

The Gavel and the Green Spaces

Is the judiciary equipped to adjudicate the science of development control? Evidence from Westlands, Kilimani and Kileleshwa, Nairobi.

Ochieng Ombaka — Advocate of the High Court of Kenya; Chairperson, Kileleshwa Ward Neighbourhood Association (KIWANA); Policy Analyst, Wazo Africa LLP. Aspirant, Member of Parliament, Dagoretti North.

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Declaration of interest

The author is the current Chairperson of the Kileleshwa Ward Neighbourhood Association (KIWANA), one of the residents' associations whose litigation and advocacy are analysed in this paper, and is a political aspirant for the Dagoretti North parliamentary seat, which contains two of the three wards studied. The author has personally authored or contributed to several of the primary documents relied on (the *Siaya Road Area Character* assessment, KIWANA's memoranda to the County and to NEMA, and correspondence with the Office of the Governor). This paper should be read as engaged scholarship: its factual claims are documented and, wherever possible, sourced to public records, judgments and third-party reporting, but the reader should weigh the author's position when assessing the paper's normative conclusions. Peer review and adversarial comment are expressly invited.

Abstract

Between 2019 and 2026, residents' associations in Nairobi's high-value residential belt — Westlands and Parklands in Westlands Constituency, and Kilimani, Kileleshwa and Lavington in Dagoretti North — mounted an unprecedented wave of environmental litigation against the Nairobi City County Government, the National Environment Management Authority (NEMA) and individual developers. They lost far more than they won. This paper argues that the losses are not principally attributable to weak facts. They are attributable to a **procedural turn** in the adjudication of development-control disputes: the courts and the National Environment Tribunal have consistently framed the legal question as "*was the correct process followed and are the approvals facially valid?*" rather than "*is this development environmentally sustainable on the evidence?*" Where residents adduced scientific evidence — traffic-impact assessments showing failing intersections, hydrological evidence, daylight and area-character analysis, expert environmental reports — the courts treated that evidence as displaced by the mere existence of an EIA licence and a development permit, invoking deference to NEMA's "special area of expertise" (*Mbaazi Avenue Residents Association v Metricon Home Nairobi Company Ltd* [2025])

KECA 1593 (KLR)). The precautionary principle, statutorily designed to operate *in favour of* the environment where scientific certainty is absent (Environmental Management and Co-ordination Act, s. 2), has instead been read to require residents to *prove* "threats of serious or irreversible damage" before it is triggered — an inversion of its logic. Meanwhile the exhaustion doctrine routes residents to a County Physical and Land Use Planning Liaison Committee that has been non-functional "for lack of facilitation" since December 2024 (*Northern Block Residents Ltd v Mediview Ltd* [2025] KEELC 7817 (KLR)).

The paper (i) sets out the science of development control that the legal framework is meant to operationalise; (ii) reconstructs the statutory architecture, including the under-enforced Regulation 7(2) of the Environmental (Impact Assessment and Audit) Regulations and section 48 and the Second Schedule of PLUPA, which define a lawful local plan as a survey- and GIS-based scientific instrument — with a mandatory environmental report, area-wide traffic level-of-service analysis and infrastructure gap analysis — rather than a bare density table; (iii) analyses the three lead cases — the *Lavington Five*, *Rhapta Road* and *Mbaazi* — and four supporting cases; (iv) compiles, from the NEMA EIA register, the Kenya Gazette and the litigation record, the trajectory of permitted residential density in the three wards over roughly a decade, showing an escalation from a four-storey ceiling (2004) to draft policy allowances of up to 30 storeys (2025–2026); (v) connects this trajectory to the March 2024 and March 2026 Nairobi floods, the water and power deficits, traffic collapse, and daylight-deprivation harms; (vi) interrogates the claim that the relocation of United Nations entities to Nairobi is a material driver of demand, and sets out how residents might petition the UN system to commit to housing its staff only in sustainable developments (compulsion being foreclosed by immunity); and (vii) proposes reforms to litigation strategy, judicial practice and institutional design. The central recommendation is that development-control litigation must move from procedural review to **evidence-led merits review**, and that the courts should equip themselves — through assessors, court-appointed experts and practice directions on expert evidence — to weigh planning and environmental science rather than defer around it.

Keywords: development control; environmental impact assessment; precautionary principle; urban densification; Physical and Land Use Planning Act; Nairobi; judicial review; structural interdict; stormwater; daylight

1. Introduction: the puzzle of the losing plaintiff

Since 2019, and with rising intensity since 2023, residents' associations across Nairobi's most valuable residential neighbourhoods have gone to court to resist high-rise residential development. They have alleged, in one configuration or another, that particular towers — and the pattern of approvals that produces them — violate the right to a clean and healthy environment under Article 42 of the Constitution of Kenya, 2010, read with the State's environmental obligations under Articles 69 and 70.

On any honest scorecard, the residents are losing. In the two matters that have reached the Court of Appeal on the merits — *Mbaazi* and *Rhapta Road* — the developments were allowed to proceed. In *Rhapta Road* the Court of Appeal actually **increased** the interim height ceiling for the corridor from 16 to 20 storeys (*Claire Kubochi Anami v County Executive Committee Member, Built Environment and Urban Planning, Nairobi City County*, Civil Appeal No. E160 of 2025 (Court of Appeal), judgment of 19 September 2025). In *Dennis Pritt*, the Environment and Land Court (ELC) twice declined to restrain construction on Turbo Road, Kilimani, even while accepting that the petitioners had a *prima facie* case that the County was approving developments without a statutory local plan (*Dennis Pritt Residents Association v Nairobi City County Government* [2025] KEELC 948 (KLR); [2026] KEELC 2427 (KLR)). Before the National Environment Tribunal, the *Lavington Five Roads Association's* challenge to an EIA licence for a petrol station on James Gichuru Road was dismissed (*Maina v National*

Environment Management Authority [2023] KENET 1348 (KLR)); its parallel challenge to the underlying change of user was struck out on jurisdictional grounds by the Court of Appeal (Civil Appeal No. E568 of 2023 (consolidated)).

The residents do occasionally win — but narrowly and structurally. In *Sangahani* the ELC declared that the County had failed since 2019 to constitute its statutory planning forum and to prepare county and local plans, and gave deadlines (*Sangahani v Nairobi City County Government* [2025] KEELC 6985 (KLR)). In *Mwingi Court* the ELC quashed an EIA licence and a change of user for want of the registered owner's consent and want of public participation (*Mwingi Court Residents Associations v Barasa t/a Gabasa (K) Enterprises* [2025] KEELC 6766 (KLR)). Both wins turned on process defects. Neither engaged with whether the development was, on the science, sustainable; and neither undid a completed building or a mass of prior approvals.

This paper's thesis is that the pattern of outcomes is best explained not by the weakness of the residents' evidence but by the **frame** the tribunals have adopted. The recurring judicial question is procedural: *Was public participation held? Was an EIA licence issued? Was a development permit issued? Have the approvals been challenged in the correct forum?* If the answer is yes, the petition fails, more or less regardless of what the scientific evidence in the record says about drainage, traffic, daylight, water or cumulative impact. The courts have expressly declined to "substitute" their judgment for NEMA's in its "special area of expertise" (*Mbaazi* [2025] KECA 1593, [94]–[95]), while NEMA, for its part, does not visibly discharge the substantive gate-keeping that Regulation 7(2) of the EIA Regulations assigns it. The result is a governance gap that no institution owns.

The paper proceeds as follows. Part 2 describes the demand pressures on the three wards, including a critical interrogation of the "UN relocation" hypothesis. Part 3 traces the densification trajectory from 2004 to 2026. Part 4 sets out the science of development control that the law is meant to translate. Part 5 reconstructs the statutory and policy architecture. Part 6 analyses the case law. Part 7 develops the paper's analytical claims about the procedural turn and the science deficit. Part 8 compiles the EIA and approval record for the three wards and quantifies the density trend. Part 9 links the trend to observed consequences. Part 10 asks whether residents can hold the UN system to account. Part 11 offers recommendations. Part 12 concludes.

A methodological note. The evidentiary base is: (a) eight judgments and rulings of the ELC, the Court of Appeal and the National Environment Tribunal, 2023–2026; (b) EIA study reports and project documents drawn from the NEMA ENVIS register and from the litigation and Senate-petition record (including reports referenced [NEMA/ENVIS/SR/00493](#) and /00504); (c) statutory instruments; (d) Nairobi City County policy documents, including the 2004 zoning guide, the 2021 Development Control Policy, and the draft 2023/2025/2026 Development Control Policy and its annexed Property Matrix; (e) a Nairobi City County Assembly Sectoral Committee report; (f) KIWANA's residents' surveys, memoranda and correspondence; (g) the Kenya Gazette (Vol. CXXVIII No. 103, 19 June 2026), which carries NEMA's statutory invitations for public comment on EIA study reports; and (h) contemporaneous reporting and peer-reviewed and institutional literature on urban hydrology, induced traffic demand, daylight and health, and the UN presence in Nairobi.

2. The demand: the contest for the oasis

2.1 Why the pressure concentrates here

Investment in residential real estate in Nairobi is disproportionately concentrated in Parklands, Kilimani, Kileleshwa and their immediate surrounds. Several structural factors compound:

- **Colonial spatial legacy.** These neighbourhoods were laid out as low-density European residential zones under successive colonial master plans (1927; the 1948 Nairobi Master Plan for a Colonial Capital; the 1973 Nairobi Metropolitan Growth Strategy), a lineage the Court of Appeal itself recites in *Rhapta Road* (Civil Appeal No. E160 of 2025, [29]). The 2010 constitutional transition replaced local authorities with county governments and repealed the Physical

Planning Act, 1996 with the Physical and Land Use Planning Act, 2019 (PLUPA), but the underlying spatial hierarchy persisted.

- **Institutional and educational endowment.** The belt contains the schools that received the highest colonial and immediate post-independence infrastructure investment — among them Kilimani, Kileleshwa, Lavington, Westlands, Parklands and Nairobi Primary Schools, and secondary schools such as Kenya High School and Nairobi School — alongside a later concentration of high-fee private schools (Braeburn, Braeside, Nairobi International School, Kianda, Loreto Convent Valley Road, Consolata). It also holds Nairobi's oldest suburban retail districts (Sarit Centre, Westgate/Westlands Mall, Valley Arcade, Yaya, Lavington Mall).
- **Green amenity.** Proximity to Karura Forest, the Ngong Road Forest, the Nairobi Arboretum and City Park, and a mature private tree canopy, produce a microclimate and amenity value markedly different from the eastern and southern city. Community survey data for Kileleshwa nonetheless records that this canopy is being "rapidly depleted" by new construction and that most residents now have "none [green space] within a 10-minute walk" (KIWANA, 2026a).
- **A permissive density that attracts the upper-middle market.** Unlike Muthaiga, Runda, Karen or Spring Valley, where large minimum plot sizes keep unit counts low and prices "prohibitive," the mid-century zoning of Parklands, Kilimani and Kileleshwa permitted apartments, which drew a large upper-middle-income and expatriate population and, with it, a dense commercial ecosystem (petrol stations, chain food outlets, supermarkets) sustained by both volume and purchasing power.

The net effect is a small, amenity-rich, well-serviced "oasis" surrounded by a much larger city that received far less planned investment — and, correspondingly, an intense competition to acquire a parcel in the oasis and to extract the maximum yield from it. The EIA study report for the Vihiga Close development in Kileleshwa concedes the trajectory in its own words: the neighbourhood "has progressively shifted from a low-density residential zone characterised by ... standalone houses and bungalows to a high-density urban setting dominated by multi-dwelling residential" buildings (NEMA/ENVIS/SR/00493, EIA Study Report, 2025).

2.2 Interrogating the "UN relocation" hypothesis

A claim increasingly heard in the public debate — and put to the author in the course of preparing this paper — is that demand is being driven by the relocation of United Nations agency headquarters and functions to Nairobi pursuant to UN resolutions, and that this exogenous demand is what is forcing hyper-densification.

The factual premise is partly correct. There is a real and accelerating consolidation of the UN system in Nairobi:

- The UN General Assembly has approved approximately **USD 340 million** of construction at the UN Office at Nairobi (UNON) complex at Gigiri — described as the largest capital investment by the UN Secretariat in Africa outside peacekeeping — including a **USD 265.6 million** upgrade of the conference facilities intended to raise meeting capacity from about 2,000 to 9,000 participants, with construction expected between roughly 2026 and 2030 (UNON, n.d.; *The EastAfrican*, 2025).
- Three New York-based entities — **UNFPA, UNICEF and UN Women** — have been relocating operational functions to Nairobi, reportedly bringing on the order of **800 additional staff** (Eastleigh Voice, 2025; Citizen Digital, 2025).
- Under the Secretary-General's **UN80 initiative**, more than **2,300 posts** across the UN system are being moved from higher-cost duty stations (New York, Geneva) to lower-cost ones, with Nairobi (alongside Addis Ababa, Entebbe, Bangkok, Kuala Lumpur and Santiago) identified as a hub for common administrative platforms and payroll consolidation (UN News, 2025; IISD SDG Knowledge Hub, 2026).
- As of mid-2025 there were reportedly **more than 80 UN offices and over 6,000 UN personnel** in Kenya (Al Jazeera, 2025).

Three qualifications are important before this premise is turned into a causal claim.

First, causation is weak and contested. The direct drivers of the current approvals surge are documented in the litigation record and the County's own materials: (i) the absence of a gazetted

local plan, which the courts have repeatedly identified as producing "a twilight zone of governance" (Nairobi City County, 2026, quoting the Court of Appeal); (ii) speculative capital seeking yield in a market with weak enforcement; and (iii) an expatriate and diaspora rental segment of which UN staff are only a part. Real-estate commentary treats the "UN ripple" as real but modest relative to the whole Nairobi market (Centum Real Estate, 2025; *The Filing Room*, 2025). The number of net new UN staff — even on the higher estimates, a few thousand over several years — is small against a metropolitan population of roughly 5 million and an annual housing production measured in the tens of thousands of units. The UN-demand story is better understood as a **narrative used by proponents to normalise density** than as a demonstrated cause of it; it appears, tellingly, in the County's own justifications for the Property Matrix.

Second, the UN's own footprint is at Gigiri, not in the three wards. UNON, and most of the agencies, are north of Westlands. The pressure documented in this paper is on Kilimani, Kileleshwa, Lavington and central Westlands/Parklands. Any spill-over demand from UN staff is indirect (housing preferences) rather than the UN commissioning towers in these neighbourhoods.

Third, there is an irony worth naming. UN-Habitat — the UN agency that authored the *International Guidelines on Urban and Territorial Planning* (2015) and co-produced the *New Urban Agenda* (2016), both cited by the Court of Appeal in *Rhapta Road* as the standard against which Nairobi's planning falls short — is itself **headquartered in Nairobi**. The city hosting the global secretariat for sustainable urbanism is a live example of the governance failures that secretariat documents.

2.3 Petitioning the UN for a sustainable staff-housing commitment

The proposal considered here is **not** a suit to stop or "compel" the UN — that route is closed (below) — but a **petition** asking the UN system to adopt and publish a commitment that it will lease, procure, subsidise or otherwise place its staff only in developments that meet defined sustainability criteria (infrastructure concurrency, daylight and green-space standards, conformity to a gazetted local plan, stormwater-neutral design). This is a modest, achievable ask that is fully consistent with the UN's existing commitments and would give residents' associations a lever that domestic litigation cannot.

Why a petition rather than a suit. The United Nations enjoys immunity "from every form of legal process" under Article II, section 2 of the Convention on the Privileges and Immunities of the United Nations, 1946 (to which Kenya is a party) and under the UNON Headquarters Agreement (1975, as revised). A Kenyan court cannot enjoin the UN, compel it to conduct an EIA, or condition its expenditure; attempts to sue UN bodies in domestic courts are routinely dismissed on immunity grounds (see, by analogy, *Georges v United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015), *aff'd* 834 F.3d 88 (2d Cir. 2016)). Persuasion and reputational leverage, not compulsion, are the available instruments.

Why the ask is credible on the UN's own terms. The UN is already bound by the *Strategy for Sustainability Management in the United Nations System, 2020–2030* and the "Greening the Blue" programme; its Gigiri construction has pursued green-building certification; UN-Habitat — headquartered in Nairobi — is the custodian of the *New Urban Agenda* (2016) and the *International Guidelines on Urban and Territorial Planning* (2015), the very standards the Court of Appeal invoked in *Rhapta Road*. A staff-housing sustainability commitment is a coherent extension of these instruments, not a new imposition, and there is precedent for large institutional tenants (development banks, embassies, multinationals) adopting building-standard requirements for leased staff accommodation.

How to pursue it.

- 1. Address the petition to the right bodies.** The UN Resident Coordinator's Office in Kenya and the UN Country Team; UNON administration (as the common-services provider); the affected agencies (UNFPA, UNICEF, UN Women and others relocating staff); and UN-Habitat as technical sponsor. Route a copy through Kenya's Permanent Mission and the Ministry of Foreign Affairs so it is on the diplomatic record.
- 2. Attach a workable standard.** Offer a short, objective checklist a landlord's building must satisfy — e.g., located in a ward with a gazetted LPDP or, pending that, within the 2021 interim ceilings;

served by a public (not sole-borehole) water connection; on-site stormwater retention; minimum daylight factor and separation distances; a defined proportion of pervious, non-basement open ground. Aligning the checklist with the LPDP parameters the courts have ordered makes compliance easy to verify.

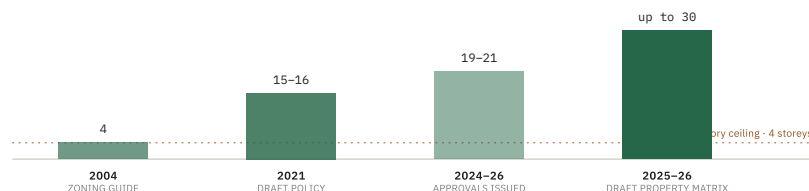
3. **Frame it as mutual interest.** Sustainable staff housing protects UN personnel from the water shortages, power outages, flooding and congestion documented in Part 9; a commitment also inoculates the UN against the reputational risk of being seen to drive unsustainable densification in its host city.
4. **Use the UN's own grievance and safeguard channels where the UN funds or implements a development.** Where a UN fund or programme (e.g., UNOPS, UN-Habitat, or a project under the UN Sustainable Development Cooperation Framework for Kenya) acts as funder or implementing partner rather than as a sovereign-immune organisation building for itself, its environmental and social sustainability standards and accountability mechanisms accept civil-society submissions even though litigation does not.

The litigable target remains the State and the County. Any UN-related development on Kenyan soil outside the headquarters district — staff housing, a leased commercial building, off-campus works — is subject to Kenyan planning and environmental law, and the correct respondents are Nairobi City County and NEMA. The *Sangahani/Rhapta Road* line — that the County must gazette lawful plans and apply infrastructure-concurrency tests — applies regardless of the identity of the eventual tenant. And Parliament and the Senate can, through their oversight and treaty functions, insist that Kenya's host undertakings be matched by trunk-infrastructure investment in the receiving sub-counties (the Senate-petition route the author's association is already using).

The realistic conclusion: the UN dimension is a **persuasion and diplomacy question**. Residents cannot injunct the UN, but they can ask it — publicly, and on its own stated principles — to house its people only where the city can sustainably carry them, and can insist that the Government of Kenya not treat "the UN is coming" as a licence to suspend planning law.

3. Battle lines: the densification trajectory, 2004–2026

The regulatory ceiling on residential height in the three wards has risen roughly **four- to seven-fold in two decades**, with most of the increase concentrated in the last five years. The sequence, as reconstructed from the County's instruments and the litigation record, is:



Permitted residential height in the three wards, by instrument. Bars show storeys; the dashed line marks the 4-storey ceiling of the 2004 *Guide of Nairobi City Development Ordinances and Zones*, still the last fully gazetted instrument. Draft figures are from the un-adopted Nairobi City County Property Matrix. Sources: §3 and §8.

- **2004 (last reviewed 2006).** *A Guide of Nairobi City Development Ordinances and Zones* (City Council of Nairobi, 2004) subdivided the city into zones and prescribed, for the relevant residential zones (Zone 3/4, covering Westlands, Kilimani and Kileleshwa), **residential apartments on sewer to a maximum of four storeys**, with ground-coverage and plot-ratio limits. The guide stated on its face that the policy was "under review," and was intended to last ten years, i.e., to about 2016 (*Mbaazi* [2025] KECA 1593, [35]–[36]).

- **2014. The Nairobi Integrated Urban Development Master Plan (NIUPLAN)**, adopted by the County Assembly for the horizon 2014–2030 pursuant to section 108 of the County Governments Act, set a strategic direction of managed densification but, being a city-wide master plan, did not descend to parcel-level zoning (*Rhapta Road*, [68]).
- **c. 2006–2016.** In the vacuum left by the expiry of the 2004/2006 guidelines and the absence of PLUPA local plans, the County (and, for a period, Nairobi Metropolitan Services) processed applications, in the words of a national policy paper cited by the ELC, "using discretion, practice, precedence, and planning justifications advanced by developers, architects and engineers" (Sessional Paper No. 1 of 2023, quoted in *Millennium Gardens* [2024] KEELC 6040).
- **December 2021. The Nairobi City County Development Control Policy, 2021**, prepared under Nairobi Metropolitan Services and annexed with "zonal maps," set skyline allowances of **16 storeys in Zone 4B, 15 storeys in Zone 4C (Kileleshwa) and 20 storeys in Zone 3C (the Rhapta Road corridor)** (KIWANA, 2026b; *Mbaazi* [2025] KECA 1593, [36], [70]). Whether this document was ever validly adopted became a central dispute (Part 6).
- **2023.** Sessional Paper No. 1 of 2023 (the draft "Nairobi City County Development Control Policy, 2023") was laid before the County Assembly. The Assembly's own Sectoral Committee on Lands, Planning and Housing found it **defective** on at least fifteen grounds, including that the County Executive "failed to conduct public participation on the draft policy before forwarding [it] to the Assembly for approval as required under [PLUPA]"; that NIUPLAN and PLUPA "were not complied with on development of local plans ... before formulation of the ... Policy"; that the zoning matrix "did not meet the standards and threshold to guide the City"; that the population projections were "unrealistic"; and that the draft was "inconsistent with the National Building Code" (Nairobi City County Assembly, 2025).
- **2025–2026.** Following the *Rhapta Road* structural interdict (below), the County produced a further iteration — variously dated 2025 and 2026 — of the **Development Control Policy** and its annexed **Nairobi City County Property Matrix**. The Property Matrix proposes, for **Kileleshwa and Riverside Drive, 30 storeys on 0.4 ha, 25 storeys on 0.2 ha, 20 storeys on 0.1 ha and 15 storeys on 0.05 ha**; for **Kilimani and the Rhapta area, 20 storeys on 0.2 ha, 15 on 0.1 ha and 10 on 0.05 ha**; at a ground-coverage of 50%, "subject to road widening structure plan" and to developers "secur[ing] approvals for commensurate expansion of sewer, water, electricity, roads by utility providers prior to commencement of densification," with "privately developed infrastructure ... also encouraged upon approval" (Nairobi City County, n.d., *Property Matrix* Annex 2; KIWANA, 2026b).
- **16 June 2026.** The Sectoral Committee's report — having, as noted, found the 2023 draft defective — was **laid on the Table of the County Assembly**, together with a Notice of Motion for its adoption (Nairobi City County Assembly, 2026, *Hansard*, 16 June 2026). The Committee's recommendation was that the Assembly **approve** a revised Sessional Paper, **re-designated the "Nairobi City County Development Control Policy, 2026,"** to come into force on Gazette publication within 21 days of the Assembly's resolution; that the County and national government "continuously and progressively rehabilitate, upgrade, extend and develop critical infrastructure ... roads, drainage, sewer ... subject to annual budget cycles"; and that the County thereafter "develop local physical and land use plans covering all the 15 zones" (Nairobi City County Assembly, 2026, *Committee Report*, recs. 1–4). In other words: adopt the policy and its density matrix **now**; deliver the statutorily-required local plans and the infrastructure **later**. As of the date of this draft the Policy had still not been adopted and gazetted — **roughly nine months after the six-month deadline** set by the Court of Appeal in September 2025.

The observed **approvals** track — and in several documented instances exceed — even the draft ceilings (Part 8). By 2024–2026, the County was issuing permits for developments of 19 to 28 storeys in Kileleshwa and along Rhapta Road, and residents allege that permits PLUPA-BPM-008773 (5 March 2026) and PLUPA/PPN-008451-N (20 December 2025) exceed the 15-storey Kileleshwa ceiling that the Court of Appeal directed the County to apply on an interim basis (KIWANA, 2026b).

It was against this escalation that residents first attended NEMA public-participation forums, then — finding those forums ineffective — turned to the ELC and the Tribunal.

4. The science of development control

Development control is not, at bottom, a legal artefact. It is an applied-science regime: a set of quantitative parameters (plot ratio, ground coverage, building lines and setbacks, height and daylight envelopes, parking ratios, minimum plot size, infrastructure-concurrency tests) whose function is to keep the aggregate load that private buildings place on shared public systems — drainage, sewers, water, roads, the electricity grid, air, sunlight, open space — within the carrying capacity of those systems. Article 42's guarantee of a "clean and healthy environment ... for the benefit of present and future generations" and Article 69's principle of sustainable development are the constitutional expression of that engineering logic. As the working draft of this paper put it: *environmental management is about the science informing the law, not the other way round.*

Four scientific relationships are directly in issue in the litigation.

4.1 Impervious surfaces, infiltration and urban flooding

The relationship between urban surface sealing and flood risk is one of the most robust findings in urban hydrology. Replacing vegetated or bare ground with roofs, paving and compacted surfaces reduces infiltration and evapotranspiration and increases the volume, peak rate and speed of stormwater runoff; drainage networks designed to move that runoff quickly to watercourses transfer the flood risk downstream (United States Environmental Protection Agency, n.d.; Miller & Hutchins, 2017). Studies consistently find that flood response worsens as the **effective** (hydraulically connected) impervious fraction rises, and that high-density land uses generate disproportionate runoff where pervious surface is minimal (Kaspersen et al., 2017).

Two features of the Nairobi case sharpen the point. First, **topography and catchment position**: Kilimani ("milimani" — "the hills"), Kileleshwa and Lavington sit in the **upper catchment** of the Nairobi River system. The Nairobi River rises at the Ondiri wetland near Kikuyu and flows through Kileleshwa, past the Arboretum, to the central business district and Eastlands; the Motoine–Ngong system drains the Dagoretti ridge through Kibera and Industrial Area (Friends of Ondiri Wetland Kenya, n.d.; Nyaramba & Thurania, 2024). Sealing the upper catchment increases the flood load on the lower-lying, lower-income districts downstream — a spatial-justice dimension to the hydrology. Second, **basements defeat the "open" area**: the Property Matrix's 50% ground coverage would, on paper, leave half the plot pervious, but the EIA study reports in the record show two-level basement parking extending under most of the plot (e.g., NEMA/ENVIS/SR/00493 , with "Basement Level 2 ... Basement Level 1 ... Ground Floor" parking and 57% ground coverage; NEMA/ENVIS/SR/00504 , "2 Basements and ground floor with parking spaces"). Where the notional open space sits on a basement slab, effective imperviousness approaches 100%. KIWANA's proposed local-plan parameters accordingly demand a mandatory percentage of "undisturbed earth and not used as a basement parking lot" (KIWANA, 2026b) — a requirement grounded in infiltration science.

4.2 Trip generation, road capacity and induced demand

A development's traffic impact is a function of its unit count, its use mix and the capacity of the road it fronts. The engineering method (as used in the developers' own traffic-impact assessments) forecasts background traffic growth, adds trips generated by the development using standard rates, and computes an intersection "Level of Service" (LOS) from A (free flow) to F (forced flow / over capacity).

The critical, and under-examined, concept is **cumulative impact**. Each individual development can truthfully report that *its* marginal contribution to an already-failing intersection is "minimal" — while the sum of many such developments drives the network to collapse. The Siaya Road traffic-impact assessment for a 15-storey, 188-unit development in Kileleshwa illustrates this precisely: it finds that the Siaya Road approach to its junctions **already operates at LOS F** and will **remain at LOS F** with or without the project, with modelled average control delay on the Siaya Road arm rising from roughly 365–664 seconds per vehicle in the base year to some 3,000–11,350 seconds per vehicle by 2030 — and then concludes that "the generated traffic from the proposed

development will have minimal impact" (GLINCE Ltd, 2024). The assessment is not dishonest; it is answering the wrong question. It measures the pebble, not the avalanche.

The deeper point is that the standard "mitigation" — road widening — is largely unavailable here (the plots sit on the road reserve, leaving no land to surrender) and, where available, is subject to **induced demand**: the near-unit elasticity of vehicle-kilometres travelled with respect to lane-kilometres means new capacity fills up (Duranton & Turner, 2011). Densification that consumes the physical and fiscal space for road expansion therefore forecloses the only remedy for the congestion it creates.

4.3 Daylight, overshadowing and health

Access to direct sunlight and adequate diffuse daylight in dwellings is a recognised determinant of health, not an amenity preference. The evidenced pathways include:

- **Vitamin D synthesis.** Cutaneous synthesis on exposure to ultraviolet-B is the principal source of vitamin D for most people; sustained deficiency causes **rickets** in children and osteomalacia in adults, and is associated with a range of chronic disease risks (Holick, 2007; Wacker & Holick, 2013). Populations with structurally limited sun exposure — including people in deep, overshadowed dwellings — are recognised risk groups.
- **Circadian and mental health.** Daytime light exposure entrains the circadian system; inadequate daytime light and excess night light are linked to sleep disruption and mood disorders, and recent public-health guidance explicitly addresses "daylight access" in housing (Schünemann et al., 2026, *Public Health Reviews*).
- **Housing standards.** The WHO *Housing and Health Guidelines* (2018) treat inadequate lighting and crowding as housing-related health hazards; longstanding building-hygiene requirements have specified "as much access as possible to sunlight and full daylight" (World Health Organization, 2018).

The working draft's stronger claim — that there are "increased incidences of jaundice in children because they see no sunrise" — should be handled carefully. Neonatal jaundice (hyperbilirubinaemia) is managed by phototherapy and, historically, by sunlight, so a dwelling that receives no morning sun can plausibly complicate home management of a jaundiced newborn. But the author is not presently able to point to an epidemiological study showing a *rise* in childhood jaundice attributable to high-rise overshadowing in these wards. The defensible formulation for an academic paper is: overshadowing measurably reduces residents' sun and daylight exposure; the health harms with strong evidentiary support are **vitamin D deficiency/rickets risk, circadian and sleep disruption, and mood effects**; and daylight is a **housing-and-health standard**, breach of which is a cognisable Article 42 harm. If a specific clinical or press report on neonatal jaundice in shadowed Nairobi dwellings can be obtained, it should be cited; otherwise the claim should be presented as a hypothesis for study. It is worth recording that at least one Nairobi developer has marketed "natural light" and "the Sun's spirit" as the central selling point of an apartment scheme — a marketing choice that concedes daylight's value even as neighbouring towers extinguish it for existing residents.

Nairobi's popular identity as "the Green City in the Sun" makes the trajectory especially pointed: the working draft's image of "the city in the sun becoming the city in the shadows" is rhetorical, but it tracks a real and measurable loss of solar access at street and dwelling level.

4.4 Infrastructure concurrency

The unifying principle is **concurrency**: additional development load must be matched by prior or simultaneous expansion of the trunk infrastructure that will carry it. This is not an aspiration; it is the express logic of Regulation 7(2)(b)(iii) of the EIA Regulations (below) and of the Court of Appeal's own third "imperative" in *Rhapta Road*: "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" (Civil Appeal No. E160 of 2025, [102]).

The evidence in the record is that concurrency is not being achieved:

- Nairobi City Water and Sewerage Company supplies roughly 525,000 m³/day against demand of 830,000–900,000 m³/day, a deficit of roughly 260,000–305,000 m³/day, with about 38% non-revenue water (Nairobi City Water and Sewerage Company, reported in *The Star*, 2021; *Daily Nation*, 2024). New developments in Kileleshwa are permitted with **on-site boreholes as "the sole water source for domestic purposes"** (Kamau, 2024, *Hydrogeological Survey Report* for the Siaya Road development) — an explicit admission that the public water network cannot serve them.
- The County Assembly's Sectoral Committee recorded, among the defects of the draft policy, a concern that the "current infrastructure (Roads, NMT and Sewerage network) carrying capacity" could not support "the density of the proposed development allowance" (Nairobi City County Assembly, 2025).
- KIWANA's residents' survey for Kileleshwa records majorities reporting deteriorating or inadequate water (55.8%), street lighting (69.8%), recreational space (48.8%), traffic and parking (46.5%), drainage/flooding (41.0%) and power supply (32.6%), with residents attributing the decline directly to "unregulated and unplanned construction of high-rise buildings without the County building the infrastructure to match" (KIWANA, 2026c).

Concurrency, in short, is being replaced by "**paper approvals**" — a phrase from KIWANA's objection — and by the privatisation of trunk infrastructure (boreholes, private substations, private sewer connections) that the Property Matrix expressly "encourages."

None of the four relationships above is extrinsic to Kenyan law, imported from planning textbooks to critique a legal regime that is silent on them. As Part 5.3 sets out, PLUPA itself defines a lawful local plan by reference to a survey- and GIS-based analysis of precisely these parameters — hydrology and environment, area-wide traffic level of service, daylight-relevant land-suitability mapping, and an infrastructure "gap analysis." The science this paper says the courts are not weighing is the science the statute already requires the planning instrument to contain.

5. The legal and policy architecture

5.1 The Constitution

Article 42 guarantees every person the right to a clean and healthy environment, "which includes the right (a) to have the environment protected for the benefit of present and future generations through legislative and other measures." Article 69 imposes correlative State obligations, including sustainable exploitation and management of the environment and elimination of activities likely to endanger it; Article 70 creates a direct enforcement right; Article 10 makes public participation and sustainable development national values; and Articles 60 and 66 subject land use to principles of equitable, efficient and sustainable use and to regulation "in the interest of land use planning."

5.2 EMCA and the EIA Regulations – and Regulation 7(2)

The Environmental Management and Co-ordination Act, 1999 (EMCA) establishes NEMA as the "principal instrument of Government in the implementation of all policies relating to the environment" and, in Part VI, requires an environmental impact assessment for specified projects. Section 2 defines the **precautionary principle** as "the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason to postpone cost-effective measures to prevent environmental degradation."

The Environmental (Impact Assessment and Audit) Regulations, 2003 (Legal Notice 101 of 2003), as amended (notably by Legal Notice 32 of 2019, and read with the risk-based categorisation introduced into EMCA's Second Schedule by Legal Notice 31 of 2019), distinguish a **project report** (Part II) for low- and medium-risk projects from a full **study report** (Part III) for high-risk projects.

Regulation 7(2), as amended, is central to this paper. It provides that a project report "shall specify —

(a) the nature of the project; (b) the location of the project including — (i) proof of land ownership, where applicable; (ii) any environmentally sensitive area to be affected; (iii) availability of supportive environmental management infrastructure; and (iv) conformity to land use plan or zonation plan; and (c) potential environmental impacts of the project and the mitigation measures ..."

Sub-paragraphs (b)(iii) and (b)(iv) are, in substance, a **statutory infrastructure-concurrency and plan-conformity test**. They require the proponent to demonstrate — and, by necessary implication, require NEMA to verify before licensing — that the commensurate environmental infrastructure exists, and that the project conforms to an approved land-use or physical development plan. The residents' core legal argument, which the tribunals have not squarely addressed, is that in the three wards **neither limb can be satisfied**: the trunk infrastructure demonstrably cannot carry the load (Part 4.4), and there is **no gazetted local physical and land use development plan** to conform to (Part 5.3). On that argument, a Regulation-7-compliant NEMA could not lawfully licence most of the developments at issue. (For study-report projects the equivalent substantive content is carried by the Second Schedule and Regulation 18; the analytical point is the same.)

Section 58(9) of EMCA further provides that the grant of an EIA licence "shall not be a defence to any civil action" — a provision (mirrored in Regulation 46(3)) that on its face contemplates that a licensed development may still be restrained by a court on substantive environmental grounds.

Appeals against NEMA licensing decisions lie to the **National Environment Tribunal** within 60 days (EMCA, s. 129; EIA Regulations, reg. 46), and from the Tribunal to the ELC and thence the Court of Appeal.

5.3 PLUPA: the planning instruments that do not exist

The Physical and Land Use Planning Act, 2019 (PLUPA; Cap. 303 in the 2022 revision) restructured the planning system:

- **Section 14** requires each county to establish a **County Physical and Land Use Planning Consultative Forum** as the statutory vehicle for institutional coordination and stakeholder participation.
- **Sections 36–44** require the preparation of a **County Physical and Land Use Development Plan**, with mandatory public participation (s. 40), County Assembly approval (s. 41) and prescribed contents (s. 39).
- **Sections 45–51** require **Local Physical and Land Use Development Plans (LPDPs)** for, among other purposes, "zoning ... urban renewal [and] redevelopment" (s. 46), with their own notice, objection, approval and publication procedure.

Section 48 and the Second Schedule are the statutory home of this paper's central claim: PLUPA does not treat a local plan as a discretionary policy choice — it defines it as a scientific instrument. Section 48(1) provides that a local physical and land use development plan "shall consist of — (a) a **survey report** in respect of the area ... carried out ... as specified in the Second Schedule; and (b) any **Geographical Information System-based maps** and descriptions as may be necessary to indicate the manner in which the land ... may be used in accordance with the requirements of the Second Schedule." Section 48(2) requires that survey report to "include technical annexes and a **sieve analysis of gradient, environment and infrastructure** so as to provide for maximum locations for new developments." The **Second Schedule** (Part A, paras 5–7; Part B, para 8) then itemises the mandatory content, and it reads as a checklist of exactly the parameters this paper says the courts are not weighing: a **spatial analysis** with land-suitability, terrain, soils and cadastral mapping; a **"report on the state of the environment; environmental assets, and condition"**; a **transport analysis of "mode, level of service, traffic flow and congestion"** — the LOS metric the developers' own traffic-impact assessments compute project-by-project (Part 4.2), which PLUPA requires area-wide, at plan stage; an **"infrastructure and services ... gap**

analysis" — the concurrency test of Part 4.4, made a mandatory planning input rather than a post-hoc licence condition; **sieve maps of the physical and land-use constraints or thresholds to development**; and, for renewal and redevelopment plans specifically, express **"measures to address environmental or flood problems"** (Second Schedule, Part C, para 15). A document lacking a survey report, GIS-based suitability and sieve mapping, and this gap analysis is not, on the face of section 48, a Local Physical and Land Use Development Plan — whatever it is called and however it is eventually gazetted (Part 7.7). - **Sections 56–63** govern development control: a county executive committee member considering a development application "shall be bound by the relevant approved ... plans" (s. 61(1)(a)) and "shall take into consideration the provision of community facilities, environmental, and other social amenities" (s. 61(1)(b)). - **Sections 76–83** establish **County Physical and Land Use Planning Liaison Committees** to hear appeals against development-permission decisions, with a further appeal to the ELC (s. 61(4)).

The pivotal, undisputed fact across the entire case law is that **Nairobi City County has never prepared or gazetted a County Physical and Land Use Development Plan or any LPDP for these wards** in the seven years since PLUPA commenced (5 August 2019). Development control has been conducted against the expired 2004 guide, the non-parcel-specific NIUPLAN, and successive **un-gazetted** iterations of a "Development Control Policy" and "Property Matrix" that PLUPA does not recognise as instruments at all. As KIWANA argues, the Property Matrix "assumes the role of an LPDP without the necessary due process" and is therefore "an illegal document as far as [PLUPA] is concerned" (KIWANA, 2026b).

5.4 The other planning statutes

The **County Governments Act, 2012** (s. 104) prohibits the appropriation of public funds outside an approved planning framework and provides for the County Integrated Development Plan; the **Urban Areas and Cities Act, 2011** (ss. 36–37) requires cities to operate within an integrated development-planning framework. The Court of Appeal in *Mbaazi* canvassed all of these to make the point that "the Constitution has bestowed the mandate on Parliament to enact statutes to create bodies to manage and regulate land use and planning" — and that a court "is not an expert in management of the environment" (*Mbaazi* [2025] KECA 1593, [93]).

6. The cases

6.1 The Lavington Five: *Lavington Five Roads Association* (Woodridge Centre petrol station, James Gichuru Road)

The development. A proposal to change the user of L.R. No. 3734/790 on James Gichuru Road, Lavington, from residential to light industrial (a petrol station), and to develop it, by Woodridge Centre Limited. The association objected at the change-of-user stage and again at the EIA stage.

The EIA challenge — National Environment Tribunal. In *Maina (suing as Chairman of the Lavington Five Roads Association) v NEMA* [2023] KENET 1348 (KLR), the association sought revocation of EIA Licence No. NEMA/EIA/PSL/21303. It argued that public participation was inadequate (no Kenya Gazette notice; a single newspaper advert relating only to the change of user; twelve questionnaires, some unnamed; one meeting), and that the study report failed the criteria in Regulation 17. The Tribunal:

- identified the issues as **"whether public participation was undertaken"** and **"whether [the] EIA Licence ... was lawfully and regularly issued"** — both procedural;
- held that because the project was categorised (via Legal Notice 31 of 2019) as **medium-risk**, only a **project report**, not a study report, was required, and that "in a project report, NEMA is not mandated to conduct a separate public participation" (citing *Communist Party of Kenya v Nairobi Metropolitan Services* [2022] eKLR and *Mui Coal Basin* [2015] eKLR);
- found "proper public participation" and that the licence was "lawfully and regularly issued";

- **expressly declined to consider the change of user** — "the Tribunal ... shall not address the issue of change of user" — and made no finding on whether a petrol station was an appropriate use for that corner, its traffic generation, or its effect on area character;
- dismissed the appeal.

The change-of-user challenge — Court of Appeal. In Civil Appeal No. E568 of 2023 (consolidated), the association appealed the ELC's striking-out of its appeal against the change-of-user approval. The Court of Appeal (Nyamweya, Ali-Aroni & Gachoka JJA) held that the ELC's appellate jurisdiction under PLUPA s. 61(4) "flows from the statute" and requires a **decision of the Liaison Committee** to appeal from; that the association had not properly filed with the Committee and had not exhausted that remedy; and that a change of user was "a field that requires technical expertise" better suited to the specialised Committee. The striking-out was upheld on jurisdiction, though the Court **set aside the costs order** against the association given the public-interest character of the litigation, substituting an order that each party bear its own costs.

Outcome. The association lost on both fronts. In neither forum did any tribunal weigh whether the development was environmentally sound. The EIA challenge failed because a project report "needs less participation"; the change-of-user challenge failed for want of jurisdiction because the association had gone to the wrong forum.

6.2 Rhapta Road: Claire Kubochi Anami v CECM Built Environment and Urban Planning, Nairobi City County (Civil Appeal No. E160 of 2025)

The development. A cluster of approvals for high-rise towers along Rhapta Road, Westlands — "some up to 28 floors" — granted to some fifteen developers. The Rhapta Road Residents Association petitioned the ELC (ELC EP Case No. E030 of 2024) alleging that the approvals were issued "in a policy vacuum or in disregard of controlling plans," in breach of Articles 10, 42 and 69, PLUPA and EMCA.

ELC (Angote J, 23 January 2025). The Judge held that the ELC had jurisdiction despite the exhaustion doctrine because the petition raised systemic constitutional questions; that the 2004 guidelines were "outdated and not enforceable"; that NIUPLAN was "not ... formally gazetted"; that the 2021 Development Control Policy, "though not yet approved by the County Assembly, had been adopted in practice ... and was being consistently applied," and was accepted "as the operative framework"; that the approvals "exceeded the permissible thresholds of their respective zones"; and — controversially — **capped permissible floors at 16**, "subject to confirmation by the County Assembly." Damages were declined; costs lay where they fell.

Court of Appeal (Musinga P, Joel Ngugi & Odunga JJA, 19 September 2025). The Court:

- **affirmed jurisdiction:** exhaustion "is not an iron cage," and the petition raised "systemic and constitutional questions about Nairobi City's planning governance ... not remedies within the remit of a Liaison Committee or the NET" ([59]–[63]);
- held that the **2004 guidelines "no longer carry binding legal status"**; that NIUPLAN "cannot itself supply parcel-specific zoning rules"; and that the **2021 Development Control Policy "did not attain full legal force without County Assembly approval and gazettment,"** but could be used as "a guiding instrument ... persuasive rather than dispositive" ([71]);
- on the **EIA challenge, deferred to the National Environment Tribunal:** "complaints as to the validity of EIA licences must go to the NET under section 129 of EMCA"; the appellants "did not discharge their burden to show that NEMA's process was ultra vires, procedurally unfair, or irrational" ([87]–[90]);
- on the **cross-appeal, reclassified Rhapta Road from Zone 4/4B to Zone 3C**, holding that "the difference between the two zones determines whether permissible heights are capped at 16 floors ... or 20 floors," and that the trial Judge's reliance on Google Maps rather than survey evidence was "a methodological misstep"; it accordingly **raised the interim cap for Rhapta-Road-fronting projects from 16 to 20 floors** ([73]–[81]);
- **issued a structural interdict:** the County to "finalise and approve through the County Assembly, and gazette comprehensive zoning and development control plans for the whole city ... in conformity with [PLUPA]" **within six months**, with an interim progress report at three months,

a final compliance report, stakeholder service, and retained supervisory jurisdiction ([99], [107(c)]);

- otherwise **dismissed the appeal**: "the broader calls for cancellation/demolition of approved developments are declined"; "developers who obtained permissions in good faith ... should not be retroactively penalised absent demonstrated illegality" ([104], [107(a)]).

Outcome. A landmark on **remedy** (the structural interdict) and on **jurisdiction** (systemic constitutional petitions are not barred by exhaustion). But on the merits the residents lost: no approval was cancelled, no building stopped, the EIA challenge was sent away, and the interim ceiling for the corridor was **increased**. The Court was explicit that "this judgment ... does not anoint judges as planners" ([106]) — a self-limitation that, this paper argues, the science of the case did not require.

Compliance. As of the County's **March 2026 progress report**, the six-month deadline (which fell in about March 2026) had **not** been met with a gazetted plan. The County reported that it had "completed" the Development Control Policy 2025, held public participation in February 2025, "endorsed over 9" LPDPs, "commenced procurement" for the Westlands–Parklands and Kilimani–Woodley LPDPs, established the s. 14 Forum, and **transmitted the policy to the County Assembly Clerk on 28 January 2026** — but that "the remaining steps ... involve statutory legislative processes beyond the unilateral control of the County Executive," and blamed a County Assembly recess (5 December 2025 – 9 February 2026) for the delay (Nairobi City County, 2026). Residents (KIWANA and the "Metro Alliance") filed a **Notice of Motion for contempt on 9 April 2026**, set for hearing 7 July 2026 (KIWANA, 2026d). By **16 June 2026** the Sectoral Committee's report was only being *laid on the Table*, with a Notice of Motion for adoption (Nairobi City County Assembly, 2026, *Hansard*) — the plan remained un-adopted and un-gazetted roughly nine months after the judgment. On the same sitting day, the Assembly's Majority Leader complained that the Planning Committee's "status report" on the sector had been "copied and pasted ... from google [the] Urban Planning Act and the Physical and Land Use Planning Act" rather than addressing "the current status."

6.3 Mbaazi: Mbaazi Avenue Residents Association & Millennium Gardens Management Ltd v Metricon Home Nairobi Company Ltd (Civil Appeal No. E1010 of 2024; [2025] KECA 1593 (KLR))

The development. Metricon's proposal for L.R. No. 330/155 on Mbaazi Avenue, Benard Estate, Lavington (in Kilimani ward): originally **three 16-storey blocks, 512 units on one acre**; scaled in the EIA licence (NEMA/EIA/PSL/23286) to **13 storeys / 416 units**; and subsequently approved by the County at **18 levels** (plan PLUPA-BPM-000252-N). Millennium Gardens, the manager of the adjoining 28-unit, four-storey scheme, petitioned (ELC Petition No. E121 of 2023); the Mbaazi Avenue Residents Association supported.

The residents' evidence. Sharing of the underground rock and deep excavation on the boundary threatening structural integrity; permanent loss of natural sunlight and air circulation to the neighbouring units; exhaust-fume pollution from ground and basement parking abutting bedroom windows; borehole-water contamination; over-stretched 225 mm sewer; traffic; loss of green and children's play space; breach of the four-storey zoning ceiling. Millennium Gardens commissioned an **expert environmental impact report** (Daniel Wanjuki, 17 May 2024) which "confirmed that the project posed grave environmental, infrastructural, health, sanitation and other socio-economic hazards."

ELC (Angote J, 19 September 2024; [2024] KEELC 6040). The Judge:

- found **substantial compliance** with the public-participation requirements of EMCA ss. 59–60 and Regulation 21, "with the only exception being the public hearing anticipated under Regulation 22" (which NEMA never held);
- held that the residents' concerns were **answered by the conditions of the EIA licence** — the geotechnical condition (2.2), the air-quality condition (2.16), the traffic-management condition (2.6), the water-harvesting condition (2.22) — and that "it has not been demonstrated that these measures will not adequately ... address the concerns";
- on sunlight, accepted Metricon's assertion that the building "would neither hinder light penetration nor affect the natural air circulation" as "not contradicted," so the plea was "unsubstantiated";

- **preferred the EIA report over the residents' expert:** "the contents of the said [Wanjuki] report were juxtaposed with those in the EIA Report and EIA License and the learned Judge ... believed the EIA report and the EIA License";
- on zoning, held that the 2004 four-storey guide had "long been superseded," relied on a document it "came across" — the **Nairobi City County Development Control Policy, December 2021** — treated the suit property as **Zone 4B (16 floors)**, and held the development "not invalid on account of the outdated 2004 Zoning Policy";
- held that the precautionary-principle burden "falls on the proponent ... [and] can be discharged by satisfactorily going through the EIA process and obtaining an EIA license," and that the petitioners had not "established a viable threat";
- dismissed the petition, while "emphasis[ing] the urgent need for the Nairobi City County to put in place the Nairobi County Physical and Land Use Development Plan."

Court of Appeal (Musinga P, Nyamweya & Odunga JJA, 3 October 2025). The Court:

- held that because the residents "did not challenge ... the approvals," the Court "must ... proceed on the basis that the same were validly issued" ([59]);
- upheld reliance on the **2021 Development Control Policy** — finding it bore a County Assembly stamp, "NCCA APPROVED 10 FEB 2022," and was therefore judicially noticeable and operative — and refused to treat the still-in-participation 2023 draft as superseding it ([65]–[68]);
- treated the "Zone 4B / 16 floors" classification as a **finding of fact** by the trial Judge that an appellate court would not disturb "simply because [the appellants] contend that it was wrongly arrived at" ([71]–[73]) — notwithstanding the appellants' argument that Benard Estate, Lavington is **Zone 5 (single dwelling, 0.1 plot ratio)** and that the trial court had "translocated" them to Muthangari;
- on the precautionary principle, held that "for the invocation of the precautionary principle, the court **must find that there are threats of serious or irreversible damage**," and that "based on the EIA processes and License, there were no threats of serious or irreversible damage **shown by MARA and Millennium Gardens**" ([82], [85]) — placing the evidential onus on the residents;
- held that the residents' expert report was "considered" because "it is clear that the contents of the said report were juxtaposed with those in the EIA Report ... and the learned Judge, as he was entitled to, believed the EIA report" ([77]);
- held that "**a court of law is not an expert in management of the environment**" and that judicial determination "should not amount to substitution of decisions made by the authority in its special area of expertise" ([93]–[95]);
- **dismissed the appeal**, discharged the conservatory orders of 4 April 2025, and — echoing *Rhapta Road* — directed the County to put the County Physical and Land Use Development Plan in place **within 12 months** ([97]–[98]).

Outcome. The most fully reasoned merits decision to date, and a comprehensive loss for the residents. The Court accepted, in terms, that daylight, air, sewer, traffic and structural risks were all "answered" by licence conditions whose adequacy it did not itself assess; that the residents' own expert was outweighed by the developer's EIA consultant; and that the precautionary principle is only engaged once the resident has proved serious or irreversible harm — the opposite of the statutory design.

6.4 Supporting cases

Dennis Pritt Residents Association v Nairobi City County Government (Petition No. E037 of 2024). Turbo Road, Kilimani; developer Girini Company Limited; alleged ~19-level apartments. **Ruling 1** ([2025] KEELC 948, Omollo J, 27 February 2025): conservatory orders **declined**, because "there is already an approved development plan in favour of the 7th Respondent which cannot be withdrawn at this interlocutory stage" and the applicants "have not pleaded ... how the intended development was going ... to be deleterious to the environment" — even though the Judge found a *prima facie* case **against the County** for approving without an LPDP. **Ruling 2** ([2026] KEELC 2427, Angote J, 30 April 2026): a review application to reopen the refusal was **dismissed** for inordinate delay (~one year, unexplained), *functus officio*, *res judicata*, and because the 2021 Policy and the property's proximity to State House "could have been discovered earlier through ordinary diligence" and "a subsequent decision of a superior court cannot found a basis for review." The

substantive complaints (the building now "covers the entire parcel, blocks air and lighting to neighbouring houses, damages rooftops," breaches the Buildings Regulations and the Development Control Around Strategic Installations Regulations) were treated as "subsequent events" that "cannot sustain a review." **The Chief Officer, Urban Development and Planning who swore the County's replying affidavits in this matter — Patrick Analo Akivaga, named as the 3rd Respondent — was arrested by the Ethics and Anti-Corruption Commission in June 2026 (Part 9.5).**

Mwingi Court Residents Associations v Barasa t/a Gabasa (K) Enterprises ([2025] KEELC 6766, Omollo J, 2 October 2025). Mwingi Road, Kileleshwa; a commercial development on land licensed for residential use. Petition **partly succeeds**: the EIA licence and the change of user are **quashed** for want of the registered owner's consent (PLUPA s. 58(4)) and want of public participation (EMCA s. 58; EIA Regs regs. 2 & 17). But the Article 42 claim is **dismissed** because "the development was abandoned midway" and "there is nothing that changes the prevailing status quo"; restoration is refused as "anticipatory"; damages are refused for want of "direct loss." A procedural win with no substantive engagement.

Sangahani v Nairobi City County Government (Petition No. E012 of 2025; [2025] KEELC 6985, three-judge bench, 14 October 2025). Parklands Residents Association. Petition **partly succeeds**: declarations that the County "failed ... since August 2019" to constitute the s. 14 Consultative Forum and to prepare county and local plans, in breach of **Article 28 (dignity) and Article 42**; directions to constitute the Forum in 6 months and to gazette the county and Parklands local plans in 12 months, with approvals after 12 months rendered "null and void"; costs to the petitioners. But the Court **declined to invalidate the mass of approvals since August 2019, declined damages** ("neither pleaded nor adduced any specific evidence"), and **declined an injunction** halting development, noting the existing *Rhapta Road* and *Mbaazi* structural interdicts.

Northern Block Residents Ltd v Mediview Ltd (Petition No. E045 of 2024; [2025] KEELC 7817, Omollo J, 13 November 2025). A preliminary objection on exhaustion is **dismissed** — critically, because the **Nairobi Physical and Land Use Planning Liaison Committee has been non-functional since December 2024** "for lack of facilitation" ("The Committee has been unable to sit ... has not received sufficient funds, logistical or administrative support"), a fact drawn from the Committee's own memorandum to the Law Society of Kenya and separately noted in *Antony Mzee (Jacaranda Avenue Residents' Association) v Multi Auto Parkhaus Ltd* (EP Petition No. E013 of 2025). The Committee is itself being sued (*Victor Odhiambo v Nairobi Physical Liaison Committee*, ELC Const. Petition No. E021 of 2025).

6.5 The pattern

CASE	FORUM	RESIDENTS' SUBSTANTIVE SCIENCE ENGAGED?	OUTCOME FOR RESIDENTS
<i>Lavington Five (EIA)</i>	NET	No — "project report needs less participation"	Lost
<i>Lavington Five (change of user)</i>	CoA	No — struck out for want of jurisdiction/exhaustion	Lost (costs order set aside)
<i>Mbaazi</i>	ELC → CoA	Considered, then displaced by EIA licence and NEMA deference	Lost
<i>Dennis Pritt</i>	ELC (2 rulings)	No — pleading and review-threshold defects	Lost (interim); <i>prima facie</i> case against County noted
<i>Mwingi Court</i>	ELC	No — decided on consent + participation defects	Partial procedural win; Art. 42 claim dismissed
<i>Sangahani</i>	ELC	No — decided on the s. 14 Forum / plan-making omission	Partial structural win; no injunction, no damages

CASE	FORUM	RESIDENTS' SUBSTANTIVE SCIENCE ENGAGED?	OUTCOME FOR RESIDENTS
<i>Rhapta Road</i>	ELC → CoA	EIA challenge referred to NET; merits not decided	Structural interdict won; interim cap raised 16→20; no cancellations
<i>Northern Block</i>	ELC	Not yet — preliminary objection stage	Objection dismissed (Liaison Committee defunct)

7. Analysis: the procedural turn and the science deficit

7.1 The frame: facial validity as a complete answer

Across the case law, the operative legal question has been reframed from a **substantive** enquiry ("does this development, on the evidence, threaten the right to a clean and healthy environment?") to a **formal** one ("were the boxes ticked?"). The clearest statement is in *Mbaazi*: because the residents "did not challenge ... the approvals," the Court "must ... proceed on the basis that the same were validly issued" ([59]); and the existence of the EIA licence, with its standard conditions, is then treated as a complete answer to every environmental complaint — sunlight, air, sewer, traffic, structural risk — without the Court itself assessing whether those conditions are adequate to the identified risks.

This is doctrinally questionable for at least three reasons.

- **EMCA s. 58(9) and Regulation 46(3)** expressly provide that an EIA licence "shall not be a defence to any civil action." A statutory scheme that says the licence is *not* a defence cannot coherently be applied so that the licence is a *complete* defence.
- **The petitions were pleaded as Article 42 violations, not as judicial review of the licence.** A constitutional environmental claim under Articles 42/70 does not require the petitioner first to have appealed the licence to the Tribunal; the Supreme Court's nuanced approach to exhaustion (*Nicholas v Attorney General* [2023] KESC 113 (KLR)) and the Court of Appeal's own reasoning in *Rhapta Road* on jurisdiction confirm this. Having accepted jurisdiction over the constitutional claim, the courts then declined to decide it substantively — routing the substance back to the Tribunal.
- **The "finding of fact" move.** In *Mbaazi* the Court treated the trial Judge's classification of Benard Estate, Lavington as "Zone 4B / 16 floors" as an unassailable finding of fact, when it was in truth a **contested legal-cum-technical characterisation** derived from an un-gazetted policy document the trial court "came across," and reached without survey evidence — precisely the "methodological misstep" the Court criticised in *Rhapta Road* ([78]).

7.2 Deference to NEMA versus NEMA's non-enforcement of Regulation 7

The courts justify non-engagement by deference: "a court of law is not an expert in management of the environment" (*Mbaazi* [93]); "complaints as to the validity of EIA licences must go to the NET" (*Rhapta Road* [89]). Deference to a specialist regulator is defensible **when the regulator is actually performing the specialist function**. The residents' unanswered argument is that NEMA is **not** performing the Regulation 7(2)(b)(iii)–(iv) function: it is not verifying the availability of commensurate infrastructure, and it cannot verify conformity to a land-use plan because none exists. On the record:

- NEMA's own case in *Mbaazi* was that it "at all times remained conscious of the statutes and regulations and took every step necessary to ensure compliance with the **correct procedures**"

— a procedural self-description.

- In *Mbaazi* NEMA never held the Regulation 22 public hearing, yet this was treated as a "slight deviation" that "could not invalidate" the licence.
- The Vihiga Close and 66 Riverside study reports (Part 8) proceed on the footing that the area "has been zoned for high rise residential units" — an assertion of plan-conformity that is, on the *Rhapta Road* and *Sangahani* holdings, simply false, because there is no gazetted plan.
- Developments are licensed with boreholes as "the sole water source" (Kamau, 2024) — a direct contradiction of Regulation 7(2)(b)(iii).

Deference in these circumstances is not deference to expertise; it is deference to a **licence stamp**. The *Rhapta Road* Court's refusal to disturb "NEMA's process" because the residents "did not demonstrate any specific procedural lapse" ([88]) illustrates the trap: the residents' complaint was not procedural at all — it was that a substantively unsustainable project was licensed.

7.3 The precautionary principle, inverted

EMCA s. 2 defines the precautionary principle so that **lack of full scientific certainty shall not be used as a reason to postpone** protective measures. Its structure places the risk of uncertainty on the actor proposing the environmentally significant activity, and — as the ELC held in *Odando v NEMA* (2021), approved by the Court of Appeal in *Mbaazi* ([79]–[80]) — implies **"shifting the burden of proof to the polluters"** and focusing on "how much harm can be avoided rather than ... how much can be tolerated."

Yet the operative test applied in *Mbaazi* is that **"for the invocation of the precautionary principle, the court must find that there are threats of serious or irreversible damage,"** which the residents must "show" ([82], [85]). This collapses the precautionary principle into ordinary civil proof: the resident must first establish serious or irreversible harm on a balance of probabilities before the principle — whose entire purpose is to operate *before* such proof is possible — is engaged. The burden that the principle places on the developer ("show that the actions are environmentally benign," *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647, cited in *Mbaazi* [78]) is discharged, on the *Mbaazi* reasoning, simply "by satisfactorily going through the EIA process and obtaining an EIA license." The developer's evidential burden is met by the very document whose adequacy is in question.

7.4 Expert evidence: the consultant's report as trump card

In both *Millennium Gardens* and *Mbaazi* the residents adduced independent expert evidence (Wanjuki; and in *Rhapta Road*, the planner John Koyier Barreh gave oral evidence). In each case the court resolved the conflict in favour of the **developer-commissioned EIA consultant's report** — in *Millennium Gardens* explicitly: the Judge "believed the EIA report and the EIA License." No court appointed its own assessor or expert; none tested the EIA consultant's methodology (for example, the trip-generation assumptions, the sewer-capacity letter, the daylight assertion) against the residents' expert. The EIA consultant is retained and paid by the proponent and is, in the residents' recurring complaint, structurally disposed to find the project "sustainable, safe and legally compliant" (the phrase used by the developer in *Lavington Five*). A judicial process that treats that report as presumptively authoritative, and the residents' expert as needing to *disprove* it, is not weighing science — it is allocating an evidential presumption to the party that commissioned the science.

7.5 Exhaustion into a vacuum

The exhaustion doctrine — "where Parliament has prescribed specialised fora ... parties must ordinarily exhaust those remedies" (*Rhapta Road* [59]) — has repeatedly been used to defeat or redirect residents' claims: to the Liaison Committee (*Lavington Five* (CoA)); the preliminary objections in *Sangahani* and *Northern Block*), or to the National Environment Tribunal (*Rhapta Road* on the EIA issue). But the **Liaison Committee has not sat since December 2024** for want of funding (*Northern Block* [2025] KEELC 7817), and the Tribunal, on the *Lavington Five* precedent, will not review the substance of a project-report licence. The doctrine, as applied, sends residents to forums that are either non-functional or non-substantive. The *Rhapta Road* and *Sangahani* courts recognised the escape hatch — systemic constitutional claims are not barred — but only at the

price of confining the remedy to **structural** orders about instruments, not **substantive** orders about buildings.

7.6 Structural interdicts fix the instrument, not the science – and the County adapts

The *Rhapta Road* and *Mbaazi* structural interdicts are genuine innovations and are the residents' most important gains. But their content is: *gazette a lawful plan*. They do not decide whether any particular tower is sustainable, and they leave "approvals already lawfully issued and acted upon" untouched ((107(d))). The County's response, documented in its March 2026 progress report and in the 16 June 2026 Assembly proceedings, has been to **produce another "Development Control Policy" and "Property Matrix"** – instruments PLUPA does not recognise as plans – rather than the s. 46 LPDPs the Act requires, and to **transmit that policy to the County Assembly** for adoption rather than run the s. 40 public-participation and s. 41 approval process for a plan. The County Assembly's own Sectoral Committee had itself catalogued fifteen defects in the draft – including that public participation was not conducted before it was forwarded to the Assembly, and that the local plans required by PLUPA and NIUPLAN were "not complied with ... before formulation of the ... Policy" – yet ultimately recommended that the Assembly **approve** a revised version (re-designated the "2026" Policy), with the local plans for "all the 15 zones" to be developed *afterwards* and infrastructure upgrades left to "annual budget cycles" (Nairobi City County Assembly, 2025; 2026, *Committee Report*, recs. 3–4). The sequencing inverts the statute: adopt the density rules first, deliver the plan and the infrastructure that are supposed to justify them later. The motivation is not hard to infer: the 2021 Policy capped Kileleshwa at 15 floors, but permits had issued for 19–30; an Assembly resolution adopting a Matrix that allows up to 30 floors would **retrospectively legitimise** those permits and blunt the pending contempt proceedings. The structural interdict, in other words, has been met with a **race to change the rules** rather than compliance with them. (These matters are before the courts; the merits are not argued here.)

7.7 The Property Matrix cannot lawfully be an LPDP – it fails section 48 on its face

Parts 5.3 and 7.6 treat the Property Matrix's central defect as procedural: it has not been gazetted, and the County Assembly's own Sectoral Committee found that it was not preceded by public participation as PLUPA requires. There is a second, independent, and more fundamental defect, and it is substantive: **the Property Matrix is not the kind of document section 48 defines as a Local Physical and Land Use Development Plan, whether or not it is ever gazetted.**

The Matrix in the record (Part 8.2) is a table of zone, sub-zone, maximum storeys, ground coverage, plot ratio and minimum plot size, with a handful of generic conditions – "subject to road widening structure plan"; "to secure approvals for commensurate expansion of sewer, water, electricity, roads ... prior to commencement of densification." Nothing in the record accompanying it is, or purports to be, the section 48(1)(a) **survey report**; nothing is the section 48(1)(b) **GIS-based suitability mapping**; nothing is the section 48(2) **sieve analysis of gradient, environment and infrastructure**; and nothing corresponds to the Second Schedule's mandatory state-of-the-environment report, area-wide transport level-of-service analysis, or infrastructure gap analysis. The "commensurate expansion ... prior to commencement" clause reads as a paraphrase of what a gap analysis would conclude – asserted without the gap analysis that would let anyone verify it, and without the enforcement machinery to check compliance before a permit issues.

This reframes the residents' strongest available argument. It is not only that the County has not yet completed the paperwork PLUPA requires – a defect a compliant gazettelement could, in principle, cure. It is that the instrument the County is trying to gazette is, on its face, the wrong *kind* of document: a density table dressed as a plan, missing every element of the technical content section 48 makes mandatory. A court asked whether the Matrix satisfies PLUPA does not need to resolve contested environmental science to answer that question; it needs only to read section 48 and the Second Schedule against the four corners of the instrument itself and ask whether a survey report, GIS mapping and a sieve analysis are anywhere in it. That is a legality question of the kind courts routinely decide – and, on this record, one the residents have not yet squarely put to a court, having argued gazettelement and participation but not the substantive content of section 48.

7.8 The EIA record itself: contradictions on the face of the file

A theme in the residents' objections, largely untested judicially, is that the EIA record contains unresolved contradictions that NEMA never adjudicated:

- **Area character.** The Siaya Road EIA asserts that "area character is preserved"; the residents' own *Area Character* assessment documents a 497-metre green street of 26 plots and 343 units, plots of 0.5–1 acre, with a maintained tree canopy, into which a 15–19-storey, 188-unit tower is proposed (KIWANA, 2026b; author's *Siaya Road Area Character*, 2024). NEMA never recorded which assessment it accepted or why.
- **Traffic.** The developers' TIAs concede LOS F and then call the marginal contribution acceptable (Part 4.2). NEMA did not require a cumulative assessment across the pipeline of approvals on the same road.
- **Public participation minutes.** In *Millennium Gardens* the minutes show residents raising sunlight, air, bedrock and infrastructure concerns that were "not addressed in the said meeting" and only partially addressed later; NEMA's site-visit report itself lists the unresolved concerns. The residents' complaint — that "the report from the EIA consultant is final, even where there are serious contradictions on the face of the record" — is borne out by the record.

If NEMA does not adjudicate the disagreement between the residents and the proponent's professionals recorded in the minutes, and the courts will not either, then public participation "counts for nothing," and the incentive to participate collapses.

8. The EIA and approval record for the three wards: a decade of density escalation

This Part responds to the specific question whether the EIAs published for Westlands, Kilimani and Kileleshwa over roughly a decade show a trend of increasing density, and if so, of what magnitude.

8.1 Method and caveats

NEMA does not publish a clean, queryable public register of EIA licences by ward. The public interfaces are: (a) the **ENVIS Licensing System Portal** (licensing.nema.go.ke, live since 28 July 2025), which handles new applications; (b) **weekly statutory notices in the Kenya Gazette and in newspapers** inviting public comment on EIA study reports under EMCA s. 59, each carrying the proponent, location, a project description (including storeys and units) and an ENVIS/SR reference; and (c) **downloadable reports** on nema.go.ke. A comprehensive ten-year enumeration would require a records request to NEMA under the Access to Information Act, 2016, and this paper recommends that the residents' associations jointly make one. What follows is a **documented sample** assembled from: the litigation record; two full EIA study reports in the Senate-petition file ([NEMA/ENVIS/SR/00493](#) and /00504); the Kenya Gazette, Vol. CXXVIII No. 103 (19 June 2026); and the County's own instruments. It is sufficient to establish the direction and rough magnitude of the trend; it is not a complete census.

Attributing EIAs to wards by parcel number. A practical technique for a fuller census is to use the Registration Section / block numbering, which is spatially coherent. On the parcels in this record: "**Nairobi/Block 19/...**" parcels fall in **Kilimani** (Turbo Road, George Padmore Road, Kindaruma Road are all Block 19); "**Nairobi/Block 22/...**" in the **Riverside Drive / Kileleshwa edge** (66 Riverside Drive is Block 22/180); "**Nairobi/Block 23/...**" in **Kileleshwa** (Siaya Road is Block 23/358; Vihiga Close is Block 23/134; Mwingi Road is Block 23/576–577); "**L.R. No. 330/...**" in **Lavington / Thompson Estate** (Mbaazi Avenue is 330/155); and older grants such as **L.R. 3734/790** on the **James Gichuru Road** frontage of Lavington. A records request to NEMA that asks for all EIA study reports and licences for parcels in Registration Sections Block 19, 22 and 23, plus L.R. 330 and the James Gichuru / Rhapta corridors, over 2015–2025, would produce a near-complete ward-level dataset that could be tabulated as below and charted against the policy ceilings.

8.2 The record (documented sample)

APPROX. DATE	PROJECT / PROPONENT	LOCATION (AREA / WARD)	PLOT	STOREYS	UNITS	UNIT MIX
2004 (rev. 2006)	Zoning baseline	Zones 3–4: Westlands, Kilimani, Kileleshwa	~0.2 ha typical	4 (apartments on sewer)	—	—
2021	Development Control Policy (draft) skyline caps	Zone 4B / 4C (Kileleshwa) / 3C (Rhapta)	—	16 / 15 / 20	—	—
2022	Woodridge Centre Ltd — petrol station	James Gichuru Rd, Lavington	LR 3734/790	change of user (residential → light industrial)	—	—
2022–23	Metricon Home Nairobi Co. Ltd	Mbaazi Ave, Benard Estate, Lavington (Kilimani)	LR 330/155, ~1 ac	proposed 16 → EIA licence 13 → County approval 18	512 → 416	predominant 1-bed
2023–24	~15 developers ("6th–20th respondents")	Rhapta Rd, Westlands (Zone 3C)	various	20–28	—	—
2024	Girini Company Ltd	Turbo Rd, Kilimani	Nairobi/Block 19/696	~19 (alleged)	apartments	—
2024	Jinshi Company Ltd	Siaya Rd, Kileleshwa	Nairobi/Block 23/358, ~0.5 ac	15	188	60×1-bed, 60×2-bed, 60×3-bed, 8 penthouse
2025–26	PLUPA-BPM-003999-N	Siaya Rd, Kileleshwa	0.2 ha	19	—	—
2025	(proponent per SR) — Vihiga Close apartments	Vihiga Close, off Vihiga Rd, Kileleshwa	Nairobi/Block 23/134	21 (+2 basements, mezz., roof); GC 57%	279	190×1-bed, 76×2-bed, 1 duplex
2025	KP Housing Development Ltd — "66 Riverside"	Riverside Drive (Kileleshwa/Lavington edge)	LR 205/66 (Nairobi/Block 22/180)	study report 18 (residents cite 21), +2 basements, mezz.	212	108×1-bed, 36×2-bed, 3 two-bed duplex, 4-bed duplex, 2 penthouse
Dec 2025	PLUPA/PPN-008451-N	Kileleshwa	—	> 15	—	—
Mar 2026	PLUPA-BPM-008773	Kileleshwa	—	> 15	—	—
Jun 2026	Jumbo Spices Ltd	George Padmore Rd, Kilimani	Nairobi/Block 19/579 (orig. 1/777)	15 (+2 basements, roof)	270	135 studio, 120×1-bed, 15×2-bed
Jun 2026	Pinklady Properties Ltd	Kindaruma Rd, Kilimani	Nairobi/Block 19/489	21 (+2 basements, mezz., roof)	198	59 studio, 59×1-bed, 19×2-bed, 38×2-bed+19×3-bed+19×4-bed duplex

APPROX. DATE	PROJECT / PROPONENT	LOCATION (AREA / WARD)	PLOT	STOREYS	UNITS	UNIT MIX
2025–26	Property Matrix (draft DCP 2025/2026)	Kileleshwa & Riverside Drive	0.4 / 0.2 / 0.1 / 0.05 ha	30 / 25 / 20 / 15 ; GC 50%	—	—
2025–26	Property Matrix	Kilimani & Rhapta area	0.2 / 0.1 / 0.05 ha	20 / 15 / 10 ; GC 50%	—	—
2025–26	Property Matrix	Lavington	0.05 ha min.	single dwelling / low-density; offices 4 floors on the James Gichuru frontage; "no densification on comprehensive schemes"	—	—

8.3 The trend

Three quantitative movements are visible even in this partial sample.

1. **Permitted height.** The residential ceiling for the belt moved from **4 storeys (2004/2006)** to **13–16 storeys** in the developments licensed and approved in 2022–2024, to **19–21 storeys** in the 2025–2026 study reports and County approvals, to a **draft policy allowance of up to 30 storeys** in Kileleshwa and Riverside. That is roughly a **4×** increase against what was actually being licensed by 2024 and a **7.5×** increase against the draft ceiling — with the steepest part of the curve in 2021–2026.
2. **Ground coverage and effective imperviousness.** Zone 4 ground coverage under the 2004 guide was in the order of 35%; the EIA study reports and the Property Matrix put it at **50–57%**; and because the "open" balance sits over two-level basement parking extending across most of the plot, **effective infiltration area approaches zero**. Density has therefore risen on *two* axes simultaneously — vertical (height/units) and hydrological (imperviousness).
3. **Unit mix.** The newer schemes are dominated by studio and one-bedroom units — e.g., Jumbo Spices at George Padmore Road, 255 of 270 units (94%) studio or one-bed; Pinklady at Kindaruma Road, 118 of 198 (60%) studio or one-bed; Vihiga Close, 190 of 279 (68%) one-bed. This shift maximises the number of households (and therefore the water, sewer, traffic and parking load) per square metre of plot, and — in the residents' account — changes the social character of family neighbourhoods and is associated with short-let/"Airbnb" use (KIWANA, 2026b). The load imposed on shared infrastructure is a function of **household count**, which the unit-mix shift inflates faster than the storey count alone suggests.

The direction of travel is unambiguous. Over roughly a decade — and overwhelmingly in the last five years — the three wards have moved from a low-rise, high-infiltration, family-household morphology to a high-rise, near-fully-sealed, small-household morphology, without a commensurate change in trunk infrastructure and without a single gazetted plan authorising the change.

9. Consequences

9.1 Flooding, 2024 and 2026

Nairobi experienced two severe flood episodes in the study period.

- **March–May 2024.** The long-rains season, enhanced by an El Niño phase, produced flooding that killed **at least 210 people nationally** by early May and displaced tens of thousands; Nairobi County was among the worst affected, with roughly **20,900 families displaced** in the county (United Nations Office for the Coordination of Humanitarian Affairs, 2024; Copernicus Emergency Management Service, 2024).
- **March 2026.** On the night of **6–7 March 2026**, the Nairobi River burst its banks; Mombasa Road and Uhuru Highway were inundated and flights were diverted from Jomo Kenyatta International Airport. Reported death tolls for the March episode ranged from the low twenties to the sixties as the event unfolded; the flash flooding was estimated to have caused on the order of **USD 300 million** in infrastructure damage, with tens of thousands displaced nationally and roughly **3,500 households affected in Nairobi** (*The Standard*, 2026; *The Eastleigh Voice*, 2026a). On **9 March 2026**, **Ian Bernard, an employee of Printwell Industries Limited on Sai Road in the Industrial Area, was filmed paddling an inflatable dinghy down the completely submerged street** — an image that became the viral emblem of the disaster; Printwell reported that floodwater had submerged its printing machinery and paper stock (*Daily Nation*, 2026a). Analyses attributed the severity to "rapid urbanisation, development on floodplains and riparian land," drainage "designed decades ago for a much smaller city," "disappearing wetlands," and "weak enforcement of planning laws" — with a Kenyan newspaper series framing the episode as **"a governance crisis, not a climate accident"** (*Daily Nation*, 2026b; *Daily Nation*, 2026c). Governor Sakaja publicly linked the floods to a "generational infrastructure deficit" (*The Standard*, 2026). This distinguishes 2026 from 2023–24: there was no El Niño anomaly.

Two points sharpen the connection to this paper's subject. First, in mid-March 2026 the Ministry of Interior, under the Nairobi Rivers Regeneration Programme, published a map of **37 flood-prone areas** in Nairobi — and **Kilimani itself now appears on that list**, in the "Nairobi South / Ngong River corridor" cluster alongside Kibera, South B, South C and Mukuru (Citizen Digital, 2026a; *The Eastleigh Voice*, 2026b). The upper catchment is no longer only exporting flood risk downstream; it is beginning to flood. Second, Ian Bernard's dinghy on Sai Road is the downstream image of the upstream cause: the Industrial Area and the central river corridor sit at the bottom of a catchment whose upper reaches in Kilimani, Kileleshwa and Westlands are being progressively sealed. The working draft's contention — that the 2026 floods, absent an El Niño signal, are a symptom of catchment sealing rather than of exceptional rainfall — is consistent with the reporting, with the government's own mapping, and with the hydrological literature (Part 4.1). It remains, strictly, a **plausible and well-supported hypothesis** rather than a formal attribution: a conclusive claim would require a hydrological study comparing runoff coefficients for the upper catchment across the densification period. KIWANA's residents' materials already state the mechanism at street level: "the flooding is also due to beacon-to-beacon construction blocking water from percolating into the soil" (KIWANA, 2026c).

9.2 Traffic

The developers' own TIAs establish that key intersections serving the three wards **already fail** (LOS F) and will remain failing regardless of any individual project (Part 4.2). The physical and fiscal space for the standard remedy — road widening — is being consumed by the same densification, and would in any event be subject to induced demand (Duranton & Turner, 2011). The KIWANA survey records traffic congestion and parking as a top-tier complaint (46.5% of respondents), together with pavement obstruction by ride-hailing and boda-boda operators serving the new density (KIWANA, 2026c).

9.3 Water and power

The metropolitan water deficit (roughly 260,000–305,000 m³/day; Part 4.4) is being met, for new Kileleshwa developments, by private boreholes drawing on a "low to medium groundwater potential" aquifer with fluoride concentrations "higher than the maximum permissible WHO limits" (Kamau, 2024). The KIWANA survey records water shortages "even during the rainy season" (55.8%) and power outages "long enough for food and medication in refrigerators to spoil" (32.6%) (KIWANA, 2026c). The Property Matrix's response — "privately developed infrastructure ... encouraged upon approval" — formalises the substitution of private utilities for public trunk investment, with the equity and resilience problems that implies.

9.4 Daylight, green space and health

The Kileleshwa community survey rates walkability, access to green space, safety in public space and noise as "Very Poor," and tree cover as "Poor" and "rapidly depleting"; 100% of respondents consider current development "too dense and too fast"; and residents describe "cramming human beings into concrete cages" where "windows now open directly into other people's lives" (KIWANA, 2026a). These are, in the language of Article 42 and the WHO *Housing and Health Guidelines* (2018), cognisable environmental and housing-and-health harms. The daylight-deprivation pathway to vitamin D deficiency and circadian disruption is well established (Part 4.3).

9.5 Governance capture

In June 2026 the Ethics and Anti-Corruption Commission arrested **Patrick Analo Akivaga, the Nairobi City County Chief Officer for Urban Development and Planning**, after recovering approximately **KES 65.3 million in cash** (about KES 51.3 million and USD 113,000) at his residence and vehicle; the EACC stated that he was under investigation for "conflict of interest, abuse of office, bribery, and possession of unexplained assets," and alleged that he had received **more than KES 170 million** through irregular cash and mobile-money deposits between the 2019/20 and 2025/26 financial years (Citizen Digital, 2026b; Capital FM, 2026; *Daily Nation*, 2026d; *The Eastleigh Voice*, 2026c). This official is the same person who **swore Nairobi City County's replying affidavits in Dennis Pritt (where he is the 3rd Respondent) and in Rhapta Road**, defending the County's discretionary, case-by-case approvals practice and its reliance on the un-gazetted policy.

The Assembly proceedings of **16 June 2026** fill in the institutional picture. Following the arrest, Governor Sakaja **disbanded the entire Urban Planning Technical Committee (UPTC)** — the multi-agency advisory body through which every development application is routed — and "returned all the powers ... to the CEC Member for Built Environment and Urban Planning," appointing Mr Dominic Mutegi as Acting Chief Officer in place of Analo. Separately, the **Office of the Ombudsman (Commission on Administrative Justice)** had reported to the Director of Public Prosecutions that "a raft of officers had conspired to do an illegal approval of a building in **South C — the one which collapsed**," and forwarded names for prosecution; the DPP approved the prosecution of **more than 37 UPTC staff**. The Assembly's Majority Leader alleged on the floor that **one name — that of "the *prima facie* person in the approval of these buildings," the officer who "clicks a button to approve the plan" — had been dropped from the prosecution list**, while "very vulnerable secretaries" and a first-year architect who had merely been minuted as present were charged (Nairobi City County Assembly, 2026, *Hansard*, 16 June 2026). These are untested allegations in a live process and are recorded here only as they appear in the Official Report; the point for this paper is structural. When a building collapses in South C, the accountability question that Parliament asks is *who approved it* — and the answer runs through the same discretionary approval machinery, operating without a gazetted plan, that produced the towers in the three wards.

The arrest and the collapse do not prove that any particular approval analysed in this paper was corrupt, and the criminal process must run its course. But together they substantiate the working draft's contention that the development-control vacuum is not merely a bureaucratic backlog. A regime in which approvals are issued outside any gazetted plan, "on a case-by-case basis" by a technical committee, is a regime with a very large discretionary surface — its Chief Officer has been arrested with tens of millions in unexplained cash, its technical committee has been disbanded, and dozens of its staff face prosecution over a fatal collapse. The absence of a plan is not neutral. It is the **precondition** for both rent extraction and unaccountable risk.

10. Recommendations

10.1 For residents' associations and their counsel: litigate the science

1. **Plead and prove a substantive Article 42 case, not a procedural one.** Lead with quantified environmental evidence — an independent cumulative traffic study for the whole corridor, a

catchment runoff/infiltration analysis, a daylight/overshadowing model to a recognised standard (e.g., BRE), a sewer and water capacity analysis obtained from NCWSC by Access to Information Act request, and an air-quality assessment. Frame the relief as protection of the right, under Article 70 and the Environment and Land Court Act, not as judicial review of a licence.

2. **Sue on Regulation 7(2)(b)(iii)–(iv) directly**, joining NEMA, and put in issue whether NEMA verified infrastructure availability and plan-conformity before licensing. Use the borehole-as-sole-water-source admissions and the "no gazetted plan" findings from *Rhapta Road/Sangahani* as the evidential spine.
3. **Attack the legality of the Property Matrix on two independent grounds**: (a) procedurally, that it usurps the s. 46 LPDP function without the s. 40 public-participation process, relying on *Rhapta Road* [69]–[71] and the County Assembly Sectoral Committee's own findings (Nairobi City County Assembly, 2025); and (b) substantively, that it fails **section 48 and the Second Schedule on its face** — demand production of the survey report, the GIS-based suitability and sieve maps, the state-of-environment report and the infrastructure gap analysis that section 48 makes mandatory content of any LPDP, and plead that, absent them, the Matrix cannot be an LPDP whatever the County Assembly resolves (Part 7.7). Ground (b) does not require the court to weigh contested planning science; it requires only that the instrument be read against the statute.
4. **Move for a court-appointed assessor or expert** under the Environment and Land Court's powers, so that the conflict between the developer's EIA consultant and the residents' expert is resolved by an independent technical opinion rather than by a presumption in favour of the licence.
5. **Consolidate**. The associations are litigating the same governance failure in a dozen separate suits with inconsistent outcomes. A single consolidated, well-resourced test case — with the best available science and, potentially, UN-Habitat and professional bodies (AAK, KIP, LSK) as *amici* — would carry more weight than the current fragmented docket.
6. **Pursue the s. 129 EMCA route in parallel**, but plead the project-report/study-report distinction carefully so that *Lavington Five* is distinguished, and press the Tribunal to exercise its statutory power to take expert evidence and conduct site inspections.
7. **On the UN dimension**, do not sue the UN (immunity forecloses it). Instead (a) **petition the UN Country Team, UNON, the relocating agencies and UN-Habitat to adopt a published commitment to place staff only in sustainable developments**, attaching an objective checklist aligned to the LPDP parameters (Part 2.3); (b) make submissions to the relevant UN sustainability and grievance mechanisms where a UN fund or programme is a project funder or implementing partner; (c) petition Parliament and the Senate to condition Kenya's host undertakings on trunk-infrastructure investment in the affected sub-counties; and (d) engage UN-Habitat as a technical partner (and possible *amicus*) in the preparation of the court-ordered LPDPs.

10.2 For the judiciary

1. **Issue Practice Directions for the Environment and Land Court on expert evidence in development-control disputes**: mandatory disclosure of the EIA consultant's instructions and fee arrangement; a duty of the expert to the court; provision for a single joint expert or a court assessor; and a requirement that the court make explicit findings on the disputed technical questions rather than defer to the licence.
2. **Reaffirm the statutory precautionary principle**. Where an Article 42 petition raises a credible, evidenced risk (not mere apprehension), the burden should shift to the proponent to demonstrate that the project is environmentally benign, and the "EIA licence obtained" cannot, by itself, discharge that burden — consistent with EMCA s. 58(9) and *Odando*.
3. **Calibrate deference to actual regulatory performance**. Deference to NEMA is appropriate where NEMA has demonstrably applied Regulation 7(2); it is not a reason to decline a constitutional merits enquiry where the record shows the regulator applied only "the correct procedures."
4. **Use the structural-interdict supervisory jurisdiction to specify substance**, not only to demand a gazetted instrument: for example, a moratorium on approvals above the 2021 interim ceilings in a ward until that ward's LPDP is gazetted and its infrastructure-concurrency schedule is filed.

10.3 For the County, the County Assembly and the national government

1. **Fund and reconstitute the County Physical and Land Use Planning Liaison Committee** immediately; a defunct statutory appeal body is a denial of the remedy the exhaustion doctrine assumes exists.
 2. **Prepare and gazette the s. 46 LPDPs** for Westlands–Parklands and Kilimani–Woodley–Kileleshwa through the full s. 40 public-participation and s. 41 approval process — not a "Development Control Policy" and "Property Matrix" transmitted to the Assembly as a resolution — and ensure each contains the **section 48 survey report and GIS-based sieve analysis** (state of the environment, area-wide transport level of service, and an infrastructure gap analysis), commissioned from independent professionals and published in full alongside the plan, not merely a zoning table asserting that infrastructure will follow.
 3. **Subject the draft Development Control Policy and the Property Matrix to a Strategic Environmental Assessment** under EMCA, with an infrastructure carrying-capacity study for each zone, before any adoption — the step the County Assembly Sectoral Committee already found was missing.
 4. **Legislate an infrastructure-concurrency test with teeth**: no development permission above a defined threshold without a binding, funded utility-upgrade agreement, with public-sector delivery as the default and private infrastructure permitted only against enforceable performance security.
 5. **National government**: treat the consolidation of the UN system in Nairobi as an occasion to co-invest in the trunk water, sewerage, stormwater and transport capacity of the receiving sub-counties, and record that commitment in any host or expansion instrument.
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11. Conclusion

The residents of Nairobi's high-value belt are not losing in court because their grievances are imagined. They are losing because the tribunals have chosen a frame in which the only questions that matter are whether the correct forms were filed and the correct stamps obtained. Within that frame, the science in the record — the failing intersections, the sealed catchment, the extinguished sunlight, the borehole that concedes the water network cannot cope, the un-gazetted plan that Regulation 7 requires and that does not exist — is not weighed and rejected; it is simply not reached. The precautionary principle, which the legislature wrote to protect the environment against the very uncertainty that complex urban systems generate, has been turned into a requirement that residents first prove the harm the principle exists to pre-empt. Deference to NEMA has become deference to a licence. And the exhaustion doctrine points to a Liaison Committee that has not met in over a year.

The structural interdicts in *Rhapta Road* and *Mbaazi* are real progress, and the recognition in those cases that systemic constitutional claims survive the exhaustion doctrine is important. But an order to "gazette a plan" is being met by a race to gazette a *different* rule that legitimises what has already been built — while the skyline continues to change and, on the evidence of March 2024 and March 2026, the city floods.

The remedy is not for judges to become planners. It is for development-control litigation to be conducted, and adjudicated, as what it is: a dispute about applied science, in which the court's task is to weigh the planning and environmental evidence — with the help of independent experts where necessary — and to decide, on that evidence, whether a proposed intensification of load is within the carrying capacity of the systems that will bear it. Article 42 promises the environment will be "protected ... through legislative and other measures." The gavel is one of those measures. It should be used to weigh the science, not to defer around it.

Appendix A – Consolidated table of authorities and instruments

Cases

- *Antony Mzee (suing on behalf of Jacaranda Avenue Residents' Association) v Multi Auto Parkhaus Ltd*, EP Petition No. E013 of 2025 (Environment and Land Court, Nairobi).
- *Claire Kubochi Anami & 2 others (suing as officials of Rhapta Road Residents Association) v County Executive Committee Member (CECM) Built Environment and Urban Planning, Nairobi City County & 20 others*, Civil Appeal No. E160 of 2025 (Court of Appeal at Nairobi; Musinga P, Joel Ngugi & Odunga JJA), judgment of 19 September 2025 (appeal from ELC EP Case No. E030 of 2024, Angote J, 23 January 2025).
- *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties)* [2022] eKLR.
- *Dennis Pritt Residents Association & 4 others v Nairobi City County Government & 6 others* (Environment & Land Petition No. E037 of 2024) [2025] KEELC 948 (KLR) (AA Omollo J, 27 February 2025) (Ruling).
- *Dennis Pritt Residents Association & 4 others v Nairobi City County Government & 6 others* (Petition No. E037 of 2024) [2026] KEELC 2427 (KLR) (OA Angote J, 30 April 2026) (Ruling).
- *Georges v United Nations*, 84 F. Supp. 3d 246 (S.D.N.Y. 2015), aff'd 834 F.3d 88 (2d Cir. 2016).
- *Maina (suing as the Chairman of Lavington Five Roads Association) v National Environment Management Authority & another* (Tribunal Appeal No. 36 of 2022) [2023] KENET 1348 (KLR) (21 November 2023) (Judgment).
- *Mbaazi Avenue Residents Association & another v Metricon Home Nairobi Company Ltd & 2 others* (Civil Appeal No. E1010 of 2024) [2025] KECA 1593 (KLR) (Musinga P, Nyamweya & Odunga JJA, 3 October 2025) (Judgment).
- *Millennium Gardens Management Ltd v Metricon Home Nairobi Company Ltd; Nairobi City County Government & 2 others (Interested Parties)* (Environment & Land Petition No. E121 of 2023) [2024] KEELC 6040 (KLR) (OA Angote J, 19 September 2024) (Judgment).
- *Mui Coal Basin Local Community & 15 others v Permanent Secretary, Ministry of Energy & 17 others* [2015] eKLR.
- *Mwingi Court Residents Associations v Barasa t/a Gabasa (K) Enterprises & 3 others* (Environment and Land Petition No. E016 of 2024) [2025] KEELC 6766 (KLR) (AA Omollo J, 2 October 2025) (Judgment).
- *Ndirangu wa Maina (suing on his own behalf and as Chairman of Lavington Five Roads Association) v Director-General, Nairobi Metropolitan Services & 2 others*, NAI Civil Appeal No. E568 of 2023 (consolidated) (Court of Appeal at Nairobi; Nyamweya, Ali-Aroni & Gachoka JJA) (appeal from ELC Appeal No. E100 of 2022, Omenge J, 26 January 2023).
- *Nicholas v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR).
- *Northern Block Residents Ltd & another v Mediview Ltd & 5 others* (Environment and Planning Petition No. E045 of 2024) [2025] KEELC 7817 (KLR) (AA Omollo J, 13 November 2025) (Ruling).
- *Odando & another v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)* (Constitutional Petition 43 of 2019) [2021] KEELC (as cited in *Mbaazi*).
- *Sangahani & 2 others (for and on behalf of Parklands Residents Association) v Nairobi City County Government & 5 others; 108 (Interested Party)* (Petition No. E012 of 2025) [2025] KEELC 6985 (KLR) (Angote PJ, Omollo & Mbogo JJ, 14 October 2025) (Judgment).
- *Vellore Citizens Welfare Forum v Union of India* (1996) 5 SCC 647.
- *Victor Odhiambo v Nairobi Physical Liaison Committee & 2 others*, ELC Constitutional Petition No. E021 of 2025.

Legislation and subsidiary legislation (Kenya)

- Constitution of Kenya, 2010, arts. 10, 28, 42, 60, 66, 69, 70, 185.

- County Governments Act, No. 17 of 2012, ss. 87, 102–104, 108, 111.
- Environmental Management and Co-ordination Act, No. 8 of 1999 (Cap. 387), ss. 2, 7, 58, 58(9), 59, 60, 125, 129.
- Environmental (Impact Assessment and Audit) Regulations, 2003 (Legal Notice No. 101 of 2003), regs. 4, 7, 8, 9, 17, 18, 21, 22, 46, as amended by Legal Notice No. 133 of 2007 and Legal Notice No. 32 of 2019; and Legal Notice No. 31 of 2019 (risk-based categorisation).
- Physical and Land Use Planning Act, No. 13 of 2019 (Cap. 303), ss. 5, 14–16, 17, 20, 36–51 (esp. s. 48 — contents of a Local Physical and Land Use Development Plan: survey report, GIS-based mapping, sieve analysis of gradient, environment and infrastructure), 56–63, 76–83, and the **Second Schedule** [s. 48] (Part A, paras 5–7: spatial, demographic, economic, housing/infrastructure and transport analysis, sieve maps; Part B, para 8: survey report contents, including state of the environment, transport level of service, and infrastructure gap analysis; Part C, para 15: flood-risk mitigation for renewal/redevelopment plans).
- Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations.
- Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021.
- Physical and Land Use Planning (Buildings) Regulations, 2021.
- Physical and Land Use Planning (Development Control Around Strategic Installations) Regulations, 2021.
- Urban Areas and Cities Act, No. 13 of 2011, ss. 36–37.
- Access to Information Act, No. 31 of 2016.

International instruments

- Convention on the Privileges and Immunities of the United Nations (1946), art. II.
- Rio Declaration on Environment and Development (1992), Principles 10 and 15.
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