



Mbesa Investments Limited v County Government of Mombasa; Bayusuf & another (Interested Parties) (Constitutional Petition 23 of 2022) [2023] KEELC 18543 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 23 OF 2022**

LL NAIKUNI, J

MAY 31, 2023

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLE
27, 43 & 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

**IN THE MATTER OF: PHYSICAL & LAND USE PLANNING
ACT, NO.13 OF 2019 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO.4 OF 2015

BETWEEN

MBESA INVESTMENTS LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

FAHAD IQBAL AHMED BAYUSUF INTERESTED PARTY

MUSLIMS FOR HUMAN RIGHT INTERESTED PARTY



RULING

I. Introduction

1. The ruling herein pertains to the two (2) Notice of Preliminary Objections dated 28th July, 2022 by the 1st Interested party and another dated 4th August, 2022 by the Respondent herein. For ease of reference, the Honorable Court decided to deal with the twin objections simultaneously but under separate headings.

II. The Preliminary Objection by the 1st Interested Party

2. The 1st Interested Party from the onset held that this Honorable Court lacked jurisdiction to hear and determine the issues raised from the filed Petition by the Petitioner herein. They held that an issue to jurisdiction needed not pleaded by a party as it could be raised at any time and in any manner, even by the Court itself. Where Notice of such objection are only be confined to that Notice as given. Any such jurisdictional issues touching on the proceedings could be canvassed and determined.

III. The Preliminary Objection by Respondent

3. Upon being served with the Petition and the application, the Respondent herein filed a Notice of Preliminary Objection on 4th July 2022 stating as follows:-
 - a. That both the Application and Petition is inconsistent with the provision of Section 72 (3) of the *Physical and Land Use Planning Act* 2019.
 - b. That both the Application and Petition offended the provisions of the *Physical and Land Use Planning Act* 2019 is concerned especially with the time frames stipulated in Section 72 of the *Physical and Land Use Planning Act* 2019 thus this claim is time barred.
 - c. That the Petitioner is guilty of laches.
 - d. That this Application and Petition is inconsistent with the Provisions of the Fair Administrative Action No.4 of 2015 read together with Article 47 (3) of *the Constitution* of Kenya 2010.
 - e. That to expound on the point of law in paragraph 4 the Respondent refers this Honorable Court to prayers number (iv) and (v) in the Petition, which are for Orders of Certiorari and Prohibition and pleads as follows:
 - i. This Petition is anchored, among others, on Article 47 of *the Constitution* on Fair Administrative Action.
 - ii. The said Article has provision that Parliament shall enact legislation to give effect to the rights in Clause (1).
 - iii. Accordingly, Parliament enacted the *Fair Administrative Action Act*, 2015, which is an Act of Parliament to give effect to Article 47 of *the Constitution*.



- f. That further to the above, the *Fair Administrative Action Act*, 2015, has made provision at Section 12 thereof that:

“This Act is in addition to and not in derogation from the general principles of common law and Rules of natural justice.”

- g. That the orders of Certiorari and Prohibition sought by the Petitioner are Common Law prerogative Orders, called writs, whose place in our law is in the *Law Reform Act*, cap 26. At Section 8 thereof, provision is made that “Orders of Mandamus, Prohibition and certiorari substituted for writs.”

- h. The Respondent states that by virtue of Section 9(2) of the *Law Reform Act*, provision is made that:

“applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.”

- i. That the subject matter of the Petition has since gone stale and there is no cause of action as the development permission issued to the Petitioner has since expired.

IV. Background Information

4. Briefly prior to embarking into the said objections, it is critical that the Honorable Court extrapolates on the background information of the Petition briefly. By a Petition dated 20th June, 2022 and filed on 23rd June, 2023, initially the Petitioner approached the High Court in “Constitutional Petition Number 43 of 2020: MBESA Investments Limited -vs- The County Government of Mombasa whereupon the High Court issued a Conservatory Order in the interim on 7th July 2020 in favour of the Petitioner whose effect was to “stay the enforcement and implementation of the Enforcement Notice issued by the Respondent dated 24th June 2020 to stop developments on Plots Number MN/I/3412, MN/I/5503 and MN/I/5504 located in Nyali area within Mombasa County”. An appeal was filed in the Court of Appeal against a Ruling on a Preliminary Objection being Mombasa Civil Appeal No. 64 of 2020: Fabad Iqbal Abmed Bayusuf – Versus - MBESA Investments Limited & 2 Others whose main issue was on jurisdiction of the High Court and on 10th June 2022 the Court of Appeal proceeded to strike out Petition 43/2020 on the basis that the Environment & Land Court was the proper forum vested with adequate jurisdiction whose effect.
5. Upon filing the present Petition in the proper forum, the 1st Interested Party and the Respondent have raised jurisdictional issues on the Court to down its tools and decline to hear the matter.

V. Submissions

6. On 22nd November, 2022 while all the parties were present in Honorable Court, they were directed to have the preliminary objection dated 4th August, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Respondent’s

7. The Respondent through Mr. Murtaza Tajbhai for the Office of the County Attorney filed their written submissions dated 8th November, 2022 and filed on the same date. Mr. Tajbhai Advocate



submitted that the Respondent herein the County Government of Mombasa filed a notice of preliminary objection dated 4th August 2022 on nine (9) points of law.

8. The points of law were as follows:-

- a. That both the Application and Petition is inconsistent with Section 72 (3) of the [Physical and Land Use Planning Act 2019](#).
- b. That both the Application and Petition offends the provisions of the [Physical and Land Use Planning Act 2019](#) is concerned especially with the time frames stipulated in Section 72 of the [Physical and Land Use Planning Act 2019](#) thus this claim is time barred.
- c. That the Petitioner is guilty of laches.
- d. That this Application and Petition is inconsistent with the Provisions of the Fair Administrative Action No.4 of 2015 read together with Article 47 (3) of [the Constitution](#) of Kenya 2010.
- e. That to expound on the point of law in paragraph 4 the Respondent refers this Honourable Court to prayers number (iv) and (v) in the Petition, which are for Orders of Certiorari and Prohibition and pleads as follows:
 - i. This Petition is anchored, among others, on Article 47 of [the Constitution](#) on Fair Administrative Action.
 - ii. That Article has provision that Parliament shall enact legislation to give effect to the rights in Clause (1).
 - iii. Accordingly, Parliament enacted the [Fair Administrative Action Act, 2015](#), which is an Act of Parliament to give effect to Article 47 of [the Constitution](#).
- f. That further to the above, the [Fair Administrative Action Act, 2015](#), has made provision at Section 12 thereof that:

“This Act is in addition to and not in derogation from the general principles of common law and Rules of natural justice.”
- g. That the orders of Certiorari and Prohibition sought by the Petitioner are Common Law prerogative Orders, called writs, whose place in our law is in the [Law Reform Act, cap 26](#). At Section 8 thereof, provision is made that “Orders of Mandamus, Prohibition and certiorari substituted for writs.”
- h. The Respondent states that by virtue of Section 9(2) of the [Law Reform Act](#), provision is made that:

“applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.”
- i. That the subject matter of the Petition has since gone stale and there is no cause of action as the development permission issued to the Petitioner has since expired.

9. The Respondent based their arguments on the following reasons:



- a. Whether the Court has jurisdiction to entertain and determine this Application and Petition and any consequential orders that may arise from its determination of the objection that the Application and Petition is time barred?
 - b. Whether there was any cause of action considering the development permission issued to the Petitioner had since expired?
10. The Counsel referred to the often quoted case of “Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Ltd 1969 E.A. 696, defines what amounts to a Preliminary Objection. In the words of Law J.A;
- “.....So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....”
11. Mr. Tajbhai submitted the effect of the case law cited above, was that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria;
- i. It must be pleaded by one party and admitted by the other;
 - ii. It must be a matter of law which is capable of disposing off the suit;
 - iii. It must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.
12. Mr. Tajbhai thus submitted that the present objection being one challenging the jurisdiction of this Court to entertain the Petition pursuant to the provision of Sections 72 of the *Physical and Land Use Planning Act* 2019 was on a pure point of law easily satisfying the above requirements and thus properly raised before this Court. He was guided by the ratio in the case of County Government of Migori – Versus - INB Management IT Consulting Limited [2019] eKLR whereby the Court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:
- “The jurisdictional point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That, jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal – Versus - Judicial Service Commission & Others when in demystifying jurisdiction quoted from the decision in Supreme Court of Nigeria Supreme Case No.11 of 2012 Ocheja Emmanuel Dangana -Versus - Hon. Atai Aidoko Aliusman & 4 Others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows:-
- ...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a Court or Tribunal without requisite jurisdiction is a nullity-dead-and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”
13. On whether the Court has jurisdiction to entertain and determine this Application and Petition and any consequential orders, that it may arise from its determination of the objection, the Counsel held that the Application and Petition were time barred submitted that having submitted that the Preliminary Objection was properly before this Court. The Counsel now turned to the crux of the



objection i.e. whether the Court has jurisdiction to hear the Application and Petition. Section 72(3) of the [Physical and Land Use planning Act](#) 2019 states as follows:-

“Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall bear and determine the appeal within thirty days of the appeal being filed.”

14. The Learned Counsel stated that bearing in mind the above provision of law, the law entails that once an alleged party was aggrieved due to an issuance of an enforcement notice, they ought to appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice. In this instant Petition the Petitioner had clearly defaulted on the time frames as stipulated in the law. The Petitioner had come before this Honourable Court after nearly two years. The law entailed that if there was an aggrieved party upon issuance of the enforcement notice they have a time frame of fourteen (14) days to air their grievance. The [Physical and Land Use Planning Act](#) at the provision of Section 93 of the [Physical and Land Use Planning Act](#) 2019 states as follows:-

“All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court”.

15. The Learned Counsel submitted that therefore it was incumbent upon the Petitioner to file its appeal to the enforcement notice dated 24th June 2020 within fourteen days before this Honourable Court. Unfortunately, that was not the case and the Petitioner filed this suit after almost two years. Equity does not aid the indolent. To buttress his point he relied on the case of:- “Bosite Ongero – Versus - Royal Media services [2015] eKLR, the Court stated that:-

“the question of limitation touches on the jurisdiction of the Court, which means that if a matter is statute barred, the Court would lack jurisdiction to entertain it.” In case of “Gathoni – Versus - Kenya Co-operative Creameries Ltd [1982] KLR 104, the Court of Appeal held as follows:-

“The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

16. The Learned Counsel contented that in the same breath as the above cited case laws, this Honourable Court should down its tools because with due respect this Honourable Court lacked the requisite jurisdiction as the legislature gave strict time frames with regards disputes of such nature thus the Petitioner came out of time and was guilty of laches. On the same issue of time frames, they ventured into the second limb of the Preliminary objection where the Petitioner herein has sought for prerogative orders, called writs whose place in our law is in the [Law Reform Act](#) Cap 26 and the [Fair Administrative Action Act](#) 2015.
17. The Learned Counsel averred that the Petitioner herein had sought for prerogative orders in their Petition, he submitted that while there was nothing wrong with that but the orders in the Petition as clothed were subject to the time limitations and the general principles of such prerogative orders applied. He submitted that orders of certiorari had a time limitation of six (6) months since the decision by the administrative authority was made and in this instant case the Petitioner had sought for such



orders after two (2) years. The development approval issued to the Petitioner herein had since lapsed and the matters herein had been overtaken by events and as such the matter had gone stale considering there was no legal cause of action. In conclusion, he prayed for the application and the Petition be dismissed with costs to the Respondent.

B. The Written Submission by the 2nd Interested Parties' opposing the 1st Interested Party's preliminary objection

18. The 2nd Interested Parties through Mr. Murta Tajbhai for the Office of the County Attorney filed their submissions dated 8th November, 2022 and filed on the same date submitted that they were opposing the Preliminary Objection dated filed on the 18th of July 2022 by the 1st interested party. The preliminary objection, is purely based on a point of law challenging the jurisdiction of the court to hear the Petition filed on 20th of June 2022.

19. The Learned Counsel submitted that from the preliminary objection, the same was premised on provision of Section 72 (3) and Section 93 of the Physical and Land Use Planning Act no. 13 of 2019 and Section 9(2) of the Law Reforms Act. The 2nd Interested Parties join issue with the Petitioner in opposing the preliminary objection. The provision of Section 72 (3) provides as follows:-

‘Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.’

20. The Learned Counsel argued that the provisions upon which the preliminary objection was founded being anchored on the provisions of the above cited section of the law presupposes that there exists a County Physical Planning and Land Use Liaison Committee. The 2nd Interested Parties invited the Honourable to consider whether the said committee was in place in relation to Mombasa County. It was not in dispute that the said committee never existed in Mombasa and as a result, the correct provision to rely upon was Section 93 of the *Physical and Land Use Planning Act* no. 13 of 2019 which provides that:-

QUOTE

‘All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court.’

21. Based on the above provisions of Section 93, he submitted that the 1st interested party cannot rely on 72 (3) and Section 93 of the *Physical and Land Use Planning Act* no. 13 of 2019 to canvass the issue of effluxion of time in challenging the competency of the Petition. As things stood, the statute only governed matters taken before the Liaison Committee and since the Liaison Committee never existed in Mombasa, then the same timeframe could not be used to govern the Environment and Land Court's competence to hear and determine the Petition. The 1st Interested Party had not in its preliminary objection set out any law that takes away the jurisdiction of the Honourable Court to hear and determine the Petition before it. The cited provisions of the law related to the Liaison Committee and invocation of its jurisdiction and not the competency of this Honourable Court to hear and determine the dispute.



22. The Learned Counsel argued that the Public Procurement & Asset Disposal Act cannot be compared to *Physical and Land Use Planning Act* No. 13 of 2019 as that Act also gave timeframe for matters to go to Court after the exhaustion of the internal mechanisms but the *Physical and Land Use Planning Act* No.13 of 2019 did not. Therefore, this meant that the said comparison could not be used in the instant case as the *Physical and Land Use Planning Act* was silent on when a party ought to go to court when dissatisfied with the decision of the Liaison Committee.
23. The Supreme Court in the case of “Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 26 of 2014 [2014] eKLR opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:
- “In *Pepper – Versus - Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The Learned Judge thus pronounced himself:
- “The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”
24. In his submission, the Learned Counsel stated that a legislation was only given another interpretation if the literal interpretation amounted to absurdity. In the instant case, the provision of Sections 72 (3) and Section 93 of the *Physical and Land Use Planning Act* No. 13 of 2019 was express and should be given their literal meaning.
25. On whether the Petition was time barred by the provision of Section 9 of the *Law Reform Act*, the Learned Counsel submitted that the 1st Interested Party was confused on whether the matter before this Court was a Constitutional Petition or a Judicial Review application. From the pleadings, it was evident that the matter filed was a Petition and not a Judicial Review application. The Section relied upon by the 1st Interested Party governed Judicial Review applications brought under the Law Reforms Act and not judicial review orders sought in Constitutional Petitions. The Courts have held once and again that one could be granted prerogative orders in a Constitutional Petition and not only in Judicial Review applications.
26. To support himself on this legal position, the Learned Counsel relied on the case of “Brampton Investment Limited – Versus - Attorney General & 2 Others [2013] eKLR where the Court held that:
- “In my view, prerogative orders can now be sought in the form of a Petition as provided in Article 23 of *the Constitution*. A Respondent should not be disadvantaged by costs merely because the Petitioner chose to commence proceedings in a different form, in this case a Constitutional Petition when the orders sought could also have been granted through proceedings of Judicial Review under Order 53 of the Civil Procedure Rules. In the



circumstances, I do not detect an error on the part of the learned Deputy Registrar to approach the matter as one seeking prerogative orders.”

27. The Counsel opined that the Courts had explained and expanded the scope of judicial review proceedings to include where there was a violation of the right to fair hearing and fair administrative action which were the matters that could be canvassed in Constitutional Petitions like the present case. In such instances the applicable rules were those for enforcement of *the constitution* and not the Law Reforms Act route.

28. To buttress on this point, he relied on the case of “Child Welfare Society of Kenya – Versus - Republic & 2 others Ex-parte Child in Family Focus Kenya [2017] eKLR where the court of Appeal held that:-

Finally, as we settle the principles upon which we shall consider the matter before us, this Court, as recently as 20th July, 2017, in the case of Independent Electoral and Boundaries Commission (IEBC) – Versus - National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR was in no doubt about the current place of JR in our system of governance. After extensively reviewing the CCK Supreme Court decision (supra) and other cases, including Suchan Investment Limited – Versus - Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, and Pharmaceutical Manufacturers Association of South Africa in re ex-parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33, the five-Judge bench held:

“In our considered view presently, Judicial Review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of *the Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and Rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of *the Constitution*. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both..... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.”

29. The Learned Counsel submitted that prerogative remedies sought in constitutional Petitions were different from prerogative remedies sought in judicial review proceedings commenced under the Law Reforms Act. The promulgation of *the Constitution* of Kenya 2010 and the enactment of the *Fair Administrative Action Act* vested upon the Courts the jurisdiction to grant judicial review remedies in constitutional petitions which were not commenced under the provisions of the Law Reforms Act.

30. The Courts could now give judicial review orders in constitutional provisions upon being satisfied that the same were merited in a constitutional petition. Similarly, parties may invoke the provisions of the Law Reforms Act to seek the prerogative orders of judicial review. The prerogative orders sought in the present proceedings related to constitutional proceedings and were therefore not to be hampered by the provisions of the Law Reforms Act.

31. In conclusion, the learned Counsel held that the 1st interested party’s preliminary objection did not have any basis and the same should be dismissed with costs.



C. The Written Submissions of the Petitioner

32. The Petitioner's through the Law firm of Messrs. Balala & Abed Advocates filed their written submissions dated 12th October, 2022 and filed on the same date. Mr. Mohammed Advocate submitted that the Respondent herein the County Government of Mombasa filed a notice of preliminary objection dated 4th August 2022 on nine (9) points of law.

The Learned Counsel submitted that the Petitioner approached the High Court in "Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - The County Government of Mombasa whereupon the High Court issued a Conservatory Order in the interim on 7th July 2020 in favour of the Petitioner whose effect was to:- "stay the enforcement and implementation of the Enforcement Notice issued by the Respondent dated 24th June 2020 to stop developments on Plots Number MN/I/3412, MN/I/5503 and MN/I/5504 located in Nyali area within Mombasa County". An appeal was filed in the Court of Appeal against a Ruling on a Preliminary Objection being "Mombasa Civil Appeal No. 64 of 2020: Fabad Iqbal Abmed Bayusuf – Versus - MBESA Investments Ltd & 2 Others whose main issue was on jurisdiction of the High Court and on 10th June 2022 the Court of Appeal proceeded to strike out the Constitutional Petition 43/2020 on the basis that the Environment & Land Court was the proper forum vested with adequate jurisdiction whose effect. Upon filing the present Petition in the proper forum, the 1st Interested Party and the Respondent have raised jurisdictional issues on the Court to down its tools and decline to hear the matter.

33. The Learned Counsel argued that from the preliminary objections raised, the issues that emerge and ought to be determined by the court to reach a fair and just decision on the 1st Interested Party's & the Respondent's Preliminary Objections on whether the Petition is time barred by virtue of Section 72 (3) Physical & Land Use Planning Act No. 13 of 2019 as read with Section 93 of the Act and whether the Petition was time barred by virtue of the provision of Section 9 (2) of the Law Reform Act, Cap. 26.
34. The Learned Counsel averred that on the Petitioner's Preliminary Objection on the 1st Interested Party's Cross Petition on the issue of whether this Court has jurisdiction to hear matters touching on privacy under Article 31 of the Constitution. Both the Respondent and the 1st Interested Party contend that the Petition is time barred, the same having been filed exactly 2 years from the date the cause of action arose i.e the "Enforcement Notice" dated 24th June 2020 from the Respondent suspending the Petitioner's approval Reference Number CP/AAA/2628. They ground their argument on Section 72 (3) Physical & Land Use Planning Act that gives a strict timeline that:

"Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use and the Committee shall bear and determine the appeal within thirty days of the appeal being filed."

35. The Learned Counsel asserted that it was common knowledge and a fact admitted by both the Respondent and the 1st Interested Party that no County Physical and Land Use Planning Liaison Committee existed in the County Government of Mombasa. He held that the law never operated in a vacuum as the adage goes, that's why the provision of Section 93 of the Physical & Land Use Planning Act provides an avenue that:

"All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court."



36. The Learned Counsel submitted that interestingly, both the Respondent and the 1st Interested Party having admitted that there existed no County Physical & Land Use Planning Liaison Committee still want the Court to read in the timeline provided under Section 72 (3) of the Act to the provision of Section 93 and hold that the Petitioner ought to have filed its Petition within 14 days from the date of the cause of action. The question now to be answered was whether the timelines provided in Section 72 (3) of the Act should be applicable when one approaches the Environment & Land Court under Section 93. In answering this question, the Court was obligated to properly interpret the above two provisions of statute i.e Sections 72 (3) and 93. In the case of Law Society of Kenya – Versus - Kenya Revenue Authority & another [2017]eKLR, (see page 7 Petitioner's List of Authorities) the court summarized the principles governing the interpretation of statutes as follows:

- i. Under Article 259 of *the Constitution*, the court enjoined to interpret *the constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of *the constitution* to protect and promote the purposes and principles of *the constitution*.
- ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. [30] (The court should start by assuming that the Act in question is constitutional).
- iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.
- iv. *The constitution* should be given a purposive, liberal interpretation.
- v. That the provisions of *the constitution* must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. [31]
- vi. The spirit of *the constitution* must preside and permeate the process of judicial interpretation and judicial discretion. [32]

37. The court further observed (page 8 Petitioner's List of Authorities):

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.

In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go



to its aid to correct to make up the deficiency. Courts decide what to be law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

that of literal construction. All that the Court has to see at the very outset is, what does the provision say the Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating.

38. Similarly the Court of Appeal in the case of “Mount Kenya Bottlers Ltd & 3 others – Versus - Attorney General & 3 others [2019] eKLR (see page 33 Petitioner’s List of Authorities) had this to say:

“47. Guided by the above principles this Court in its analysis of determining the intention of a statute, in the case of County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015]eKLR pronounced itself as follows: “Interpretation of any document ultimately involves identifying the intention reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

39. The Learned Counsel submitted that from the above cases, the Court had to look at the plain meaning of the law in question in interpreting what the Parliament intended. The provision of Section 93 of the Act gave jurisdiction to the Environment & Land Court jurisdiction to hear disputes relating to physical and land use planning, in the absence of the national and county physical and land use planning liaison committees. Having said this, did Parliament intend that the timelines provided for under the provision of Section 72 (3) of the Act should be applicable when a litigant approached the Environment & Land Court. A plain reading of the provision of Section 93 of the Act clearly stipulated that one was to approach the Environment & Land Court in the absence of the County Liaison Committees. The particular section never mentions that the timelines provided for under Section 72(3) should apply. That is why the court in the Law Society of Kenya case (supra) cautioned the Court cannot add words to a statute to read words into it which are not there. As such, the 1st Interested Party’s reliance on the case of “Depar Limited – Versus - County Executive Committee Member for Lands, Physical & 2 Others [2020] eKLR (at pages 13-17 of his List of Authorities) was misplaced since the issue of a litigant filing early or late was never an issue for determination.

40. The 1st Interested Party also compares the provisions in the Physical & Land Use Planning Act to the provisions of the Public Procurement & Asset Disposal Act and relied on the Court of Appeal decision in the case of Civil Appeal No. E039 of 2021: Aprim Consultants – Versus - Parliamentary Service Commission & Others (at pages 18-35 of his List of Authorities). This case was also misplaced with due respect since the section in question under the provision of Section 175 of the Public Procurement & Asset Disposal Act clearly provides for those timelines unlike Section 93 of the Physical & Land Use



Planning Act which does not. In any event, the Petition before this Court seeks various reliefs under Article 23 of *the Constitution*. Article 24 (2) provides that:-

“.....a provision in legislation limiting a right or fundamental freedom is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom and further that it shall not be construed to limit the right or fundamental freedom.”

41. That right to approach this Court for a fair hearing cannot be limited by the provisions of Section 72 (3) of the Act since the timelines provided apply strictly on the County Liaison Committees and does not apply to a litigant approaching this Court under the provision of Section 93 of the Act. Had the legislature intended the timelines under Section 72 (3) of the Act to apply on Section 93, nothing would have been easier for them to say so like they did in Section 175 of the Public Procurement & Asset Disposal Act. In concluding this issue, the Petitioner submitted that this Petition was not time barred as Section 93 of the Physical & Land Use Planning Act did not provide for timelines to approach the Environment & Land Court where there exists no County Physical & Land Use Planning Liaison Committee and the court has the requisite jurisdiction to hear this Petition.
42. On the issue was whether the Petition was time barred by virtue of Section 9(2) *Law Reform Act*, the Learned Counsel submitted that among its prayers, the Petitioner sought for judicial review orders of Certiorari and Prohibition to be issued against the Respondent. Quite expected, the Respondent and the 1st Interested Party argue that the prayers sought are prerogative commonlaw to be filed within 6 months old rely on the provisions of Section 9 (2) ad (3) of the *Law Reform Act*.
43. The Learned Counsel submitted that Section of the *Law Reform Act* reads as follows:
Rules of court
 1. Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court-
 - a. prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;
 - b. requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;
 - c. requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.
 2. Subject to the provisions of subsection (3), rules made under subsection (1) may or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
 3. In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding court or judge may adjourn the application for leave until the appeal is determined.
44. The Learned Counsel contention was that the High Court in the case of ”Matagei-vs-Attorney General; Law Society of Kenya (Amicus Curiae) (Petition 337 of 2018) [2021] KEHC 460 (KLR) (Constitutional and Human Rights) (13th May, 2021) (Judgment) had occasion to deal with the



provision of Sections 8 and 9 of the Law Reform Act and observed as follows:- (page 60 Petitioner's List of Authorities):

“What is now required is for the Chief Justice to make rules under Section 10 (2) of the FAA Act and the Cabinet Secretary for the time being responsible for the administration of justice, in consultation with the Commission on Administrative Justice, to make regulations under Section 13 (1) of the Act. The National Assembly may also need to formally repeal sections 8 and 9 of the LR Act so that the FAA Act becomes the only law upon which applications for orders of judicial review are anchored.

97. Nevertheless, as I have already stated, Sections 8 and 9 of the LR Act and Order 53 of the CPR have been rendered otiose and their continued retention in our statute books will only serve to promote the wrong notion that Kenya has a two-tracked system for seeking judicial review against administrative action.”

45. The above decision as read with Section 9 of the Law Reform Act reveals the following:

- i. There has been no rules made under Sub - Sections 1 and 2 prescribing that applications for an order of Mandamus, Prohibition or Certiorari shall, in specified proceedings, be made within six months,
- ii. Subsection 3 limits the time for filing judicial review proceedings to 6 months only on an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed.

46. The Learned Counsel averred that the judicial review prayers sought in this Petition were orders of Prohibition and Certiorari to issue against the Respondent and not to remove any judgment, order, decree, conviction or other proceedings for the purpose of it being quashed. The Petitioner thus submitted that the provision of Section 9 of the Law Reform Act was not applicable in the present proceedings and consequently the Petition was not time barred.

47. On the issue of whether this Court has jurisdiction to bear matters touching on privacy under Article 31 of the Constitution, the Learned Counsel submitted that the 1st Interested Party filed a Cross Petition principally alleging that the development the Petitioner is undertaking infringes on his rights to privacy enshrined under Article 31 of the Constitution. He does admit that he raised this issue in Nairobi National Environment Tribunal No. 30 of 2020. The Petitioner in response has filed a Replying Affidavit sworn on 3rd August 2022 by its Managing Director one Hussein Shariff Alwy and at Paragraph 3 deponed:

“3. That upon the advise of the Petitioner's advocates on record, which advise I verily believe to be sound, the Petitioner shall at the earliest opportune moment raise the objection on a point of law in that that court lacks jurisdiction to entertain the Cross Petition on the grounds:

- i. That the provision of the right to privacy as enshrined under Article 31 of the Constitution denies this Court the jurisdiction to entertain the Cross Petition;
- ii. That without prejudice to (i) above, the matter on the 1 Interested Party's right to privacy is subject of an appeal in this Court being Environment & Land Court Civil Appeal Number 17 of 2022: Fabad Iqbal Abmed Bayusuf- Versus - MBESA



Investments Ltd & Ano (see pages 33-38 of the 1st Interested Party's bundle of documents)hence Sub Judice.

48. The provision under Article 31 of *the Constitution* provides:
Every person has the right to privacy, which includes the right not to have:
- a. Their person, home or property searched;
 - b. Their possessions seized;
 - c. Information relating to their family or private affairs unnecessarily required or revealed; or
 - d. The privacy of their communications infringed
49. The Learned Counsel submitted that the said Article 31 was very clear on its coverage which did not extend to stopping development and construction of works in someone's own property vis a vis the neighbors privacy. Furthermore and without prejudice to the above argument, this Court could not entertain the Cross Petition since the matter on the 1st Interested Party's right to privacy is subject of an appeal in this Court being "Environment & Land Court, Investments Ltd & Ano (see pages 33 - 38 of the 1st Interested Party's bundle of documents) hence "Sub Judice".From the above, it was abundantly clear and the Petitioner submitted so that the 1st Interested Party Cross Petition was an abuse of the court process and ought to be struck out with costs.
50. In conclusion, the Learned Counsel submitted that the Petitioner humbly submitted that Section 72 of the Physical & Land Use Planning Act was complete in its own way since it provided for the procedure and the timelines when one was to approach the County Physical & Land Use Planning Liaison Committee. The same never extended to Section 93of the same Act and the Court should desist the invitation by both the Respondent and the 1st Interested Party from adding or reading into words which were not there. The timeline under Section 9 of the *Law Reform Act* was inapplicable to the present proceedings and the Court should not entertain that argument. The Cross Petition was an abuse of the court process the same issues having being raised a separate judicial process and ought to be struck out. From the foregoing, the Petitioner humbly prayed that the preliminary objections raised by the Respondent and the 1st Interested Party be dismissed with costs and to uphold the preliminary objection by the 2nd Interested Party.

VI. Analysis and Determination

51. I have carefully considered the two Preliminary Objections dated 28th July, 2022 and 4th August, 2022 and the written submissions by all parties and plethora authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
52. The issue for determination remains whether this Court has the jurisdiction to entertain the Petition herein. To do that the following three (3) sub-issues emerge for its determination.
- a. Whether the Preliminary Objections raised by the 1st Interested Party dated 28th July, 2022 and the Respondent dated 4th August, 2022 meet the threshold of the objections by Law and precedent.
 - b. Whether the Environment and Land Court has the jurisdiction to hear and determine the issues rained from the filed Petition by the Petitioners herein.
 - c. Who will bear the costs.



Issue No. a): Whether the Preliminary Objections raised by the 1st Interested Party dated 28th July, 2022 and the Respondent dated 4th August, 2022 meet the threshold of the objections by Law and precedent.

53. The main issue here is on preliminary objections raised by the Respondent and the 1st Interested Person. Therefore, it is imperative that the Honorable Court dealt with the concept of an objection to detail. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

54. The above legal proposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited – Versus- West End Distributors Limited. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

55. I wish to cite the case of “Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

56. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Respondent and 1st Interested Party herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Respondents and the Interested Parties were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.



57. Undoubtedly, and as founded herein above, Preliminary objection ideally ought to be on matter of pure law. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. Permits the development of the law; and
- d. Contributes to good governance.....”

58. This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution ‘is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

59. A Petition ought to follow the principles laid down of drafting Constitutional Petitions. Based on the principles set out in the edit of The Court of appeal case of the Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013) eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of Anarita Karimi Njeru –Versus - Republic [1980]KLR 154 [1979] eKLR. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:

“We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the Constitution it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.

In other words, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”



In Hassan Ali Joho & Another – Versus - Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR decision which has been subsequently cited by the Supreme Court in Hassan Nyanje Charo – Versus - Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, the Supreme Court further stated at paragraph 15:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

60. The sovereignty of the people of Kenya and the supremacy of *the Constitution* cannot be subject to challenge in any manner. Article 2 inter alia declares *the Constitution* as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of *the Constitution* is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of *the Constitution* is invalid. Article 3 places an obligation upon every person to respect, uphold and defend *the Constitution*.
61. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions. *The Constitution* also provided for alignment of the laws then in force at its promulgation in Section 7(1) of the Sixth Schedule.
62. Chapter 4 of *the Constitution* creates the Bill of Rights. Article 19 provides that the Bill of Rights, which comprises of the human rights and fundamental freedoms, is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. It also gives the purpose of recognizing and protecting human rights and fundamental freedoms being to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The human rights and fundamental freedoms are inherent in that they belong to each individual and are not granted by the State. They are also only subject to the limitations contemplated in *the Constitution*.
63. Article 22 provides for the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(3) provides some of the remedies which a Court in dealing with proceedings instituted under Article 22 can grant. The reliefs include declaration of rights, injunctions, conservatory orders, declarations of invalidity of a law, compensation and orders of judicial review. Needless to say, the orders of judicial review include certiorari, prohibition and mandamus.
64. Further to Article 22, *the Constitution* in Article 258 accords the right to any person to institute Court proceedings claiming that *the Constitution* has been contravened, or is threatened with contravention.
65. This Court has previously dealt with the powers of a superior Court in Constitutional Petitions. In the case of “Nairobi High Court Constitutional Petition No. E364 of 2020 Okiya Omtatah Okoiti – Versus - Attorney General & 5 Others [2020] eKLR this Court was confronted with the question as to whether a Court can issue a conservatory order in proceedings challenging the constitutionality of a law brought under Article 258 given that *the Constitution* is silent on grant of such a remedy. It was argued that the position was unlike in proceedings challenging infringement or threats of infringement of the



rights and fundamental freedoms provided in Article 22 of the Constitution where the Constitution clearly provides for the remedies which include a conservatory order.

66. It has been submitted by the Respondent and the 1st Interested Party that there is no constitutional value in the Petition to warrant the jurisdiction of this Court to hear and determine the Petition herein. These opponents to the Petition aver and maintain that the issue before the court relates to Environment and Land Use and should be canvassed in the Environment and Land Court.

67. In my view, to unravel this issue the starting point must be the Article 165(3)(b) of the Constitution which gives the High Court the jurisdiction;

“...to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened..”

68. As I understand it, the only issue which brought the Petitioner to this Court was to invalidate the Enforcement Notice dated 24th June 2020. The issue then is to establish whether or not the said Enforcement Notice threatened a right or a fundamental freedom which was being enjoyed by the Petitioner, and the 2nd Interested Party. As I have stated in the foregoing paragraphs, the Petitioner commenced the preliminary aspects of the project in the year 2015. It invested a lot of resources in terms of colossal amount of money, time and expertise in the project all these years. It identified contractors, and suppliers of materials and indeed made provision for every aspect of the project, satisfying all forward and backward linkages in contract formations, supplies and other aspects of the project. This was an involving exercise, both in terms of financial input, and human resource involvement. Every aspect of the project was meticulously carried out, investigated and approved by the County Government of Mombasa. On 4th April 2020, NEMA approved the project. These approvals then paved way for the Petitioner to commence construction in the project site, and sometime before 24th June 2020, the construction started on the site, and the construction workers, whose interests are catered herein by the 2nd Interested Party, moved to site to earn their daily bread. In my view therefore, the Petitioner had acquired a bundle of rights when he secured all the approvals required under the law to start the project. As contracted workers in the site, the 200 construction workers whose interests are represented by the 2nd Interested Party equally acquired a bundle of rights, including the right to earn wages in a lawfully established construction site to which they have contracted their labour. These accrued rights for the Petitioner and for the workers represented by the 2nd Interested Party are what were, and are, threatened by the said Enforcement Notice issued by the Respondent on 24th June 2020. They amount to economic rights which are protected under Article 43 of the Constitution, and the Petitioner has every right to invoke Article 165 (3)(b) of the Constitution to have this Court protect these rights.

69. Even then, granted that the Respondent can indeed issue the said Enforcement Notice, the Petitioner has submitted, correctly in my view, that any such action must still be anchored in the law. The Petitioner avers that the said Enforcement Notice was issued incomplete violation of Article 47 of the Constitution and the Fair Administrative Action Act. Article 47 of the Constitution states as follows:-

47.

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.

70. The Petitioner avers that the manner in which the said Enforcement Notice was issued violated Petitioner’s fundamental rights under Article 47, and indeed this is the reason the Petitioner has come to this Court. Evidently, this is a matter to be intensively investigated by this Court during the trial and not in this Ruling. Suffice it to say, that this Court has the authority to entertain any alleged claim on violation of rights under Article 47 of *the Constitution* and the *Fair Administrative Action Act*.

Issue No. b). Whether the Environment and Land Court has the jurisdiction in this matter.

71. Under this Sub heading the Jurisdiction of this Court has been questioned. A related submission has been made that the complaints herein should be addressed by the Environment and Land Court under Article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act* No.19 of 2011, and that indeed there are ongoing matters in the ELC related to the suit herein.
72. There is no doubt in my mind that there will be occasional situations where the High Court and the Environment and Land Court, and indeed other sister courts could have concurrent jurisdiction on a particular issue. However, there will always be one court which, on the particular issue before the court, has more abundant jurisdiction. More so, in my view, if the issue herein arose before proceedings in an ELC case, that court would be able and indeed should deal and determine the constitutional issue within the proceedings. But if the constitutional issue is the sole basis for commencement of proceedings, and if it is an isolated issue which can be determined in isolation, then the High Court must be allowed to proceed and entertain the matter.
73. Now in this Petition, it is alleged that in the “High Court in Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - The County Government of Mombasa where the High Court issued conservatory orders in the interim on 7th July, 2020.
74. The provision of Section 13 of the Environment and Land Court sets out the jurisdiction of the Environment and Land Court to include disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, relating to compulsory acquisition of land, land administration and management, relating to public, private and community land and contracts, choses in action or other instruments granting enforcement interests in land and any other dispute relating to environment and land.
75. The dispute before this Court presented by the Petitioner does not relate to the issues set out above. This is purely a dispute where it is alleged that the Respondent has acted in excess of its powers and violated the right to fair administrative action to suspend works at a construction site and direct labourers to leave site. It is a violation of rights and freedoms of the individual that has been affected and is being litigated.
76. Clearly, in my view, the orders sought in the said ELC matter are distinct. They are conservatory orders stopping construction in the suit property for reasons given therein, among them that the suit properties are in close proximity to the Plaintiff’s property, and that the approvals given should be cancelled. All these are matter well governed under the provision of Section 93 of the *Physical and*



Land use Planning Act. By this alone, the ELC is properly clothed with the jurisdiction to hear and determine the matters placed before it by the Petitioner through the filed Petition. Hence, the objection on whether the Court has jurisdiction is lame, baseless and unfounded.

77. Further, this Court is not satisfied that the grounds being relied on by the Respondent had reached the threshold of dismissing the present Petition. Interestingly, although both the Respondent and the 1st Interested Party admit that the Liaison Committee under the provision of Section 72 (1) (2) and (3) of the Physical and land Use Planning Act, 2019 does not exist at the County Government of Mombasa. Thus, the next recourse in law is to invoke the provision of Section 93 of the same Act, where the dispute are referred to this Court. From the keen reading and being in full agreement with the Learned Counsel for the Petitioners and the 2nd Interested Party, there is no time stipulation nor statutory limitation for preferring a matter before this Court. Therefore, upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Petition. For these reasons, the Preliminary objections by the Respondent and the 1st Interested party must fail.

Issue No. c). Who will bear the Costs of the Objection

78. It is not well established that and from Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost.
79. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.
80. The Proviso of the Provisions of Section 27(1) of the Civil Procedure Act Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Cooperative Societies eKLR (2014)
81. In the instant case the Petitioner has succeeded in protecting its case and gotten the orders sought. They are entitled to costs. However, taking that the matter is still proceedings to full trial let the costs of the application be assessed at the conclusion of the Petition.

Conclusion and Disposition

82. In view of the above, having caused such an elaborate analysis of the framed issues herein and when all is considered therefore, the Court finds and holds:-
- a. That the two (2) Notice of Preliminary objections dated 28th July, 2022 by the 1st Interested Party and 4th August, 2022 by the Respondent herein be and are hereby found not merited and the same are overruled in its entirety.
 - b. That an order to have the Notice of Motion application dated 20th June, 2022 be canvassed by way of written submissions as follows:-
 - i). The Respondents and the Interested Parties herein granted 21 days leave to file their Replies and written Submissions.
 - ii). The Petitioner granted 21 days leave to file and serve further affidavit if need be responding to any new issues raised and Written Submissions.
 - c. That the matter be mentioned on 10th July, 2023 to ascertain compliance and further directions including taking a ruling date.



- d. That the Petition dated 20th June, 2022 to be fixed for hearing within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling.
- e. That costs of the objection to be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEAN, SIGNED AND DATED AT MOMBASA THIS 31ST DAY OF MAY 2023.

.....

HON. JUSTICE MR. L. L. NAIKUNI, (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant;
- b. Mr. Mohammed Ali Advocate for the Petitioner.
- c. Mr. Tajbhai Advocate for the Respondent.
- d. Mr. Tajbhai holding brief for Mr. Willies Otieno Advocate for the 2nd Interested Party.
- e. No appearance for the 1st Interested Party.

