



JAJ Superpower Cash & Carry Limited v Cabinet Secretary Ministry of Interior & National Admin & 4 others (Environment and Land Petition E014 of 2024) [2025] KEELC 5273 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND PETITION E014 OF 2024**

**AA OMOLLO, J
JULY 10, 2025**

BETWEEN

JAJ SUPERPOWER CASH & CARRY LIMITED PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR & NATIONAL ADMIN 1ST RESPONDENT

CITY COUNTY OF NAIROBI 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH RESPONDENT

WATER RESOURCES AUTHORITY 5TH RESPONDENT

JUDGMENT

1. The Petitioners filed this suit against the Five (5) Respondents vide its petition dated 8th May 2024 and amended on 4th November 2024 seeking to be granted the following reliefs;
 - a. A declaration that the Respondents actions and conduct of demolishing the Petitioner’s boundary wall along the Width of the Ngong River in its property known as LR no 209/13083 located along Makena Road, South-B amount to denial, violation and/or infringement of the Petitioner’s fundamental rights and freedoms under Articles 27 (1), 40(3), 47(1) and 47 (2) of the Constitution of Kenya.
 - b. A declaration that the actions and conduct of the order issued on the 2nd May, 2024 by the 1st Respondent are in breach of Article 47 of the Constitution of Kenya and the Fair Administrative Action Act, rules of natural justice hence null and void.



- c. A declaration that having duly and lawfully issued the requisite Environment Impact License, pursuant to and in accordance with the provisions of the *Environment Management and Coordination Act*, 1999, and a construction permit dated 24th September, 2020 the Respondents herein and in particular, the 2nd and 4th Respondent is bound by the terms of the said License.
 - d. An order of permanent injunction barring the Respondents, jointly and severally acting through their agents or anyone acting under their instructions more so the Nairobi Regional and County Security Teams and any Multi-agency Team under the auspices of the National Disaster Operation Centre (NDOC) barring them from entering into, breaking, destroying, demolishing, or in any other way interfering with the Petitioner's property known as LR no 209/13083 located along Makena Road, South-B, Industrial Area.
 - e. An order of compensation for breach of the Petitioner's right.
 - f. An order of restitution restoring the Petitioner's property known LR no 209/13083 located along Makena Road, South-B, Industrial Area to its previous state as at the date before demolition of the wall.
 - g. In the alternative to prayer (5) hereinabove, an order that the Respondents do pay the Petitioner the total costs for repair of any damage occasioned to the Petitioner's property known as LR no 209/13083 located along Makena Road, South-B as presented in the report adduced by the Petitioner of Ksh.30,196,606.
 - h. An order that the Respondents bears the Costs of the Petition herein.
 - i. Any such orders that this Honourable Court shall deem just and fit to grant.
2. The Petition is supported by two affidavits (supporting and further) both sworn by Doreen Nyawira, the Petitioner's Legal Officer on 8th May 2024 and 4th November 2024 respectively.
 3. The petition is grounded on several provisions of the *Constitution* of Kenya, 2010, which collectively assert the supremacy of the *Constitution*, the sovereignty of the people of Kenya, and the obligation of all persons and State organs to uphold national values and fundamental rights.
 4. It is impleaded that article 1(1) affirms that all sovereign power belongs to the people, while Article 3(1) imposes a duty on every individual to respect and defend the *Constitution*, Articles 10(1) and 10(2) bind all public officials and organs to act in accordance with values such as the rule of law, democracy, and sustainable development, which values are important where administrative or legal actions affect private rights.
 5. Further the Petitioner draws support from Articles 22(1) and 23(1), which grant every person the right to seek redress in court for actual or threatened violations of rights, the Bill of Rights, as outlined in Articles 19 and 20 which provides that all state organs respect and enforce these rights to the fullest extent possible, Article 23(3), where the High Court is empowered to grant remedies, including declarations, injunctions, and judicial review, Article 27(1) which guarantees equality before the law and Article 40(3) which protects individuals from unlawful deprivation of property, requiring due process and just compensation.
 6. The petitioner averred that it owns the leasehold property known as LR no 209/13083 herein after referred to as "the suit property", which was lawfully acquired for 99 years from June 1996. It stated that the 5th Respondent vide its letter dated 18th September, 2018 did an inspection of the suit property



- which is located along Makena Road, South-B for purposes of measuring the width along the Ngong River. Thereafter, the 5th Respondent advised/recommended on the six-meter riparian reserve in accordance with Water Quality Regulations 2006 and other laws through GPS Coordinates showing that no activity should be undertaken within the full width of a river upto a minimum of six (6) metres.
7. They aver to adhering to the requirements of Water Resources Authority and went ahead and obtained a Water Regulation Authority clearance for the riparian reserve as guided by the ESIA license dated 12th May, 2012 and Boundary and Nairobi City County Urban Planning Department Approval for Plan CPF-AM 990 Boundary Wall.
 8. The Petitioner further stated that the 1st Respondent, through the office of Physical Planning department issued them with a construction permit dated 24th September, 2020. The permit authorised them to undertake the construction of a boundary wall while observing the six (6) metres riparian section. That by virtue of the Water Resources Authority license, Nairobi City County's (Urban Planning Department) Approval; not only were the Petitioner's rights over its property as juxtaposed to the riparian section determined, but the Petitioner had a legitimate expectation that the issue of its boundary wall and property had been fully determined and was not subject to challenge by any other body or person.
 9. The Petitioner averred that following the press release by the then Ministry of Interior and National Administration Cabinet Secretary, Kithure Kindiki of 2nd May, 2024, the Respondents on 6th May, 2024 commenced the demolition of their wall.
 10. When it produced all the requisite documents in support of the construction of their wall and requested for the Respondents to ascertain compliance in terms of the measurements and coordinates availed by the relevant government bodies, the Respondents backed down and verbally undertook to conduct the said measurements. But on the 7th May, 2024 without informing it nor verifying the documents and measurements, the Respondent returned and demolished part of the wall that was along the full width of the Ngong river.
 11. That the Petitioner was not given any opportunity to represent its case and make any submissions on the demolition of its property contrary to its right to fair administrative action as provided for under article 47 of the Constitution of Kenya. It asserted that after the demolition of the wall, they experienced theft in their premises and those of their tenants comprised of motor vehicle garages and other businesses that eventually ceased operation.
 12. The petitioner argues that its constitutional right to property under article 40 of the Constitution of Kenya has been violated by the Respondents, who demolished part of its legally approved boundary wall without justification. In addition, the petitioner claims a violation of article 27(1), which guarantees every person equal protection and benefit of the law. That the Respondents' unilateral and discriminatory actions have deprived them of the lawful use and enjoyment of its property, despite full compliance with all regulatory and legal requirements.
 13. The petitioner emphasizes that the demolition was not only unjustified but also unlawful, arbitrary, and capricious, given that all necessary permits and approvals were obtained from relevant authorities including NEMA, Nairobi City County, and the Water Resources Authority and were never revoked or contested before the demolition occurred.



14. Further, the Petitioner state that the Respondents have unilaterally imposed a 30-meter riparian reserve requirement, up from the previously approved 6 meters, without any legal or administrative backing, contradicting their own prior directives and approvals, which change threatens to further diminish the petitioner’s use and ownership of its land.
15. Additionally, the petition asserts that Article 27(1) was violated, as the Respondents failed to afford the petitioner equal protection under the law noting that it had previously obtained a favorable ruling in *ELC Petition No. E004 of 2021*, which recognized its rights concerning the property. The Petitioner also stated that the Environmental Impact Assessment (EIA) license issued by NEMA and approvals from Nairobi City County, which authorized the construction of the boundary wall, remain valid and have not been revoked.

1st & 3rd Respondent’s response

16. The 1st & 3rd Respondents opposed the petition vide grounds of opposition dated 13th June 2014 and a replying affidavit dated 25th November 2024 where they denied constitutional violations alleged by the Petitioner. They state that the Petitioner was notified to remove the offending wall over the riparian area considering the el nino rains that were ongoing, thus obstructing the free flow of water and could cause blockage leading to flooding.
17. They argue that riparian land and rivers are public land under article 62 of the [Constitution](#), held in trust by the national government and administered by the National Land Commission. As such, they contend that the Petitioner cannot claim private property rights over riparian areas and any registration or approval that interferes with riparian land is not protected under article 40, which also excludes property acquired illegally or unlawfully.
18. In further response to the Petitioner’s claim, the 1st & 3rd Respondents state that notices were issued for the removal of illegal structures encroaching on riparian areas, which included the Petitioner’s wall. It is their assertion that even if the approvals existed, which they deny, it cannot override environmental protections outlined in Articles 42, 69, and 70, which prioritize the right to a clean and safe environment for all, particularly in light of fatal floods caused by such encroachments.
19. They further claim that the Petitioner violated the minimum 6-meter riparian buffer, building a perimeter wall just 4 meters from the river, obstructing water flow and increasing flood risk. The 1st and 3rd Respondents invoke the Public Safety Act to justify the emergency demolitions without prior hearings, arguing that public safety during the El Niño floods necessitated urgent action. Thus, the right to be heard was lawfully limited due to imminent danger.
20. Additionally, these Respondents emphasize that EIA approvals or building permits do not grant ownership of riparian land, as such areas are protected for environmental integrity and public safety. They cite Sessional Paper No. 7 of 2017 and Section 28 of the [Land Registration Act](#) to argue that riparian reserves are overriding interests not subject to private ownership and restoration of these areas is a government priority to prevent future environmental hazards.
21. The 1st and 3rd Respondents reject the petitioner’s claim for Kshs. 30 million in special damages, terming it unsubstantiated, unverified, and fraudulent due to lack of a professional report. They also deny evidence of unlawful demolition, stating that any removal of structures was of illegal constructions on public land. They urge the court to dismiss the petition and protect the land as public property.



4th Respondent Response

22. The 4th Respondent filed replying affidavit sworn by Dr. Ayub Macharia on 30/10/2024 where he deposed that the Respondents, particularly through the multi-agency team, assert that the Petitioner's construction project, approved via an Environmental Impact Assessment (EIA) license dated 24th May 2012 was subject to specific environmental conditions. These included, the protection of the riparian reserve by prohibiting any development within a minimum of six (6) meters from the riverbanks, and up to 30 meters depending on the river's highest flow level.
23. The 4th Respondent acknowledged that the Petitioner received approval in 2012 to construct four blocks of four-storey commercial buildings but the EIA license consisted not just of a certificate but also binding conditions that had to be observed in full throughout the construction and operational phases.
24. He stated that according to reports dated 6th May 2024 and 20th September 2024, a multi-agency inspection team, which included the 1st and 4th respondents (Ministry of Interior and NEMA), found that the petitioner had violated the EIA conditions, specifically, the perimeter wall that had been built only 4 meters from the river instead of the required minimum 6 meters, thus encroaching upon the riparian reserve.
25. That as a result of this violation, the perimeter wall was lawfully demolished to enforce compliance with environmental regulations. The 4th Respondent emphasized that an EIA license is not a blanket authorization to contravene the law, and any breach of its conditions invalidates the licensee's protections.

5th Respondent's response

26. The 5th Respondent said it is a State Corporation established under Section 11 of the *Water Act*, 2016, and opposed the petition vide its replying affidavit sworn by John N. Kinyanjui on 16th December 2024. It explained its role as an agent of the national government responsible for regulating water resources and which duties include setting and enforcing water use and flood mitigation standards, issuing water permits, and coordinating with relevant bodies for effective water management.
27. Mr Kinyanjui deposes that following the heavy rains and flooding in March–May 2024, the 5th Respondent began a nationwide flood mitigation initiative from 15th May 2024, focusing on mapping flood marks, identifying riparian reserves (up to 30 meters), and marking pollution sources. That a public notice of this exercise was issued on 29th May 2024.
28. The 5th Respondent denied carrying out or threatening any demolition on the Petitioner's property and asserts that any such claims must be strictly proven.
29. The 5th Respondent referenced the repealed *Water Resources Management Rules*, 2007, which defined riparian land as a minimum of 6 meters and up to 30 meters from the riverbank and stated that any development within this zone required prior authorization from the Authority. It denied ever issuing any development approvals or permits to the Petitioner and clarified that a letter cited by the Petitioner merely emphasized compliance with riparian buffer requirements.
30. According to the Water Resources Regulations, 2021, any enforcement by the 5th Respondent must follow a clear legal process, including issuing a formal compliance order under Regulation 130. That no such order was issued to the Petitioner noting that if any encroachment is established, due process is followed, including site visits and court directions.



31. The 5th Respondent also invoked Articles 66 and 69 of the Constitution in affirming the State's duty to regulate land use and environmental conservation for public safety and sustainable development. It maintains that regulation of water resources, including riparian protection, is constitutionally mandated and necessary for equitable and safe environmental stewardship.

Submissions:

32. The Petitioners, 1st & 3rd Respondents, 2nd respondents and 5th Respondents filed submissions dated 12th February 2025, 18th February 2024, 27th March 2025 and 1st April 2025 respectively. The Petitioner outlined the background of the claim, stating that they acquired and developed a private property, including constructing a perimeter wall after obtaining all necessary approvals from relevant authorities.
33. Despite these approvals, on 6th and 7th May 2024, the Respondents acting on a directive to clear structures within a 30-meter riparian corridor, demolished the Petitioner's perimeter wall without notice or a fair hearing. That this was done even after they presented valid permits and requested verification in their presence that the approval for the construction of the wall had been approved at a 6-meter distance from the river.
34. The Petitioner submitted that it is the lawfully registered proprietor of the suit property, having been issued with a Certificate of Lease by the Land Registrar for a term of 99 years starting 1st June 1996. In support, the Petitioner relies on the case of Wreck Motors Enterprises v Commissioner of Lands & Others (Nairobi Civil Appeal No. 71 of 1997), where the Court of Appeal affirmed that a certificate of title is conclusive evidence of ownership, only challengeable on grounds of fraud or illegality.
35. The Petitioner also draws strength from the decision in the case of ELC Petition No. E004 of 2021 (Edwin Motari & Anor v AG & Others), where the Justice Oguttu Mboya court affirmed the private proprietary nature of the same parcel of land.
36. On the issue of approvals, the Petitioner contends that all necessary permits were duly obtained from both the 2nd Respondent and the 5th Respondent. Notably, the boundary wall was constructed following a permit dated 24th September 2020 and GPS coordinates issued by the 5th Respondent, which specified a 6-metre riparian reserve from the river bank. The Petitioner submitted that they complied with the Environmental Impact Assessment (EIA) license dated 24th May 2012.
37. Regarding the demolition, the Petitioner submits that the same was carried out arbitrarily and without any prior notice or fair hearing, contrary to Article 47 of the Constitution and the Fair Administrative Action Act, 2015. That despite the Petitioner submitting documentation and even halting the demolition temporarily pending verification, the Respondents resumed and completed the demolition on 7th May 2024. They cited the case of Republic v Nairobi City County & 2 others [2016] eKLR, where the court held that less than one day's notice could not be deemed valid, and any action taken in violation of fair administrative procedures is procedurally improper.
38. The Petitioner reiterates that there is no concrete evidence from the Respondents showing the wall encroached the 6-metre riparian reserve, especially since the measurements alleged were taken after the wall had already been demolished.
39. The Petitioner disputes the later imposition of a 30-metre riparian reserve standard, which was not communicated nor officially enacted at the time of construction and referenced the case in Petition No. 32 of 2012, Rosemary Wanjiru Njirai v OCS Molo Police Station & Another [2017] eKLR, where the court ruled that the state cannot dispossess private property without due process or lawful acquisition.



40. The Petitioner submitted that the Respondents failed to issue any statutory Environmental Restoration Order or follow the due process outlined in Section 109 of the *Environmental Management and Coordination Act* (EMCA), 1999, before undertaking the demolition. The Petitioner places reliance in the case of *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300, which emphasizes the importance of procedural fairness and adherence to natural justice in administrative decisions affecting property rights.
41. That as a consequence of the unlawful demolition, they seek monetary compensation for loss and damage suffered, estimated at Kshs. 30,196,606 as per the unchallenged Bill of Quantities filed. Their argument finds support on the case of *Republic v Nairobi City County & Others* [2016]eKLR, where the court affirmed that compensation is a valid remedy for violation of fair administrative action.
42. On the other hand, the 1st and 3rd Respondents highlighted the legal framework governing riparian reserves and stated that Kenyan law imposes strict restrictions on development within riparian reserves. That Section 29 of the *Physical Planning Act* empowers county governments to regulate land use and prohibit development near water bodies. The Physical Planning (Subdivision) Regulations, 1998 (Reg. 15) and Survey Regulations, 1994 (Rule 111) require a minimum 10 to 30 meters buffer on either bank of a river or stream.
43. They also submit that *Environmental Management and Coordination (Water Quality) Regulations*, 2006 (Rule 6(c)), and *Water Resources Management Rules*, 2007 (Rule 116), prohibit development within 6 to 30 meters from the highest flood level. The 1st and 3rd Respondents submitted that these laws are reinforced by Article 62 of the *Constitution*, which defines land between high and low water marks as public land. Thus, riparian land is not available for private development, regardless of title.
44. On the validity of Notice issued on 2nd May 2024, the 1st and 3rd Respondents stated that the Petitioner admitted being notified that a wall had encroached 4 meters into riparian land but failed to act. That although development approval documents were produced, they did not authorize construction on public riparian reserve. In support of their argument, they cite the case of *Kenya National Highways Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR, where the court affirmed that no amount of approval or permit can validate a development in a protected or public area and as such, the demolition carried out was valid, lawful, and in public interest, especially amid a flood crisis.
45. The 1st and 3rd Respondent further submitted that the EIA license issued in 2012 was conditional in that it required construction to begin within two years and compliance with riparian zone laws and that since the wall was constructed in 2020, it contravened this term. That the permit did not and could not authorize development in contravention of environmental statutes. They referred to the case of *Samuel Kamau Macharia v KCB & 2 Others* [2012] eKLR where the court clarified that legal instruments issued in violation of express statutory provisions are null and void ab initio. Therefore, the petitioner's wall was illegal despite the EIA license and permit, as it was built on protected riparian land.
46. The 2nd Respondent averred that Paragraph (k) of the Construction permit required the Petitioner to expressly maintain a minimum of 10 meters from Ngong River being riparian way leave, but they constructed the perimeter wall within 6 meters from the banks of Ngong river. They denied ever issuing the petitioner with any approval, authorization or permit in respect of any development erected on the riparian areas, specifically within 10 meters from the river bank.
47. Further, that paragraphs (i)(j) and (k) required the Petitioner to seek approvals from various bodies before commencing any construction, which included NEMA, NWSC, KPLC and WRA but they failed to comply with Clause 2 of NEMA License.



48. The 1st and 3rd Respondent stated that the State is duty bound under Articles 42, 69, and 70 of the Constitution to protect and preserve the environment, including riparian lands citing Castle Rock Gardens Mgmt Ltd v AG & 4 Others [2017] eKLR, where the court held that public agencies are obligated to remove polluting or illegal structures affecting water bodies.
49. That the “precautionary principle” underpins this duty, requiring preemptive action to prevent ecological harm and since the petitioner had already encroached into the riparian reserve, the respondents acted within their constitutional and statutory mandates to remove the illegal wall.
50. On whether the Petitioner suffered loss or damages, the 1st & 3rd Respondents submitted that if losses occurred, they were self-inflicted because the petitioner ignored multiple warnings and proceeded with illegal construction.
51. They submitted that courts have consistently held that one cannot benefit from their own unlawful conduct citing Kenya Bus Services Ltd v Gituma [2004] 1 EA 91, the where Court of Appeal emphasized that parties who act in disregard of statutory provisions cannot claim compensation for consequences arising from their own violations.
52. The 2nd Respondent submitted that the Petitioner is a victim of their own actions and has not proved, demonstrated nor adduced evidence that the respondent breached the petitioner’s rights under Article 27(1),40(3),47(1) and 47(2). That the petitioner has no locus standi to sue for damages in relation to the section of land determined as riparian land and in support cited the case of Aloys Mataya Moseti v National Environment Management Authority & another [2020] eKLR.
53. They stated that special damages pleaded are not the direct natural or probable consequence of the act complained of and may not be inferred from the act and in support cited the case of Kosgei v Mutisya (Civil Appeal 4 of 2023) [2024] KEHC 156(KLR) where court relied in the case of Richard Okuku Oloo v South Nyanza Sugar Co.Ltd [2013]eKLR which held the same.
54. Additionally, on special damages, they stated that they must be pleaded with specificity and strictly proved, as established in Ouma v Nairobi City Council [1976] KLR 297 and Banque Indosuez v D.J. Lowe & Co. Ltd [2006] 2 KLR 208.
55. That the petitioner’s claim is based on a document authored by a legal officer lacking professional qualifications in construction, architecture, or quantity surveying with no expert report or certification tendered to validate the figures.
56. In support they cited the case of Coast Bus Services Ltd v Murunga Danyi [1992], where the Court held that unsubstantiated figures unsupported by proper documentation cannot form the basis of a damages award, therefore the claim is speculative, unverified, and legally untenable.
57. The 2nd Respondent submitted that the Petitioner has not demonstrated with specificity how the alleged violations occurred nor has it produced satisfactory evidence to support the alleged violation and in support cited the case of Anarita Karimi Njeru (*supra*) and Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others (2013) eKLR.
58. They stated that they have been sued by virtue of being the entity that issued a construction permit to the Petitioner to build the perimeter wall, which permit was issued by the defunct Nairobi Metropolitan services, that was in charge of Nairobi County during the material times of this petition, thus they are not liable for their actions. Further, that under paragraph (n) of the permit, the petitioner indemnified Nairobi Metropolitan Services from any claim that might arise during and after construction. Therefore the 2nd Respondent cannot be held liable.



59. The 5th Respondent submitted that Article 40 of the Constitution protects the right to property but this right is not absolute and is subject to lawful limitations in the public interest. That Articles 66(1) and 69(1) of the Constitution allow the State to regulate land use in the interest of environmental protection and public safety and cited Kenya Ports Authority v Modern Holdings (EA) Limited [2017] eKLR, where the Court of Appeal emphasized that property rights must yield to statutory and constitutional imperatives, particularly where public safety or environmental preservation is at stake.
60. The 5th Respondent submitted that the Petitioner never obtained a riparian use permit from them and the document annexed as “DN-3” was merely a letter reminding the Petitioner to comply with riparian distance requirements. It was not a statutory permit under Form WRA011 as prescribed in the Water Resources Management Rules. In support, they cited the case of Kenya National Highways Authority v Shalim Masood Mughal & 5 Others [2017] eKLR, where the court held that developments in protected zones must strictly adhere to statutory procedures.
61. That since no formal application (WRA001) was submitted and no permit was issued, the Petitioner’s construction in the riparian zone was illegal. The 5th Respondent denied that they demolished the petitioner’s wall nor issue any demolition threats and that its role was limited to flood mitigation and geo-referencing during the heavy rains of March to May 2024.
62. That the exercise was publicly communicated, as evidenced by the notice in The Standard newspaper dated 29th May 2024 and since no action was taken by the 5th Respondent directly against the petitioner’s property, no cause of action against them has crystallized. Further, the 5th Respondent submitted that the permits granted by the 2nd and 4th Respondents were conditional with Clause “k” of the construction permit requiring the petitioner to seek approval from the 5th Respondent before constructing near riparian land.
63. Similarly, clause 2.1 of the EIA license required compliance with riparian reserve laws, thus the Petitioner did not meet these conditions, violating both environmental regulations and the terms of their own approvals. In support they relied on the case of Republic v National Environmental Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR, where the court invalidated an EIA license where conditions attached to it had not been complied with.
64. The 5th Respondent also submitted that the Petitioner failed to show evidence that they caused or participated in any demolition and further, equity bars relief for parties acting unlawfully. This Respondent referred to the case of Nairobi City Council v Thabiti Enterprises Ltd [1995-98] 2 EA 231, where the Court refused to compensate a developer who failed to comply with planning regulations.
65. In closing, the 5th Respondent relied on the equitable maxim “he who comes to equity must come with clean hands” in urging that the petitioner having failed to comply with clear statutory obligations, cannot claim compensation for enforcement action taken in the public interest.

Analysis and Determination:

66. I have read the amended petition together with the supporting affidavits and considered the annexures thereof, the Respondents’ responses in opposition as well as considered the submissions filed by the respective parties. Therefore, in determining the dispute, I frame the following issues;
- i. Whether the Petitioner’s development was duly approved?
 - ii. Whether the Petitioner’s proprietary rights to develop were infringed?
 - iii. Whether the Petitioner’s right to fair hearing was infringed?



- iv. Whether the Petitioner is entitled to the reliefs sought?
- v. Cost

i. Whether the construction of the wall by the Petitioner was duly approved?

- 67. The core object of the petition herein is the Petitioner's wall which was demolished by Respondents. It is not in dispute that the wall had been constructed along the width of the Ngong river and which wall the Petitioner avers is built on LR no 209/13083 located along Makena Road, South-B.
- 68. The Petitioner stated that before construction of the impugned wall, the 5th Respondent inspected the area and vide its letter dated 18th September, 2018 recommended on the six-meter riparian reserve in accordance with Water Quality Regulations 2006, where no activity should be undertaken within the full width of a river to a minimum of six (6) metres. The Petitioner avers that it adhered to the said requirements by obtaining from the 5th Respondent a clearance for the riparian reserve as guided by the ESIA license dated 12th May, 2012 and County Urban Planning Department Approval for Plan CPF-AM 990 Boundary Wall.
- 69. Further, it also obtained from the 2nd Respondent's Physical Planning Department a construction permit dated 24th September, 2020 authorizing the construction of a boundary wall while observing the six (6) metres riparian section. A copy of this permit was annexed as "DN2"
- 70. Clause "k" of the said permit required the petitioner to seek approval from the 5th Respondent before constructing near riparian land. The condition read;
 - "(k) Wayleave for sewer, water, power, drainage and riparian being maintained & seek approval from NWSC, KPLC, WRA (Water Resource Authority) before commencement of works. (Minimum 10 m Riparian way leave to be maintained)."
- 71. The Petitioner assert that it obtained clearance of the 5th Respondent vide the letter dated 18/9/2018. According to them, the letter determined the riparian boundary of the suit property by showing the GPS co-ordinates taken at the edge of the riparian reserve six meters from the river bank. On the face of the said letter of 18.9.2018, I discern two issues, first that the letter was done before the approval dated 24th September of 2020 was obtained.
- 72. Thus, it cannot be used to cure the requirement of clause K. Second, the said letter recommended the that a riparian reserve of six meters be observed and compliance with the relevant laws it listed. The 5th Respondent said that they give clearance/permit in a specified format given under the Water Act and not by a letter. I conclude that the averment by the Petitioner that they obtained approval from the 5th Respondent for building the wall is incorrect.
- 73. The Petitioner also relied on the Environmental Impact Assessment License from NEMA (4th Respondent), dated 24/5/2012 which was for the construction of four blocks of storeys on the suit property. The construction of the buildings were not in dispute as it is the boundary wall which is alleged to have encroached on the riparian reserve. There is no evidence that approval of the 4th Respondent was sought as regards the construction of the wall.
- 74. Accordingly, it is my answer to the first question is that the Petitioner obtained approval only from the 2nd Respondent before construction of the impugned wall on the suit property. Whether it duly complied with the conditions/requirements of the said license are discussed in the next paragraphs.



ii. Whether the Petitioner's proprietary rights to were infringed?

75. The Petitioner stated that the Respondents infringed in its proprietary interest under article 40 of the Constitution by damaging and destroying its wall and exposing occupants of the impugned property without any justifiable cause. The duty to prove the alleged violations lay squarely on the shoulders of the Petitioners.
76. The title of the Petitioner to the suit property is not in challenge herein and I chose to add this would not be the right cause of action to determine the validity or otherwise of that title. There is no doubt that the sanctity of title to property is protected under article 40 of the Constitution. This was enunciated in the Supreme Court decision in Rutongot Farm Ltd v Kenya Forest Service & 3 others [2018] eKLR where the Court held that:
- “ ... once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property.”
77. What is in contest is whether the impugned wall was built on the riparian reserve with the Respondents arguing that protection of the right to property under article 40 of the Constitution is not provided for riparian reserve/land which is public land.
78. In order to hold the Respondents liable for breaching its proprietary rights, the Petitioner was under a duty to demonstrate that the wall was built outside the six meters riparian reserved which according to them was the length set by the 5th Respondent. Other than pleading that the wall was not built within the riparian reserve, the Petitioner did not file an expert report to corroborate the facts set out in the petition. The burden could only shift to the Respondents if such a report was produced.
79. The 2nd Respondent stated that Clause k of the construction permit provided that a minimum of 10m Riparian way leave was to be maintained. Clause 2.1 of NEMA license issued in 2012 provided that in the event that the project site borders a river or a stream the proponent, pursuant to Regulation 6 (c) of Water Quality Regulation 2006, shall protect the riparian reserve by ensuring that no development activity is undertaken within the full width of the river or stream to a minimum of six (6) meters and a maximum of 30 meters on either side based on the highest recorded flow level.
80. The wall was being constructed on permission received from the 2nd Respondent and since the license referred to 10m, the Petitioner can only apportion blame on the 2nd Respondent if the construction was done in line with the conditions set therein. As already stated, there were no licenses obtained from the 4th and 5th Respondents hence they cannot be bound by the terms of a non-existent license. The EIA license was for building of storeyed house not for a wall and the Petitioner cannot infer that the same was inclusive of building a wall.
81. In terms of what was the correct distance of riparian reserve to be observed, the license from the 2nd respondent at clause j of the conditions required of the proponent to obtain an EIA license from the 4th Respondent before commencement of works. No such license was obtained and instead the Petitioner relies in the initial license for the buildings. The initial EIA license issued by the 4th Respondent (which is not for building the wall), gave provision of minimum 6 meters and maximum of 30 meters as riparian reserve. Clause 2.1 of the EIA license actually forbade the proponent from undertaking any development activity within the full width of the river/stream to a minimum of 6m and a maximum of 30m.



82. The Petitioner was thus put on notice on the distances of the riparian from the time it obtained the EIA license in 2012 with the licenses referring to the provisions of regulation 6 (c) of the Water Quality Regulations 2006 on protection of riparian reserve. The Petitioner placed reliance on the 5th Respondents letter of September 2018 as one of the authorization for putting up the impugned wall. The letter read thus;

“Re: Riparian Determination Protection on Plot LR no 209/13083 on along Dunga Road, South B Nairobi County for Jaj Superpower Cash and Carry.

your letter RE: QW/18/09/03/01 dated 10th September for the above-mentioned activity which was received in this office on 10th September 2018 is hereby acknowledged.

Site inspection done by this office on 11th September 2018 revealed the following;
That the site abuts Ngong River. That there are sewer connections and conveyance lines on the plot. That there are high voltage power lines passing through the plot, That the river channel is lined with concrete slabs. The table shows the GPS co-ordinates taken at the edge of the riparian reserve six meter from the river bank.

.....(table)

Water Recourses Authority recommends that a riparian reserve of six meters should be observed.

The proponent should adhere to all provisions of Water Act 2016 and Water Resources Management Rule 2007, Rule 118 (1) and listed in the sixth schedule and other guidelines relation to Water and Waste Water Management, Riparian Land Water Recourses Management Rules Part IX section 116 (3), (4), and (5), Water Courses and Wetland in Protection. The proponent should observe all other laws and guide lines pertaining activities the proponent intends to carry out on the said plot.” (underline mine for emphasis).

83. Although the letter recommended observance of 6 meters riparian reserve, it also informed the proponent to fulfil the requirements of the Water Act and the attendant Regulations. Part IX of the Water Resources Management Rules, 2006 provide for the conservation of Riparian and Catchment areas. Rule 116 of the said Part provides as follows:

“ 116. Determination of the Riparian Land

116. “Riparian Land”, as defined in Part 1 of these rules does not imply a change of
(1) ownership but imposes management controls on land use for water resource quality as defined in these rules.

116. Unless otherwise determined by a Water Resources Inspector, the riparian land
(2) on each side of a watercourse is defined as a minimum of six (6) meters or equal to the full width of the watercourse up to a maximum of thirty meters on either side of the bank.

116. The width of the watercourse shall be equal to the distance between the top
(3) edges of its banks.

116. The riparian land shall be measured from the top edge of the bank of the
(4) watercourse and this will apply to seasonal and perennial watercourses.”



84. The Respondents contended that the Petitioner failed to comply with the same, erecting the wall on the riparian land, thus cannot say its proprietary interest was infringed. In the further affidavit sworn on 4th November, 2024, the Petitioner did not address itself to the assertion on the non-compliance with the conditions of the permits.
85. The demolition of the wall perse does not constitute a breach of property where the Petitioner did not present evidence first that the wall was outside the six meters. Moreso the absence of approvals from the 4th and 5th Respondents brings doubt ether the impugned wall complied with the regulations on protection of riparian reserve.

iii. Whether the Petitioner’s right to fair hearing was infringed

86. Under this heading, the question is whether the Petitioner was given an opportunity to be heard and or whether it was allowed reasonable time to remove the offending wall if at all. The Ministry of interior and National administration issued a press release dated 2nd May 2024 on public security referenced as vacation or mandatory evacuation orders due to torrential rains (copy annexed to the affidavit in support of the petition).
87. In the said press under unlawful settlements within riparian land, it was ordered that all persons residing within the 30 metre riparian corridor of rivers and other water courses across the Country vacate immediately and in any case within 24 hours effective 2/5/2024 at 1830 hours, failing which they will be subjected to mandatory evacuation for their safety and their premises, whether for public or private use shall be removed. The 1st and 3rd Respondents confirmed that the impugned demolition was made pursuant to this notice.
88. They invoked the Public Safety Act to justify the emergency demolitions without prior hearings, arguing that public safety during the El Niño floods necessitated urgent action, thus limiting the right to be heard due to imminent danger. The 5th Respondent also submitted that articles 66 and 69 of the Constitution imposes a duty on the State to regulate land use and environmental conservation for public safety and sustainable development.
89. In the case of Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others, Petition No, 18 of 2014 as consolidated with petition No. 20 of 2014 [2014] eKLR, Lady Justice Njoki Ndung’u in a concurring opinion explained in great detail what a fair hearing is all about as follows;

“257. Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contests remain unsettled.”

258. What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v Union of India & Others*,



1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements:

- (i) an opportunity of hearing must be given; and
- (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs, Calcutta & Others*, AIR 1962 Cal. 460).”

90. In this case, the 1st Respondent and or its agents visited the Petitioner on 6th May 2024 and commenced the demolition but put it on hold when presented with the documents by the petitioner. However, they returned the following day and completed the exercise. The timeline when the notice was issued and the demolition took place was less than seven (7) days. The Petitioner not having been previously notified that they had contravened the regulations and required to remove the wall, a seven-day notice was short.

91. The 1st Respondent’s notice was general and in response to the Petition, they only filed grounds of opposition which grounds do not specify the likely danger to the area where the suit land is situated. Thus, the defence of Public Safety adopted to justify not affording the Petitioner reasonable notice is without basis. For this reason, I find that the Petitioner’s right under article 47 has been breached.

iv. Whether the Petitioner is entitled to the reliefs sought?

92. In light of the foregoing analysis, I find that the Petitioner is not entitled to the reliefs seeking declarations for violations of articles 40 and 27 of the Constitution under paragraph 1. It is also not entitled to the reliefs under paragraphs 3, 4, and 6.

93. However, in view of the finding that the notice served on the petitioner was too short to allow them remove the offending structure, they are entitled to some compensation. The compensation is not tagged to the costs of rebuilding the wall which the petitioner has put at Kshs 30,196,606. This is because the Petitioner did not annex a copy of the bill of quantities used in the application made to the 2nd Respondent and NCA for approval to construct the wall. Secondly, an award for compensation is not to be confused with a claim for specific performance or restitution. It is pegged at this court’s discretion having reviewed the inconvenience caused to a claimant.

94. In this instance, the court having found that the Petitioner had built the wall without respecting the distance stated in the permit issued to them, and also failed to present evidence that the wall was built outside the 6 meters as they claimed, I award it Kshs Five million (5,000,000=) as reasonable compensation for the breach of its article 47 rights. The award is as against the 1st and 3rd Respondents jointly and severally since it is the 1st Respondent and its representatives who issued and executed the notice.

95. The petition has partially succeeded so I award costs as against the 1st and 3rd Respondents to pay the costs of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH JULY 2025

A. OMOLLO

JUDGE

