found that it was adequately undertaken at two phases as required, and these views informed the conditions stipulated in the EIA License. It was the court's finding therefore that the appellant and interested party had failed to demonstrate that the mitigating measures addressed therein would not be adequate to address their concerns.

[36] On allegations that there was no compliance with Regulation 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 by the 2nd respondent, the appellate court found that holding a public hearing was at the discretion of the 2nd respondent, depending on the circumstances. In the instant case, it found that there was evidence that the 1st respondent undertook a comprehensive public engagement exercise and part of that exercise informed the contents of the EIA License. Concerning the question of whether the 1st respondent undertook the mitigation measures set out in the EIA License, the court found it premature and therefore saw no justification for interfering with the ELC's decision on the issue.

[37] The Court of Appeal, in agreement with the trial court, urged that, while the Nairobi City County Development Control Policy, 2021 was the relevant operational planning document, it was necessary for the Nairobi City County to be fully compliant with the law as regards development and planning processes generally. In addition to the structural interdicts issued by the Court of Appeal in ***Claire Kubochi Anami & Others suing as Officials of Raphta Road Residents Association Vs Environment & Urban Planning, Nairobi City County and 19 Others***, Civil Appeal No. E160 of 2025 therefore, it further directed the Nairobi City County to ensure that the Nairobi County Physical and Land Use Development Plan or its equivalent, is in place within 12 months from the date of the judgment in the present matter. Furthermore, the appellate court directed that, at the lapse of the said period, the appellant and interested party would be at liberty to move the ELC for appropriate orders.

iii. Proceedings in the Supreme Court

[38] Undeterred, the appellant has filed the instant appeal challenging the decision of the Court of Appeal on the grounds that the learned Judges erred in law by:

- (a) *Applying the unpleaded draft Nairobi City County Development Control Policy, 2021 (long replaced by another draft policy, the Nairobi City County*

- Development Control Policy, 2023); and holding without evidence that the 2021 draft “was approved by the National Assembly on 10 February 2022”;*
- (b) In the alternative, (assuming the draft 2021 policy were valid), declining to review the record, to determine if or not the ELC had misapplied the height restriction for Zone 5 or translocated the project to a different Zone 4.*
 - (c) Overlooking the pleadings, evidence and submissions on the Metricon project’s adverse environmental impact and violation of the petitioner’s right to a clean and healthy environment.*
 - (d) Endorsing, despite Article 24, a limitation of the petitioners’ rights to a clean and healthy environment under Article 42, using a draft policy (not a law) that was not completed, adopted, or gazetted.*
 - (e) Ignoring the precautionary principle by allowing the construction to proceed without clarity on the applicable height restriction or Zoning Policy.*

[39] The appellant for the above reasons now seeks the following reliefs:

- i. The appeal be and is allowed.*
- ii. The Court of Appeal (Musinga (P), Nyamweya and Odunga JJA) judgment and orders given at Nairobi on 3rd October 2025 in **COACA/E1010/2024 – Mbaazi Avenue Residents Association & Another Vs Metricon Home Nairobi Company Limited & 2 others** be and are set aside.*
- iii. The petition dated 12th October, 2023 in **ELCLC/E121/2023 – Millennium Gardens Management Limited Vs Metricon Home Nairobi Company Limited** be and is allowed.*
- iv. The appellants be awarded the costs of this appeal; in the alternative, considering the public interest issues raised, each party bears its own costs.*

D. PARTIES’ CASES AND SUBMISSIONS

a. Appellant and Interested Party’s Submissions

[40] The appellant and interested party filed joint submissions dated 10th April, 2026 on 13th April, 2026 in support of the petition. They have framed four (4) issues for determination. First, on *whether the appellate court wrongly applied the unpleaded Nairobi City County Development Control Policy, 2021* in making its decision, they contend that, before the ELC, all parties agreed that the 2004 Zoning Guidelines (as reviewed in 2006) was applicable and remained relevant to their dispute, although it was undergoing review during the pendency of the case before the ELC. They therefore contend that neither the Nairobi City County Development Control Policy, 2021 nor the 2023 draft policy were pleaded or relevant to the determination of their case. To support that position, they rely on the Supreme Court decision in ***Parliament of Kenya & another Vs Oloit & 2 others*** [2026] KESC 28 (KLR) to urge that a court exceeds its jurisdiction when it grants reliefs that had not been pleaded or in respect of which the opposing parties were not afforded an opportunity to address the court through evidence and submissions. They add that the only exception to this principle was as stated in ***Odd Jobs Vs Mubia*** [1970] EA 476 - that is, where it is clear that the parties specifically left an unpleaded issue for determination by the court which was not the case in the present dispute.

[41] The appellant and interested party have further urged that the Court of Appeal's affirmation of the ELC's position on the 2021 policy improperly equated a draft policy with binding law, an approach wholly inapplicable to an unapproved draft. They contend that this resulted in a denial of their right to a fair hearing and occasioned a miscarriage of justice. They furthermore urge that there is no public record of any resolution, gazette notice, or formal adoption conferring legal effect on the 2021 draft policy. In any event, they contend, that contested policy document was superseded by the Nairobi City County Development Control Policy, 2023, which itself was being subjected to public participation at all relevant times and was therefore not also available to be used to determine any dispute between any parties.

[42] The appellant and interested party also submit that the Court of Appeal's decision contradicted its own jurisprudence on the 2021 policy because, in ***Claire Kubochi***

Anami Vs CECM Built Environment & Urban Planning, Civil Appeal E160 of 2025, the Court of Appeal acknowledged the absence of a binding planning framework within Nairobi and directed the Nairobi City County to “*complete, adopt through the County Assembly, and gazette*” the relevant policy within six months, whereas in the instant case it treated the document as already approved as at 10th February 2022.

[43] Second, on *whether the court erred in using a draft policy to limit the appellant’s rights under Article 24 of the Constitution*, they urge that rights can only be limited by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. They aver that, in any event, a policy is not law and can be flexibly applied depending on the circumstances. Relying on the decision in ***(Salih) Vs Secretary of State for the Home Department*** [2003] EWHC 2273, they urge that an unpublished policy which is not yet in force cannot limit a person’s rights. They further submit that the policy relied on by the Court of Appeal is not clear, awaits qualification and approval by the County Assembly of Nairobi County; thus, it cannot be relied on as law.

[44] Third, on *whether the appellate court failed to re-evaluate the record to determine whether the ELC misapplied the applicable zoning regulations, assuming the validity of the Nairobi City County Development Control Policy, 2021*, they urge, in the alternative, that even if the draft and unpleaded 2021 policy were applicable, both the ELC and Court of Appeal erred in their application of the zoning framework. They contend that the superior courts below “translocated” the contested development from Zone 5 to a different zoning regime - Zone 4B, Muthangari - thereby permitting high-rise development inconsistent with the correct planning framework. They submit therefore that the appellate court erred by declining to interrogate this error and was under a duty to reconsider the evidence, evaluate it independently and draw its own conclusions. To buttress this averment, they cite the decision in ***Munya Vs Kithinji & 2 Others*** [2014] KESC 38 (KLR).

[45] Fourthly, on *whether the Court of Appeal erred in law by authorising the project to proceed without certainty on the applicable planning framework*, the appellant

contends that, rather than stop the project pending gazettelement of a regulatory framework, the Court of Appeal allowed it to proceed while directing the Nairobi City County to ensure that the Nairobi County Physical and Land Use Development Plan or its equivalent was in place within 12 months from the date of the delivery of the decision. They contend that the court, in doing so, disregarded the pleadings, evidence, and submissions resulting in a violation of the appellant's rights to a clean and healthy environment. They also submit that the court failed to apply the precautionary principle as mandatorily required by law.

[46] The appellant and the interested party filed rejoinder submissions dated 27th April, 2026 on 30th April, 2026 in response to the 1st and 3rd respondents' submissions and replying affidavit. They submit that the 1st and 3rd respondents conceded that the 2021 draft policy was neither pleaded nor left for determination by the ELC and therefore the taking of judicial notice that the document existed cannot cure a pleading defect, and that parties are bound by their pleadings. They contend further that, reliance on an unpleaded draft policy was a denial of justice as counsel did not have an opportunity to address the court through evidence and submissions on the issue. Citing the Supreme Court decision in ***Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino Uhuru Village in Mikindani, Changamwe Area, Mombasa) Vs National Environment Management Authority & 3 others*** [2024] KESC 75 (KLR), they urge that lack of scientific certainty is no excuse for postponing protective measures.

ii. 1st Respondent's Case

a. 1st Respondent's Affidavit in Response to the Petition of Appeal

[47] In response and in opposition to the petition of appeal, the 1st respondent filed an affidavit sworn by its director, Yu Tang, on 24th April, 2026 and filed on 5th May, 2026. The 1st respondent sets out the litigation history and the decisions of the superior courts and adds that: the issue of zoning was extensively canvassed by the parties before the trial court; the question as to which document was applicable in relation to

zoning was left for determination by the court; the court took judicial notice of all the draft policies and guidelines in Nairobi County pursuant to Section 60 of the Evidence Act notwithstanding that they were unpleaded; the 2021 policy was published by the defunct Nairobi Metropolitan Services to provide parameters of development applications; the 2021 policy was approved by the Nairobi City County Assembly on 10th February, 2022; and is the lawful operative instrument regulating zoning in Nairobi City County. It is the 1st respondent's contention that the appellate court was therefore correct in its findings that the impugned development is located in Zone 4B. It urges that this was a finding of fact and that this Court's jurisdiction under Article 163(4)(a) is limited, and it cannot disturb findings of fact by the superior courts below.

[48] According to the 1st respondent, it obtained approvals and licenses on: change of user; development plans; excavation and transport approvals; EIA License; and Certificate of Compliance by the National Construction Authority. It adds that none of the approvals obtained were revoked or cancelled, and remain valid and were not challenged by the appellant. Further, that adequate public participation was undertaken; no threats of serious and irreversible damage to the environment warranting the invocation of the precautionary principle was established; the mitigation measures were adequate; the appellant failed to demonstrate any violations or limitations of its right to a clean and healthy environment; and that the appeal is frivolous, vexatious, made in bad faith, meritless and an abuse of the court process and ought to be dismissed.

b. 1st Respondent's Submissions

[49] The 1st respondent's submissions are dated 30th April, 2026 and filed on 5th May, 2026. It submits that the area's zoning policy was extensively canvassed by all parties before the ELC. To support its case, it relies on the Court of Appeal decision in ***Rawal Vs Judicial Service Commission & Anor.; Okioti (Interested Party), International Commission of Jurists & Ano. (Amicus Curiae)*** Civil Appeal 1 of 2016) [2016] KECA 534 (KLR) where the appellate court outlined the exceptional circumstances under which a trial court can validly determine an unpleaded issue.

Further, citing the case of ***Eunice Cecilia Mwikali Maema Vs The Council of Legal Education and 2 others*** Civil Appeal No.121 of 2013 which affirmed that courts are not precluded from considering applicable legal instruments merely because they were not pleaded, particularly where such instruments were operational at the material time.

[50] The 1st respondent asserts that the Nairobi City County Development Control Policy, 2021 is a document of public notoriety and has been used to consider and approve applications for development permission across the County. Further, that this Court in its Ruling dated 31st March, 2026 found that the Nairobi City County Development Control Policy was a document of public notoriety and was therefore available to all and sundry. It submits further that, pursuant to the Nairobi City County Development Control Policy, 2021, its development is located in Zone 4B, which allows development up to 16 floors. It therefore urges that the Court ought not to disturb the findings of fact, citing the Supreme Court decision in ***Peter Ngoge Vs Francis Ole Kaparo and 5 others***, SC Petition No.2 of 2012 and ***Erad Suppliers & General Contractors Ltd Vs National Cereals & Produce Board*** (Pet 5 of 2012) [2012] KESC 6 (KLR) where the Court determined that only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court.

[51] The 1st respondent further submits that various meetings were held as part of public participation prior to the preparation of the EIA Study Report, during which mitigation measures were proposed to address the identified negative impacts. On the precautionary principle, it urges that the trial court's inclination was towards taking anticipatory measures to prevent environmental harm, and adopting responsive mitigation measures where necessary, which is consistent with the precautionary principle.

iii. 3rd Respondent's case

a. 3rd Respondent's Affidavit in Response to the Petition of Appeal

[52] The 3rd respondent, in response to the appeal, filed on 23rd April, 2026 an affidavit sworn on 16th April, 2026 by Patrick Analo Akivanga, the Chief Officer Urban Development and Planning of the 3rd respondent, . It averred that the ELC Judge admitted that he “*came across the Nairobi City County Development Policy, December, 2021*” and it is not contested that this was not an expressly pleaded document. It is the 3rd respondent’s other case that, while it is trite law that a court ought not to determine a matter on the basis of unpleaded issues, there are well-established exceptions to the rule, particularly where evidence is led, and the conduct of the proceedings demonstrates that an issue, though unpleaded, was left for the determination by the court.

[53] The 3rd respondent further contends that the Nairobi City County Development Policy, 2021 was formulated in response to the gap left after the expiry of the 2004 Zoning Guidelines which were reviewed in 2006. It adds that the 2004 Zoning Policy was to last for 10 years-from 2006 to 2016 - and was therefore outdated at the time the petition was filed. It is its averment that the Nairobi City County Development Policy, 2021 was approved by the Nairobi City County Assembly on 10th February, 2022 and was thereafter fully operational and could not therefore be termed a draft.

[54] The 3rd respondent furthermore argues that a court is entitled to take judicial notice on matters of law or fact in its determination, and such was the case with the Nairobi City County Development Policy, 2021. It also avers that it is not true that the 2021 policy was succeeded by the Nairobi City County Development Control Policy, 2023 as the latter remains pending approval by the Nairobi County Assembly. It adds that any challenge to the validity of the 2021 policy is a distinct and substantive constitutional question that falls within the original jurisdiction of the High Court and not the ELC.

b. 3rd Respondent’s Submissions

[55] The 3rd respondent filed submissions dated 17th April, 2026 on 23rd April, 2026. It submits that, while the 2021 policy was unpleaded, it falls under the well-established

exceptions to the rule on unpleaded pleadings being used by courts in determining an issue. In that regard, it relies on the Supreme Court decision in ***Salat Vs Independent Electoral and Boundaries Commission & 7 others*** [2015] KESC 31 (KLR) on the definition of ‘judicial notice’. It adds that in that context, the 2021 Development Control Policy bears the words “NCCA APPROVED 10 FEB 2022” and has never been repealed meaning that it was available for application at all relevant times.

[56] The 3rd respondent further submits that the Court of Appeal decision in ***Claire Kubochi Anami Vs CECM Built Environment & Urban Planning Nairobi City County & 19 Others*** (*Anami case*) addressed a distinct question concerning the absence of a comprehensive, city-wide physical land use development plan and zoning framework as contemplated under Section 46 of the Physical and Land Use Planning Act, 2019. It argues therefore that the directions issued in the ***Anami case*** (*supra*) were not a declaration that there was no regulatory framework in existence, but rather a recognition of the need for a more comprehensive, harmonised, and formally gazetted planning regime in Nairobi that is also compliant with statutory requirements.

[57] It is the 3rd respondent’s other submission that the concurrent findings by the superior courts below were grounded on evidentiary record and no error of law or constitutional violation has been demonstrated to warrant intervention by this Court. It further urges the point that the appellate court properly exercised its discretion in declining to interfere with the ELC’s finding on the applicable zoning classification and height restrictions. It furthermore contends that the precautionary principle is triggered where there is credible evidence of a threat of serious or irreversible environmental harm even in the absence of full scientific certainty and cites the decision in ***Vellore Citizens Welfare Forum Vs Union of India*** (1996) 5 SCC 647 to support that proposition.

[58] Lastly, the 3rd respondent submits that the issues raised by the appellant either fall outside the jurisdiction of the Supreme Court as they concern matters of fact

conclusively determined by the superior courts below, or are premised on a mischaracterisation of the findings and reasoning of the courts. It therefore urges for the dismissal of the petition with costs.

E. ANALYSIS AND DETERMINATION

[59] From our careful consideration of the respective pleadings, written and oral submissions in the instant appeal, the following issues emerge for 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?*
- i. *Whether the appeal meets the Constitutional threshold under Article 163 (4)(a) of the Constitution.***

[60] The 3rd respondent, during the hearing, urged that once the constitutional language used is removed from the appeal, all claims primarily concern factual findings by the ELC, which were also confirmed by the Court of Appeal. It submitted that the appeal raises questions such as: which zoning policy is applicable? Does the suit property fall within Zone 4B or Zone 5 in Nairobi County planning records? Should one expert report have been favoured over another? Was public participation adequate? Was the environmental impact assessment sufficient? And finally, had the 2021 policy been approved by 10th or 15th February 2022? The 3rd respondent submits

in that context that these are classic questions of fact that have been fully litigated before the trial court and the Court of Appeal. It opines that, regarding the standard of inference with concurrent findings, this Court has already stated in ***Munya Vs Kithinji & 2 Others*** [2014] KESC 38 (KLR) that it can overturn concurrent findings only in exceptional circumstances; in this case, the appellant has not shown such exceptional circumstances.

[61] In response to the constitutional basis of the appeal, the appellant submits that the Court of Appeal ignored the precautionary principle set out in Article 69, and therefore maintains that their constitutional rights were violated.

[62] In answering the question posed above, in ***Mbaazi Avenue Residents' Association & another v Metricon Home Nairobi Company Limited & 2 others*** [2026] KESC 30 (KLR), a Ruling in this same case delivered on 31st March 2026, we determined that this Court has jurisdiction to entertain the appeal when we held as follows:

i. On Jurisdiction, the 1st applicant instituted proceedings before the ELC by way of a constitutional petition dated October 12, 2024. Among the reliefs sought were declarations that the intended development on LR No 330/155 (Original No 330/39/8), along Mbaazi Avenue in Nairobi County, infringed upon the members' right to a clean and healthy environment, and that the development contravened article 10 of the Constitution for want of proper and meaningful public participation.

ii. In addressing the petition, the trial court expressly identified and determined certain constitutional questions. At paragraphs 102 and 103 of its judgment, for example, the court found that the dispute concerned land use and its environmental implications, and that the petitioner had specifically pleaded alleged violations of articles 10, 42, 47, and 69(d) of the Constitution. The court proceeded to interrogate the petition within that constitutional

framework, including the principles of public participation, sustainable development, and the right to a clean and healthy environment. On appeal, the Court of Appeal similarly engaged with several constitutional issues. At paragraph 61 of its judgment, it specifically framed one of the central questions for determination as to whether the ELC erred in failing to find a threat to, or violation of, the right to a clean and healthy environment arising from the impugned development under article 69(d) of the Constitution.

iii. From our examination of the record, therefore, it is evident that the issues in contest before both the trial court and the Court of Appeal turned on the interpretation and application of the Constitution, particularly articles 10, 42, and 69 thereof. The Court of Appeal's determination was also directly grounded on its understanding and application of these provisions. We are therefore satisfied, without saying more, that the appeal meets the jurisdictional threshold set out under article 163(4)(a) of the Constitution. Accordingly, we find and hold that this court has jurisdiction to entertain the appeal as filed”.

[63] In reiterating our finding above, we note that the parties' respective submissions highlighted five issues before us. These include 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. We have examined these issues and consider them constitutional controversies because they stem from Articles 10, 42, 50, and 69 of the Constitution. They began in the trial court and have now reached this Court. We are also alive to, and reiterate that the Court has no jurisdiction to revisit the factual findings of either the ELC or the Court of Appeal that touch on evidence without any constitutional underpinning. ***See Okoiti Vs Portside Freight Terminals Limited & 12 others*** SC Petition E011

of 2024 [2025] KESC 44 (KLR) and ***Dina Management Limited Vs County Government of Mombasa & 5 others*** [2023] KESC 30 (KLR).

[64] One clear factual finding to us is the consideration of whether there was substantial compliance with the statutory requirements and whether public participation was adequately observed. Substantial non-compliance with the statutory requirements has not been raised in this appeal; the Court of Appeal also determined that the question relating to public participation had not been raised on appeal. We also find that there are already established mechanisms to appeal any insufficiency to the statutory mandates in the various Acts. In ***Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions) v Munyao & 148 others (Suing on their own behalf and on behalf of the plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme)*** SC Pet. 3 of 2016 [2019] KESC 83 (KLR) we determined in paragraphs 118 to 119 that:

“.... In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts

upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action....”

[65] Having delineated the parameters which are of factual dispositions and which do not necessarily require our intervention, we still find that the outstanding issues pass constitutional muster under Article 163 (4) (a) of the Constitution and we therefore answer this issue in the affirmative.

ii. Whether the Court of Appeal erred in law in applying the unpleaded draft Nairobi City County Development Control Policy, 2021

[66] This issue is at the core of the appeal and in that regard, we note that the appellant urges that, during the ELC proceedings, all parties agreed that the 2004 Zoning Guidelines, as reviewed in 2006, remained applicable, even while under review. However, the ELC based its decision on the Nairobi City County Development Policy of December 2021, which allegedly classifies the property as part of “Zone B” with a proposed skyline of 16 floors. The Court of Appeal upheld this decision, reasoning that once a government policy is brought to the court's attention, it can be used as evidence even if it was not explicitly pleaded. The appellant, on the other hand, contends that the appellate court erred in various respects: it did not afford the appellant an opportunity to be heard regarding the policy, and it erred in relying on what the appellant describes as an inchoate and incomplete policy.

[67] The appellant made considerable arguments at the Court of Appeal regarding the trial court’s reliance on the draft policy, further arguing that it had already become

obsolete by the time they filed the petition at the ELC, having morphed into the 2023 policy.

[68] The true status of the Nairobi City County Development Policy 2021 was reflected upon during the hearing of the appeal herein. It became clear to the Court that the policy, despite its notoriety and application, has not been enacted in accordance with Sections 36 to 50 of the Physical Land Use and Planning Act, Cap 303. It was also revealed to the Court by the parties that the current Nairobi City County Development Policy 2023 (*essentially word-for-word with the 2021 Policy*) has since been gazetted.

[69] A court basing its judgment on an unpleaded issue creates a narrow exception to the general rule that parties are strictly bound by their pleadings. The East African Court of Appeal established this concept in ***Odd Jobs v Mubia (supra)***. In the case, the plaintiff initially pleaded that no contract (for the sale of a motor vehicle) was entered into and no sale had therefore been conducted; the plaintiff therefore claimed for a return of Kshs.5,700/- paid to the defendant. During the hearing, the plaintiff shifted the course of his testimony and averred that there was indeed an oral agreement, upon which he based his claim for repair of the motor vehicle. Both parties called witnesses who testified regarding the terms of the agreement and whether it was a condition of the car purchase that the defendant's agent also ought to have carried out repairs on the vehicle. The trial court entered judgment in favour of the claimant for the sum of Kshs. 5,700/-. On appeal, the defendant took the view that the trial court had considered an unpleaded issue. The appellate court, in dismissing the appeal, held thus:

“(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision;

(ii) on the facts, the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it”. [Emphasis Ours]

[70] The decision in *Odd Jobs* must also be considered against the well-settled principle that a court exceeds its jurisdiction when it grants reliefs that have not been pleaded or in respect of which the opposing parties were not afforded an opportunity to address the court through evidence and submissions. See *Parliament of Kenya & another v Okiiti & 2 others* (Petition E016 & E017 of 2025 (Consolidated)) [2026] KESC 28 (KLR).

[71] In this case, the genesis of the dispute and the pleadings before the trial Court were based on a reliance on the 2004 policy and the recognition of the Nairobi Integrated Urban Master Plan, 2014 and it is not contested that the appellant and all other parties were not granted an opportunity to address or even challenge the provisions of the Nairobi City County Development Policy, 2021. In that context, the appellant's challenge to the project has been consistent: during public participation and at the hearing, the issue was that the existing Zoning policy allows only four-storey buildings. The Nairobi City County Development Policy 2021 was not introduced as evidence, but the trial court Judge, on his own motion, relied on it.

[72] The 1st respondent, on its part, submits that the policy was a document of public notoriety, and the trial court was therefore correct in taking judicial notice thereof. The 1st Respondent relies on Section 60 of the Evidence Act which provides:

“(1) The courts shall take judicial notice of the following facts—

(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;

....

(o) all matters of general or local notoriety.” [Emphasis ours]

[73] In *Wamwere & 5 others v Attorney General* Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR), the Court cited the decision of the House of Lords in *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at p 210 and observed that:

“Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.”

[74] In *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KECA 39 (KLR) the court (*Madan, Kneller & Hancox JJA*) explained on matters a judge can take judicial notice of in the following terms:

“...One ought not to adopt semantic evasions by taking the pose of an ostrich in a matter of this kind. Two near enough examples are *Dennis v King*, [1916], 2 K.B 1 & 6 where judicial notice was taken that the streets of London are crowded, and dangerous. In *Holloway v. Povey* [1984] 271 EG 195, the Court of Appeal held that a whole season’s growth (garden) without doing anything about it, could constitute deterioration (of dwelling house) of which judicial knowledge could be taken. The Law Society’s Gazette, Vol 81, No 40, 1 Nov 1981, p 3083. Sarkar on Evidence, 10th Ed P 517, tells us that some facts are so notorious in themselves or of such public (knowledge) and universal character that the court is bound to recognise and take notice of them. Such facts do not require proof. No exhaustive list of such notorious facts has been or can be made for they are too numerous, and of an increasing trend; no limit can be set to their numbers....”

[75] In agreeing with and persuaded by the above findings, we note that Part 1 of the Fourth Schedule to the Constitution sets out the functions of the National Government, which include formulating policies on various issues such as national economic policy and planning, education, housing, and energy. While some of the policies are founded on the constitutional imperatives deriving from the above functions, others are made pursuant to legislative requirements. Governments operate through policy directives made at various levels. As we noted

in ***Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (***CCK Case***):

“285.The Policy document is a general statement of aspirations which the Government wished to commit, or had committed itself to. Judicial notice has to be taken of the fact that the Government, in the normal discharge of its duties, does churn out policy statements, guidelines, and sessional papers as frameworks within which to conduct public affairs, and to deliver goods and services to the people.” [Emphasis Added]

See also para. 200 of ***Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae)*** [2024] KESC 63 (KLR)

[76] In the Ruling dated 31st March, 2026 on an application for adducing additional evidence, this Court stated that the 2021 Policy “*is a document of public notoriety, and the applicants ought reasonably to have been aware of it.*” That finding was made only to the extent that the Policy was in the public domain and not whether it should have been invoked in the first place, a matter we shall shortly address in detail.

[77] In the above regard, while acknowledging that a Judge can take judicial notice of well-known facts, including that of a policy document in the public domain, such facts or evidence ought not to be contentious for them to be relied upon. The evidence regarding the Nairobi City County Development Policy, 2021, was and remains contested, particularly as to whether, being a draft policy, it was applicable at the material time. The parties’ position, clearly set out in the evidence before the trial court, was that the applicable zoning policy was the *Nairobi City Council: A Guide of Nairobi City Development Ordinances and Zones (City Council 2004)* and the *Nairobi Integrated Urban Development Master Plan of December 2014* [NIUPLAN]. The trial court only relied on the Nairobi City County Development Policy 2021 “*having seen*

it”, while the Court of Appeal relied on it after citing that it “*has the stamp of the Speaker and bears the words’ NCCA APPROVED 10 FEB 2022.*”

[78] Our point of departure from the trial court and the Court of Appeal is not, strictly speaking, that the courts were precluded from taking judicial notice of the 2021 draft policy, and we stated as much in our Ruling cited above. The difficulty lies in the manner in which the Policy was introduced into the determination and the decisive weight subsequently attached to it. Judicial notice, even where properly invoked, cannot operate as a substitute for the requirements of procedural fairness, nor can it be deployed so as to deprive a party the opportunity to address a matter that bears materially upon the determination of the dispute.

[79] This Court has consistently underscored the centrality of pleadings to the adjudication process. In ***Odinga & Another Vs Independent Electoral and Boundaries Commission & 2 Others*** [2017] KESC 31 (KLR), we stated that no party should be permitted to depart from its pleadings, as pleadings define the issues for determination, ensure that parties are fully appraised of the case they must meet, and provide a fair opportunity to place relevant evidence before the court. This Court further emphasized that issues arise only where a material proposition of fact or law is affirmed by one party and denied by the other, and that it is neither desirable nor permissible for a court to frame or determine issues that do not arise from the pleadings.

[80] In the present case, the application or otherwise of the impugned 2021 Policy was not pleaded as an issue for determination yet, both the trial court and the first appellate court adopted and relied upon it without first inviting the parties to address its relevance, accuracy, or legal effect. The appellant was consequently denied an opportunity to interrogate the premise on which the court proceeded to rely on it, or to demonstrate why it ought not to bear the significance ultimately attributed to it. Neither court sufficiently interrogated whether, having regard to the pleadings and the evidence on record, the policy could properly assume a determinative character

without further submissions from the parties, nor did they fully canvass the legal and evidential consequences of resolving an unpleaded issue in that manner.

[81] A court's entitlement to take judicial notice of a matter does not also displace its obligation to accord the parties a fair hearing. Judicial notice may dispense with formal proof of a fact in appropriate circumstances; it does not, without more, dispense with the right of a party to be heard on the relevance, application and legal consequences of that fact where it is capable of materially affecting the outcome of the proceedings. To hold otherwise would permit judicial notice to become a vehicle by which an unpleaded and untested issue assumes dispositive significance without the safeguards inherent in the adversarial process.

[82] The trial judge should, in our view, ought to have verified the document's authenticity and applicability, especially given that he acknowledged the provisions of the Physical and Land Use Planning Act, Cap 303, in paragraphs 194 to 202 of his decision. In ***Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others***; (supra) we held as much to the question whether courts had jurisdiction to test the legality of policy positions taken by the Executive and Parliament during the legislative process. At paras 211-212 of that decision, we stated thus:

“ 211. In our view therefore, nothing turns on whether a policy is manifested through a law or flows from a given policy, as a policy may be made pursuant to a statutory requirement. What remains evident is that the National Government and Parliament are bestowed with constitutional mandates and functions on one hand, and the courts with the mandate of interpreting or testing them against the Constitution on the other hand. These are distinct but interdependent roles that have to be undertaken under the current design of the Constitution. Since all arms of government serve the same people, the policy makers through exercise of public

participation should endeavour to make policies that are consistent with the Constitution and resonates with the people.

212. Where the courts intervene, they should strive to sustain policy recommendations by the Executive and Legislature except in situations where the policy is outrightly unconstitutional and remedial measures need to be taken in the meantime, especially in the realm of public policy.....” [Emphasis ours]

[83] We reiterate the above holding and would add that significant steps required under the Act were not undertaken before the Nairobi County Government sought to rely on the draft policy in approving the 1st respondent’s project. Despite its notoriety, the validity of the draft policy should not, therefore, have been a matter for the trial court to determine, as it had not properly been placed before it, and the admission that the learned judge only ‘*came across it*’ after the hearing had been concluded is telling. The Court of Appeal, in its appellate role, should have also re-evaluated the facts to reach a just and fair decision. Both the trial court and the Court of Appeal should similarly have examined the policy more carefully against the provisions of the Physical and Land Use Planning Act, Cap 303. This desirable scrutiny is intensified because they relied on it despite it being an unpleaded issue. The process for the promulgation of a county physical and land use development plan, as required by section 41 of the Physical and Land Use Planning Act, was not complete at the time the dispute was litigated before the two courts below. The process would only end, and the policy passed by the County Assembly following its publication in the official gazette and in at least two newspapers with national circulation. The 2021 policy, insofar as it was still a draft, was inchoate.

[84] We thus conclude that the trial and appellate courts erred not only because the policy was not pleaded but also by relying heavily on it without giving the parties and in particular the appellant a fair chance to respond or 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 a 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 court and the appellate court erred in applying the unpleaded draft Nairobi City County Development Control Policy, 2021, without affording the appellant an opportunity to be heard.

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.

[85] Notwithstanding that the Draft Nairobi City County Development Policy, 2021 had not been formally enacted and therefore did not, in itself, possess the force of law, its relevance could not be considered in isolation from the historical and evolving zoning framework within Nairobi County. Its status as a draft instrument was undoubtedly material to the weight that could properly be attached to it; it did not, however, necessarily render it irrelevant to an inquiry into the planning context prevailing at the material time.

[86] In that regard, the 1st respondent contended that developments within the immediate vicinity of the suit property had been approved at heights exceeding 16 floors. It pointed to both completed developments and others under construction, which it asserted had received approval by the Nairobi City County organs. That contention raised a broader question as to the actual zoning and development-control practice applicable to the area, and whether the Draft Policy merely reflected an emerging planning position already being applied by the County Government or purported, without lawful foundation, to introduce a new zoning regime. In ***Anami & 2 others (Suing as Officials of Rhapta Road Residents Association) v County Executive Committee Member (CECM) Built Environment and Urban Planning, Nairobi City County & 20 others*** [2025] KEELC 128 (KLR)

the Court of Appeal considered this history at paragraphs 67 to 71 of its judgment, wherein it outlined as follows:

***“67 We agree with the 1st and 2nd respondents that the 2004 Zoning Guidelines, however influential in practice for many years, originated under the repealed Physical Planning Act within a pre-2010 constitutional framework. It was never a county legislation passed by the County Assembly under Article 185 of the Constitution. Its legal force could not and cannot eclipse the post-2010 architecture under the Physical and Land Use Planning Act, 2019 (“PLUPA”), which vests plan-making and zoning control in county assemblies through approved physical and land use development plans. To treat the 2004 Zoning Guidelines as binding law two decades on would be to give indefinite life to an instrument designed as a short-term ordinance and inconsistent with the devolved constitutional order.*”**

68. As to NIUPLAN 2016, all parties were agreed that it was a formally adopted, County Assembly-approved plan and, therefore, enjoys legitimacy. However, its nature must be correctly appreciated. It is a county-wide integrated master plan: it sets the strategic direction, articulates spatial structure, and provides broad development policy intent. It does not, however, descend to the granularity of parcel-specific zoning contemplated under section 46 of PLUPA, which requires detailed local physical and land use development plans. NIUPLAN 2016, thus, operates as a compass rather than a detailed map. It is indispensable for overall direction but cannot, standing alone, determine permissible floor counts for a particular street or plot.

69. Turning to the 2021 Development Control Policy, the evidence before the trial court and this Court established that it was

prepared through technical processes, subjected to stakeholder consultations, and internally adopted by the County Executive as the operative framework. What remained contested was its formal approval and gazettment by the County Assembly. The record showed the existence of a stamped “seen/received” version but no clear resolution or gazette notice of adoption was presented. The 1st and 2nd respondents seemed to vacillate on its official status. The appellants correctly pressed that such an approval gap meant the 2021 Development Control Policy lacked the formal status of law. We agree: under Article 185 of the Constitution and section 45 of PLUPA, only the County Assembly can imbue such a policy with binding legal effect.

70. Nonetheless, the law does not permit a vacuum. As the learned ELC Judge observed, in the twilight between an outdated ordinance and an un-gazetted policy, governance must still be exercised. PLUPA together with its 2021 Regulations provides the procedural and substantive guardrails: development applications must undergo scrutiny by technical committees, inter-agency referrals, assessment of infrastructure sufficiency, compatibility with existing land uses, density considerations, and evaluation of cumulative effects. Within that framework, it was not unreasonable for the Nairobi City County to have referred to the 2021 Development Control Policy as a guiding instrument, provided that it was treated as persuasive rather than dispositive. Draft or interim policies can play an interpretive role to give context and consistency, but the final and binding zoning authority must emanate from a duly adopted plan or policy through the County Assembly.

71. Our conclusion, therefore, is threefold. First, the 2004 Zoning Guidelines no longer carry binding legal status in Nairobi under the devolved framework and PLUPA. Second, NIUPLAN 2016 remains a valid, strategic, county-wide plan but cannot itself supply parcel-specific zoning rules. Third, the 2021 Development Control Policy, while legitimately prepared and used as a practical guide, did not attain full legal force without County Assembly approval and gazettment. We, therefore, agree with the learned Judge in his acknowledgment and use of the 2021 Development Control Policy as an operative administrative guide, while agreeing with the appellants that it is not a consummated legislative instrument.

[Emphasis ours]

[87] We are aware that the *Anami Case* is before us on appeal and we are also aware that the contested policy was also the subject of proceedings in the Environment and Land Court decision in *Dennis Pritt Residents Association & 4 others v Nairobi City County Government & 6 others* [2026] KEELC 2427 (KLR) where the Court, on an application for its introduction as a new discovery, held as follows:

“...Moving to the Nairobi City County Development Control Policy, 2021, the same cannot by any stretch constitute newly discovered evidence. The policy has been in existence since 2021 and has long been publicly available. Indeed, even prior to the decision in *Claire Kubochi Anami*, parties and courts alike had referred to and relied upon it in matters concerning development control within Nairobi....”

[88] In addressing the issues raised regarding the impugned Policy, we are alive to the fact that the State should mainly be responsible for the legitimacy of its approvals; an innocent party should be reasonably protected from defects that were neither known nor easily discoverable. Nonetheless, this protection should not apply if the recipient knew of the illegality, overlooked obvious warning signs, improperly obtained

approval, or had a statutory duty that could not be delegated. In ***Export Processing Zone Authority & 10 others v National Environment Management Authority & 3 others*** [2024] KESC 75 (KLR) we held as follows on the presumption of regularity:

“...In general, the presumption of regularity presupposes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done. The doctrine provides a degree of deference to the actions or decisions made by government officials or institutions. It is grounded in the assumption that these officials act within the bounds of the law, follow established procedures, and operate in good faith when performing their duties. This presumption also relieves courts or reviewing bodies from conducting a deep, thorough review of every action or decision unless there is specific evidence to suggest wrongdoing, procedural lapses, or irrational behavior. (See *The Presumption of Regularity In Judicial Review Of The Executive Branch Harvard Law Review* pg. 2432). The idea is that, in the absence of clear evidence to the contrary, administrative actions should be presumed to be regular, lawful, and reasonable....” [Emphasis Ours]

[89] The appropriate judicial response must therefore be sensitive to both the imperative of legality and the requirements of fairness. Courts should examine the nature and gravity of a defect; whether it was apparent on the face of the approval or reasonably discoverable; the recipient's knowledge and conduct; the extent of reliance on the approval; the statutory responsibilities of the recipient; the public interest at stake; and the consequences of the remedy for affected parties. This approach preserves the principle that public authorities cannot authorize what the law forbids, while recognizing that the State should ordinarily bear responsibility for defects arising from its own processes, rather than transferring, without qualification, the

consequences of those defects to an innocent party who reasonably relied on its official acts.

[90] In the above context, the 1st respondent herein sought approvals for its project from various statutory bodies. All these bodies approved the project. It has not been shown to us that the 1st respondent obtained approvals through improper means or was aware of any illegality in procuring those approvals. That being the case and both the superior courts below having upheld their authenticity, as a matter of fact, and their legality as well, we find no justifiable reason to cancel those approvals.

[91] The ELC in determining the height restriction, a matter central to the appeal, held as follows in paragraph 213 of its judgment:

“The Development control guidelines in the policy have been annexed as “zonal maps”, annexure 2. The suit property falls under “zone 4B” which provides a skyline/levels of 16 floors, which is within the Respondent’s proposed development.”

[92] The Court of Appeal similarly addressed its mind to the height restriction question and found the same to be a matter of fact, which it ought not to depart from. The Court of Appeal equally held that the learned judge's findings had not been demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or that he failed to appreciate the weight or bearing of circumstances admitted.

[93] The appellant in the above context submits that the applicable zoning for the suit property situated in Benard Estate, Lavington (Zone 5) imposed a restrictive height limitation for a single dwelling. However, both courts effectively reclassified the development from Zone 5 to a different zoning regime (Zone 4B, Muthangari), thereby permitting high-rise development that is inconsistent with the applicable planning framework, the appellant concludes.

[94] In our view, the Court of Appeal, being the first appellate court was, for all practical purposes, in as good a position as the trial court to interrogate the affidavit

evidence, the documentary material placed before it, and the competing inferences capable of being drawn therefrom. Its duty consequently required more than an endorsement of the conclusions reached by the trial court. It was required to reconsider the evidence, evaluate it for itself, and determine whether those conclusions were borne out by the record. This omission assumes particular significance in the circumstances of this case because the proceedings before the trial court were determined entirely on affidavit evidence; no witnesses were called and no oral testimony was taken.

[95] In *Fanikiwa Ltd & 3 others v Sirikwa Squatters Group & 17 others* [2023] KESC 105 (KLR) we stated as follows at par. 77-78 regarding reliance on affidavit evidence as opposed to *viva voce* evidence in rendering decisions involving heavily contested issues:

“.....We recognize that the superior courts below relied on rule 20(1)(a) of the Mutunga Rules to hear the matter by way of affidavit evidence. However, we are of the view that a court is required to make a special endeavour to unravel all the competing claims and in particular, by calling for viva voce evidence from witnesses, especially those who have sworn depositions, and cross-examination done. This is particularly important because its decision will have a far-reaching impact especially upon the party(ies) whose ownership may end up being nullified. In taking this view, we are fortified by rules 20(3), (4), and (5) of the Mutunga Rules which allow a court to admit oral evidence, examine and cross-examine parties.

78. In the circumstances of this case therefore, we are not convinced that it was prudent and judicious, considering the highly contentious nature of the claims and circumstances of each of the numerous parties involved to determine this matter by affidavit evidence only. The authors of the said affidavits ought to have been

called and cross-examined to test the veracity of the affidavits and documentary evidence. To our minds, this would have presented the best available evidence for the learned trial judge to make his decision fairly.

[96] We reiterate our decision above and note that this is another instance where far-reaching consequences have befallen parties because of the trial court's reliance on affidavit evidence. In contentious cases such as this one, we determine that *viva voce* evidence ought to be the preferred alternative. Further, where a dispute is determined principally, if not entirely, on affidavit and documentary evidence, an appellate court must be particularly vigilant in independently examining the record, since it enjoys substantially the same evidential vantage point as the court of first instance.

[97] Having already determined that the 2021 Policy could not have formed the basis for area zoning or building height restrictions, we must 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. This finding is however not dispositive of the appeal because we have also sustained the legality of all approvals by all the relevant agencies and so this finding is made on that basis and subject to our other findings below.

iv. Whether the petitioners' rights to a clean and healthy environment under Article 42 were violated.

[98] The project by the 1st respondent was commenced after it had obtained a change-of-user application, which was approved on 24th March 2022. The 1st respondent thereafter applied to NEMA for an EIA license in accordance with **Sections 59(1) and (2) of EMCA**; it placed advertisements calling for views in newspapers and via radio, and conducted stakeholder engagement on various dates, where the issues raised in this case were discussed at length. The 1st respondent further carried out a traffic impact assessment report and a geotechnical investigation report to ascertain the suitability of the land and provide geotechnical recommendations, and presented the requisite approvals from the Water Resources Authority, indicating that the

borehole on the site was drilled by the previous owner of the land. The 1st respondent also received approvals from the Nairobi City Water and Sewerage Company confirming that the sewer line on which the project was situated had adequate capacity to convey sewage within the Mbaazi Area; an EIA License; a certificate of compliance from the National Construction Authority; and approval of its plan.

[99] Both courts below reasoned that some issues raised by the appellant's members were addressed through various mechanisms. The geotechnical report, for example, examined whether sharing the bedrock could compromise the integrity of neighbourhood houses and provided guidelines for excavations to preserve structural safety. The EIA states that the building should comply with County Laws to ensure it does not block sunlight. Additionally, the 1st respondent highlighted measures to connect the development to the national sewer system and to comply with the EMCA (Air Quality) Regulations. The 1st respondent also conducted a Traffic Impact Assessment. The assessment report recommended implementing a comprehensive water harvesting and storage scheme to supplement the NSWC supply.

[100] It is not in doubt that the complaints and issues raised by the appellant were also addressed through various mechanisms as outlined above. The trial court's analysis also considered the appellant's expert report.

[101] Article 42 of the Constitution provides as follows:

“Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
(b) to have obligations relating to the environment fulfilled under Article 70”.

[102] The appellant urges us to rely on the precautionary principles as set out in the **Rio Declaration Rule 15** and as we applied it in the *EPZ vs Owino Uhuru case* (supra). Rule 15 provides as follows:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

[103] In this instance, there is no indication of serious or irreversible damage to the environment. In our earlier Ruling in this matter, we indicated that there was room for restoration orders to be made should the Court find, in this judgment, that there has been a violation of the appellants' rights. We stated as follows in that regard:

“We agree with the respondents that any perceived harm suffered or may be suffered by the applicants may be mitigated through appropriate directives, including requiring the 1st respondent to downscale the development or to comply with an environmental restoration order, should the need arise. Any violation of rights or environmental concerns can also be adequately remedied through damages, which, in the circumstances of this case, constitute a more appropriate remedy than halting ongoing construction....”

[104] The concerns relating to structural integrity, sewerage, water supply, traffic, air quality and other environmental effects were the subject of technical studies, regulatory scrutiny and proposed mitigation measures. The appellant has not demonstrated, on the evidence, that those measures were manifestly inadequate or that the project nevertheless presented a credible threat of serious or irreversible environmental damage. The evidence does not establish a credible threat of serious or irreversible harm in the first place; only after that conclusion is reached does the availability of mitigation and restoration become relevant.

[105] To this issue therefore, and solely on the 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 on the same.

v. What Reliefs should issue?

[106] The foregoing necessarily brings us back to the question of zoning. In our view, in this dispute, zoning should not be seen solely as a matter of development control or administrative convenience. Instead, it must be viewed within the broader constitutional context of Article 42. Decisions about permissible density, height, character, and development intensity directly impact access to light, traffic flow, water and sewerage infrastructure, structural safety, environmental quality, and the overall effect of development on an area's character and capacity. Therefore, zoning is a key regulatory tool through which the State enforces the right to a clean and healthy environment.

[107] In making the finding above, we are also mindful of the statutory architecture established under the Physical and Land Use Planning Act. Section 78 of the Act which provides a statutory mechanism for enforcement where a development is undertaken without the requisite development permission, or otherwise in contravention of the conditions upon which such permission was granted. That enforcement framework is important. Courts should be slow to assume functions which Parliament has, in the first instance, entrusted to designated planning authorities. The constitutional jurisdiction of a court remains available, nevertheless, where the legality of the planning process itself, the protection of constitutional rights, or the lawfulness of the resulting administrative action is properly placed in issue. In ***Martin & 106 Others v. Engineers Registration Board & 7 others; Egerton University & Another*** (Interested Parties) (Petition 19 of 2015 & 4 of 206 (Consolidated) [2018] KESC 54 (KLR) this Court particularly circumscribed jurisdiction in matters of policy in the following terms:

“...As a court, we agree that when it comes to matters of policy formulation, we have a very minimal role to play, in matters education and especially professional training. However, we are cognizant of the fact that where such policy decisions affect the fundamental rights and freedoms protected by the Constitution, then those actions invite this court and courts in general to intervene and safeguard those rights and freedoms. In this regard, see Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others [2012] eKLR where it was held that the court is not the appropriate forum for issuing guidelines....”

[Emphasis added]

[108] The position that emerges is therefore not that the 1st respondent embarked upon the project wholly outside the regulatory framework. As already demonstrated, it obtained a change of user, an EIA license, development approvals and various technical and regulatory clearances. Neither can we overlook the considerable reliance placed upon those approvals. We have also recognized that the draft Nairobi City County Development Policy, 2021, although relevant to understanding the evolution of planning practice within Nairobi County, had not acquired the force of law. It could therefore provide historical or contextual assistance, but could not, without more, constitute the normative foundation upon which development rights could be conferred.

[109] Accordingly, we find that the impugned development approval made on the strength of 2021 policy, insofar as it rested upon an inadequately established zoning basis, cannot stand. We further recognize and are alive to the fact that the **Nairobi City County Development Control Policy 2023** (now, *The Nairobi City County Development Control Policy 2026*) underwent the necessary statutory requirements and was approved by the County Assembly on 16th June 2026. During the hearing of this appeal, the parties confirmed this fact. In addition to this holding we reiterate that the approvals for the project cannot be impugned and that Article 42 aforesaid was not

contravened leaving the invocation of the 2021 Policy as the only issue we have found in favour of the appellant.

[110] In the above context, our opinion is that it is within the purview of the 3rd respondent to ensure conformity with duly enacted policies and where it does not, then judicial intervention in a restricted sense may be necessary. We therefore set aside the Court of Appeal's finding to the extent that it relied on the Nairobi City County Development Policy 2021. We also 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. This, in our view, appropriately reconciles the competing considerations before us. It vindicates the appellant's right to a fair hearing under Article 50 and recognizes 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 upon 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 and this is within the mandate of the 3rd respondent without further input of this Court and in the specific circumstances of this case.

F. COSTS

[111] On costs, we do find that the appellant has partially succeeded in its appeal. We have, in this judgment, also largely absolved the 1st respondent from any wrongdoing on its part. In ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others***; SC Petition 4 of 2012; [2013] eKLR, we held that costs follow the event unless the Court for good reason thinks otherwise. In the present case, noting the issues in contest and the fact that they are of great interest to the construction projects in Nairobi County generally, we deem it fit to order that each party should bear its costs.

G. ORDERS

[112] In the premises, we issue the following orders:

- 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 otherwise 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).*

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. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

**REGISTRAR,
SUPREME COURT OF KENYA**

