IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA (P), JOEL NGUGI & ODUNGA, JJ.A.)

CIVIL APPEAL NO. E160 OF 2025

BETWEEN

CLAIRE KUBOCHI ANAMI (CHAIRLADY)
ALEX TITO MWANGI MUIRURI (SECRETARY)
KACIT MEDIRATTA (TREASURER)
Suing as officials of **RHAPTA ROAD**
RESIDENTS ASSOCIATION ....APPELLANTS

AND

COUNTY EXECUTIVE COMMITTEE MEMBER (CECM)
BUILT ENVIRONMENT AND URBAN PLANNING,
NAIROBI CITY COUNTY & 20 OTHERS...............1ST RESPONDENT
THE NAIROBI CITY COUNTY................................2ND RESPONDENT
DIRECTOR GENERAL, NATIONAL
ENVIRONMENT MANAGEMENT AUTHORITY......3RD RESPONDENT
NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY................................4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL..........5TH RESPONDENT
MAWA DEVELOPMENT COMPANY.......................6TH RESPONDENT
WIMAX HOMES LIMITED...................................7TH RESPONDENT
SHIMONI RESORTS LIMITED............................8TH RESPONDENT
HALE END PROPERTIES LIMITED......................9TH RESPONDENT
KANTI NARAN MANJI PATEL, NITABEN KANTI
PATEL, UMESH KALYAN NAWAN PATEL AND
NARENDRA KALYAN PATEL...........................10TH RESPONDENT
KANJI KUNJEVI PATEL &
SAPNA MAVIN KERAI......................................11TH RESPONDENT
HOLLOWAY LIMITED.......................................12TH RESPONDENT
SKY VALLEY VENTURES KENYA CO. LTD.........13TH RESPONDENT
PATTERSON INVESTMENTS LIMITED...............14TH RESPONDENT
RHAPTA ROAD PLAZA LIMITED.......................15TH RESPONDENT
CENTRAL LINK PROPERTY COMPANY LTD......16TH RESPONDENT
GAUFFINGENIEURE GMBH AND COMPANY......17TH RESPONDENT
LOVI VENTURES KENYA COMPANY LTD...........18TH RESPONDENT
JAYANT RAJNIKANT ACHARYA.......................19TH RESPONDENT
MEDINA PALM DEVELOPMENT LIMITED..........20TH RESPONDENT
NANCY WANGARI AVERDUNG AND
FOLKER AVERDUNG.......................................21ST RESPONDENT

(*Being an appeal on from part of the Judgment of the Environment and Land Court, at Nairobi (Angote, J.) delivered on 23rd January, 2025*

in

***ELC EP Case E030 of 2024*)**

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JUDGMENT OF THE COURT

A. INTRODUCTION

1. This appeal concerns the constitutional governance of urban planning in Nairobi and the legal architecture that must discipline the City's rapid vertical growth. The dispute was triggered by a cluster of approvals for high-rise developments along Rhapta Road, some up to 28 floors, granted to the 6th to 20th respondents. The appellants, civic-minded officials of the Rhapta Road Residents Association, contended before the Environment and Land Court (ELC) that the approvals were issued in a policy vacuum or in disregard of controlling plans and zoning instruments, thereby violating the Constitution and statute.

2. By a detailed judgment dated 23rd January 2025, the ELC found that the approvals, "in so far as the number of floors is concerned," were not aligned with the then operative zoning regime; capped the permissible height at 16 floors pending the County Assembly's action on the 2021 Nairobi City Development Control Policy; directed compliance with that policy framework when issuing further permissions; declined damages; and ordered each party to bear its own costs.

3. The appellants, still aggrieved, preferred this appeal, urging that the 16-floor cap amounted to impermissible judicial legislation, and

seeking more radical reliefs, including cancellation of approvals and demolition orders. In turn, the 9th respondent filed a cross-appeal, principally urging that the ELC erred in assuming the developments sat in Zone 4, which typically has lower height ceilings, whereas Rhapta Road is within Zone 3C, which is a higher-intensity urban corridor.

B. PROCEDURAL POSTURE AND RECORD

4. The ELC petition (filed on 12th August, 2024) challenged discrete approvals issued by the 1st and 2nd respondents (County Executive Member for Built Environment and Urban Planning and Nairobi City County) to the 6th to 20th respondents and the associated Environmental Impact Assessment (EIA) licences issued by the 3rd and 4th respondents (NEMA and its Director-General). The Petitioners pleaded violation of Articles 10, 42 and 69 of the Constitution; non-compliance with the Physical and Land Use Planning Act, No. 13 of 2019 (PLUPA); and defective environmental decision-making under the Environmental Management and Co-ordination Act, No. 8 of 1999 (EMCA).

5. As aforesaid, the Petition before the Environment and Land Court (ELC) was instituted by a residents' association of Rhapta Road and its environs (the appellants herein). They contended that there was a pattern of haphazard, uncoordinated, and unregulated development within their neighbourhood, facilitated by the Nairobi City County Government (1st and 2nd respondents) and the National Environment Management Authority (NEMA) (3rd and 4th respondent).

6. Their primary grievance was that approvals had been granted for the construction of multi-storey buildings, in some instances rising

to 28 floors, contrary to the zoning restrictions and planning policies that governed the area. They urged that the approvals violated the 2004 Nairobi City Development Ordinances and Zones (hereinafter, "2004 Zoning Guidelines"); the Nairobi Integrated Urban Development Master Plan (NIUPLAN), 2016 (hereinafter, "NIUPLAN 2016"); the 2021 Nairobi City Development Control Policy (hereinafter, "2021 Development Control Policy"), and other applicable instruments. The Petitioners pleaded violation of Articles 10, 42 and 69 of the Constitution; non-compliance with the Physical and Land Use Planning Act, No. 13 of 2019 (PLUPA); and defective environmental decision-making under the Environmental Management and Co-ordination Act, No. 8 of 1999 (EMCA).

7. The appellants sought declaratory and injunctive reliefs. Central among these was an order compelling the County Government and relevant agencies to gazette their neighbourhood as "Zone 4" and to comply strictly with NIUPLAN 2016 and the 2021 Development Control Policy in granting development permissions.

8. In the petition before the ELC, the appellants asked for the following reliefs against the respondents, jointly and severally:

   a) A permanent conservatory order restraining the Respondents their respective agents, servants and or employees and officers, contractors, consultants and all persons acting under their respective authority and permission from undertaking any or any further demolition, excavation, construction, development, building and or other construction activities with respect to the respective properties listed [in the Petition].

   b) A declaration be granted to the effect that the approvals for development permissions granted by the

1st and 2nd Respondents with respect to the properties registered in the respective names of the 6th to 21st Respondents listed in Order (a) above, are unlawful, irregular, null and void and of no effect.

c) ***A declaration be granted to the effect that the approvals for development permissions granted by the 1st and 2nd Respondent with respect to the properties registered in the names of the 6th to 21st Respondents listed in Order (a) above, were granted in violation of the zoning provisions set by the 2nd Respondent and therefore, the approvals for development permissions are unconstitutional and further unlawful for being in violation of the Physical and Land Use Planning Act, the obligations of the 2nd Respondent under the County Governments Act, the Urban Areas and Cities Act and all the Regulations laid down in the said statutes.***

d) ***A declaration be granted to the effect that the 2nd Respondent do, within such period of time set by the Honourable Court, enforce and or compel the 6th to 21st Respondents to comply with the zoning and other requirements under the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022; and in default of compliance thereof, the 2nd Respondent be directed to enforce compliance through demolition of all the properties partially constructed by the 6th to 21st Respondents respectively at the cost and expense of the 6th to 21st Respondents as per their respective affected properties listed in Order (i) above.***

e) ***A declaration be granted to the effect that the Environmental Impact Assessment (EIA) Licenses granted by the 3rd and 4th Respondents in favour of the 6th to 21st Respondents with respect to the properties listed in Order (a) above, are irregular, unlawful, null and void and of no effect.***

f) A mandatory injunction be granted directing the 1st, 2nd, 3rd and 4th Respondents, their agents, and or officers, to forthwith Gazette the Petitioners' Development Zone 4 in the Kenya Gazette and to henceforth comply with the Nairobi Integrated Urban Development Master Plan (NIUPLAN) 2016 and Nairobi City County Development Control Policy, 2022 when granting development permissions to any developer in the Rhapta Road area within the Nairobi City County.

g) A mandatory injunction be granted directing the 1st,2nd,3rd and 4th Respondents, their agents, servants, and or employees and or officers, to forthwith issue restoration orders directed at the 6th to 21st Respondents, as the case may be, to restore all properties registered in their respective names as listed in Order (a) above; to the former ordinary state with flora and fauna before the development permissions were granted, and before the demolition, construction and or other building activities were undertaken following grant of permissions by the 1st, 2nd , 3rd and 4th Respondents.

h) General Damages.

i) Exemplary Damages against the 2nd and 4th Respondents jointly and severally.

j) Costs of the Petition.

k) Such further orders as the Court may deem just and expedient be issued.

Evidence by the Petitioners Before the ELC

9. The appellants' case at the ELC was two-pronged: (i) that the Nairobi City County Government had abdicated its statutory duty by failing to promulgate and gazette a compliant local plan and development control policy for the Rhapta Road corridor; and (ii) in the resulting policy vacuum, the 1st to 4th respondents issued approvals and

Environmental Impact Assessments (EIA) licences using discretionary yardsticks, often misrepresenting zoning status, thereby breaching Article 10 of the Constitution (public participation and rule of law); Article 42 (clean and healthy environment); and Article 69 (sustainable development which includes inter-generational equity).

10. The appellants' case was supported by affidavits and oral testimony. There was the verifying affidavit of Alex Tito Mwangi Muiruri, the Secretary of the Rhapta Road Residents Association; the Affidavit dated 10th August, 2024 by John Koyier Barreh, an urban planner; and a further affidavit by the same John Koyier Barreh dated 12th November, 2024. In addition, John Koyier Barreh testified during the hearing.

11. The affidavit of Alex Tito Muiruri described the rapid transformation of the Rhapta Road corridor, where low-density residences were increasingly overshadowed by high-rise blocks. He stated that this shift had caused severe congestion, strain on sewerage and road networks, and threatened to destroy the residential character of the area.

12. In in his affidavits and testimony, Mr. Barreh informed the court that under the 2004 Zoning Guidelines, Rhapta Road was designated as Zone 4, which permitted development of up to four floors. He further explained that NIUPLAN 2016, though never formally gazetted, envisaged a gradual densification of Nairobi but within carefully managed thresholds. According to his evidence, the approvals for 20 to 28 storey towers in the Rhapta Road area disregarded both the 2004 Zoning Guidelines and NIUPLAN 2016, amounting to arbitrary administrative action.

13. Mr. Barreh deponed and later testified that the Environmental Impact Assessments (EIA) carried out for the contested developments were superficial and failed to consider cumulative impacts. He warned of risks including overburdening the drainage system, water shortages, air and noise pollution, and irreversible degradation of residents' quality of life.

14. The appellants maintained that the constitutional right to a clean and healthy environment under Article 42 of the Constitution was being violated. They invoked Articles 10, 69, and 70 of the Constitution to argue that the respondents had failed in their obligations of sustainable development, public participation, and environmental protection.

Evidence by the Respondents

15. The 1st and 2nd respondents (the County Executive Member for Built Environment and Planning and the Nairobi City County Government) responded to the petition through the replying affidavits both dated 15th October, 2024 by Patrick Mbogo and Godfrey Akumali. The 2nd respondent also filed another affidavit by Patrick Analo Akivagi, the Chief Officer of Urban Development and Planning dated 22nd October, 2024. In all these affidavits, the 1st and 2nd respondents defended the impugned approvals. They deponed that the 2004 Zoning Guidelines were obsolete and inconsistent with the Constitution of Kenya 2010 and the Physical and Land Use Planning Act (PLUPA) 2019. In their view, the County had progressively applied the 2021 Development Control Policy, which reflected updated demographic realities, rapid urbanisation, and the need for vertical housing solutions.

16. They emphasized that the approvals were granted after technical evaluations, site visits, and compliance with applicable procedural requirements, including public participation. They denied any illegality or irregularity in the approvals. They urged the court to approve the operative regulatory regime in deference to the role of the County Executive in planning and zoning matters.

17. The 3rd and 4th respondents (NEMA and its Director-General), through Veronicah Kimutai, a Senior Principal Environmental Compliance Officer, deponed in an affidavit dated 2nd December, 2024, that all the developers in question had submitted EIA reports, which were reviewed and licences duly issued. NEMA argued that no evidence had been provided of breach of licence conditions or of actual environmental harm. It was their position that once licences were issued lawfully, challenges should have been pursued through the National Environment Tribunal (NET), not the ELC.

18. Some of the developers (6th to 20th respondents) filed replying affidavits as follows: Hu Bin, a director of the 7th respondent, filed one dated 30th August, 2024; Li Bo, the Managing director of the 9th respondent, filed one dated 23rd October, 2024; Kanti Naran Manji Patel, a director of the 10th respondent, filed one dated 22nd October, 2024; Hasmita Patel, a director of the 12th respondent, filed one dated 22nd October, 2024; Yiwen Sun, a director of the 13th respondent, filed one dated 30th August, 2024; Olav Kala, an employee of the 14th respondent authorized to swear an affidavit on its behalf, filed one dated 2nd December, 2024; Ke Huang, a director of the 16th respondent, filed one dated 15th November, 2024; Xiulan Chen, a director of the 18th respondent filed one dated 30th August, 2024; Wang Cheng, a director of the 20th respondent, filed one dated

29th August, 2024; and Nancy Wangari Averdung, a registered proprietor of LR No. 1870/IV/77, filed one dated 12th November, 2024. Their common position was that they had obtained development approvals lawfully after following due process, including public participation forums. They contended that the appellants were merely opposed to change and were seeking to freeze the city in a bygone era, contrary to the constitutional imperative of sustainable development.

19. The developers insisted that their projects were fully compliant with the law. They criticised the appellants for clinging to the 2004 Zoning Guidelines, which they described as anachronistic. They also noted that the character of Rhapta Road had already transformed, with multiple high-rise buildings in place, and that the appellants could not realistically expect the area to remain low-rise.

20. In particular, the director of the 9th respondent testified that their property lay in Zone 3C, not Zone 4, and, therefore, a maximum height of 20 floors was permissible under the 2021 Development Control Policy. They accused the appellants of misclassifying the area and of failing to adduce expert survey evidence to support their claims.

21. All the respondents challenged the jurisdiction of the ELC based on the doctrine of exhaustion.

Issues and Findings Before the ELC

22. The learned Judge of the ELC distilled the Petition into four issues:

   a. Whether the ELC had jurisdiction in light of the exhaustion doctrine under PLUPA and EMCA.

b. The status and applicability of the 2004 Zoning Guidelines, NIUPLAN 2016, and the 2021 Draft Development Control Policy.

c. Whether the development approvals granted to the respondents violated zoning requirements, planning law, or constitutional guarantees.

d. What remedies, if any, the court should grant.

23. On jurisdiction, the learned Judge acknowledged the exhaustion doctrine but held that the Petition raised constitutional and multi-faceted issues that transcended the narrow competence of the Liaison Committee in PLUPA or the National Environment Tribunal. The learned Judge concluded that, therefore, the ELC had jurisdiction.

24. Turning to the status of planning instruments, the learned Judge held that the 2004 Zoning Guidelines were outdated and not enforceable as binding county legislation under the 2010 Constitution and PLUPA 2019. On the other hand, the learned Judge found that NIUPLAN 2016, while a useful policy guide, had not been formally gazetted. The 2021 Development Control Policy, though not yet approved by the County Assembly, had been adopted in practice by the County Executive and was being consistently applied. The learned Judge, therefore, accepted it as the operative framework at the time.

25. On the validity of approvals, the learned Judge found that the developments approved for 6th to 20th respondents exceeded the permissible thresholds of their respective zones. He declared that the approvals were in violation of the zoning provisions. However,

using the 2021 Development Control Policy as the functional operative framework, he modified them to cap the number of floors at 16, subject to confirmation by the County Assembly when approving the 2021 Development Control Policy.

26. On remedies, the learned Judge issued declaratory reliefs directing the respondents to henceforth comply with the 2021 Development Control Policy. He declined to award damages, citing the public interest nature of the litigation. Costs were ordered to lie where they fell.

27. In sum, the ELC judgment recognised the appellants' grievances as legitimate to a large extent. It condemned the haphazard grant of development permissions and insisted on adherence to updated planning policies. However, it stopped short of granting the mandatory injunctions in the exact form sought, instead issuing moderated declaratory reliefs. The Judge also classified some properties as lying in Zone 4 rather than Zone 3C, a point which later became central in the cross-appeal before us.

28. Ultimately, the ELC granted the following final reliefs:

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

    b. ***A declaration is hereby issued that the development approvals issued to the 6th to 20th Respondents by the 1st and 2nd Respondents in respect to the suit properties enumerated above are hereby varied limiting the number of floors to***

16, subject to the County Assembly of Nairobi's decision while approving the 2021 Nairobi City Development Control Policy.

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

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

e. ***Each party shall bear their own costs.***

C. FACTUAL AND PLANNING BACKGROUND

29. In his judgment, the learned Judge undertook a meticulous review of Nairobi's planning history — from colonial-era master plans (1898; 1901; 1927; 1948) through the 1973 Nairobi Metropolitan Growth Strategy, to the 2014–2016 Nairobi Integrated Urban Development Master Plan (NIUPLAN) and the 2021 Development Control Policy. Overlaying these are zoning instruments: the preliminary zoning under the 1948 Plan, a 1968 revision, the Upper Hill Rezoning Plan (1993), and the 2004 Zoning Guidelines.

30. The constitutional and statutory terrain shifted materially after the 2010 Constitution: county governments replaced local authorities; the County Governments Act, 2012 repealed the Local Government Act; and PLUPA, 2019 repealed the Physical Planning Act, 1996. PLUPA reorganized the planning system: county physical and land use development plans (sections 36 – 45); local plans (section 46);

development permission processes (Part IV, especially sections 57 – 63); and liaison committees (section 78).

31. The record reveals a city in transition: NIUPLAN, 2016 was adopted as a county-wide integrated planning framework; however, detailed local physical and land use plans, and an updated development control/zoning policy to replace the 2004 Zoning Guidelines, lagged. In the vacuum, Nairobi County City Government relied on the PLUPA framework, professionalised multi-agency review committees, and, increasingly, the (draft) 2021 Development Control Policy as a practical guide.

32. In Rhapta Road and its environs (Westlands), pressure for high-rise, mixed-use residential intensification has been acute. The appellants protested that approvals for towers up to 28 floors — without a gazetted, up-to-date zoning plan — were haphazard and constitutionally infirm.

33. As aforesaid, the learned Judge substantially agreed with the appellants. He noted the persistence of outdated zoning instruments, the lack of gazetted updated county plans under the Physical and Land Use Planning Act (PLUPA), and the consequent regulatory uncertainty and granted some reliefs as outlined above.

D. <u>THE PARTIES' CASES ON APPEAL</u>

34. In their memorandum of appeal, the appellants set out no less than twenty-two (22) grounds. Conscious that several were prolix and overlapping, they later streamlined them in their written submissions and organised them under four broad clusters as follows:

a. Grounds 1, 2, 3, 4, 5, 6 and 7 of the Appeal: The learned

trial Judge acted without jurisdiction by purporting to promulgate his own preferred Development Control policy on behalf of the 1st and 2nd Respondent despite the finding that there was no such policy in place.

b. ***Grounds 8, 9, 10, 11, 12, 13, 14, 15: The learned trial judge erred in law and in fact in failing to analyse the evidence adduced at the trial and arrived at erroneous findings including findings that there was no breach of environmental laws.***

c. ***Grounds 16, 17, 18, 19, 20, 21 and 22: The learned trial judge erred in law and in fact in failing to grant orders requiring the 1st to 4th respondents to comply with the law and the Constitution. He erred in condoning a deliberate violation of the duties of the 1 ' to 4!h Respondents to comply with the Constitution.***

d. ***Ground 19: The learned trial Judge erred in falling to protect the intergenerational equity and to protect the interests of future generals by failing to rein in on the errant Respondents.***

35. The 9th respondent (Hale End Properties Ltd) also filed a Notice of Cross-Appeal challenging, *inter alia*, the trial Court's location/zoning findings (placing its parcel Nairobi Block 3/85 under Muthangari Zone 4B) and urging want of first-instance jurisdiction in light of statutory exhaustion doctrines. Other developers (7th, 13th, 16th, 18th and 20th respondents) aligned with those grounds.

36. We conducted an expedited hearing on 16th July 2025. During the hearing, the appearances were as follows: Mr. Mwangi together with Mr. Wanyoike appeared for the appellants; Mr. Muganda together with Ms. Kinyua appeared for the 1st respondent; Mr. Owuor together with Mr. Mogire and Mr. Oriero appeared for the 2nd

respondent; Mr. Ngararu Maina for the 3rd and 4th respondents; Mr. Alan Kamau for the 5th respondent; Mr. Makori with Mr. Andiwo for the 7th, 13th, 16th, 18th, and 20th respondents; Mr. Lusi for the 9th respondent; and Mr. Adano held brief for Ms. Khadija for the 10th respondent. Each of the counsel addressed the Court and highlighted the parties' written submissions.

37. The appellants anchored their appeal on the contention that the Environment and Land Court (ELC) fundamentally erred in law by descending into the arena of policy-making and capping permissible floors at sixteen without a legal basis. Counsel argued that their case before the ELC was straightforward: the County had abdicated its constitutional duty to plan, as mandated under Articles 185, 186 and the Fourth Schedule of the Constitution, as well as the Physical and Land Use Planning Act (PLUPA). In their view, the last valid policy were the 2004 Zoning Guidelines which limited Zone 4 (covering Rhapta Road) to four storeys. They cited ***Bi-Mach Engineers Ltd v James Kahoro Mwangi [2011] eKLR*** for the principle that discretion must be exercised judiciously and not whimsically. They contended that the trial court, having found that the County lacked an approved policy, ought to have annulled the impugned approvals and ordered restoration, including demolition where necessary, rather than substituting its own policy benchmark.

38. The appellants further submitted that the ELC failed to consider intergenerational equity, a constitutional imperative embedded in Articles 42 and 69 of the Constitution, which requires safeguarding the environment for present and future generations. They relied on ***Peter K. Waweru v. Republic of Kenya*****, Miscellaneous Civil**

Application 118 of 2004; High Court judgement delivered in 2006; reported as ***(2007) African Human Rights Law Reports 149 (KeHC 2006)*** which emphasised the role of courts in compelling executive agencies to meet sustainability obligations. They also criticised reliance on the affidavit of a NEMA officer (Ms. Veronica Kimutai), arguing that her evidence was untested, lacked annexures, and could not qualify as expert evidence under the Evidence Act. They submitted that the EIAs relied upon were fatally defective for misrepresenting the zoning status of the area.

39. Lastly, they resisted the respondents' argument on the doctrine of exhaustion, citing ***Nicholas Njeru v Attorney General & 8 Others [2013] eKLR*** and ***Superior Homes (Kenya) Ltd v Attorney General & 2 Others [2019] eKLR***, to argue that constitutional petitions raising broad constitutional violations are not barred merely because there exist specialised tribunals. They contended that they were entitled to approach the constitutional court directly because the dispute went beyond technical questions of development control and raised structural failures in governance.

40. The 1st and 2nd respondents (the CECM for Built Environment and Planning and the County Government) opposed the appeal, maintaining that the 2004 Zoning Guidelines were spent. Counsel submitted that under the repealed Local Government Act and Physical Planning Act, zoning ordinances had the force of subsidiary legislation, but those statutes were expressly repealed by the County Governments Act and the PLUPA of 2019. Consequently, the ordinances ceased to apply unless re-enacted under the new regime. They relied on Section 91 of PLUPA and the general principle of statutory interpretation on repeals as

articulated in ***Kenya Bankers Association v Minister for Finance & Another [2002] 1 KLR 61***. They insisted that the relevant legal regime is now found in sections 58 to 61 of PLUPA and the subsidiary regulations of 2021, which require approvals to be considered by technical liaison committees drawing on expert input.

41. The County further defended the reliance on NIUPLAN 2016 as an overarching policy framework. Though not a "special plan" in the strict sense under section 36 of PLUPA, they argued it was approved by the County Assembly and remains operative pending the adoption of more detailed local physical and land use plans. They also pointed to the 2021 Development Control Policy, which, though pending formal approval, had undergone public participation and was applied as a guiding framework, consistent with Kenya's jurisprudence of the court's deferring to other constitutional bodies where a matter is textually committed to them. In this regard, the 1st and 2nd respondents cited the Supreme Court's decision in ***Mate & another v Wambora & another [2017] KESC 1 (KLR)*** and this Court's decision in ***Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others [2018] KECA 332 (KLR)***. They argued that consistent with this deferential approach, courts should consider and utilize evolving draft frameworks when extant policies are outdated. This, they argued, is what the learned Judge did in applying the 2021 Development Control Policy.

42. On the exhaustion doctrine, they submitted that disputes over approvals fall squarely within the mandate of the Physical and Land Use Liaison Committee and the National Environment

Tribunal. They relied on ***Speaker of the National Assembly v Karume [1992] KLR 21*** and the Supreme Court's holding in ***Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR*** to argue that the petitioners ought to have pursued those remedies first. In their view, the ELC only had jurisdiction in its appellate capacity over such matters. They urged the dismissal of the appeal, but agreed with the cross-appeals to the extent that the trial court had no basis to cap approvals at 16 floors without anchoring it in enacted policy.

43. NEMA and its Director-General (the 4th and 3rd respondents, respectively), represented by counsel, emphasised that it had lawfully discharged its statutory mandate under the Environmental Management and Coordination Act (EMCA). It argued that the Environmental Impact Assessment (EIA) licences issued to the developers complied with sections 58 to 63 of EMCA, following technical evaluations and stakeholder consultations. They disputed the claim that the affidavits relied upon were inadequate, pointing out that by consent of the parties, only the petitioners and the County called oral expert witnesses while other respondents, including NEMA, relied on affidavits. They stressed that the affidavit of Ms. Veronica Kimutai was a sworn statement by a Senior Principal Environmental Compliance Officer, whose expertise was not challenged by cross-examination. Consequently, the appellants could not belatedly attack its probative value.

44. The 3rd and 4th respondents further argued that the alleged misrepresentations in the EIAs were not substantiated, and in any event, any grievances against its licensing decisions ought to

have been filed before the National Environment Tribunal under Section 129(1) – (2) of EMCA. They relied on ***Republic v National Environmental Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR*** for the principle that specialised bodies with technical competence must be the primary forum for challenging EIA decisions. The 3rd and 4th respondents, thus, supported the trial court's finding that no material breach of environmental law had been demonstrated.

45. The 7th, 13th, 16th, 18th, and 20th respondents, through counsel, aligned themselves with the County's submissions, but emphasized that the trial court erred in misclassifying Rhapta Road as lying in Zone 4. They argued that under the Nairobi City Development Control Policy of 2021, Raphta Road is expressly designated as Zone 3C, which permits developments up to twenty floors. Their clients had lawfully obtained approvals for 20–22 floors in reliance on that designation, which had been endorsed by County technical committees. They submitted that the ELC wrongly capped their developments at 16 floors, thereby undermining their accrued property rights and legitimate expectations.

46. They further argued that developers should not be penalised where they had acted in reliance on approvals granted by competent authorities. Citing ***Kenya National Highways Authority v Shalien Masood Mughal & 5 Others [2017] eKLR***, they urged the Court to recognise the importance of stability in approvals to avoid disrupting multi-billion-shilling investments. They added that granting the appellants' prayers would create chaos by exposing 90% of existing Nairobi developments to

demolition. They urged the Court to adopt a proportionality approach, balancing the appellants' environmental concerns with the rights of developers and the housing needs of the city's residents. They prayed that the cross-appeal be allowed to correct the zoning error and validate their approvals up to 20 floors.

47. The 9th respondent also filed a cross-appeal, submitting that the trial court wrongly assumed jurisdiction over disputes that should have gone to specialised bodies. It stressed that section 78A–C of PLUPA channels grievances over zoning, plans, and development approvals to the Physical and Land Use Liaison Committees, while section 129 of EMCA addresses grievances over EIA licences. They relied heavily on the Supreme Court's guidance in ***Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR*** that constitutional avoidance requires parties to pursue specialised mechanisms before resorting to constitutional litigation. They argued that the ELC acted without jurisdiction in entertaining the petition at first instance.

48. On the merits, they submitted that the ELC misclassified their property. The court, after noting the absence of a surveyor's evidence, resorted to Google Maps to identify its location. Counsel argued that this amounted to a denial of fair hearing and an error on the face of the record. They sought correction of the misclassification and reinstatement of their approvals up to 20 to22 floors as granted by the County. They added that the 2004 ordinances could not govern present approvals because they fail to meet the requirements of section 39 of PLUPA on the contents of development plans. They urged the Court to uphold the

doctrine of transitional provisions under the Sixth Schedule to the Constitution, which requires existing laws to be read in conformity with the Constitution, and held that the 2004 Zoning Guidelines could not survive under that standard.

49. In reply, the appellants maintained that the respondents had distorted the record. They clarified that their prayers in the petition sought to compel the County to gazette and adopt a lawful policy, not for the court to apply an unapproved draft. They insisted that the 2004 Zoning Guidelines remained the last lawful instrument, as even County witnesses admitted during trial. They emphasized that draft policies, however advanced, cannot substitute for formally adopted laws after public participation and County Assembly approval, as required under sections 36 and 46 of PLUPA. They cited ***Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR*** for the proposition that public participation is a non-derogable requirement in policy-making.

50. On exhaustion, the appellants reiterated that their case went beyond mere technical approvals and raised questions of constitutional abdication of duty. They distinguished ***Speaker v Karume*** **and** ***Mutanga Tea*** cases, noting that both allow exceptions where constitutional violations are alleged. They urged the Court not to "sacrifice constitutional compliance on the altar of technical procedure." On developers' reliance interests, they argued that illegality cannot breed rights, citing ***Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR***, and insisted that approvals obtained contrary to the law cannot be protected. They, therefore,

prayed that the appeal be allowed, the impugned approvals quashed, and the County compelled to undertake lawful planning.

51. On jurisdiction, they argued the petition was multi-faceted and constitutional in character, and that specialized tribunals (PLUPA liaison committees; NET) could not supply systemic relief or structural accountability.

F. STANDARD OF REVIEW AND ISSUES FOR DETERMINATION

52. Being a first appellate court, our mandate is to reconsider and re-evaluate the evidence on record and arrive at our own independent conclusions, while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (See ***Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123***). We are, however, also alive to the principle that an appellate court will not lightly interfere with findings of fact by the trial court unless they are based on no evidence, or on a misapprehension of the evidence, or where it is shown that the trial court acted on wrong principles. (See ***Jabane v Olenja [1968] KLR 661***).

53. Guided by this standard, and having carefully considered the entire record of appeal, the comprehensive judgment of the Environment and Land Court, the submissions of learned counsel together with their oral highlights before us, we are of the view that the real controversies in this appeal crystallize into five interrelated issues.

    a. The first issue is whether the ELC properly assumed jurisdiction in light of the doctrines of exhaustion and

specialized statutory mechanisms under the Physical and Land Use Planning Act (PLUPA) and the Environmental Management and Coordination Act (EMCA).

b. The second issue is the legal status and force of the planning instruments invoked in this dispute, namely, the 2004 Zoning Guidelines, the Nairobi Integrated Urban Development Master Plan (NIUPLAN) of 2016, and the Nairobi City County Development Control Policy of 2021. This requires us to consider the nature of each instrument, its statutory pedigree, and the extent to which it can lawfully regulate development control in Nairobi today.

c. The third issue concerns zoning classification, specifically, whether the learned Judge erred in treating the impugned properties along Rhapta Road as falling within Zone 4, whereas the respondents contend that they properly fall within Zone 3C — a classification that carries materially different implications for permissible density and floor heights.

d. The fourth is whether the Environmental Impact Assessment (EIA) licences issued to the 6th to 20th respondents were lawfully granted or impugnable on grounds of irrationality, procedural unfairness, ultra vires action, or inadequate public participation.

e. The fifth and final issue concerns remedies. Having regard to the alleged governance gaps, what is the appropriate form of relief? Should the Court merely

issue declaratory orders, or is this a case warranting the more intrusive but dialogic remedy of a structural interdict, complete with timelines, reporting obligations, and consideration of intergenerational equity?

54. We now proceed to analyse each of these issues in turn.

G. ANALYSIS AND DETERMINATION

(i) Jurisdiction and Exhaustion

55. A threshold issue raised in both the appeal and cross-appeal was whether the ELC had jurisdiction to entertain the petition in the first place. The 9th respondent (Hale End Properties Ltd) and several other respondents strongly argued that the appellants should have pursued their grievances before the statutory mechanisms provided under PLUPA and EMCA. Specifically, they invoked the County Physical and Land Use Planning Liaison Committees under section 78 of PLUPA, which hear and determine complaints relating to development permission, and the NET under section 129 of EMCA, which hears appeals relating to Environmental Impact Assessment licences. Counsel relied on ***Speaker of the National Assembly v Njenga Karume [1992] eKLR***, for the proposition that where the Constitution or statute establishes a dispute-resolution mechanism, it must be strictly followed.

56. According to these respondents, the Petitioners' grievances — whether about excessive building heights, defective approvals, or flawed EIA processes — were squarely within the remit of these specialised tribunals. They argued that the Petitioners' recourse

to the ELC was a classic example of "forum shopping," calculated to bypass the expertise of the liaison committees and NET. They urged that the doctrine of exhaustion, as reaffirmed in ***Geoffrey Muthinja & Another v Samuel Henry Ndungu Mukunya & 5 Others [2015] eKLR***, required the ELC to down its tools.

57. On the other hand, the appellants submitted that their claim was not a conventional dispute about the terms of a specific development approval. Rather, it was a constitutional challenge to Nairobi City County's systemic failure to promulgate lawful and updated zoning instruments, and to the manner in which State organs had permitted unregulated high-rise construction contrary to Articles 10, 42, and 69 of the Constitution. They principally relied on ***Superior Homes (Kenya) Plc Vs Water Resources Authority & 9 Others*** (a decision of this Court)**;** ***William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others*** **[2020] eKLR** (a five-judge bench decision of the High Court), where the courts clarified that exhaustion is not absolute and may be departed from where the dispute raises issues of constitutional interpretation or systemic governance failures.

58. The appellants emphasised that neither a Liaison Committee nor the NET could grant the structural or programmatic remedies they sought, such as declarations on the County's obligation to align planning instruments with the Constitution, or a structural interdict compelling compliance with NIUPLAN 2016. They also noted that the County Assembly's inaction, which lay at the heart of the petition, was beyond the statutory jurisdiction of either specialized tribunal.

59. We agree with the appellants on this point. In our view, the doctrine of exhaustion serves an important constitutional function. It promotes institutional comity by recognizing the legislature's intent that certain technical disputes be resolved in specialized fora. It enhances efficiency by allocating cases to bodies with subject-matter expertise. This Court has consistently reaffirmed that principle, most famously in ***Speaker v Karume*** **(supra)**, ***Geoffrey Muthinja*** **(supra)** and ***Kibos Distillers Limited & 4 Others v Benson Ambuti Adega & 3 Others [2020] eKLR***. We reaffirm the general principle: where Parliament has prescribed specialized fora and a clear path of review, parties must ordinarily exhaust those remedies. That discipline respects legislative design, leverages technical expertise, and refines records for judicial review.

60. However, our jurisprudence has equally recognised that exhaustion is not an inflexible rule. As the High Court observed in ***William Ramogi*** **(supra)**, courts may intervene where statutory mechanisms are plainly inadequate to deal with constitutional claims, or where insistence on exhaustion would result in a denial of justice. Differently put, the exhaustion doctrine is not an iron cage. Courts retain a narrow gate for exceptions — where a dispute transcends routine merits review (for example, where it raises systemic constitutional issues); where the statutory path is ineffective; or where urgent structural relief is necessary and no practical alternative exists.

61. Applying those principles here, we are satisfied that the ELC did not err in assuming jurisdiction. The Petition raised systemic and constitutional questions about Nairobi City's planning

governance — specifically, the County's admitted failure to finalize, approve, and gazette lawful zoning and development control instruments nearly two decades after the 2004 Zoning Guidelines had become obsolete. The reliefs sought were constitutional in character: declarations of invalidity, injunctions binding multiple State organs, and structural remedies to compel future compliance. These were not remedies within the remit of a Liaison Committee or the NET. The Petition did not merely assail isolated approvals; it impugned the City's planning posture writ large — alleging policy abdication, legislative vacuums, and the need for structural remedies to catalyze lawful planning instruments. The ELC confronted a multi-faceted controversy at the intersection of urban planning, environmental governance, fair administrative action, and socio-economic rights.

62. To be clear, our holding does not supplant the jurisdiction of specialized tribunals in their proper sphere. Disputes about the validity of a particular EIA licence; the conditions attached to a single development approval; or the enforcement of compliance notices, remain within their province. What distinguishes this case is that the alleged violations were not discrete but structural; they went to the core of Nairobi's planning paralysis and implicated fundamental rights under Articles 10, 42, and 69 of the Constitution. In such circumstances, constitutional supervision by the ELC was warranted.

63. We, therefore, reject the respondents' jurisdictional complaint. The ELC acted properly in entertaining the petition, and we affirm its approach on this preliminary question.

(ii) Status of Planning Instruments in Nairobi City

64. It became clear during this appeal that the real substantive controversy revolves around the status and legal force of Nairobi's planning instruments: the 2004 Zoning Guidelines; the NIUPLAN 2016; and the 2021 Development Control Policy. On appeal, the appellants urged that the 2004 Zoning Guidelines and NIUPLAN 2016 remain the only binding frameworks, and that reliance on the 2021 Development Control Policy amounted to unlawfully smuggling unapproved norms into decision-making.

65. The 1st and 2nd respondents countered that the 2004 Zoning Guidelines are legally obsolete, that NIUPLAN is a high-level strategy document incapable of parcel-level zoning, and that the 2021 Development Control Policy was, in fact, the operative tool in practice, having undergone public participation and consistent administrative application. The developers (the 6th to 20th respondents) echoed this position, adding that to invalidate approvals based on "rigid" reliance on outdated plans would paralyse urban development.

66. NEMA, for its part, submitted that its EIA role presupposed the County's planning framework and that it could not be faulted for issuing licences where planning permissions had already been granted.

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 gazettement 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 gazettement. 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.

72. As we direct below, however, this should not end matters. While we permit the 1st and 2nd respondents to continue, ephemerally, to use the 2021 Development Control Policy as an administrative guide, in this judgment, we provide for a clear and time-bound sunset trajectory to this state of affairs.

(iii) Zoning Classification

73. A further critical question pressed in this appeal is whether the learned Judge erred in classifying the developments by the 6th to 20th respondents as falling within Zone 4 (Muthangari/Kileleshwa) rather than Zone 3C (Rhapta Road). This question is not merely semantic: the difference between the two zones determines whether permissible heights are capped at 16 floors (Zone 4/4B) or 20 floors (Zone 3C).

74. The appellants' case was that Rhapta Road is unquestionably situated in Zone 4, as confirmed by the 2004 Zoning Guidelines and by NIUPLAN 2016 (see page 171 of Volume 1 of the Record of Appeal). Their counsel, Mr. Mwangi, drew our attention to these documents, emphasizing that they clearly classified Kileleshwa, including Rhapta Road, as limited to four (4) storeys. The appellants argued that to place Rhapta Road within Zone 3C was to indulge the developers' attempt to escape established restrictions and to "rebrand" the corridor as a high-rise district.

75. The 1st and 2nd respondents, however, contended that the appellants are misguided in clinging to the 2004 Zoning Guidelines. They submitted that the County has since developed more recent instruments which, while pending finalisation, guide present practice. They pointed specifically to the 2021 Development Control Policy. At Volume 3, page 1019 of the Record of Appeal, the 2021 Development Control Policy lists Rhapta Road expressly within Zone 3C and sets a permissible limit of 20 floors for mixed-use development. Counsel pointed out that although the learned Judge agreed to use the 2021 Development Control Policy as an administrative guide, he misdirected himself by lumping Rhapta Road together with the broader Kileleshwa/Muthangari block, instead of recognising its separate reclassification.

76. The 7th, 13th, 16th, 18th and 20th respondents (developers) advanced a similar line. They stressed that their approvals were obtained in good faith under the 2021 Development Control Policy, which was the operative framework applied by the County. Their counsel, Mr. Andiwo, argued that at page 1019 of the Policy, "Rhapta Road" is expressly listed as a distinct corridor under Zone 3C, with a height allowance of up to 20 floors. He criticised the learned Judge for relying on Google Maps and generalised descriptions of Kileleshwa instead of giving effect to the documentary evidence. In their submission, the error went to the heart of the judgment: by treating the developments as limited to 16 floors, the court-imposed restrictions inconsistent with the County's planning instruments.

77. The 9th respondent (Hale End Properties) also cross-appealed on this point. Through counsel, Mr. Lusi, it emphasised that the ELC expressly found that the appellants had not adduced surveyor's evidence to establish the siting of the 9th respondent's parcel, Nairobi Block 3/85. Yet having so found, the court nonetheless relied on Google Maps to locate the property within Zone 4B. This, counsel argued, was procedurally irregular and substantively erroneous. The correct zoning, demonstrated at page 1019 of the 2021 Development Control Policy, placed the property in Zone 3C with a permissible limit of 20 floors.

78. Having carefully reviewed the record, we are persuaded that the learned Judge erred in his treatment of Rhapta Road's zoning. First, the reliance on Google Maps in the face of contested boundaries, without calling for expert surveyor's evidence, was a methodological misstep. Zoning classifications are not a matter of impressionistic geography but of statutory instruments and gazetted plans. Secondly, the 2021 Development Control Policy — which the learned Judge, correctly as we have held above, adopted as an acceptable administrative guide — does contain, at Volume 3, page 1019, an explicit tabulation classifying "Rhapta Road" under Zone 3C with a 20-floor cap. It is, therefore, incorrect to assimilate Rhapta Road to Zone 4/4B.

79. We are conscious of the appellants' argument that only gazetted, Assembly-approved instruments can supply binding law. We have agreed with that proposition in our earlier discussion. However, the narrow issue here is not the ultimate legal force of the 2021 Development Control Policy but the factual mischaracterisation by the trial court. Even if treated only as a persuasive or interim

administrative guide, the 2021 Development Control Policy demonstrates that the County itself has consistently treated Rhapta Road as falling within Zone 3C, distinct from Muthangari/Kileleshwa zones. To insist otherwise would be to entrench a manifest error of fact.

80. In the circumstances, we allow the cross-appeal to the limited extent of correcting the zoning misclassification. The correct position, on the evidence, is that Rhapta Road falls within Zone 3C as set out in the 2021 Development Control Policy (Vol. 3, p. 1019), with a height allowance of up to 20 floors. Thus, as a matter of administrative coherence, any project whose principal access and frontage is on Rhapta Road shall, for floor-count purposes, be assessed under Zone 3C parameters (including the greater-of-two rule should the County's final policy adopt intersection/edge-case tests), subject always to plot-ratio, site coverage, infrastructure capacity, servitudes, servitudes' upgrades, and all other technical and environmental controls.

81. We note that the 16-floor cap by the ELC was expressly interim and tethered to the County Assembly's decision on the 2021 Development Control Policy. The zonal correction we make in this judgment requires a parallel adjustment of the interim cap for Rhapta Road-fronting projects: pending final County action, the varied approvals for those specific projects shall be capped at twenty (20) floors — that being the Zone 3C metric referenced across the record — again subject to all applicable technical parameters and to any stricter limit yielded by parcel-specific constraints (e.g., plot ratio, aviation/servitude restrictions, utilities).

(iv) The EIA Licences

82. A distinct ground of appeal concerned the Environmental Impact Assessment (EIA) licences issued by the 3rd and 4th respondents (the Director-General of NEMA and NEMA itself). The appellants contended that the ELC misdirected itself by accepting the validity of those licences. Their primary argument was that the licences were procured on the basis of misrepresentations by developers — notably that the affected plots were located in zones permitting high-rise construction. They pointed to the EIA reports in the record, which repeatedly stated that Rhapta Road permitted multi-storey developments "without restriction." Counsel argued that these assertions were demonstrably false and that NEMA, in failing to interrogate them, had abdicated its statutory mandate under sections 58 to 59 of the Environmental Management and Co-ordination Act (EMCA).

83. The appellants further argued that NEMA's evidence was fatally deficient. They complained that the ELC relied on the affidavit of one Ms. Veronica Kimutai, a Senior Principal Compliance Officer at NEMA, even though she was never subjected to cross-examination. According to them, this deprived the court of a fair opportunity to test her qualifications, methodology, or independence. They also contended that her affidavit was unsupported by annexures, and that its uncritical acceptance by the ELC demonstrated a bias in favour of the regulatory agency. In the appellants' submission, the court should instead have drawn an adverse inference against NEMA for failing to call *viva voce* evidence, particularly since expert testimony was central to the dispute.

84.The 1st and 2nd respondents (the CECM for Urban Development and Planning and the County Government) opposed this position. They argued that the appellants were seeking to relitigate issues that properly fall within the jurisdiction of the NET under section 129(1)(a) of EMCA. They maintained that any grievance concerning the content, adequacy, or participatory quality of an EIA licence is a classic EMCA dispute which Parliament has mandated to the Tribunal. The County, therefore, characterised the appellants' challenge in this regard as a jurisdictional misadventure disguised as a constitutional claim.

85.NEMA itself defended its process. Through its replying affidavits, it explained that the licensing process for each of the impugned developments followed the statutory procedure: the submission of project reports; public notices and opportunities for objections; review by technical officers; and the grant of conditional licences subject to compliance with other statutory approvals (including building permits, WARMA consents, and National Construction Authority certifications). NEMA stressed that environmental governance is multi-layered: the EIA licence is not a blanket authorisation but a gatekeeping instrument to ensure that environmental safeguards are addressed before construction proceeds. It maintained that the appellants failed to demonstrate any specific procedural lapse or breach of EMCA.

86.The developers who participated in the appeal (the 7th, 9th, 13th, 16th, 18th and 20th respondents) aligned themselves with NEMA's defence. They argued that they acted in good faith, applied for and obtained all the requisite approvals, and commenced construction lawfully. To them, the appellants' claim amounted

to selective opposition to a handful of developments on Rhapta Road, while ignoring the hundreds of comparable buildings already standing. Counsel argued that fairness and legitimate expectation demanded that lawfully issued licences not be retroactively nullified by litigation aimed at only a few projects.

87. Having reviewed the record, we find no merit in the appellants' challenge to the EIA licences. First, the record is clear that the parties had, by consent, agreed on a litigation plan whereby most respondents would rely on affidavit evidence rather than oral testimony. This was a pragmatic case-management choice, aimed at avoiding a protracted trial. It would, therefore, be inconsistent for the appellants now to complain that NEMA did not call its officers for cross-examination. Secondly, the affidavit of Ms. Kimutai was properly on record, sworn by a senior compliance officer whose qualifications and responsibilities were apparent on the face of the document. The appellants neither applied to cross-examine her nor filed a rebuttal affidavit. On that footing, the ELC cannot be faulted for treating her evidence as credible.

88. On the substance, the appellants did not discharge their burden to show that NEMA's process was *ultra vires*, procedurally unfair, or irrational under EMCA sections 58 to 59. While there were complaints of misstatements in individual project reports, no specific licence was shown to have been issued without compliance with statutory steps. More importantly, the gravamen of this litigation was always zoning and planning governance, not environmental licensing *per se*. The ELC, therefore, properly treated the EIA claims as incidental to, rather than constitutive of, the real controversy.

89. Finally, on this specific issue, we agree with the respondents that, in the ordinary course, complaints as to the validity of EIA licences must go to the NET under section 129 of EMCA. The Tribunal has the specialised competence, processes, and remedies to interrogate the adequacy of environmental assessments. The ELC was correct in declining to usurp that jurisdiction. It rightly confined itself to the planning governance deficits that were squarely before it.

90. For these reasons, we affirm the ELC's disposition on the EIA issues. The appellants' challenge fails.

(v) Appropriate Relief: Structural Interdict & Intergenerational Equity

91. The record before us discloses a structural governance gap. The Rhapta Road corridor, one of Nairobi's fastest-growing urban zones, is regulated by outdated 2004 Zoning Guidelines, which themselves arose under the repealed Physical Planning Act. While the NIUPLAN 2016 exists as an Assembly-approved city-wide strategy, it was never intended to operate as parcel-specific zoning law. Meanwhile, the 2021 Development Control Policy remains in draft, un-gazetted form. In this seam, discretionary approvals, however well-intentioned, risk unevenness, opacity, cumulative environmental harm, and ultimately, a loss of public trust in planning governance.

92. In such circumstances, declaratory relief is insufficient. Kenyan constitutional jurisprudence recognises that systemic violations of rights or governance obligations sometimes demand supervisory remedies. Article 23(3) of the Constitution explicitly empowers courts to issue "appropriate relief." In ***Mitu-Bell***

Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR), the Supreme Court affirmed that structural or supervisory orders are an appropriate tool to ensure the realization of socio-economic rights. Likewise, in ***Save Lamu & 5 others v National Environmental Management Authority & Another [2019] eKLR***, this Court approved supervision and reporting mechanisms to safeguard environmental compliance under Article 42 of the Constitution.

93. Comparative constitutional jurisprudence is instructive. The South African Constitutional Court, in ***Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC)*** and ***Minister of Health v Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC)***, paired declaratory relief with time-bound remedial duties and report-back mechanisms to vindicate socio-economic rights. These remedies, described as structural interdicts, are not judicial takeovers of executive functions but dialogic tools designed to catalyse state action while maintaining the separation of powers.

94. In India, the Supreme Court has developed the doctrine of continuing mandamus, particularly in environmental and planning litigation (for example, ***M.C. Mehta v Kamal Nath (1997) 1 SCC 388***), whereby state agencies are compelled to act under periodic judicial supervision. In Colombia, the Constitutional Court has adopted *sentencias estructurales* to compel systemic reforms in housing, environmental protection, and displacement governance.

95. The classic features of a structural interdict are well known:

i. A declaration of breach or duty by the court;

ii. Specification of the mandatory steps required to remedy the breach;

iii. A clear and reasonable timeline by the government agency to take remedial action;

iv. Reporting back to the court (often with opportunities for affected stakeholders to respond); and

v. Continuing supervision, limited in scope and duration, to ensure compliance.

96. This framework is well suited to the present case. The continued reliance on pre-2010 planning instruments has produced a twilight zone of governance in which neither citizens nor developers have certainty. NIUPLAN 2016 provides city-wide vision, but parcel-level decision-making remains exposed to discretionary, inconsistent practice. The absence of an approved, gazetted, and legally enforceable zoning policy undermines the constitutional values of the rule of law, transparency, and public participation (Article 10 of the Constitution), as well as the environmental rights guaranteed under Articles 42 and 69 of the Constitution.

97. International urban governance standards reinforce this view. The ***UN-Habitat "International Guidelines on Urban and Territorial Planning" (2015)***, to which Kenya subscribes, emphasise that effective urban planning requires: (a) a clear legal framework anchored in legislation; (b) institutional capacity for implementation; and (c) mechanisms for accountability and citizen participation. Similarly, the ***New Urban Agenda (UN-***

Habitat, 2016) underscores the role of legally binding, forward-looking plans in creating sustainable and resilient cities. The absence of such frameworks, coupled with reliance on discretionary approvals, is antithetical to these global norms and places Nairobi at risk of unplanned vertical sprawl, infrastructure deficits, and environmental degradation.

98. We, therefore, consider it appropriate to frame relief in the form of a structural interdict. This will not involve this Court substituting itself for the County Assembly or the County Executive. Rather, it will ensure that the organs constitutionally mandated to plan Nairobi do so within a defined period and under transparent, participatory procedures.

99. Accordingly, the structural order this Court fashions will comprise the following stages:

    i. ***Timetable for Compliance***: The Nairobi City County shall, within six (6) months of this judgment, finalise and approve through the County Assembly, and gazette comprehensive zoning and development control plans for the whole city – including Rhapta Road corridor and other affected high-density zones, in conformity with the Physical and Land Use Planning Act, 2019.

    ii. ***Interim Reporting***: Within three (3) months of this judgment, the County Government shall file in this Court a progress report detailing steps undertaken, including initiation of public participation forums, preparation of draft bills, regulations or policies, and consultations with professional associations such as the

Architectural Association of Kenya, Institution of Planners, and the Law Society of Kenya.

iii. ***Final Reporting***: At the expiry of six months, the County shall file a final compliance report annexing the gazetted instruments and summarising the public participation undertaken.

iv. ***Stakeholder Participation***: The reports shall be served upon the appellants, the 1st and 2nd respondents, NEMA, and relevant civic groups, including registered residents associations, who shall have liberty to file comments or objections within twenty-one (21) days.

v. ***Supervisory Jurisdiction***: This Court shall retain limited supervisory jurisdiction for the purpose of considering compliance reports and, if necessary, issuing further directions.

100. Finally, we emphasise that structural relief of this kind also advances the doctrine of intergenerational equity, long recognised in international environmental law and cited with approval by this Court in ***Save Lamu* (supra)**. As articulated in the ***Brundtland Report (1987)***, sustainable development requires meeting the needs of the present without compromising the ability of future generations to meet their own needs. By compelling Nairobi to adopt lawful, up-to-date zoning and development control frameworks, this Court ensures that urban development is not only orderly and

transparent today, but also safeguards the city's livability, inclusivity, and resilience for generations to come.

101. Nairobi's urban form will shape the life chances of Nairobians yet unborn. Uncoordinated densification clogging narrow rights-of-way, overwhelming sewers and starving public open space risks path dependence that will be costly to reverse. Conversely, planned compact growth — integrating transit, utilities, mixed use and adequate public realm — can deliver affordability, efficiency and liveability.

102. The central thread that emerges is threefold. First is *predictability*: citizens and investors alike are entitled to know, in advance, the rules that govern land use and urban form through codified, accessible, and enforceable plans and policies. Second is *transparency*: development control must rest on published standards, open criteria, and authentic public participation that reflects the constitutional values of accountability and inclusivity. Third is *capacity-constrained approvals*: permissions must be calibrated to existing and planned infrastructure so that cumulative impacts on roads, drainage, sewerage, water, power, schools, and health services are neither ignored nor deferred indefinitely.

103. These three imperatives are not aspirational; they are already embedded in the Constitution — particularly Articles 10, 42, and 69 — and in the scheme of the Physical and Land Use Planning Act. What has been lacking is faithful implementation. It is precisely to cure that implementation deficit that structural interdicts serve a purpose: they are supervisory tools that compel timely completion of lawful plans

while ensuring that urban development remains orderly, participatory, and sustainable for present and future generations.

104. Finally, we reaffirm that remedies must also respect proportionality and legal certainty. Developers who obtained permissions in good faith after multi-agency review should not be retroactively penalized absent demonstrated illegality. At the same time, pending projects remain subject to any new lawful, generally applicable controls adopted through due process (subject, of course, to fair transition provisions embedded in the instruments themselves). This balances investment-backed expectations with environmental stewardship and community rights.

H. CONCLUSION AND DISPOSITION

105. This litigation has illuminated both the strains of Nairobi's rapid urban transformation and the fragility of its regulatory scaffolding. The petition, appeal and cross-appeal, have underscored the urgent need for clarity, accountability, and forward-looking planning instruments that respect the Constitution, the rule of law, and the rights of both present and future generations. Our decision herein affirms that urban development must be lawful, participatory, and sustainable. It also recognises that planning is not merely a technical exercise but a constitutional duty engaging values of transparency, rule of law, equity, and intergenerational stewardship. In directing the Nairobi City County to adopt time-bound lawful plans under continuing judicial supervision, we align this city's

governance with global best practices and with Kenya's constitutional promise of sustainable development.

106. This judgment and the orders we give below do not anoint judges as planners. They restore planning to where the Constitution places it — the County's democratic and technical institutions — while employing a measured, supervisory remedy to ensure that predictable, participatory and sustainable controls govern Nairobi's growth. The City's skyline may rightly reach for the clouds; but its planning must be rooted in law, evidence, transparency, capacity and fairness — for present and future generations.

107. For the foregoing reasons, and in light of our analysis above, the final orders of this Court are as follows:

    a. ***Appeal***: Save for the structural interdict order this Court has fashioned, the appeal lodged by the appellants is hereby dismissed. For avoidance of doubt, we affirm the declarations issued by the learned Judge to the effect that development approvals must comply with lawful zoning and policy instruments, and with the governing frameworks of the Constitution, the PLUPA, and the EMCA. We affirm that the ELC acted within jurisdiction and within its remedial discretion in issuing the interim variations (subject to our findings and orders on cross-appeal) and directing compliance with the 2021 Nairobi City County Development Control Policy pending approval. The broader calls for

cancellation/demolition of approved developments are declined.

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

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

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

corridor, in compliance with the Constitution and Physical and Land Use Planning Act, 2019 (PLUPA).

b. *Procedure and Paramaters:* Such instruments shall be preceded by meaningful public participation, in keeping with Article 10 of the Constitution and section 40 of Physical and Land Use Planning Act, 2019 (PLUPA), and shall transparently address: plot ratios, site coverage, height envelopes, setbacks, parking and mobility hierarchies, public open space, stormwater management, and infrastructure concurrency (including water, sewerage, power, schools, health, and emergency services), and all other relevant considerations.

2. *Interim Report:* Within three (3) months of the date hereof, the County Government shall file in this Court a progress report detailing steps undertaken, including initiation of public participation forums, preparation of draft bills, regulations or policies, and consultations with professional associations such as the Architectural Association of Kenya, Institution of Planners, and the Law Society of Kenya.

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

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

d. ***Transitional Posture***:

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

ii. Pending development applications not yet finalized shall continue to be processed under the Physical and Land Use Planning Act, 2019 (PLUPA) and extant Regulations, guided by the

2021 Development Control Policy and any interim administrative policies used consistently and transparently, and subject to the outcome of the instruments to be gazetted pursuant to these orders.

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

108. Orders accordingly.

Dated and delivered at Nairobi this 19th day of September,2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR