

**APPROVAL AND LICENSING OF BUILDINGS IN KENYA: Challenges  
and Corrective Measures Taken in Nairobi County.**

By

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Prepared under the supervision of

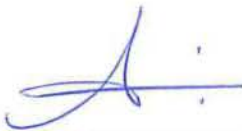
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**Declaration**

I, WENDY KANORIO MUCHAI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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## **ABSTRACT**

Approval and licensing of buildings is an important aspect of building regulations, by virtue of which developers, project planners and licensing authorities can be held liable for substandard buildings, haphazard developments and unauthorised structures that are leading to the loss of lives of many people and massive destruction of property. Regardless of the robust laws and policies that have been enacted to regulate urban planning and evaluate development projects, Kenyan urban areas, and more specifically Nairobi, still faces a myriad of issues concerning poor urban planning and frequent collapsing of buildings.

This study aims to look into the current legal framework governing approvals and licensing of buildings in Kenya, and to examine the effectiveness or lack thereof of the enforcement mechanisms undertaken to effectuate such approvals and licensing of developments, as well as to investigate the factors that contribute to the challenges in implementing the licensing and approval of buildings as established by law.

## ABBREVIATIONS

COK	-	Constitution of Kenya
CEC	-	County Environment Committee
CGA	-	County Governments Act
EIA	-	Environmental Impact Assessment
ELC	-	Environment and Land Court
ELCA	-	Environment and Land Court Act
EMCA	-	Environmental Management and Co-ordination Act
ERA	-	Engineers Registration Act
NEMA	-	National Environment Management Authority
NECC	-	National Environment Complaints Committee
NEAPC	-	National Environment Action Plan Committee
PPA	-	Physical Planning Act
UACA	-	Urban Areas and Cities Act

## LIST OF CASES

*Republic v Commission on Administrative Justice Ex-Parte Justus Mwendwa Kangethe [2017] Eklr.*

*Wainaina Kenyanjui & 2 others v Andrew Ngángá [2013] Eklr.*

*Wilfred Masinde Wanyonyi v Director of Public Prosecutions & another [2015] Eklr.*

## LIST LEGAL INSTRUMENTS

*Architects and Quantity Surveyors Act*

*Building Code: The Local Government (Adoptive By-Laws) (Building) Order 1968*

*Constitution of Kenya (2010)*

*County Governments Act No. 17 Of 2012*

*Environmental Management and Co-ordination Act No. 8 of 1999*

*Environment and Land Court Act No. 19 of 2011*

*Physical Planning Act 1996 (Cap 286)*

*Sessional Paper no. 3 of 2009 on National Land Policy*

*Sessional paper no. 3 of 2004 on National Housing Policy*

*Sessional Paper No. 6 of 1999 on Environment and development*

*Urban Areas and Cities Act No. 13 Of 2011*

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

The various statutes requiring the licensing of building contractors and developers by states and municipalities have regard to public interest. These laws have proven to be absolutely necessary for the protection of the general public against various abuses.<sup>1</sup>

The Physical Planning Act, 1996 (Cap 286) of the Laws of Kenya, together with other planning laws and regulations were enacted to deal with approvals and licensing of developments in Kenya, yet there are so many cases on buildings particularly those meant for human settlement in the urban areas which lack approval and the required authorisation to be put up.<sup>2</sup>

Poor development control has been one of the planning system's central weaknesses, where much development proceeds without oversight and in contravention of prepared physical plans.

Contrary to section 30 of the Physical Planning Act (Cap 286), requirements to adhere to permitting processes and to ensure change of user and land subdivision proposals follow approved plans are often ignored, with unapproved buildings being erected haphazardly at high densities in locations with limited public access and services. Building codes have often evaded and residential structures are collapsing, killing residents.<sup>3</sup>

After independence, many land Laws were enacted resulting in a complex land management and administration system.<sup>4</sup> To solve this problem of many laws, the government embarked on the formulation of a National Land Policy and came up with sessional paper number 3 of 2009; that provided an overall framework and defined the key measures required to address the critical issues of land administration, access to land, land use planning and the

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<sup>1</sup> 'Edwards C.D, Legal Requirements that Building Contractors be licensed' (1947)  
<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2291&context=lcp>> accessed Jan 19, 2018.

<sup>2</sup> <http://kenyalaw.org/ki/fileadmin/CommissionReports/Report-of-the-Commission-of-Inquiry-to-Examine-the-Existing-Building-Laws-By-Laws-and-Regulations.pdf> accessed 22 August 2017.

<sup>3</sup> <http://kenyalaw.org/ki/fileadmin/CommissionReports/Report-of-the-Commission-of-Inquiry-to-Examine-the-Existing-Building-Laws-By-Laws-and-Regulations.pdf> accessed 22 August 2017.

unplanned proliferation of informal urban settlements among other issues.<sup>5</sup> The paper provided that national, regional, urban, per-urban, spontaneous settlements planning principles and guidelines would be formulated and implemented in a transparent, sustainable, comprehensive, participatory and accountable manner.<sup>6</sup>

Before the promulgation of the Constitution of Kenya 2010, the Department of Physical Planning in the Ministry of Lands was the institution that was charged with the responsibility of Physical Development Planning, including the subject of approvals and licensing of upcoming buildings.<sup>7</sup> Other multiple institutions that were involved at various levels in the country included: the local authorities under the Ministry of Local Government, Regional Development bodies under the Ministry of Regional Development and the Ministry of Nairobi Metropolitan Development and the Ministry of Northern Kenya.<sup>8</sup> After the advent of devolution, the approval mandate has now gone to the county governments.<sup>9</sup>

When the Physical Planning Act (Cap 286) was enacted, it set out to deal with development control issues, including development approvals and procedures for seeking such approvals. According to s. 29 (c) and (d) of the Act, it is the legal mandate of the local authorities' subject to the provisions of this Act, to consider and approve all development applications and grant all development permissions and in addition, to ensure the proper execution and implementation of approved physical development plans.<sup>10</sup>

To obtain a development permission, one is to make an application in the form prescribed in the Fourth Schedule of the Act, to the clerk of the local authority responsible for the area in which the land concerned is situated. This application is to be accompanied by plans and particulars as are necessary to indicate the purposes of the development.<sup>11</sup>

The local authority to which a development application has been made is to within thirty days after the receipt of the application, refer it to the Director of physical planning for his

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<sup>5</sup>sessional paper no. 3 of 2009 on National Land Policy.

<sup>6</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015, accessed 21 Jan. 17.

<sup>7</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' (2015)

<sup>8</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015, accessed 21 Jan. 17.

<sup>9</sup><https://www.standardmedia.co.ke/lifestyle/article/2000083689/getting-authorities-stamp-of-approval-gives-you-peace-of-mind> accessed on 31 Jan. 17.

comments. In consideration of the application, the local authority may also consult any other relevant officer as listed in the Act.<sup>12</sup>

The local authority is to notify the applicant in writing of its decision within thirty days and is to specify the conditions, if any, attached to the development permission granted, or in the case of refusal to grant the permission, the grounds for refusal. Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13.<sup>13</sup>

Subject to the development application, where a local authority is of the opinion that proposals of any development activity will have injurious impact on the environment, the applicant is required to submit together with the application, an environmental impact assessment report.<sup>14</sup>

The Registrar of documents is entitled refuse to register a document relating to the development of land unless a development permission has been granted and the appropriate conditions relating to such development permission have been complied with.<sup>15</sup>

## 1.2 Statement of the problem

Despite the existence of Physical Planning Laws in Kenya and bodies charged with the responsibility of development control, there has been evidence of unapproved buildings in most urban areas in Kenya,<sup>16</sup> uncontrolled physical planning, lack of adherence to approved plans, mushrooming of slums and poor liquid and solid waste disposal systems which have led to an environmental crisis.<sup>17</sup> The collapsing buildings have resulted to unwarranted deaths of many, causing permanent damage to the injured workers and people whose lives revolve around the construction environment.<sup>18</sup> These issues would have been prevented had building inspections and necessary approvals been granted during and after construction as part of

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<sup>12</sup> Section 32, Physical Planning Act ((Act no. 6 of 1996).

<sup>13</sup> Section 33, Physical Planning Act ((Act no. 6 of 1996).

<sup>14</sup> Section 36, Physical Planning Act (1996).

<sup>15</sup> Section 37, Physical Planning Act (1996).

<sup>16</sup> <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-of-Inquiry-to-Examine-the-Existing-Building-Laws-By-Laws-and-Regulations.pdf> accessed 22 August 2017.

<sup>17</sup> <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-of-Inquiry-to-Examine-the-Existing-Building-Laws-By-Laws-and-Regulations.pdf> accessed 22 August 2017.

<sup>18</sup> Milgo. K.CEO Kenya Accreditation Service, Collapsing buildings in Kenya and importance of Building

routine maintenance and as is required by the Physical Planning Act cap 286 Laws of Kenya.<sup>19</sup>

In a report released by a commission of inquiry tasked with examining the existing building laws, by-laws and regulations, it was stated that the main issues revolving around urban physical planning in Kenya are that the laws governing building developments are scattered in several statutes and confer control responsibilities to various entities without any form of coordination for effective policing and enforcement.<sup>20</sup> Also, that the absence of a comprehensive and integrated legal framework, is what has given rise to loopholes, which have been exploited by property developers, and resulted to opportunities for both conflict of interests and irregularities among the enforcement authorities.<sup>21</sup>

Therefore, this paper seeks to look into the enforcement of the laws that constitute development control, and especially those stipulating the procedure for approvals and licensing of upcoming buildings, while finding solutions to the problems caused by uncontrolled and unlicensed development projects.

### **1.3 Justification for the Study**

As a result of this existing crisis pertinent to upcoming buildings and building projects in urban areas and especially in Nairobi, this study seeks to advocate for the enhancement of adherence to the provisions in law revolving on the subject of approvals and licensing. While it is evident that sustainable and equitable growth in urban areas requires inclusive, participatory and appropriate approaches to planning, it is with no doubt that effective urban land control and management to solve the current land use problems such as formation of slums, incompatible use, unapproved or sub-standard developments for the purpose of achieving sustainable city development is absolutely necessary. Therefore, this study will not only address the enforcement mechanisms and enforcement challenges of the regulations provided for by the planning laws in Kenya, but also hopes to contribute towards the concepts of Environmental impact assessment and Urban development control.

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<sup>19</sup> Section 30, Physical Planning Act (1996).

<sup>20</sup> <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-of-Inquiry-to-Examine-the-Existing-Building-Laws-Bv-Laws-and-Regulations.pdf> accessed 22 August 2017.

In the case of *Wanaina Kenyanjui & 2 others v Andrew Ng'ang'a*,<sup>22</sup> the court was of the opinion “*That the law always regards the effects of a development on the private rights of others as a material consideration in the granting of development permission, and that is why there are elaborate provisions on the consultation and participation by those who may be affected by such a development.*” In this case, the court ruled in favour of the Plaintiff’s application which was premised on grounds that the development of a student hostel on the Defendant’s land was unauthorized and illegal, because the buildings housing the student hostel were not vetted or approved by the relevant authority.<sup>23</sup>

This case is an illustration that courts do not tolerate unapproved structures and all persons seeking to put up buildings ought to adhere to the provisions of the law.

#### **1.4 Hypothesis**

The study proceeds on the following hypothesis:

- i. That the laws addressing approvals and licensing of buildings are compulsory for all persons conducting development.
- ii. That enforcement mechanisms which ensure compliance with approval and licensing requirement laws have not been followed.
- iii. That the legal framework for urban planning and development seeks to promote safety of persons as well as uphold every person’s right to a clean and healthy environment as provided for in Article 42 of the Constitution of Kenya.
- iv. That local authorities charged with the responsibility of giving approvals and issuing licences for development have underperformed as evidenced by the numerous collapsing and unapproved buildings in the country.

#### **1.5 Objectives of the study**

The aim of this research is to emphasize strict adherence to the legal framework and proper procedure in law, guiding approval and licensing of buildings for all development projects carried out in Nairobi.

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<sup>22</sup>*Wanaina Kenyanjui & 2 others v Andrew Ng'ang'a* (2013) Eklr.

### Specific Objectives

- i. To critically analyse the current legal framework governing approvals and development permissions in Kenya, and to examine the effectiveness or lack thereof of the enforcement mechanisms undertaken to effectuate approvals and licensing of developments.
- ii. To analyse the importance of approvals, development control and impact assessment in urban planning, while investigating the factors contributing to the challenge in implementing the rules as set out in law.

### **1.6 Research Questions**

The study seeks to address the following questions:

- i. How can the approval and licensing requirements pertinent to urban planning be effectively enforced to guide and control urban development in Kenya?
- ii. What have been the shortcomings of the relevant officials in terms of overseeing development control and approvals over the years?
- iii. What measures have been taken so far in cognisance of the unapproved developments in the country?

### **1.7 Literature Review**

This section seeks to present the various existing sources of reference and literature, relevant to the topic of study. The review looks at the areas of study undertaken on approvals and licensing of developments, development control and impact assessment and some aspects of sustainable urban development. The information is derived from statutes, journal articles, textbooks, newspaper reports, government reports, academic research papers and other reliable internet sources.

One of the main requirements for adequate enforcement process, is to confirm every single construction project has a building permit.<sup>24</sup> There must be adequate quantity of skilled staff to visit the sites proposed for construction before granting a building permit, and most

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<sup>24</sup>Baris D.P, 'Importance of Appropriate Building Codes and Regulations in Improving Low-Income Settlements

importantly, the construction site must be visited at various stages when construction is in progress, to ensure conformity with the approved design.<sup>25</sup>

The Physical Planning Act outlines approvals as seeking a development permission, which is permission granted under section 33 of the Act, by a local authority to an applicant to develop land.<sup>26</sup> Section 30 of the Physical Planning Act provides that no person is to carry out developments without development permission granted by the local authority; It is an offence punishable by fine of a 100,000/- or imprisonment of up to 5 years to carry out development without permission.<sup>27</sup>

Section 12 of the Nairobi City County Regularization Act provides that failure to submit for regularization of illegal and unapproved structures will lead to enforcement action including demolition, disconnection of water and other services and eviction of occupants of such structure.<sup>28</sup>

According to Laura Schatz, the law plays an integral role in regulation, whether through legislation that frames the urban planning process or through appeal bodies such as courts or tribunals, where implementation of that framework is reviewed. Also, that the law provides the boundaries within which public authorities must act.<sup>29</sup> But most importantly, the legal framework must in itself be effective and coordinated so as to provide an appropriate legal foundation for proper urban planning and governance. Mc Auslan adds that planning is only as effective as the administrative system supporting it as well as the political philosophy, willingness and commitment of the state in which it operates.<sup>30</sup>

Charles M. Haar argues that public interest is predominant in urban planning and development, and that land use laws exist to promote the common good rather than the narrower aim of protecting private property.<sup>31</sup> Professor J. M. Kiamba argues that effective integrated development is premised on the presence and operationalization of an effective

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<sup>25</sup> Baris D.P, 'Importance of Appropriate Building Codes and Regulations in Improving Low-Income Settlements Conditions in African Region'3 *Journal of the Network of African Countries on Local Building Materials and Technologies HABITAT* (1995) 42.

<sup>26</sup> Section 2, Physical Planning Act (1996).

<sup>27</sup> Section 30, Physical Planning Act (1996).

<sup>28</sup> Section 12, Regularization of Developments (Act No.3 of 2015).

<sup>29</sup> Laura Schatz, 'The balance of planning ideologies in Existing Use Rights cases at the New South Wales Land and Environment Court.' State of Australian cities conference (2015) <<http://soacconference.com.au/wp-content/uploads/2016/02/Schatz..pdf>> accessed 22 Jan. 17.

<sup>30</sup> McAuslan P, 'Urban Land and Shelter for the Poor' *London, Earthscan* (1985) 66.

legal framework.<sup>32</sup> More importantly, B.J. Peers is of the view that laws must match the changing needs of a society.<sup>33</sup> And in this regard, there is a need for planning laws to be reviewed regularly to match the ever-changing needs of the society.<sup>34</sup>

## 1.8 Theoretical Framework

This study seeks to rely more on the Normative Theory of planning, the Public Interest Theory and the theory on social order.

The Normative Theory of planning is basically interpreted as, how planning ought to be carried out and deals more with what planning is for and why to plan,<sup>35</sup>. According to Kevin Lynch, “Decisions about urban policy, or the allocation of resources, or where to move, or how to build something, must use norms about good and bad; values are an inevitable ingredient of decision and without some sense of the better, any action is perverse; When values lie unexamined, they are dangerous.”<sup>36</sup>

The Public Interest Theory on the other hand, satisfies the explanation that regulation seeks the protection and benefit of the public at large.<sup>37</sup> In consideration of why approvals and licensing of buildings need to be done, it may be argued that it is for the public good or in the public interest.<sup>38</sup> The various statutes requiring the licensing of building contractors by states and municipalities during building stages purport to express the public interest; these laws are said to be necessary in order to protect the general public against various abuses.<sup>39</sup> According to Friedman, the question is whether planning should work for the maintenance of established power relations, for a gradual system change or for a radical transformation of society.<sup>40</sup>

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<sup>32</sup>Professor J. M. Kiamba, “Land Use Policy and Planning for Security and Sustainable Development” a paper presented at stakeholder’s open forum on ‘Land Reform for Sustainable Peace and Development’ held at the Grand Regency Hotel, Nairobi on 12.3.2008, page 11.

<sup>33</sup>B.J. Peers, ‘Property Rights vs. Development Control’ *Vol 52, Town Planning Review* 45 (1981); and ‘Instruments for Land Policy’ *Vol 3, Urban Law and Policy* (1980) 115.

<sup>34</sup>John Mativo, ‘The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance’ LLM Thesis, University of Nairobi November, 2015.

<sup>35</sup><http://homes.create.aau.dk/steino/phd/steino-thesis04.pdf> accessed 22 Jan. 17.

<sup>36</sup><http://homes.create.aau.dk/steino/phd/steino-thesis04.pdf> accessed 22 Jan. 17.

<sup>37</sup>Ndumia S, ‘Influence of Regulatory Framework on Performance of Building Construction Projects in Nairobi County, Kenya’ Project Planning and Management Thesis, University of Nairobi, 2015, 18

<sup>38</sup>Hertog J, ‘Review of Economic Theories of Regulation’, Utrecht School of Economics Utrecht University December 2010, 5. <[http:// www.uu.nl/rebo/economie/discussionpapers](http://www.uu.nl/rebo/economie/discussionpapers)> accessed Jan 31.18.

<sup>39</sup>Corwin D, ‘Legal Requirements That Building Contractors Be Licensed’ <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2291&context=lcp>> accessed on 1 February

The other theory on social order speaks to the way in which a society is organized along with certain rules and standards that are set forth in order to maintain that society.<sup>41</sup> It requires coordination and cooperation. For social order to arise and be maintained, two separate problems must be overcome, firstly, People must be able to coordinate their actions and secondly, they must cooperate to attain common goals.<sup>42</sup> Edward Banfield in 1958, describes a village with inadequate schools, bad medical facilities, and poor roads- conditions that harm everyone- he says the residents do not cooperate politically to pressure the various government agencies that conceivably, might remedy these problems.<sup>43</sup> He describes this inability to cooperate as an utter lack of public- spiritedness giving rise to the described social disorder.<sup>44</sup>

## **1.9 Assumptions**

The assumptions relied on in conducting this study are as follows:

- i. That there is an existing legal framework dealing with the subject of approvals and licensing of buildings.
- ii. That the subject of approvals and licensing of buildings in Kenya is one of a critical nature and must be addressed.
- iii. That there is sufficient material and facts to rely upon when conducting the study.

## **1.10 Research Methodology**

This research intends to rely more on secondary sources including but not limited to scholarly online sources, journals and articles with detailed information on urban planning and development and particularly, on the subject of approvals and licensing of buildings, as opposed to doing field work, conducting interviews and issuing questionnaires. This is because the study is to be conducted in a shorter period of time, and does not intend to rely on personal opinions of people on the ground, but of scholars who have written and published their views on the same. In addition, conducting field work would mean use of extra resources and means to obtain information, yet this study does not seek to incur additional

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<sup>41</sup><https://www.reference.com/world-view/social-order-maintained-3cc7c148b7bbcf04?qo=contentSimilarQuestions> accessed Jan. 7 2017.

<sup>42</sup><http://www.sup.org/socialorder/Excerpts/Part%20I.pdf> accessed Jan. 7 2017.

costs. Therefore, conducting extensive desktop research will be the most suitable method to use in conducting this study.

### **1.11 Limitations of the Study**

- i. The study is relying on secondary sources as the main method of research which will limit the information gathered to that of authors who have specialized in the area as opposed to the opinion of people in the field.
- ii. Although the information available on the Internet is free of cost, it will require lot of effort, patience, extreme care and skill to dig out useful information; there is need for suitable modification for every piece of information obtained in order to adjust data as per the need of the research work undertaken.

### **1.12 Chapter Breakdown**

This study is divided into the following chapters:

#### **i. Chapter one; Background to the study**

This chapter serves as an introduction to the research and lays a foundation to the topic of study. It includes the background of the research, statement of the problem, the hypothesis, research questions, literature review, theoretical framework and the study objectives to enable a proper analysis, scrutiny and appreciation of the purpose; why the research is being undertaken.

#### **ii. Chapter two; Analysis of the Theoretical framework**

This chapter will comprehensively analyse the theoretical concepts relied on to explain urban planning in relation to approvals and licensing of buildings. The chapter seeks to establish a link between the concepts relied on with the enforcement and application of the Legal Framework in Kenya.

#### **iii. Chapter three; Application and enforcement of the laws relating to approvals and licensing of Buildings**

In this chapter, the study will dwell more on the subject of approvals and permissions, the whole development process as provided for in the various legislations enacted to deal with buildings. The chapter will also provide a critical analysis of the achievements and shortcomings of the subject of approvals and licensing of buildings in Kenya.

This chapter seeks to explain the aspects of impact assessment, in relation to approval and licensing of buildings as well as highlighting the necessity of such assessments in any development undertakings.

**v. Chapter five; Summary of findings, Conclusions and Recommendations**

This chapter will give a summary of the findings of the study, making brief conclusions, recommendations and suggestions for reforms in order to realize effective urban planning in Kenya, that is characterized by licenced buildings.

## CHAPTER TWO

### 2.0 Introduction

This chapter analyses the theories relied on to explain urban planning in relation to approvals and licensing of buildings in urban areas and their relevance to the Kenyan situation. The chapter further seeks to establish a link between the theories relied on and the enforcement and application of the urban planning laws in Kenya.

As a result of the uncontrolled physical planning, unapproved project plans, mushrooming of slums, poor liquid and solid waste disposal systems and the collapsing of buildings that have resulted to unwarranted deaths of many in Nairobi, the theories relied upon in this chapter are necessary to give proper guidance on the appropriate ways in which planning must be carried out, the benefits of good urban planning and also the importance of good urban governance.

### 2.1 The Normative Theory of Planning

The theory of Normative planning must always be placed at the very core of planning, because it deals with the question of why to plan.<sup>45</sup> From an economic stand point, individual citizens and organizations of a particular country to some extent bear the economic expense of public planning.<sup>46</sup> For instance, the improvement of a particular neighborhood is very dependent on the contribution of all landowners, through the improvement of their individual properties. However, if not all buildings are improved as agreed upon, then the effort of improving one building becomes one that is pointless, and thus, all other individual landowners become reluctant to undertake improvement. The outcome is further decline, which then automatically leads to a decreased rental value for all.<sup>47</sup> This has been the case for Urban dwellings in Kenya, where slums and substandard buildings are coming up rampantly yet the landowners and building occupants seem undisturbed.

From this point of view, public planning therefore, must have a purpose, which cannot be achieved unless it is done in an efficient manner. Planning is to be at all costs, an instrument for the realization of public policy goals, and must go hand in hand with public intervention.

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<sup>45</sup><http://homes.create.aau.dk/steino/phd/steino-thesis04.pdf> accessed 27 July, 17.

Such intervention, is usually inform of among other ways: taxation or legislation by the government so as to prevent the private market from exploiting others.<sup>48</sup>

Within the normative theory of Planning, is the communicative planning theory by John Forester, who is of the view that communication is the most important element of planning practice and that it includes Interaction (with stakeholders or interest groups), communicating ideas, forming arguments and finally reaching consensus on a course of action to take.<sup>49</sup> with this theory, the planner does not decide what is right or wrong in the planning process, there has to be the interaction with other parties to the planning process so that any misleading power tactics can be counteracted.<sup>50</sup> For communicative planning theorists, the aim of planning is a just process, and that if the process is just, the outcome will be as well.<sup>51</sup>

While writers in this school of thought do not dispute on the operation of power and its involvement in planning, the belief still holds that if communication processes are correctly managed, then it is possible for voluntary but binding agreements to be reached.<sup>52</sup>

However, the strongest critique to the normative theory of planning has been that it is more idealistic than realistic, that normative theories are based on assumptions regarding civil society, identity, and the possibilities of 'bottom up' development, which are unlikely to hold in the context of large parts of Africa.<sup>53</sup> The assumptions here being that organs of civil society are sufficiently organized to be able to: commit themselves to an organized process of planning which is acceptable to all; that they engage in a process of consensus-seeking which is democratic and equitable; that they negotiate any processes or outcomes with formal structures of government; that they mobilize resources and capacities to carry forward decisions; and finally that they maintain involvement with processes of implementation.<sup>54</sup> But the highly dysfunctional nature of civil society in many countries and especially in the Sub-Saharan Africa makes it extremely difficult for such normative processes to occur.<sup>55</sup>

The relevance of the Normative theory of planning to this study is to advocate for Good urban governance in urban physical planning which co-relates to approvals and licensing

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<sup>48</sup><http://homes.create.aau.dk/steino/phd/steino-thesis04.pdf> accessed 27 July, 17.

<sup>49</sup> Stifftel B and Watson V, *Dialogues in Urban and Regional Planning*, Routledge, New York ,2005, 275.

<sup>50</sup> Sager, 'Logic of Critical Communicative Planning', (2006) Planning Theory.pdf, 5.

<sup>51</sup> Stifftel B and Watson V, *Dialogues in Urban and Regional Planning*, Routledge, New York ,2005, 277.

<sup>52</sup> Vanessa Watson, 'The Usefulness of Normative Planning Theories in The Context of Sub-Saharan Africa,' (2001) Vol 1(1) *SAGE Publications* 27-52.

<sup>53</sup> Vanessa Watson, 'The Usefulness of Normative Planning Theories in The Context of Sub-Saharan Africa,' 45.

processes being executed as they should be. The concept of good urban governance is said to be distinguished by public participation, unanimity, accountability, transparency, responsiveness, effectiveness, efficiency and equality.<sup>56</sup> Good urban governance is inevitably linked to the welfare of the citizenry as per the public interest theory also discussed in this chapter, and must enable all citizenry indiscriminately, to access the benefits of urban citizenship, affirming that no person can be denied access to the necessities of urban life, including adequate shelter, security of tenure, safe water, sanitation, a clean environment, health, public safety and mobility.<sup>57</sup>

This theory is also in line with, Article 69 of the Constitution of Kenya 2010, which provides for the states' obligation in promoting respect for the environment; including the state's role in establishing systems of environmental impact assessment and environmental audit for all development projects.<sup>58</sup>

## **2.2 The Public Interest Theory**

In line with formal definitions, public interest is described as the objective of authorized governments carrying out activities necessary for the welfare of the community.<sup>59</sup> That even though it is evident in most cases if not all, that governments' actions aim towards interest of the capital or the elite, it is strongly argued that decisions made by such governments must ideally reflect or aim towards attainment of the common good of all classes. Public interest then, becomes a way of balancing and weighing out competing interests of various existing groups.<sup>60</sup>

Forester J argued that planners act in consideration of the public interest by abiding to the rules of open, honest and transparent communication in their dealings with the public and the decision makers, so that this consensus outcome reflects the public interest.<sup>61</sup>

The only way that planners can define public interest is by acting in accordance with the preferred planning principles.<sup>62</sup> Since planning involves political choices about the

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<sup>56</sup> John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015.

<sup>57</sup> John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015.

<sup>58</sup> Article 69, Constitution of Kenya (2010).

<sup>59</sup> Grant J, 'Rethinking the Public Interest as a Concept' (2005) <<https://www.cip-icu.ca/Files/Awards/Plan-Canada/Rethinking-the-Public-Interest-as-a-Planning-Conce.aspx>> September 10, 2017.

<sup>60</sup> Grant J. 'Rethinking the Public Interest as a Concept' (2005).

disposition of land facilities and resources, the outcomes are not necessarily acceptable by all and consensus is not always possible.<sup>63</sup> However, this public interest theory still maintains that planning processes must remain credible and transparent while not serving any particular individual's long-term or short-term interests.<sup>64</sup>

Public interest is often differentiated with private or individual interests, under the assumption that what is good and favorable for society may not be favorable for a given individual and vice versa. Disputably, the utilitarian interpretation to public interest very much rests on the idea of individual happiness; reflecting that in aggregate terms, public interest is represented through a majority vote.<sup>65</sup> However, in the case of planning, public interest theory supports that the intended outcomes of land use planning must center on guiding and regulating land and property developments in order to serve society's best interests, that public interest is greater than the sum total of all the individual interests in society.<sup>66</sup>

The 'public interest' has for a long time been used to justify planning as an activity that restricts certain private property rights.<sup>67</sup> However, research emphasizes on how planning has been thoroughly undermined by making it an inherently political activity, informed by values and often conducted against various of competing interests and power asymmetries. This view has weakened the position of the public interest justification for planning.<sup>68</sup> According to Rawls and his theory of justice, 'the good' is to be 'produced' following the institutionalisation of the principles of justice through debate among people enjoying equality of opportunity.<sup>69</sup> Thus, the principles governing a just society are connected to a conception of fairness established by subjects capable of assuming an objective view. In essence therefore, Rawls is suggesting that it is possible for actors to detach themselves from prior

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<sup>62</sup> Grant J, 'Rethinking the Public Interest as a Concept' (2005).

<sup>63</sup> Grant J, 'Rethinking the Public Interest as a Concept' (2005).

<sup>64</sup> Grant J, 'Rethinking the Public Interest as a Concept' (2005).

<sup>65</sup> Lloyd G, 'Planning and the public interest in the modern world' Lecture at the Royal Society of Edinburgh (2006) <[http://rtpi.org.uk/media/579473/transcript\\_-\\_greg\\_lloyd\\_-\\_2006.pdf](http://rtpi.org.uk/media/579473/transcript_-_greg_lloyd_-_2006.pdf)> accessed 16 August 2017.

<sup>66</sup> Lloyd G, 'Planning and the public interest in the modern world' Lecture at the Royal Society of Edinburgh (2006) <[http://rtpi.org.uk/media/579473/transcript\\_-\\_greg\\_lloyd\\_-\\_2006.pdf](http://rtpi.org.uk/media/579473/transcript_-_greg_lloyd_-_2006.pdf)> accessed 16 August 2017.

<sup>67</sup> Lennon M, 'On the 'Subject' of Planning's Public Interest', Research Repository University College Dublin (2016) <http://hdl.handle.net/10197/7358> accessed 16 August 2017.

<sup>68</sup> Lennon M, 'On the 'Subject' of Planning's Public Interest', Research Repository University College Dublin (2016) <http://hdl.handle.net/10197/7358> accessed 16 August 2017.

conceptions of 'the good' in following a logic of rational self-interest to come up with a form of societal arrangement from which the concept of 'the good' can be produced.<sup>70</sup>

Whereas the principle is that planning decisions should take in to account the interests of the wider public, the reasonable next step is to ask how far the 'public' extends and whether planning decisions ought to take into account solely those living presently or the future generations to come.<sup>71</sup> Each of these questions points to a very different idea about who and what planning decisions should favour, but also gives a clue at the different ways in which collective interests might be accounted for.<sup>72</sup> Therefore, in trying to answer some of these questions, planning, is understood to be rooted in the idea that decisions to develop land and property should not detract from the quality of life experienced by a wider public. In turn, planning for the future is about the idea that all those individual decisions made should contribute to a quality of life that is better than that experienced today.<sup>73</sup> Hence the relevance of this theory is to actualize the concept of sustainable development, which as per the Brundtland Report of 1987, was defined as development which seeks to meet the needs of the present generation without ever compromising on the needs of the future generations.<sup>74</sup> That public interest seeks to meet the needs of the present and posterity.

Further, this theory allows for the enforcement of environmental rights for all persons as provided for in Article 70 of the Constitution of Kenya 2010 that; all persons indiscriminately, may seek redress in a court of law where their right to a clean and healthy environment has been or is likely to be infringed, threatened or violated and the court may thus give the following orders as indicated : (a) prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.<sup>75</sup>

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<sup>70</sup>Lennon M, 'On the 'Subject' of Planning's Public Interest', Research Repository University College Dublin (2016) <http://hdl.handle.net/10197/7358> accessed 16 August 2017.

<sup>71</sup>Maidment C, 'Planning in the Public Interest: Looking for the 'public interest' in English plan-making' PHD thesis in Town & Regional Planning University of University of Sheffield 2015.

<sup>72</sup>Maidment C, 'Planning in the Public Interest: Looking for the 'public interest' in English plan-making' PHD thesis in Town & Regional Planning University of University of Sheffield 2015.

<sup>73</sup>Maidment C, 'Planning in the Public Interest: Looking for the 'public interest' in English plan-making' PHD thesis in Town & Regional Planning University of University of Sheffield 2015.

<sup>74</sup> Report of the World Commission on Environment and Development: Our Common Future (1987) <[www.un-](http://www.un-)

If this theory having great regard for public interest was to be applied in the Kenyan context diligently, it is more likely that the current crisis and prevalent problems in urban development planning which include mushrooming of slums and unwarranted collapsing of buildings that undermine public safety contrary to what is guaranteed by Article 42 of the constitution of Kenya 2010, would be minimized.<sup>76</sup> That because all the laws addressing approvals and licensing of buildings are compulsory for all persons conducting development<sup>77</sup>, this theory would actively serve as a guide for proper urban development planning to planners and city developers because they uphold the principles of good urban governance, proper development control and sustainable development all for the welfare of the people.

If the public interest is ignored, there is little reason for planning to exist.<sup>78</sup> That without the recognition that interventions in land and property contribute to a collective quality of life those with the means would be able to build as they wished, introducing the architect to the builder without intermediary.<sup>79</sup>

### **2.3 Theory on Social Order**

The theory on social order speaks to the way in which a society is organized along with certain rules and standards that are set forth in order to maintain that society.<sup>80</sup> It requires coordination and cooperation; For social order to arise and be maintained, two separate problems must be overcome: People must be able to coordinate their actions and they must cooperate to attain common goals.<sup>81</sup> If people are to live together, they must not only be able to coordinate their activities but also to interact productively which means sustaining cooperation. Cooperation entails people working together for the same end. Societies vary in their levels of coordination and cooperation and, therefore, in their levels of social order.<sup>82</sup>

Edward Banfield in 1958, describes a village with inadequate schools, bad medical facilities, and poor roads- conditions that harm everyone- he says the residents do not cooperate

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<sup>76</sup> Article 42, Constitution of Kenya (2010).

<sup>77</sup> Section 30, Physical Planning Act (1996).

<sup>78</sup> Maidment C, 'Planning in the Public Interest: Looking for the 'public interest' in English plan-making' PHD thesis in Town & Regional Planning University of University of Sheffield 2015.

<sup>79</sup> Maidment C, 'Planning in the Public Interest: Looking for the 'public interest' in English plan-making' PHD thesis in Town & Regional Planning University of University of Sheffield 2015.

<sup>80</sup> <https://www.reference.com/world-view/social-order-maintained-3cc7c148b7bbcf04?ao=contentSimilarQuestions> accessed August 16 2017.

politically to pressure the various government agencies that conceivably, might remedy these problems. He describes this inability to cooperate as an utter lack of public-spiritedness giving rise to the described social disorder.<sup>83</sup>

For Thomas Hobbes, social order only arises where social contracts are formed and entered in to.<sup>84</sup> That social contracts are the means by which societies remain stable through implied agreements with the sovereign.<sup>85</sup> These contracts are the set standards and expectations that most people believe necessary to maintain order and progress. Thomas Hobbes, asserted that on a fundamental level, human beings lived short, brutal, and chaotic lives in the absence of collective morals and agreed upon values, which made possible the formation of a society.<sup>86</sup> From Hobbes' perspective then, social contracts are the bedrock of society because they encourage people to think beyond their own self-interest in order to preserve order.<sup>87</sup>

However, according to John Locke, we can only talk of social order where there is liberty, which covers, among others, the right to life and property hence no need of such a sovereign.<sup>88</sup> For Locke, men are rational beings capable of keeping the divine precepts that guide the state of nature; the state of Nature being a state of liberty where persons are free to pursue their own interests and plans, free from interference because the Law of Nature and the restrictions that it imposes upon persons, is relatively peaceful.<sup>89</sup> Thus, Social order from the Lockean point of view can be said to manifest when people enjoy their right to liberty, to the extent that such enjoyment does not violate the liberty of others.<sup>90</sup>

Aside from this theorists' views, Social order can be said to include organization, regularity, stability and predictability.<sup>91</sup> The attainment of order must be based on an adequate apprehension of social roles; a reciprocal and systematic way of relating obligations and rights with expectations.<sup>92</sup> In relation to social order, social norms also help to promote uniform behaviours in relation to agreements, justice, means of communication, and property rights,<sup>93</sup> hence eliminating a situation of social disorder.

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<sup>83</sup>Banfield E, *The Moral Basis of a Backward Society*, The Free Press, New York (1958).

<sup>84</sup>Hobbes T, *Leviathan*, London: Maxfield Publishing Co,1651.

<sup>85</sup><http://study.com/academy/lesson/social-order-definition-and-lesson.html> accessed August 16, 2017.

<sup>86</sup><http://study.com/academy/lesson/social-order-definition-and-lesson.html> accessed August 16, 2017.

<sup>87</sup><http://study.com/academy/lesson/social-order-definition-and-lesson.html> accessed August 16, 2017.

<sup>88</sup>Locke J, *The second Treatise on Government*, London: Whitmorb and Fenn,1690.

<sup>89</sup>Locke J, *The second Treatise on Government*, London: Whitmorb and Fenn1690.

<sup>90</sup>Locke J, *The second Treatise on Government*, London: Whitmorb and Fenn 1690.

<sup>91</sup>Zanden J.W, *Social Psychology*, New York: Random House, 1997.

The relevance of this theory to this study is that it speaks holistically to the proper regulation of urban planning and development together with the proper enforcement of the laws that govern urban physical planning in Kenya, to avoid a situation of chaos and disarray in the country as is now evidenced by the substandard developments that are collapsing and endangering the lives of many more people frequently than before.<sup>94</sup> More specifically, the Social Order theory fundamentally guides this research paper and is at the forefront of the discussions and proposed solutions for this study due to its focus on the people, their welfare and a general state of order. A proper application and a reliance of this theory in our current urban areas in Nairobi would not only complement the current legal framework and set standards for urban physical planning in Kenya, but would also serve as a guide for the local authorities charged with this responsibility of conducting approvals and licensing of development projects in Kenya.

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<sup>94</sup>Daily Nation, Monday May 2, 2016 <https://www.nation.co.ke/news/History-of-collapsed-buildings-in->

## CHAPTER THREE

### LEGAL FRAMEWORK AND POLICY ON APPROVALS AND LICENSING OF BUILDINGS IN KENYA

#### 3.0 Introduction

Urban development, planning laws and regulations as applied in Kenya so far seem to fail to adequately provide for orderly and sustainable urban development. The result has been unapproved buildings, squatter settlements and informal sector developments which have continued to come up in Nairobi particularly, in spite of officially approved urban development plans.

This chapter seeks to look into the legal framework governing urban planning and especially the approval and licensing of developments in Kenya, as well as the institutional framework established to look into such matters. The chapter will also list some of the problems Kenya is facing in ensuring suitable developments and development control in the urban areas and especially in Nairobi. The chapter will finally look into the measures the country has taken to solve the current problem of rampant collapsing and haphazard developments in the urban settlements of Nairobi.

Sofar, there are a number of principle statutes that have been enacted to deal with Physical Planning and bring about development control: The Constitution of Kenya, The County Governments Act, the Physical Planning Act, the Environmental Management and Coordination Act, Urban Areas and Cities Act, Engineers Registration Act, Architects and Quantity Surveyors Act and finally the Building Code: The Local Government (Adoptive By-Laws) (Building) Order 1968. The Physical Planning Act was enacted in 1996 repealing the Town Planning Act dealing with planning in Urban areas and the Land Planning Act that dealt with planning in rural areas.

#### 3.1 Constitution of Kenya (2010)

Article 42 of the Constitution of Kenya 2010 provides that every person has the right to have the environment protected for the benefit of present and future generations through legislative and other measures.<sup>95</sup> Article 69 further confers an obligation on the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and for that state to establish systems of environmental impact assessment,

environmental audit and monitoring of the environment.<sup>96</sup> These provisions are very relevant, to protect the people of Kenya from the incessant collapsing of buildings that are substandard, neither approved nor licensed.

The constitutionalizing of the right to a clean and healthy environment will definitely contribute to many legal and extra-legal actions that will enhance environmental protection, because it has provided a platform to enhance the implementation and enforcement of existing environmental laws and policies; it will contribute in filling the gaps in environmental legislation and will foster accountability on the part of the government.<sup>97</sup>

Article 70 of the Constitution of Kenya 2010 further provides that persons may seek redress in a court of law where their right to a clean and healthy environment has been or is likely to be infringed, threatened or violated and the court may thus give orders to: prevent, stop or discontinue any act or omission that is harmful to the environment; compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or provide compensation for any victim of a violation of the right to a clean and healthy environment.<sup>98</sup>

Article 70 (1) therefore gives every Kenyan access to a court of law to seek redress in environmental matters. It is an adjustment to the much stricter rules on locus standi which had been a barrier to seeking environmental justice. Article 70 (3) even provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.<sup>99</sup>

The Fourth Schedule of the Constitution empowers the National government to come up with housing policy, the general principles of land planning and to coordinate planning done by the counties. The same schedule empowers the County governments to conduct county planning and development which includes housing, statistics, land survey and mapping.<sup>100</sup>

### 3.2 Physical Planning Act 1996 (Cap 286)

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<sup>96</sup> Article 69 (1) (a) and (f), Constitution of Kenya (2010).

<sup>97</sup> David R. Boyd, 'The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment',

<sup>98</sup> Article 70, Constitution (2010).

<sup>99</sup> Kariuki M and Kariuki F, Safeguarding Environmental Rights in

Kenya <http://www.kmco.co.ke/attachments/article/105/A%20Paper%20on%20Safeguarding%20Environm>

Over time, it has been proven that Physical Planning should be a conscious but comprehensive approach to orderly and healthy use and management of the natural environment of human settlements.<sup>101</sup> It flourishes by systematically anticipating and achieving adjustment in the physical environment of part or a whole settlement, given the constraint of social, economic, political and human resources.<sup>102</sup>

For physical planning to be a success, one ought to incorporate the aspects preparation and implementation of development plans and control of development. These two responsibilities centre on the issue of law, how to obey rule of law and more so, on the laws relating to physical planning as enshrined in the Physical Planning Act which explicitly provides for physical planning activities in Kenya.<sup>103</sup> However these two responsibilities mostly focus on prompting and controlling development so as to achieve a sustainable urban physical planning that is anchored on rule of law.<sup>104</sup>

As per the Physical Planning Act of 1996, the procedure for approval and licensing which amounts considerably to development control is set out as follows:

First, that to obtain a development permission, one must make an application being in the form prescribed in the Fourth Schedule, to the clerk of the local authority responsible for the area in which the land concerned is situated. This application is to be accompanied by plans and particulars as are necessary to indicate the purposes of the development.<sup>105</sup> Then the local authority to which a development application has been made is to within thirty days after the receipt of the application, refer it to the Director of physical planning for his comments. In consideration of the application, the local authority may also consult any other relevant officer as listed in the Act.<sup>106</sup> Afterward, the local authority is to notify the applicant in writing of its decision within thirty days and is to specify the conditions, if any, attached to the development permission granted, or in the case of refusal to grant the permission, the grounds for refusal. Any person who is aggrieved by the decision of the local authority

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<sup>101</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015.

<sup>102</sup>Ganiyu B, Rule of Law, Physical Planning and Urban Governance in Nigeria: A Panacea to Sustainable Urban Development <http://www.ssrn.com/link/OIDA-Intl-Journal-SustainableDev.html>.

<sup>103</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015, accessed 21 Jan. 17.

<sup>104</sup>Ganiyu B, Rule of Law, Physical Planning and Urban Governance in Nigeria: A Panacea to Sustainable Urban Development <http://www.ssrn.com/link/OIDA-Intl-Journal-SustainableDev.html>.

refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13.<sup>107</sup>

Subject to the development application, where a local authority is of the opinion that proposals of any development activity will have injurious impact on the environment, the applicant is required to submit together with the application, an environmental impact assessment report.<sup>108</sup> And the Registrar of documents is entitled refuse to register a document relating to the development of land unless a development permission has been granted and the appropriate conditions relating to such development permission have been complied with.<sup>109</sup>

This long approval process has continually proved that the development control process is a tedious process and probably the reason why the relevant local authorities in Kenya have become reluctant overtime to effectively follow up all applicants as required by law.<sup>110</sup> The continuous occurrences of delay issues and substandard supervisions can no longer be tolerated if Nairobi is to achieve the status of a sustainably developed city. But because this has not been a problem experienced solely in Kenya, some of the other developing countries have tried to come up with solutions that have improved development control in their end.<sup>111</sup>

### **3.3 County Governments Act No. 17 Of 2012**

Part XI of the County Planning Act in section 103 provides that the main objectives of county planning are to: ensure harmony between national, county and sub-county spatial planning requirements; facilitate the development of a well-balanced system of settlements and ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions across a county; develop urban and rural areas as integrated areas of economic and social activity; among others.<sup>112</sup> These functions bring out the aspect of development control in a very detailed manner as applicable to any devolved unit of governance. These functions are important for this study because they highlight what counties

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<sup>107</sup> Section 33, Physical Planning Act.

<sup>108</sup> Section 36, Physical Planning Act.

<sup>109</sup> Section 37, Physical Planning Act.

<sup>110</sup> Che'Man N, Johar F and Yaakup A, 'GIS in Development Control Process: The Case of Development Control System for City Hall of Kuala Lumpur' (2006)<http://eprints.utm.my/3540/1/noordini-iapn.pdf> accessed 14 Dec. 17.

<sup>111</sup> Che'Man N, Johar F and Yaakup A, 'GIS in Development Control Process: The Case of Development Control System for City Hall of Kuala Lumpur' (2006)<http://eprints.utm.my/3540/1/noordini-iapn.pdf> accessed 14 Dec.

in Kenya ought to abide by when making development plans, and more specifically, when giving licenses and development permissions to developers.

Section 108(1) further provides that there is to be a five-year integrated development plan for each county which shall have: clear goals and objectives; an implementation plan with clear outcomes; provisions for monitoring and evaluation (M&E); and clear reporting mechanisms.<sup>113</sup> Further that county integrated development plans are supposed to be open for public inspection at the offices of the county in question.<sup>114</sup>

### **3.4 Urban Areas and Cities Act No. 13 Of 2011**

This Act was enacted to give effect to Article 184 of the Constitution of Kenya which provides for the, classification, governance and management of urban areas and cities; provides for the criteria of establishing urban areas, and which also provides for the principle of governance and participation of residents and for connected purposes.<sup>115</sup> The Act provides that the management of a city and municipality shall be vested in the county government and administered on its behalf by a board constituted in accordance with section 13 or 14 of this Act; a manager appointed pursuant to section 28; and such other staff or officers as the county public service may determine.<sup>116</sup> It describes some of the board's functions to include among others to control land use, land sub-division and land development.<sup>117</sup>

Further, the Act provides that, an integrated urban or city development plan shall bind, guide, and inform all planning for development and decision-making and ensure comprehensive inclusion of functions.<sup>118</sup> And that a city or urban area integrated development plan shall be aligned to the development plans and strategies of the county governments.<sup>119</sup>

This Act informs this study and is relevant in that it affirms that urban areas and cities are under the scope of county governments, which have been mandated to regulate and supervise developments and development plans, and further that urban areas and cities cannot develop in isolation, county authorities mandated to license and give development permissions must be involved.

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<sup>113</sup>Section 108, County Governments Act.

<sup>114</sup>Section 108(3), County Governments Act.

<sup>115</sup> Preamble, Urban Areas and Cities Act (Act no.13 of 2011).

<sup>116</sup>Section 12, Urban Areas and Cities Act.

<sup>117</sup>Section 20(d), Urban Areas and Cities Act.

### **3.5 Building Code: The Local Government (Adoptive By-Laws) (Building) Order 1968**

The building code was set up as a development control tool to comprehensively address among others, matters revolving around comfort, aesthetics, safety, public health, lifespan and performance of the built environment and their inhabitants.<sup>120</sup>

The code clearly outlines the process of application for development permission and erection of buildings.<sup>121</sup> It sets the limit of 30 days as the period within which the authority must communicate to the developer or his agent about the status of the application under.<sup>122</sup> Under clause 9, the code defines the extent of approval including basis of conditions or period within which development must be commenced or terminated<sup>123</sup> and even grounds for disapproval.<sup>124</sup> For purposes of ensuring safety of both occupants and buildings during and after construction, the code provides for mandatory inspections; that a person who has erected a building shall give to the council notice in writing of its completion to enable a final inspection to be made and a certificate of completion to be issued and that no person shall occupy, use or permit the occupation or use of any building before a certificate of completion has been issued by the council in respect thereof.<sup>125</sup> The regulations further prescribe mandatory enlisting of services of registered architects and engineers under clause 12A, for purposes of design and supervision of certain category of buildings to ensure compliance with the set standards.

The Building code is relevant to this study because it informs the process of building in Kenya, and requires a developer to be aware of various requirements that need to be fulfilled before undertaking the building process. It is important that any developer carries out due diligence on the issues that are likely to be confronted in the process of construction, right from inception of architectural designs, to the commissioning of the completed building; the whole process of receiving building approvals for the said project.

### **3.5 Architects and Quantity Surveyors Act**

Architects and Quantity Surveyors Registration Act; Chapter 525 Laws of Kenya provides for the registration and regulation of persons registered to practice as architects and Quantity

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<sup>120</sup>Local Government (Adoptive By-Laws) (Building) Order (1968).

<sup>121</sup> Part I, Local Government (Adoptive By-Laws) (Building) Order (1968).

<sup>122</sup> Clause 7(1), Local Government (Adoptive By-Laws) (Building) Order (1968).

<sup>123</sup> Clause 9(1), Local Government (Adoptive By-Laws) (Building) Order (1968).

Surveyors. It also defines practices amounting to professional misconduct and the punitive measures to be taken against the culprits.

This Act is important in distinguishing competent developers who are qualified to seek building permission, and to recognise the work of such developers as opposed to the work of unlicensed developers who come up with sub-standard plans and unlicensed projects.

In addition to the legal framework on licensing and Approval of developments, Kenya has set out various policies over the years, which have had an impact on urban planning and the building sector, and which have strengthened its legal frame work.<sup>126</sup>

The policies that have had an impact on the Planning and building sector include:

**a) Sessional Paper no. 3 of 2009 on National Land Policy<sup>127</sup>:** The first of its kind in Kenya; the policy objective is “to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity”. It defines the key measures required to address the critical issues of land administration, land use planning, proliferation of informal settlements, outdated legal framework, institutional framework and information management. The key principal in the policy is land use planning which is recognized as essential for the efficient and sustainable utilization and management of land and land based resources.

**b) Sessional paper no. 3 of 2004 on National Housing Policy<sup>128</sup>:** This policy recognizes the absence of comprehensive land use management plans. It aims at facilitating the formulation of comprehensive plans in land administration for sustainable housing development in the future among others.

**c) Sessional Paper No. 6 of 1999 on Environment and development<sup>129</sup>:** This policy aims at integrating environmental aspects to the national development planning process. It gives comprehensive guidelines for achieving sustainable development with regard to the effects of development on the environment.

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<sup>126</sup>Kimani M. and Musungu T, 'Reforming and Restructuring Planning and Building Laws and Regulations in Kenya for Sustainable Urban Development', 46th ISOCARP Congress (2010).

<sup>127</sup>Sessional Paper no. 3 of 2009 on National Land Policy.

## **3.6 THE INSTITUTIONAL FRAMEWORK**

### **3.6.1 National Environment Management Authority**

The National Environment Management Authority (NEMA), is established under the Environmental Management and Co-ordination Act No. 8 of 1999 (EMCA) as the principal instrument of Government for the implementation of all policies relating to environment.<sup>130</sup>

Section 9 (2) of Environment Management and Co-ordination Act mandates the Authority to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of the Government of Kenya in the implementation of all policies relating to the environment.<sup>131</sup> In consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment.

In housing and urban planning, NEMA is empowered by the EMCA to conduct environmental impact assessments, and the Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.<sup>132</sup>

### **3.6.2 National Environment Complaints Committee**

Previously referred to as the public complaints committee and which comprises of a Chairman appointed by the Cabinet secretary and who must be a person qualified for appointment as a Judge of the High Court of Kenya; a representative of the Attorney-General; a representative of the Law Society of Kenya; a representative of non-governmental organisations appointed by the National Council of Non-Governmental Organisations and who shall be the secretary of the Complaints Committee and one person who has demonstrated competence in environmental matters, nominated by the Council of County Governors and who shall be secretary to the Complaints Committee.<sup>133</sup> Subject to the EMCA, the Complaints Committee is mandated to regulate its own procedure. The functions of the

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<sup>130</sup>Section 7, The Environmental Management and Co-ordination Act, (1999); <https://www.nema.go.ke/> accessed 29 Nov. 17.

<sup>131</sup>Section 9(2), The Environmental Management and Co-ordination Act, (1999).

Complaints Committee are<sup>134</sup>: to investigate – any allegations or complaints against any person or against NEMA in relation to the condition of the environment in Kenya; on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendation to the National Environmental Council; and finally, to prepare and submit to the Council, periodic reports of its activities which report forms part of the annual report on the state of the environment under section 9 (3) of the EMCA. They also undertake public interest litigation on behalf of the citizens in environmental matters.<sup>135</sup>

### **3.6.3 National Environment Action Plan Committee**

The National Environment Action Plan Committee shall, after every five years, prepare a national environment action plan for consideration and adoption by the National Assembly, and the national environment action plan is to among others, identify and appraise trends in the development of urban and rural settlements, their impacts on the environment, and is to include strategies for the amelioration of their negative impacts; as well as propose guidelines for the integration of standards of environmental protection into development planning and management.<sup>136</sup>

### **3.6.4 The County Environment Committee**

This committee is responsible for the proper management of the environment within the county for which it is appointed and is to develop a county strategic environmental action plan every five years.<sup>137</sup>

### **3.6.5 Environment and Land Court**

The Environment and Land Court is of the Courts contemplated by article 162(2) of the COK 2010, with the same status as the High Court. The court is established under section 4 of the Environment and Land Court Act No. 19 of 2011, and has jurisdiction to hear any other dispute relating to environment and land. The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and

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<sup>134</sup>Section 32, The Environmental Management and Co-ordination Act, (1999).

<sup>135</sup>Section 21, The Environmental Management and Co-ordination (Amendment) Act, (2015).

with the provisions of The ELC Act or any other written law relating to environment and land.<sup>138</sup>

Further, the court has powers to deal with disputes relating to land administration and management, and is also empowered to hear cases relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.<sup>139</sup>

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<sup>138</sup>Section 13, Environment and Land Court Act (2011).

## CHAPTER FOUR

### URBAN DEVELOPMENT CONTROL AND IMPACT ASSESSEMENT

#### 4.0 Introduction

This chapter looks into the development control and environmental impact assessment aspects of development, identifying areas where the relevant authorities in Kenya have gone wrong, while trying to offer relevant solutions. The chapter also addresses the challenges that outweigh development control and the measures taken to address such issues so far.

#### 4.1 Urban Development Control

With urban planning laws, comes the issue of development control, which is a process that aims to achieve all the objectives depicted in spatial plans; It entails the government regulating land use and construction of new buildings, so as to ensure that developers do not deviate from approved building plans.<sup>140</sup>

The issue of controlling our physical environment is fundamental and is important not only for public health but also public safety. According to Keeble (1969), development control involves regulating all the intricate aspects of development, about which specific guidance cannot be given by the development plan, so as to ensure proper outcome; the aim being to allow for orderly environment that meets the requirements for ideal living.<sup>141</sup> Johar (2006) views development control and approval, as a tedious process that involves analyzing the appropriateness of planning applications, while requiring various data from the relevant agencies.<sup>142</sup> A planning application will be assessed in terms of current development scenario, land information, planning requirements and planning design.<sup>143</sup> Development control enables proper development and remains relevant in building, protecting a healthy

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<sup>140</sup> Ngetich J, Opata G and Mulongo L, 'A Study on the Effectiveness of Urban Development Control Instruments and Practices in Eldoret Municipality, Kenya', *Journal of Emerging Trends in Engineering and Applied Sciences* (2014) 83.

<sup>141</sup> A.O. Obabori, D.A. Obiuwevbi and J.I. Olomu, 'Development Control an Important Regulator of Settlement Growth: A Case Study of Ekpoma, Nigeria', *Kamla-Raj* (2007) 285.

<sup>142</sup> Che'Man N, Yaakup A, Johar F, 'GIS in Development Control Process: The Case of Development Control System for City Hall of Kuala Lumpur', (2006) <[https://www.researchgate.net/publication/310240060\\_GIS\\_application\\_for\\_Computerized\\_Development\\_Control\\_System\\_in\\_Enhancing\\_Local\\_Authority\\_Functions](https://www.researchgate.net/publication/310240060_GIS_application_for_Computerized_Development_Control_System_in_Enhancing_Local_Authority_Functions)>September 6, 2017.

economy and allowing for a sustainable environment.<sup>144</sup> It also analyses the possible impact of the proposed development all in the public interest, and to keep the public from inappropriate and substandard developments; It is a process that involves strict adherence to all procedures, building codes and standards to ensure that physical plans conform to approved plans.<sup>145</sup> Thus, in order to improve development control, efficient, current and reliable information is always necessary at the local authority level so as to facilitate proper administrative procedures for development control.<sup>146</sup>

Article 42 of the constitution of Kenya 2010, provides that every person has a right to a clean and healthy environment including the right to have the environment protected for the benefit of present and future generations.<sup>147</sup> This right can only be realized through urban development control. If there is no development control, the right to a clean and healthy environment as recognized and protected under the constitution is derogated. The failure to ensure proper development control processes in Kenya has led to the rise in disasters such as collapsing of buildings and its attendant losses.<sup>148</sup>

On 14th June 2011, building structures under construction on L.R No. 7107/2 plot off Airport North Road were found to have been illegally erected as the developer had not sought development permission as required under Section 33 of the Physical Planning Act collapsed, the building collapsed allegedly due to poor workmanship, resulting in the death of four casual labourers, while several others sustained injuries.<sup>149</sup>

On 4<sup>th</sup> January 2015, a building collapsed at Huruma, Nairobi, a seven-storey residential building under construction in Huruma Ngeii II estate in Nairobi collapsed killing five tenants and injuring Thirty-two others,<sup>150</sup> the collapse of the said building was attributed to poor workmanship, very shallow foundation on black cotton soil, structural defects due to

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<sup>144</sup> John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015.

<sup>145</sup> John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015.

<sup>146</sup> Che'Man N, Yaakup A, Johar F, 'GIS in Development Control Process: The Case of Development Control System for City Hall of Kuala Lumpur', (2006).

<sup>147</sup> Article 42, Constitution of Kenya (2010).

<sup>148</sup> Ngetich J, Opata G and Mulongo L, 'A Study on the Effectiveness of Urban Development Control Instruments and Practices in Eldoret Municipality, Kenya', *Journal of Emerging Trends in Engineering and Applied Sciences* (2014).

<sup>149</sup> *Wilfred Masinde Wanyonyi v Director of Public Prosecutions & another* [2015] eKLR.

poor concrete mix, use of sub-standard bars, lack of adequate reinforcements and lack of building supervision. Other reported cases<sup>151</sup>

On December 17 2014, A five-storey residential building that was partly occupied and was still under construction collapsed in Kaloleni. Seven people died. April 2 2015, Seven people died and many others trapped after a building behind Thika Road Mall in Roysambu collapsed.

March 09 2016, A four-storey building in Zimmerman, Nairobi, whose construction was questioned two years before collapsed. No one was injured since it had been vacated. April 28 2016, A wall collapsed along Nairobi's Lenana Road; three people died and several others injured. On June 13 2017, a seven-storey building collapsed at Kware pipeline Embakasi.

The above occurrences show the prevalence of cases of collapsing structures in the country which need to be addressed.

## 4.2 Problems facing urban development control in Kenya

Over the past few years, buildings and development projects in Nairobi have been coming up rampantly to such an extent that urban managers are facing great challenges in ensuring that urban areas are environmentally conducive to work and live in.<sup>152</sup> So far, efforts to use various tools of development control system in order to bring about harmonious urban and natural environments have failed, and in the process, fragmented and substandard developments have been established.<sup>153</sup> These developments are characterized by; abuse of common public interests, unplanned, insanitary and crowded settlements, inadequate physical and social infrastructure and generally, environmental degradation.<sup>154</sup>

UN-Habitat in their re-assessment of urban planning and development regulations in African cities listed factors which contribute to non-compliance of urban development control regulations, and Kenya suffers some of these:<sup>155</sup>

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<sup>151</sup> Daily Nation, Monday May 2, 2016 <https://www.nation.co.ke/news/History-of-collapsed-buildings-in-Nairobi/1056-3186472-afy099z/index.html%20accessed%2022%20November%202017>.

<sup>152</sup> Machelombe T, 'Ways in which Development is controlled in Kenya' (2016) <<https://environmentalideas.wordpress.com/> accessed September 18, 2017.

<sup>153</sup> <https://environmentalideas.wordpress.com/> September 18, 2017.

<sup>154</sup> <https://environmentalideas.wordpress.com/> September 18, 2017.

### **a) Poor policy Implementation**

The implementation of urban development policies and regulations has been characterized by failures, following bureaucratic decisions, unnecessary delays and poor execution of approvals for projects by specialized bodies, ineffective local institutions and staff, lack of proper coordination of framework relating to development planning and inadequate participation of beneficiary population.<sup>156</sup> All this has occurred as a result of physical development plans not being informed by local needs, thus failing to address local realities.<sup>157</sup>

### **b) Lack of an integrated legal framework**

The laws themselves are scattered in several statutes; They define problems and confer control responsibilities to various entities without any form of coordination for effective policing and enforcement.<sup>158</sup> This absence of a comprehensive and integrated legal framework has created ambiguities in the law; loopholes and opportunities for conflict of interest which have been exploited by property developers and the bulk among the enforcement authorities.<sup>159</sup>

### **c) Laxity to approve plans**

The law requires that all developers must submit their development proposals to Local Authorities for approval<sup>160</sup>. However, developers have most of the time been forced to commence their developments after experiencing such unreasonable delays, and sometimes the approvals or disapprovals are communicated long after the development has already taken place; These delays have occasioned some of the developers taking advantage and coming up with substandard buildings or buildings in unauthorized locations.<sup>161</sup>

### **d) Rapid Population increase and High poverty levels**

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<sup>156</sup>Problems of Implementation of Urban Development Plan in Developing Countries' <<http://faculty.kfupm.edu.sa/crp/habibms/docs/crp-502/CRP-502-Problem-Implementation-Plans.pdf>> accessed Jan 29.18.

<sup>157</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015, accessed 2 October. 2017.

<sup>158</sup>Kimani M. and Musungu T, 'Reforming and Restructuring Planning and Building Laws and Regulations in Kenya for Sustainable Urban Development', 46th ISOCARP Congress (2010).

<sup>159</sup>Kimani M. and Musungu T, 'Reforming and Restructuring Planning and Building Laws and Regulations in Kenya for Sustainable Urban Development', 46th ISOCARP Congress (2010).

<sup>160</sup>Section 31, Physical Planning Act.

Kenya like other developing countries has had a rapid population increase. With a large proportion of urban population in poverty struggling to make a living, compliance with urban development regulations is not in their scheme of priorities.<sup>162</sup> The urban growth has occurred mainly outside the planned areas leading to massive growth of slums and informal settlement in all urban centres.<sup>163</sup> The problem is that very few urban centres have up to date physical development plans. Most of the existing urban physical development plans were prepared in the 1960/70s and very few of them have been revised to cope with rapid urban growth.<sup>164</sup> In addition, the urban development policy has not been keen to provide regulations that are in line with the needs of the people and the current social-economic realities such as urban poverty hence the high degree of non-compliance with urban development and planning regulations.

#### e) Poor enforcement mechanisms

The Nairobi County Town Planning and Housing Executive observed that there are adequate laws to govern housing and property development but the challenge was in enforcing them.<sup>165</sup> The incessant collapse of buildings in Nairobi has been blamed on failure to enforce building laws<sup>166</sup>. Even more alarming, is the ineptitude and inefficiency on the part of some professionals and other players in the industry.

#### f) Corruption

It is evident that corruption plays part for the crumbling infrastructure; Officers in the county government are accused of taking bribes to overlook building code violations.<sup>167</sup> That owning property in Kenyan slums especially, now requires political connections and payment

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<sup>162</sup>Muiruri P, *Women Street Vendors in Nairobi, Kenya: a situational and Policy analysis within a Human Rights framework*, Organisation for social science research in Eastern and Southern Africa (OSSREA), Ethiopia, 2010, 67.

<sup>163</sup>Mireri C, *Environment and Sustainable Development; Urbanisation Challenges in Kenya*, chapter 7 <http://ir-library.ku.ac.ke/bitstream/handle/123456789/12573/Urbanisation%20Challenges%20in.....pdf;sequence=1> accessed 14 Dec.17.

<sup>164</sup> Mireri C, *Environment and Sustainable Development; Urbanisation Challenges in Kenya*, chapter 7 <http://ir-library.ku.ac.ke/bitstream/handle/123456789/12573/Urbanisation%20Challenges%20in.....pdf;sequence=1> accessed 14 Dec.17.

<sup>165</sup>Tom Odongo quoted in the Daily Nation, 2nd December 2015 at page 15.

<sup>166</sup>Engineer Muchemi quoted in the Daily Nation, January 1 2015.

<sup>167</sup>Klopp J and Paller J, 'How elites and corruption have played havoc with Nairobi's housing',

of significant fees (bribes), to get a building permit. And when such substandard investments are made, landlords benefit from informality and ambiguous land tenure rights.<sup>168</sup>

### 4.3 Measures taken to address unapproved developments in Nairobi

The current and prevalent cases of sub-standard developments in Nairobi and especially in the slum areas moved Nairobi county to commence a process of regularizing all unapproved buildings in the city, by notifying all concerned developers and the general public that the Nairobi City County Government embarked on the regularization of developments exercise.<sup>169</sup>

This has been done by passing of The Nairobi County Regularization Bill into an Act (No.3 of 2015); The Act was passed by the County Assembly of Nairobi City to provide for the regularisation of unapproved developments in Nairobi County.<sup>170</sup> Further, the Act was enacted to bring unauthorized developments under the umbrella of planning framework and providing basic facilities and infrastructure to the residents.<sup>171</sup> This excludes unauthorized developments made on public land from regularization but includes regularizing unauthorized developments made up to the commencement (of the act), in conservation areas and those that have more than the required number of floors.<sup>172</sup> It also intends to appoint an advisory committee for the to be in charge of the regularization exercise, such measures as may be necessary to ensure its fair, equitable and efficient implementation.<sup>173</sup>

The Act proposes regularization of unauthorized constructions put up on county or private land except those on existing or proposed roads, on land set aside for widening of railway lines, communications or other civic facilities or public utilities, forest cover, river banks, public amenities and land belonging to another person among others.<sup>174</sup> Developments will have up to twelve months from the Act's commencement to apply for and obtain regularization, with the county government having the power to extend this period by not

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<sup>168</sup> Klopp J and Paller J, 'How elites and corruption have played havoc with Nairobi's housing', <<http://theconversation.com/how-elites-and-corruption-have-played-havoc-with-nairobis-housing-60865>> accessed 2 October. 2017.

<sup>169</sup> 'Nairobi City County Government Moves to Regularize Unapproved Buildings' <<http://buildesign.co.ke/nairobi-city-county-government-moves-regularize-unapproved-buildings/>> accessed Jan 29. 18.

<sup>170</sup> Preamble, Nairobi City County Regularization of Development Act (No.3 of 2015).

<sup>171</sup> Section 3, Nairobi City County Regularization of Development Act (No. 3. Of 2015).

<sup>172</sup> <https://constantcap.wordpress.com/2015/01/28/nairobi-kenya-aims-at-regularizing-unauthorized-structures/> accessed 29 Nov. 17.

more six months; This will require owners of unauthorized structures to obtain a certificate of regularization from the county government<sup>175</sup> During the regularization period, some amnesty will be given to projects that commenced before the commencement of the Act but conform to safety standards and directions.<sup>176</sup>

The Act proposes regularization fees and the demolition of all buildings not regularized upon the expiry of the regularization period.<sup>177</sup> Owners making changes to developments will assume all liability for any injury, damage or loss.<sup>178</sup>

#### 4.5 Environmental Impact Assessment (EIA)

Environmental Impact Assessment is a tool used to obtain information about all the potential impacts of a proposed development or project to the environment, then using that information to make a decision whether the development should proceed to the building stage or not.<sup>179</sup> It is a procedure used for evaluating the likely impact of a proposed activity on the environment.<sup>180</sup> Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed.<sup>181</sup>

In Kenya, Environmental Impact Assessment (EIA) is one of the tools for Environmental management under the Environment Management and Co-ordination Act Cap 387 Laws of Kenya<sup>182</sup>, the Environmental (Impact Assessment and Audit) Regulations and the Constitution of Kenya 2010. Article 69 of the Constitution of Kenya 2010 obliges the state to establish systems of environmental impact assessment, environmental audit, and monitoring of the environment and for the state to eliminate all processes and activities that are likely to endanger the environment; and that every person in this regard, to cooperate with the state

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<sup>175</sup>Section 5, Regularization of Development Act (No. 3. Of 2015).

<sup>176</sup>Section 8, Regularization of Developments Act.

<sup>177</sup>Section 12, Regularization of Developments Act.

<sup>178</sup>Section 14, Regularization of Developments Act.

<sup>179</sup><http://www.kenyalawresourcecenter.org/2011/07/environmental-impact-assessment.html> accessed 18 Dec. 17.

<sup>180</sup>John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015, accessed 2 October. 2017.

<sup>181</sup>Muigwa K, Environmental Impact Assessment (EIA) in Kenya, A Paper Presented to the Institute of Development Studies (IDS) students on Dec 4(2012).

<sup>182</sup><http://www.kmco.co.ke/attachments/article/109/A%20Paper%20on%20Environmental%20impact%20assess>

organs and other persons to protect and conserve the environment and to ensure ecologically sustainable development and use of natural resources.<sup>183</sup>

The need for EIA was brought out in Principle 17 of the 1992 Rio Declaration on Environment and Development which affords the strongest evidence of international support for EIA in the following terms; “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent authority.”<sup>184</sup> Similarly, Agenda 21 calls on States to assess the environmental suitability of infrastructure in human settlements, as follows,“ states to ensure relevant decisions are preceded by EIA and to take into account the costs of any ecological consequences”. Further, it makes a call to integrate environmental considerations in decision-making at all levels and in all ministries and to ensure the transparency of and accountability for the environmental implications of economic and other policies.<sup>185</sup>

Overtime, it has been proven that an effective Environmental Impact Assessment Provides an opportunity for public scrutiny and participation in decision-making; Facilitates better informed judgments when balancing environmental and developmental needs; At the international level, it may alert governments and international organizations of the likelihood of transboundary harm; and that it Contributes toward the implementation of national policies on sustainable development and precautionary action.<sup>186</sup>

EIA is relevant to this study as it is part of the legal requirements of approval and licensing when carrying out development projects. The law stipulates that a developer is not to implement a project likely to have a negative environmental impact, or for which an EIA is required by the Environment Management and Coordination Act or regulations issued under it unless an EIA has been concluded and approved in accordance with the law.<sup>187</sup>

Environmental Impact Assessment can be said to be part of development control. It is clear that issues outlined to affect the process of development control in Kenya are critical and

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<sup>183</sup> Article 69, Constitution of Kenya (2010).

<sup>184</sup> Principle 17, The Rio Declaration on Environment and Development (1992).

<sup>185</sup> Philippe Sands, *Principles of International Environmental Law*, p.802-803.

<sup>186</sup> Muigwa K, Environmental Impact Assessment (EIA) in Kenya, A Paper Presented to the Institute of Development Studies (IDS) students on Dec 4 (2012).

must be taken seriously by government authorities and all other stakeholders.<sup>188</sup> Environmental Impact Assessments should always form part and parcel of the development and planning process, for all projects being carried out. The laxity in carrying out of the EIA processes in Kenya effectively, has had a large contribution to the substandard buildings being put up, most of which are collapsing in Nairobi and especially in the slum areas which are densely populated.<sup>189</sup>

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<sup>188</sup><https://www.pambazuka.org/land-environment/environmental-impact-assessment-why-it-fails-kenya> accessed 19 Dec. 17.

<sup>189</sup>Kaonge J, 'Environmental Impact Assessment: Why it fails in Kenya' (2015)

## CHAPTER FIVE

### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

#### 5.0 Introduction

This chapter seeks to make a comprehensive summary of the findings from the various topics discussed in this document, as well as give recommendations and working solutions to the issues.

Following the issues discussed in chapter 1, 2, 3 and 4 and in light of the challenges facing the proper approval and licensing of buildings in Kenya, it is clear that changes need to be made if at all we are to curb the collapsing of buildings in the Urban areas in Kenya. Urban Planning Laws in Kenya need to be harmonized so as to conform with the letter and spirit of the Kenya Constitution 2010, although it should be noted that it is not the existing laws that are deficient but the lack of proper implementation, poor enforcement and lack compliance by all citizens; those in authority and those not in authority.<sup>190</sup>

Under planning laws and legislation, any development which requires approval or development permission but does not have the said permission is an unauthorised development.<sup>191</sup> The introduction of a culture of enforcement is critical to ensure that the planning control system works properly and for the benefit of the whole community.<sup>192</sup>

The focus of this whole study was to question the whole process regarding approval and licensing of buildings in Kenya, which is a critical process in the early and late stages of development control. Basically, trying to question the whole approval process which has not

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<sup>190</sup> John Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' LLM Thesis, University of Nairobi November, 2015, accessed 2 October. 2017.

<sup>191</sup> Development Management; Guidelines for planning Authorities, June (2007)

<http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Planning/FileDownload%2C14467%2Cen.pdf> accessed Jan 25.2018.

<sup>192</sup> <http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Planning/FileDownload%2C14467%2Cen.pdf> accessed Jan

been effective in Kenya over the years as evidenced by the rampant cases of buildings and projects collapsing yet there are many laws and regulations present on urban planning and development control.

## **5.1 Conclusions**

From the overall study, it is clear on the need for more responsive, applicable legislation and planning approaches that deal with issues of high urbanization rate characterized by informality in urban development, uncontrolled urban growth and sprawl, and acute shortage of housing that leads to emerging of unapproved and unlicensed buildings.

Regarding the problems facing urban development control compliance, the study concludes that there is need for transparency and accountability and a general application of the principles of good governance as listed in Article 10 of the Constitution of Kenya 2010 among development control stakeholders (development control officials, developers, policy makers and the general public). There needs to be strict enforcement of the laws which is what is lacking to make the process of licensing and approvals of developments effective. In addition, the public must be allowed to take part and participate in the development process.

## **5.3 Recommendations**

This study makes several recommendations to address the challenges faced in approval and licensing of buildings. The recommendations act as a possible intervention measures to facilitate effective approvals of developments in Nairobi county and generally other urban centres in the country. They are drawn from the findings of the study and the current problems hindering the proper development process.

- a) There is need to adopt new innovative planning approaches that involve the use of modern technology such as the planning portal and paperless application process for approval of development plans so as to reduce the time taken for the whole process as well as reduce congestion in offices.
- b) There is need review and harmonize all laws and regulations regarding urban planning to conform to the 2010 constitution and to eliminate duplication of efforts and mandates among the concerned institutions.

- c) To address enforcement, there is need to classify violation of development control and the approval process as a criminal offence due to the effects the collapses are having on life and property. Offenders can be heavily fined or jailed or their unapproved developments demolished at their own cost to act as a deterrent measure and to empower courts to take up such issues.
- d) Fostering and encouraging public-private partnerships Agenda 21 explains that Partnerships between different industry sectors and the resultant synergies and pooling of resources will benefit all parties and that the private sector and other service providers are also important stakeholders in the development and implementation of sustainable construction.
- e) Decisions regarding planning, approvals and implementation of the laws must be widely consulted; decisions that are going to affect the public and residents should not be done at boardrooms. There must be an acknowledgement of public participation especially in matters of public interest.

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