REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 276 OF 2018

REPUBLIC...APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAIROBI..........................RESPONDENT

AND

KILIMANI PROJECT

FOUNDATION & 21 OTHERS............................INTERESTED PARTIES

AND

CYTONN INVESTMENT

PARTNERS SIXTEEN LLP..................................EX PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant Cyton Investment Partners Sixteen LLP is a Liability Partnership incorporated under the Limited Liability Partnership Act.[1]

2. The Respondent is the County Government of Nairobi established under Article **176** of the Constitution as read with the first Schedule thereto and Section **12** of the County Governments Act.[2]

3. The first Interested Party is an organization formed by the local residents of Kilimani, who have joined forces to address issues within their immediate local milieu, and act as a voice for their community. The second Interested Party, Cavina School is a British Preparatory School located in Nairobi, Kenya for children aged three to thirteen years of all nationalities and backgrounds while the third to the twenty-second Interested Parties are adults of sound minds Residing at Kilimani in Nairobi.

Factual Matrix

4. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. My reading of the respective parties' pleadings is that the history of this dispute is uncontroverted. Notably, a preview of the background shows that the applicant purchased Land Reference Nos. 2/85, 2/86 and 2/87 and that in intends to undertake a development on the said land known as "Cyton Towers" comprising of mixed use development with offices, hotel and serviced apartments, residential apartments and a rental podium. It also common ground that architectural plans in respect of the development were prepared and submitted to the Respondent i.e Plan Reg No, CPF AN 795 for approval.

5. It is uncontested that by a letter dated 24th July 2017, the Respondent notified the applicant that it's aforesaid Plan had been approved subject to the conditions more particularly set out in the said letter.

6. The applicant further states that on 10th October 2017, M/s Transpo Consortium, acting on its behalf submitted to the Respondent a traffic impact assessment report in respect of the project which the Respondent acknowledged on 8th December 2017 and agreed with the proposed

mitigation measures. The applicant states that the Respondent sought further information from the applicant before it could approve the report, and, M/s Transpo Consortium responded on its behalf and fully addressed the matters raised in the Respondent's letter and provided all the requested information.

7. The applicant states that the development will require an Environmental Impact Assessment License under the Environmental Management and Co-ordination Act,[3](herein after referred to as EMCA), and, as part of the environmental impact assessment, it is engaging in public consultations with the residents of Kilimani. It also states that despite the positive engagement, certain residents opposed to the project have declined to engage and under the banner of Kilimani Project Foundation launched a publicity blitz via various outlets to express their objection.

8. It further states that without any prior notice, by a letter dated 30th April 2018, the Respondent unlawfully purported to cancel the said approval pursuant to section 10 of the Building Code stating that the applicant has not addressed conclusively the Respondent's letter dated 8th December 2017, and, that, the proposed development had been controverted vehemently by the Kilimani Resident's Association, hence, it can be inferred that sections 41 (3) and 52 of the PPA have not been complied with adequately.

Legal foundation of the application

9. The applicant challenges the legality of the said cancellation on grounds that:-

> *a. Section 10 of the Building Code, The Local Government (Adoptive By-Laws) Building Order 1668, does not authorize the Respondent to cancel the approved plans.*
>
> *b. The purported cancellation is ultra vires the Respondent's powers as there is no provision, whether in the PPA or at all, that authorizes the cancellation of approved plans either as the Respondent purported to do or at all.*

10. The applicant also states that the impugned decision is unlawful for violating its rights to fair administrative action guaranteed under Article 47 of the Constitution and section 7 (2) (a) (i) & (ii) (c) (d) € (h) (m) (n) & (o) of the Fair Administrative Action Act,[4] (herein after referred to as FAA Act), and, that, it is illegal and procedurally unfair because:-

> *a. The decision was made without any or any adequate notice to the applicant.*
>
> *b. The decision was made in excess of the Respondent's powers as it has no authority to cancel the approval once granted either as it has purported to do or at all.*
>
> *c. The impugned decision was taken with an ulterior motive calculated to prejudice the rights of the applicant who has expended numerous sums in the process of preparing for the development to be erected on the property.*

11. The applicant also states that it wrote to the Respondent on 16th May 2018 raising its concerns regarding the purported cancellation, but, the Respondent has failed, refused and or neglected to respond to the letter or to withdraw the cancellation. Lastly, the applicant states that the project estimated cost of development will be Ksh. 20 billion, and, so far it has expended Ksh. 1,087,434,875.81, hence, it is in the interests of justice that the orders sought be granted.

Reliefs sought

12. The applicant prays for:-

> *a. A declaration that the Respondent's decision contained in its letter dated 30th April 2018 addressed to the ex parte applicant is unlawful and contravened its right to Fair Administrative Action Act under Article 47 of the Constitution and section 4 of the Fair Administrative Action Act.*
>
> *b. An order of certiorari to bring before this honourable court and quash the Respondent's decision contained in its letter dated 30th April 2018 addressed to the ex parte applicant.*
>
> *c. An order of prohibition prohibiting the Respondent from purporting to cancel the approval of development dated 24th July 2017 either as it purported to do by its letter dated 30th April 2018 or at all.*
>
> *d. Spent.*
>
> *e. Costs of the application.*

Respondent's Replying Affidavit

13. The Respondent filed grounds of opposition dated 30th July 2018 stating that the application has no merit and warrants dismissal. It also stated that this court has no jurisdiction because the PPA establishes an elaborate appeal mechanism and forum under section 13 of the act from which applies lie in the High Court.

Respondent's Replying Affidavit

14. Justus M. Kathenge, the Respondent's Chief Officer in charge of urban planning swore the Replying Affidavit dated 18th December 2018 in opposition to the application. He averred that the applicant was required under Sections 41(3) and 52 of the PPA, to conduct public participation on the proposed project including publishing a notice of the proposed change of user in both English and Swahili, but he failed to conduct public participation as required and as a result, there were objections made by the Kilimani Area Residents objecting to the proposed development on grounds that the intended development was prejudicial to their right to a clean environment and also on grounds that the infrastructure outlay could not support a development of the profile and magnitude proposed by the applicant. He deposed that the applicant acknowledges the said objections in its verifying affidavit. Mr. Kathenge deposed that specific issues were raised in the meeting of 14th April 2018 which the applicant never addressed thereby leading to the cancellation of the development plan. He averred that the said issues include:-

a. The zoning requirements for the Kilimani area had not been complied with in the proposed development.

b. There was a nearby primary school and the health and safety of children at the Cavina School, during and after construction, had not been addressed.

c. The noise level to be generated by the project had not been addressed in the mitigation measures.

d. No clear provision had been demonstrated for the removal of waste water generated from the project.

e. Public participation and notices of the project had not been adequately provided.

15. He deposed that the decision to cancel the development plan was lawful and based on section 33 (a) (b) of the PPA. In addition, he deposed that the applicant has not filed any objection to the Respondent's Liaison Committee established under Section 13 of the PPA which has the jurisdiction to review, vary, overturn or affirm any decision of the Director of Physical Planning or officer acting on his behalf, hence, this suit is premature and incompetent.

The Interested Parties' Replying Affidavits

16. Rebecca Karanja a member of the Board of Directors of the 1st Intended Interested Party swore the affidavit dated 23rd September 2019 in opposition to the application. She deposed that the application in its entirety is an illegality, void and should not be upheld as it contravenes the Constitution and all written laws related. She averred that on or about the 12th of April, 2018, the Interested Parties learnt that the Town Planning Committee of Nairobi County Office had approved Change of User and also given development permission on L. R No. 2/86, 2/86 and 2/87 to the applicant. She averred that the alleged Approval was allegedly given on 24th July, 2017.

17. She deposed that the area in question is Zone 4 comprising of Riverside, Kileleshwa and Kilimani and that the current zoning policy for the area requires ground coverage of 35%(Thirty Five percent) for area under sewer and 25% (Twenty Five percent) for areas swear, **(sic)** with plot ratio of 75% (Seventy percent) and 25% (Twenty Five percent) respectively. She averred that the maximum allowable height for an apartment is four storeys, and, that the proposed development will comprise of three (3) Thirty five (35) storey towers of circa One Hundred and Seventy Five Thousand Square Feet (175,000) of office and commercial space for rental, One Hundred and Eighty (180) hotel rooms, One Hundred and Sixty (160) serviced apartments, three-bedroom duplex apartments and penthouse suites, four (4) basement parking floors with a capacity for circa One Thousand Two Hundred to One Thousand Five Hundred (1200- 1500) parking spaces.

18. M/s Karanja deposed that despite the Interested Parties' constant request for information from the Respondents and the Developer concerning the project, they failed, neglected and/or declined to furnish them with the information contrary to Article 35 (3) of the Constitution. In addition, she averred that according to a public notice dated Thursday 26th July 2018, the Respondent announced that it is in the process of preparing a Local Physical Development Plan (LPDP) for Kilimani area, which lies within Zone 4 of the Nairobi Planning Development Zones, and, that, the process is on-going, hence, it would be false to state that there have been 'revisions' to the zoning or to state that there are new by-laws. She averred that the alleged approval was an illegality because the Zonal regulations for Zone 4 had not been changed.

19. She averred that the Developer's failure to publish notice of its intention to effect a change of user as mandated by the PPA denied them an opportunity to address the Respondent and convey their disapproval of the proposed development. She deposed that the Respondent is not only legally required to publish Gazette Notice of the proposed Change of User and Development permission, but to also call for public participation which was not done. She averred that public participation is mandatory because the decision affects the residents.

20. She also deposed that the Respondent failed, neglected and/or refused to publish in the Gazette Notice which is also mandatory. She stated that the said approvals (if any) for the Change of User and Development plans on LR Nos 2/85, 2/86 and 2/87 was obtained illegally and without the due process, and contrary to the law and zoning regulations.

21. She deposed that the essence of the Environmental Impact Assessment Study is to assess both the positive and negative impacts of a project and in case of any negative impacts to consider the mitigation measures to be taken, and, that under *Regulation 17 of (Impact Assessment Audit) Regulations of 2003*, the Environmental Impact Assessment Study must involve the Public. She stated that the residents who area liable to be affected by a development project must be given the opportunity to give their views on the effects of the project.

22. She also averred that the applicant and the Respondent acted in violation of *Article 10 of the Constitution* which sets out the National Values and Principles of Governance, and, that, they failed to have any regard to *Article 42 of the Constitution* which provides that every person has the right to a clean and healthy environment. She also deposed that the Respondent failed to observe the obligations imposed on

them under *Article 69 of the Constitution.*

23. M/s Karanja deposed that the proposed development falls foul of the Zonal policies for Kilimani contained in the Nairobi City Development Ordinances, which indicates that Kilimani is located within **Zone 4** and the land use is indicated as residential which limits Apartment Storey to **Four (4**), and, that the allowable plot ratio is 75% on properties with sewer (25% unsewered) with allowable ground coverage at 35% on properties with sewer (25% unsewered). She averred that the Respondents have failed to adhere to the Development Ordinances while issuing approvals for the proposed project by the developer. She averred that the Zonal policies were made having in mind the infrastructure capacity of each zone.

24. Additionally, she averred that the project is being proposed without a commensurate upgrading of the existing level of infrastructure to support the development, which will ultimately have a negative social and environmental effect. She further averred that the areas of concern include the upgrading of sewerage lines to adequately service the increased levels of sewage discharge due to the proposed development; reduced water supply during peak periods and increased vehicular traffic which will exert pressure on the existing road network in the area. Further, she averred that the Interested Parties are reasonably apprehensive that the applicant has no intentions of improving the roads in the area, the sewerage system and all the infrastructure needed, hence, the development will overwhelm the limited infrastructure that is already straining. She also averred that the foregoing will lower property prices in the area which will inherently deny the Interested Parties their Constitutional Rights under *Articles 42, 69 (1) (d) (f) (g), 69 (2) and 70 (1).*

25. She further averred that in addition to public participation, there is always need to balance the various competing interests particularly where infrastructural developments are involved; and, that there is necessity to consider whether the developments can be undertaken in a manner that does not compromise the environment in a negative way. She deposed that the development must have regard to the conservation and protection of the environment and must be demonstrated to be sustainable consistent with *Articles 40 (1), 69 (1) (d) of the Constitution.* She also deposed that the whole process and the approval is flawed and the logic behind the orders sought is wary and that the application be dismissed.

26. The Interested Parties also filed the supporting affidavit of Constant Terence Cap, an expert in Urban Planning carrying on the business of planning within Nairobi and elsewhere within the Republic of Kenya. He averred that Nairobi City has been growing rapidly for the last two decades, and that Riverside, Kileleshwa, Thompson, Spring Valley, Woodley and Kilimani area are under zones 4, and, that the current zoning policy requires ground coverage of 35% for area under sewer and 25% for areas without sewer with plot ratio of 75% and 25% respectively. He deposed that the maximum allowable height for apartment is four floors. He averred that the proposed development project falls foul of the Zonal policies for Kilimani contained in the Nairobi City Development Ordinances. He also averred that the proposed design does not guarantee those within the vicinity any form of privacy as the buildings will allow its occupants to have clear line of site towards adjacent and surrounding properties, and, that, the height of the proposed development will also block the view of the nearby residential homes and school and negatively affect ambient air quality and sunlight access to the surrounding environment.

27. He also averred that the proposed development cannot be supported by the existing infrastructure, and, it will lead to increase in population density which is not feasible without the provision of adequate upgrading of infrastructure. He also averred that the area in question is not served by a sewer line that can handle such a magnitude of development, and, that, the existing sewerage lines in the vicinity are overloaded and have not been upgraded to adequately service the increased levels of sewage discharge emanating from the proposed development, and, that, the area experiences water rationing with irregular supply at a very low level.

28. He also deposed that the already overstretched public utilities in the area will not be able to service the additional demand created by tower blocks of such a large scale and density in the project area, and, that, the development and the project area are not supported by social amenities including recreation facilities such as public open spaces, playgrounds and sports facilities. Further, he averred that such social, recreational and sporting amenities are an essential part of family welfare. He averred that the proposed development will also equally generate high volumes of surface water run-off which will exert pressure on the adjacent properties, existing road network and the nearby drainage channels, and, that, no Storm Water Management Plan has been provided by the Developer.

29. He further deposed that the proposed project would set an unacceptable precedent in the area that does not conform to the character of the area the cumulative impact of which on the environment and the infrastructure is not capable of mitigation. In addition, he deposed that the approval of such a large scale, high rise, and high density development will be relied on as a precedent to justify other such large scale, high rise, and high density developments in the area the cumulative environmental impacts of which would have devastating consequences.

30. Further, he averred that there will be an irreversible loss of vegetation and faunal biodiversity during the construction involving a massive earthworks and site clearance to accommodate the proposed project, and, that, there is no place left on the plot to allow for vegetative cover. He recommended the following before construction:-

> *a. The approval of architectural and structural drawings must consider expansion of the already overstretched infrastructures of water, sewer, storm water and road. This reasoning is that as a project manager in Kilimani we are witnessing unprecedented water shortages, sewer bursts, traffic and floods due to unplanned developments; and*
>
> *b. A proper environmental assessment report carried out by NEMA in consultation with the area residents. The Authority must carry out public participation meetings of the area residents as required by the law.*

31. He also averred that Nairobi city's high urbanization and population growth rate has brought with itself immense development pressure as a result the city now faces challenges of unplanned and uncoordinated developments, inadequate infrastructure and deteriorating environment. He also observed that the path of unplanned and uncoordinated development with questionable legality cannot be the path to Nairobi city matching other developed global cities. Lastly, he proposed review of development policies before such mega structures can be put up.

32. The Interested Parties also filed the affidavit of Elizabeth Nzani Wachira, an Environmental Consultant dated 23rd September 2019. She

deposed that she holds a Post-graduate Diploma in Environmental Impact Assessment and Environmental Auditing and has worked since 2005. She averred that the proposed project will increase the number of people in the area thus exerting a lot of pressure on an already strained infrastructure.

33. She also deposed that the proposed development cannot be supported by the existing infrastructure. She averred that it will lead to increased population density which is not feasible without the provision of adequate upgrading of infrastructure. Further, she averred that the proposed development ought to be served by a sewer line that can handle such a magnitude of development, and, that, the existing sewer is overloaded and it has not been upgraded to adequately service the increased levels of sewage discharge expected to emanate from the proposed development. Further, she averred that the area experiences water rationing with irregular supply at a very low level.

34. She also deposed that the design does not guarantee those within the vicinity any form of privacy as the building will allow its occupants to have clear line of site towards adjacent and surrounding properties. Further, she averred that the height of the proposed development will block the view of the nearby residential homes and school and negatively affect ambient, air quality and sunlight access to the surrounding environment. M/s Wachira also deposed that the proposed design will reduce the solar access of the other surrounding environment by overshadowing adjacent properties by inhibiting direct solar access and depreciate their value.

35. She averred that ordinarily during construction of a four (four) basement parking floor it would need the foundation of the building to be dug deep, which, possibly includes blasting the bedrock which would create cracks in the surrounding building due to the vigorous vibration involved.

36. M/s Wachira averred that the already overstretched public utilities in the area will not be able to service the additional demand and that the development and the project area are not supported by social amenities including recreation facilities such as public open spaces, playgrounds and sports facilities, and that social, recreational and sporting amenities are an essential part of family welfare. She averred that the proposed development will also equally generate high volumes of surface water run-off which will exert pressure on the adjacent properties, existing road network and the nearby drainage channels. She maintained that no Storm Water Management Plan was shared during any of the public participation meetings that were held on the project.

Applicant's supplementary affidavits

37. The applicant filed a supplementary affidavit dated 26th March 2019 sworn by Patricia Njeri Wanjama. She averred that the applicant challenges the propriety of the Respondent's purported cancellation or invalidation of its approved Architectural Plans, and, that sections 41 and 52 of the PPA do not apply to the process of approval of architectural. She averred that the reliance by the Respondent on those provisions simply confirms the unlawfulness of its actions.

38. She also averred that the applicant applied for, and obtained approval for change of user, a matter which is not the subject of the Respondent's impugned decision, and, in compliance with sections 41 and 52 of the PPA, the applicant published notices of its application for change of user in two local dailies and placed a prominent notice at the premises. She further averred that the above mentioned documents were submitted to the Respondent and reviewed at the County Planning Meeting held on 22nd June, 2017. She deposed that the Respondent is deliberately conflating separate and distinct issues in paragraph 5 of their Replying Affidavit. She also averred that the EIA process being undertaken as required by EMCA.

39. Additionally, she averred that the meeting of 14th April, 2018 was held nine (9) months after the Architectural Plans were approved by the Respondent on 24th July, 2017, and, that, in the minutes of the said meeting, the applicant confirmed that the Architectural Plans had been approved and the public engagement was important for the EIA approval which the applicant indicated it would continue.

40. She also averred that the issues identified in paragraph 6 of Mr. Kathenge's Affidavit are matters which were considered in the approval of the Development permission, while other issues are within the ambit of the National Environment Management Authority (NEMA) when considering whether to grant an EIA Licence under section 58 of the EMCA. She deposed that it is for NEMA, to review the EIA Report when it is submitted, determine whether sufficient public participation as required by EMCA took place, whether all legitimate concerns have been identified and adequate mitigation measures put in place, and if the projects should be licensed, and, what conditions should be imposed. Further, she averred that by purporting to cancel the Architectural Plans based on objections raised by some members during the 1st of several scheduled public baraza, a process being done under EMCA, the Respondent has unlawfully pre-empted an on-going statutory exercise and usurped, the powers of NEMA.

41. She also averred that the matters raised in these proceedings are not within the jurisdiction of the Liaison Committee, which presently does not exist for it is yet to be constituted (or reconstituted), hence, to uphold the Respondent's position would be to give its decision absolute immunity from any form of challenge.

42. The applicant also filed a further supplementary affidavit sworn by Patricia Njeri Wanjama dated 1st November 2019 in reply to the Interested Parties affidavits sworn on 23rd September, 2019 by Rebecca Karanja, Elizabeth Nzani Wachira and Mr. Constant Terence. She deposed that the administrative action under challenge is the purported, "*pursuant to section 10 of the Building Code*" to cancel the approvals, an issue which is not addressed at all by the Interested Parties who focus on issues which not only are not before this Honourable court, but the court has no jurisdiction to address.

43. She averred that as required by the EMCA, the applicant commenced the process of environmental impact assessment which includes public engagement which process is on-going. She averred that the matters raised by the Interested Parties as to the alleged environmental impact of the project appears to have wrongly prompted the Respondent into its unlawful revocation of its approval thus usurping the statutory powers of others. She deposed that it is during public consultations that the Interested Parties can raise their concerns to be incorporated into the project scheme as part of the environmental management plan identifying any potential adverse effects with suitable

mitigation measures.

44. Sher averred that the exercise is being conducted under the superintendence of the NEMA to which any objection the Interested Parties have might still put forward once the EIA Report is completed and submitted, and, that, should an EIA Licence be granted over such objections, the Interested Parties still have the option of appealing, initially to the National Environmental Tribunal, then to the Environmental and land Court all the way to the Court of Appeal as a matter of right and of course subject to satisfaction of the conditions of Article 163(4) of the Constitution, to the Supreme Court. She deposed that no party whether a project proponent or a group of residents, has a veto power over the approval exercise.

45. Further, she averred that the issue of the propriety of the change of user of the project land is not before this Honourable Court, and, in any event, the applicant applied for, and obtained approval for change of user, a matter which is not the subject of the Respondent's impugned decision. She deposed that in compliance with sections 41 and 52 of the PPA, the applicant published notices of its application for change of user in two local dailies and placed a prominent notice at the premises, and, that the change of user has never been the subject of any objection or any lawful challenge whether before the Liaison Committee as provided in the PPA or at all.

Issues for determination

46. Upon considering the opposing facts presented by the parties, I find and hold that the following issues fall for determination:-

> *a. Whether this suit offends the doctrine of exhaustion of remedies.*
>
> *b. Whether this court is divested of jurisdiction by dint of Articles 162 (2) (b) and 165 (b) of the Constitution.*
>
> *c. Whether the impugned decision is tainted with illegality.*
>
> *d. Whether the impugned decision is tainted with procedural impropriety.*
>
> *e. Whether the Respondent abused its powers.*

a. Whether this suit offends the doctrine of exhaustion of remedies

47. Mr. Amoko, the applicant's counsel argued that the Respondent is mistaken on the issue under consideration at least three fronts. *First,* he submitted that the existence of an alternative remedy is not jurisdictional but a matter of discretion. *Second,* he submitted that there is no alternative remedy as the Liaison Committee does not have the jurisdiction to entertain the complaints raised by the applicant in these proceedings. *Third,* he maintained that even assuming the Liaison Committee did have such jurisdiction, the applicant is right to be before this court as (a) the Liaison Committee presently does not actually exist for it is yet to be constituted (or reconstituted) and (b) the matters presented for determination are legal and ideally suited for determination by this court which can provide the most efficacious remedies.

48. Mr. Amoko argued that where Parliament has prescribed a mechanism by which certain disputes are to be resolved, barring exceptional circumstances, it is improper for a party to bypass the prescribed statutory process and seek relief from the courts as has been held in an unbroken line of authorities. He submitted that this salutary legal principle has been upheld and applied by the courts for obvious reasons that not only has the relevant jurisdiction been donated to them but also such specialized tribunals have the necessary expertise and resources to address such specific subject-matter complaints. He submitted that this principle now has statutory foundation under section 9(2) of the FAA Act.

49. Mr. Amoko argued that that the above general principle has no application to this particular case. He cited section 13 of the PPA relied upon by the Respondent which states:-

> *13. Appeals to liaison committees*
>
> *(1) Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner an may be prescribed.*

50. Mr. Amoko also argued that under section 2 of the PPA, director means "*the Director of Physical Planning appointed under section 4*." Section 4(1) in turn provides:-

> "*There shall be appointed by the Public Service Commission a Director of Physical Planning and such other officers, who shall be public officers, as may be deemed necessary for the purposes of this Act."*

51. He argued that the Respondents reliance on section 13(1) is erroneous, and added that the decision was made by one J.M. Kathenge as Ag. Chief Officer- Urban Planning, an official of the Respondent- a County Government, not the Director of Physical Planning, an officer of National Government appointed by the Public Service Commission. He submitted that there is no decision of the Director concerning any physical development plan being challenged in these proceedings. Mr. Amoko also argued that there is yet another jurisdictional obstacle to the Liaison Committee, that is, its limited to functions prescribed under section 10 (2) of the PPA as follows:-

> *(2) The functions of other liaison committees shall be-*

(a) to inquire into and determine complaints made against the Director <u>in the exercise of his functions under this Act</u> or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act:

(b) ......

(c) ......

(d) ....

(e) to hear appeals lodged by persons aggrieved by <u>decisions made by the Director or local authorities under this Act</u>.(emphasis added)

52. Mr. Amoko submitted that the cancellation was made "*pursuant to section 10 of the Building Code* but not under the PPA, which does not have any provision allowing for the cancellation as the Respondent purported to do or at all. He maintained that these proceedings are based on violations of provisions of the FAA Act, *ultra vires* and abuse of power. To buttress his argument he relied on *Fleur Investments Limited v Commissioner of Domestic Taxes & another* **[5]** which held that it was proper for the court to grant relief on the basis of *Wednesbury* unreasonableness and unlawfulness notwithstanding the unexploited statutory appeals process. He also argued that one important exception to the alternative remedy principle is where the challenge is mounted on the basis of matters of law- not contested factual questions on which the expertise of a specialist body may be called for. He submitted that the expertise required in this matter is purely legal addressing relevant statutory provisions of the FAA Act and hallowed well-settled common law public law principles. [6] In addition, Mr. Amoko placed reliance on the Supreme Court of India's decision in *U.P. State Spinning Co. Ltd vs R.S. Pandey And Another* **[7]** thus:-

'*... <u>There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies.</u> First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. <u>Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice</u>...*'

53. Mr. Amoko maintained that assuming the Liaison Committee has jurisdiction, these proceedings constitute one of the exceptional cases, which this court should hear in the interests of justice as authorized by section 9(4) of the FAA Act. To fortify his position, he cited *Republic v Nairobi City County, Director of Planning Nairobi City County & Engineeer of Roads Nairobi City County Ex -parte: Suad Salim Abubakar t/a Saab Royale Hotel* **[8]** for the holding that:-

"*33. <u>In my view, whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action on the basis that there is a right of appeal provided by the statute where such a right is practically non-existent</u>. In this case the circumstances of the dispute render such an option a mirage. In my view, if there is no dispute resolution mechanism covering the circumstances of the case, to send the applicant away on a wild goose chase of a non-existent remedy would be absurd. Where the purported alternative remedy leaves an aggrieved party with no effective remedy, such remedy is no remedy at all. I reiterate that where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, is achieved.*

*34. **<u>In the foregoing premises the inescapable conclusion I come to is that the Respondents' decision was tainted with procedural impropriety and further that there is no more convenient, beneficial and effectual remedy available to the applicant.</u>**"*

54. Lastly, Mr. Amoko submitted that the Liaison Committee which is yet to be fully constituted is not the appropriate forum in which this matter should be determined. He maintained that (i) there is no alternative remedy as the Liaison Committee has no jurisdiction over the decision in these proceedings and (ii) even if it did, this is one of those exceptional cases as sanctioned by section 9(4) of the FAA Act in which the court should entertain the proceedings as it presents purely legal issues for determination and in any event, the Liaison Committees, have not been constituted.

55. The Respondent's counsel submitted that the law provides for a specified process and a forum for the resolution of any disputes arising under the process and submitted that this suit is premature and incompetent to the extent that the applicants failed to avail themselves to the forum provided by the law for the determination of their grievance. He argued that the suit offends section 9 (2) of the FAA Act.

56. Responding to the applicant's counsel's submission that this question does not relate directly to the jurisdiction of the court but rather to the doctrine of judicial assentation, counsel submitted that Section 9 of the FAA Act, provides that there is no jurisdiction to review an administrative action on the part of the court until the internal dispute resolution mechanism provided by law is exhausted. He argued that jurisdiction is a question of law donated either by statute or the constitution or both. He also argued that section 9 removes jurisdiction from the court with regard to review of administrative actions until such time when the aggrieved party exhausts the mechanism and process provided by law. He maintained that jurisdiction is not a matter of choice or preference, and argued that since the applicant did not appeal to the local liaison committee established under Section 13 of the PPA then this court is precluded from sustaining this action.

57. To fortify his argument, he cited *Republic v Nairobi City County Government ex parte Ndiara Enterprises Ltd* **[9]** for the holding that where the constitution or any law provides for a procedure for settlement of disputes, that procedure should be followed before resorting to the High Court or any other procedure provided by law. He also cited *Samson Chembe Vuko v Nelson Kilumo & 2 Others* [10] in which the Court of Appeal cited other decisions among *them Speaker of the National Assembly v Karume* **[11]** for the holding that where there is a clear procedure for the redress of any particular grievances prescribed by the constitution or the act of parliament, that procedure must be strictly

followed. In addition, the Respondent's counsel relied on *Joseph Njuguna Mwaura & Others v Republic* **[12]** for the holding that the entry point of justice is jurisdiction. He relied on *Alice Mweru Ngai v Kenya Power & Lighting Company Limited* **[13]** which held that where the law has granted jurisdiction to other organs of government to handle specific grievances, the courts must respect and uphold the law.

58. He argued that the question whether or not the Liason committee exists, is a question of fact that could only have been deponed to in the verifying affidavit as opposed to being introduced by submissions. He cited section 109 of the Evidence Act[14] and submitted that the applicant has not discharged the evidential burden required to show that the liaison committee does not exist and therefore the appeal process provided for by statute was unavailable. He maintained that the Liaison committee is mandated to review all decisions and hear all grievances arising from the actions of a local authority (county government).

59. The Interested Parties counsel argued that the submission that the Liaison Committee does not exist is untenable. He cited the Court of Appeal in *Kenya Ports Authority v Modern Holdings (EA) Limited* **[15]** for the holding that *"The jurisdiction either exists or does not ab initio and the none constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise like jurisdiction."* He also cited *Speaker of the National Assembly v James Njenga Karume(infra).*

60. Before determining the issue under consideration, it is important to point out that during the pendency of this suit, the PPA was repealed by the *Physical and Land Use Planning Act*[16] which was assented on 16th July 2019 and came into commencement 5th August 2019. However, since the PPA was the governing law at the time the cause of action arose and also at the time this suit was filed, it is the applicable law in this case.

61. The starting point is section 33(3) of the PPA which provides that:-

> *1. 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 committee under Section 13."*
>
> *2. Subject to subsection (3), the liaison committee may reverse, confirm or vary the decision appealed against and make such order as it deems necessary or expedient to give effect to its decision.*
>
> *3. When a decision is reversed by the liaison committee it shall, before making any order under subsection (2), afford the Director an opportunity of making representations as to any conditions or requirements which in his opinion ought to be included in the order, and shall also afford the appellant an opportunity to replying to such representations.*

62. Section 13 (1) provides that;

> *"Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed."*

63. Section 10 (2) provides for the functions of the Liason Committees as follows:-

> *a. to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act.*
>
> *b. to enquire into and determine conflicting claims made in respect of applications for development permission;*
>
> *c. to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land;*
>
> *d. to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguarding areas; and*
>
> *e. to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.*

64. Section 15 of the PPA provides for appeals to the National Committee and to the High Court in the following words:-

> *1. Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.*
>
> *2. The National Liaison Committee may reverse, confirm or vary the decision appealed against.*
>
> *3. The provisions of this Act relating to the determination by the Director or local authority of objections to physical development plans or development applications, as the case may be, or the determination of an appeal under section 13, shall apply mutatis mutandis to the determination of appeals by the National Liaison Committee under this section.*
>
> *4. Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court.*

65. A reading of the above provisions and indeed the provisions of the PPA governing approval of development application leave me with no doubt that upon receipt of the development application and project report, the county government shall within 30 days forward the same to the Director of Physical Planning and other relevant authorities such as the Land Control Board (where the subject property is agricultural). The County Government, subject to the comments of the Director of Physical Planning and the relevant authorities to which the application was forwarded to, and upon having regard to such other factors such as health and amenities may grant the applicant a development permission in a form known as PPA2 or refuse to grant the development permission. In case of refusal to grant the development permission, the County Government will inform the applicant in writing, of the grounds of its refusal. The applicant is then at liberty to appeal against the decision, to the relevant Liaison Committee established under Section 13 of the Act.

66. I have in numerous determinations of this court stated that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. [17] The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine has been consistently appreciated by our superior courts. The doctrine is now of esteemed juridical lineage in Kenya.[18] It was felicitously stated by the Court of Appeal in *Speaker of National Assembly vs Karume*[19] *a pre-2010 decision* in the following words:-

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*."

67. There is ample jurisprudence to confirm that many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. A few examples will suffice. The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*[20] as follows:-

> *"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

68. In the *Matter of the Mui Coal Basin Local Community*[21] the High Court stated:-

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

69. At least two principles emerge from decided cases. *First,* while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[22]The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.[23]

70. A reading of the above cited provisions shows that refusal of a development permission or the alleged cancellation of the development permission is an appealable decision to the Liaison Committee.

71. The above being the position, what comes into mind is section 9(2) of the FAA Act which provides that the High Court or a subordinate court under sub-section **(1)** **shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review** **and all remedies available under any other written law are first exhausted**. Also relevant is sub-section **(3)** which provides that *"*the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section (1).

72. Parliament in its wisdom used the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[24]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[25] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

73. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[26] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[27] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

74. A proper construction of section **9(2) & (3)** of the FAA Act leads me to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by subsection **(4),** which provides that: - "Notwithstanding subsection **(3),** the High Court or a subordinate Court *may*, *in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

75. I have in numerous past decisions opined that what constitutes exceptional circumstances depends on the facts of each case [28] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act is heavily borrowed from the South African equivalent legislation, that is, the *Promotion of Administrative Justice Act*,[29] hence, jurisprudence from South African Courts interpreting similar circumstances and provisions is of greater value, relevance and may offer useful guidance. I find that the following points from a leading South African decision on the subject relevant:-[30]

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

76. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[31]

77. There is no definition of 'exceptional circumstances' in the FAA Act. However, exceptional circumstances mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[32]

78. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. Mr. Amoko argued that the existence of an alternative remedy is not jurisdictional but a matter of discretion. In my view, this argument flies on the face of the mandatory provisions of section 9 of the FAA Act. It offends the now esteemed doctrine of exhaustion and the catena of local and foreign jurisprudence upholding its application and emphasising that where Parliament has established a dispute resolution mechanism, judicial review has no place.

79. There was no argument before me that the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court as opposed to the mechanism under the act. A look at the above provisions and the functions of the Liason Committee and the facts of this case suggest otherwise. The relevant provision are well designed and provide for an aggrieved party to approach the High Court. There is nothing to show that the mechanism is not effective nor has it been demonstrated that the applicant cannot obtain an effective remedy from the Liason Committee. He also argued that the matters presented for determination are legal and ideally suited for determination by this court which can provide the most efficacious remedies. This argument flies on the face of the clear statutory provisions reproduced above outlining the functions of the Liaison Committee. It also ignores the truth that the challenge before this court is refusal or cancellation of a development permission, a function within the mandate of the Liaison Committee.

80. The other argument advanced by Mr Amoko is that the Liaison Committee does not have the jurisdiction to entertain the complaints raised by the applicant in these proceedings. I have already addressed this issue in the preceding paragraph. He also argued that (a) the Liaison Committee presently does not actually exist for it is yet to be constituted (or reconstituted). This argument is attractive. However, appealing as it is, it collapses on one ground. It ignores the statutory requirement in section 9 (4) of the FAA Act that "*on application by the applicant, the court may grant an exemption."* My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, *unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act*. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[33] Section **9(4)** of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

81. The law is that Section **9(4)** of the FAA Act postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond to his case and leave it to the court to determine. No application was presented before this court to determine the existence of exceptional circumstances; nor do I see any

exceptional circumstances in the circumstances of this case.

82. Perhaps, I should boldly add that it is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act. Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the applicant can show exceptional circumstances to exempt it from this requirement.[34] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[35] An internal remedy is adequate if it is capable of redressing the complaint.[36]

83. There was no suggestion or convincing evidence that the remedy under the Act does not offer a prospect of success. There is no argument before me that the remedy under the Act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.

84. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

85. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively.

86. Perhaps I should emphasize that the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The functions of the Liaison Committee is expressly provided under the Act. A reading of the Act, and in particular the sections reproduced earlier shows that the Liaison Committee is competent to determine the dispute. In view of my analysis and the determination of the issue under consideration, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court as provided under the PPA. This case offends section **9 (2)** of the FAA Act.[37] The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA Act.[38] In conclusion, I find and hold that this suit offends the doctrine of exhaustion of statutory remedies.

b. Whether this court is divested of jurisdiction by dint of Articles 162 (2) (b) and 165 (b) of the Constitution.

87. Despite the fact that this is a fairly dipositive issue, Mr. Amoko and the Respondent's counsel did not address it at all.

88. However, counsel for the Interested Parties addressed it at length. He cited Articles 165(5) (b), 162(2)(b) & (3) of the Constitution and *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Limited*[39] and argued that the development approval is governed by the PPA and the local Zoning Regulations, and, that it involves land use and how it affects the environment. As a consequent, he argued that this matter that ideally should be handled by the Environmental and Land Court and not the Constitutional and Judicial Review Division of the High Court. It was his submission that this court lacks jurisdiction over environmental and land matters.

89. To buttress his argument, he cited the Supreme Court in *Republic v Karisa Chengo & 2 Others*[40] which held that the Constitution pronounced itself clearly on the jurisdictional competencies of various courts of law in Kenya, and, that the drafters of the Constitution, had the intention of clearly demarcating jurisdictions of the said courts so as to pre-empt lacunae and conflicts. The court went on to state that besides the Constitution, there are several statutes which demarcate the jurisdictions of various courts and tribunals and, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC.

90. Citing Article 165(5), counsel for the Interested Party argued that the High Court has expressly been denied jurisdiction on matters that are reserved for courts contemplated in Article 162(2), namely Environment and Land Court and Employment and Labour Relations Court. He urged this court to obey the Constitutional edict and down it tools for want of jurisdiction. To buttress his argument, he relied on *Celina Wambui Kigwe v Urithi Housing Cooperative Society Limited*[41] which held that the High Court does not have jurisdiction to hear Environment and Land Court matters. He also cited *Seven Seas Technologies Limited vs Eric Chege*[42] which held that the High Court has extensive jurisdiction in matters except those that fall under Article 162.

91. A court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[43] Article 165(1) of the Constitution vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of the Constitution. Article 23 (1) provides that the High Court has jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

92. The limitation of the vast powers conferred upon the High court under Article **165** is found in Article **165 (5)**. This provision states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:- (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b). Clearly, this court has no jurisdiction to determine matters falling under Article 162 (2) (2) (a) & (b) of the Constitution.

93. However, what are these matters? The answer is found in the provisions of Section **13** of the Environment and Court Act.[44]The

preamble to the said act states that it was enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes. Section **13** of the Environment and Land Court Act[45] provides that:-

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) ***relating to environmental planning and protection, climate issues, land use planning****, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs

94. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2) (b)** of the Constitution and **Section 13** of the Act. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its ***use, planning, possession, control, title, compulsory acquisition or any other dispute touching on land***, then this court has no jurisdiction.

95. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters, which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section **13 (3)** of the Act. In addition, sub-section **7 (b)** above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application. The said court can grant the reliefs sought herein.

96. I may usefully refer to *United States International University (USIU) v Attorney General.*[46]Although the said case related to labour issues, the contention was whether the Employment and Labour Relations Court established under Article **162 (2)** of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under Article **23** of the Constitution. The court stated as follows:-

"45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of

fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011.” (Emphasis added).

97. The Court of Appeal has also had occasion to address itself on the issue in the case of *Daniel N. Mugendi v Kenyatta University & 3 others.*[47] The court allowed an appeal and set aside an order dismissing a suit on grounds that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under Article **23** of the Constitution. It stated:-

> *"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.” (emphasis added).*

98. In *Republic vs National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*[48] the High Court rendered itself as follows:-

> *62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by* ***Justice Mohammed Ibrahim*** *in* ***Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR****:*
>
> 64. *Whereas this Court had in the past entertained disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in Petition No.* ***5*** *of 2015-* ***Republic vs. Karisa Chengo & 2 Others*** *it has become clear that such matters ought to be dealt with by the specialized courts, when the Court expressed itself* inter alia *as hereunder:-*
>
> *“it is obvious to us that s***tatus** *and* **jurisdiction** *are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation…Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with* **suis generis** *jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”*
>
> *65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant’s contended right to be heard stem from their yet to be determined interest in the suit land.*
>
> *66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in* ***Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012****,[para. 29-30] where it was held:*
>
> *“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with ‘general’ original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework”.*
>
> *67. Similar sentiments were expressed in* ***Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others*** *in which it was held that:*
>
> *“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”*

99. A High court may not determine matters falling squarely under the jurisdiction of the *‘status courts’* namely the Employment and Labour Relations Court and the Land and Environment Court. Even with that clear-cut jurisdictional demarcation, on numerous occasions, matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Land Court. I decline the invitation to venture into this forbidden sphere.

100. It is true the Constitution guarantees right to access courts. However, the Constitution does operate in a vacuum. It does not automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the Environment and Land Court Act.[49] As such, where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction will be inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. Consequently, I find and hold that the jurisdiction of this court in this matter has been improperly invoked. On this ground I dismiss this suit.

c. Whether the impugned decision is tainted with illegality

101. Mr. Amoko submitted that the cancellation of the approval was ostensibly pursuant to *S*ection 10 of the Building Code which comprises two by-laws, namely, *The Local Government (Adoptive By-Laws) (Building) Order 1968* and *The Local Government (Adoptive By-Laws) (Grade II Building) Order 1968*. He argued that the Respondent did not specify which one of two it invoked, but, he nevertheless proceeded on the assumption that the Respondent sought to rely on section 10 of The Local Government (Building) By-laws 1968). He argued that the said provision does not authorize such cancellation whether on the grounds cited by the Respondent or at all.

102. He argued that there is nothing in section 10 of the Building By-laws authorizing cancellation of plans and that the section is confined to the grounds upon which the Respondent would disapprove an application for approval, a stage, which had long been passed by the time the Respondent made its impugned decision of 30th April, 2018. He argued that the Building By-laws have specific provisions governing submission of an application and approval of building plans, and, that, section 4 deals with the Application Form, Section 5 – Submission of Plans, Section 6 – Fees, Section 7 – Approval of Plans, Section 9- Extent of Approval, and Section 10 – Grounds for disapproval of plans. He cited section 7 which provides: *"**Approval of Plans**.*

> *7. (1) Within thirty days of receipt of a duly completed application form together with such particulars as are required by these By-laws the Council shall notify the applicant in writing whether or not the application has been approved:.."*

103. Counsel argued that the Respondent having considered the applicant's application, pursuant to section 7, and having approved the plans, it was not open to it to invoke section 10 of the Building Code. He maintained that the said section does not provide for cancellation of a plan once approved. He argued that the reasons given for the decision were failure by the applicant to comply with Section 41 (3) and 52 of the PPA on grounds that the residents controverted the Project. He submitted that the presumption is that the said sections were not complied with. He cited the said sections which provide:-

> "***41. Subdivision of land***
>
> *(1) No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this Act and upon application made in the form prescribed in the Fourth Schedule to the local authority.*
>
> *(2)* ....
>
> *(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit."*
>
> "***52. Publication of notice in newspapers***
>
> *Every notice published in the Gazette under any of the provisions of this Act, except the notices published under sections 49 and 50, shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the Chiefs.*"

104. Regarding the application of section 41 (3) of the PPA, he argued that the provision envisages the publication by way of Gazette of an application for development, change of user or subdivision which may have an impact on adjacent properties, and it has nothing to do with architectural plans. He also argued that even if section 41 (3) was applicable, compliance with the provision requires the Respondent, to cause to be gazetted the notice of the application, and, that, opposition by residents cannot by a stretch of imagination be deemed to mean that this section was not complied with. Additionally, he argued that the Respondent failed to give evidence or reasons as to the non-compliance by the applicant.

105. He also argued that the applicant is in the process of engaging the local residents once not for purposes of planning, but as part of the Environment Impact Assessment process under the EMCA, which he argued is an entirely separate process. Mr. Amoko cited *Pastoli v Kabale District Local Government Council and Others**[50]*** for the holding that actions or decisions of public authorities or officers taken or made in excess or without jurisdiction are struck down as illegal. He also placed reliance on *An Application by Bukoba Gymkhana Club**[51]*** where the court held that in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

106. Additionally, Mr. Amoko relied on *Daniel Ingida Aluvaala & Another v Council of Legal Education & Another**[52]***for the holding that p*ublic bodies, no matter how well-intentioned, may only do what the law empowers them to do which is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. He argued that* the purported cancellation of the approval is not provided under the By-laws. He argued that the Respondent relied on a provision that is not applicable, a clear indication

of a public authority acting contrary to the provisions of the law. He maintained that the Respondent had no authority in law to cancel the Architectural Plans as it did.

107. The Respondent's Counsel submitted that the County Government is the custodian of the function of approving all development proposals and applications made by developers and other private actors and that the statutory framework under which this function is carried out is the PPA as read together with the rules and regulations made thereunder. He argued that section 33 of the act grants express power to a local authority (now County Governments), to grant or refuse development permission on grounds to be specified and provided.

108. Counsel submitted that the Respondent's decision was lawful and regular and thereby there is no basis for the grant of the orders sought in the instant application. He argued that the applicant was required to undertake certain actions and render specified reports as per the respondent's letter dated 8th December 2017, and, in absence of strict compliance with these conditions, the respondent was well within its powers to cancel the provisional approval initially granted. Lastly, counsel submitted that the applicant was also required by law under Sections 41(3) and 52 of the PPA, to undertake extensive public participation which is also a constitutional imperative, and, that, specific stakeholders voiced concern and questions with regard to the project.

109. Counsel for the Interested Parties argued that the approval was obtained without following the due process, noncompliance with the constitutional imperative of public participation, compliance with the PPA and the Zonal regulations of the area, hence, the court cannot give it a seal of approval nor can courts enforce an illegality. He argued that there cannot be a worse form of abuse of the court process, than for a court of law to knowingly lend itself to be used in furtherance of what is patently fraudulent and illegal scheme set in motion by the applicant.

110. Additionally, counsel argued that the applicant knew very well or ought to have known that the area is reserved for residential buildings of not more than four storeys high. He also argued that the applicant did not comply with the PPA, which required that they inform the immediate neighbours about the intended change of user and also post the notice in the area chief office's notice board. He submitted that the Respondent in breach of their constitutional and legal duty failed to conduct public participation before granting the impugned approval. He argued that it is abundantly clear that the approval cannot stand because it was given not only contrary to the constitutional imperative but also against PPA as well as the Zonal Regulations. He relied on *Trisquare Limited & Another v Christian Lau Larsen & Another* ***[53]*** for the holing that "*No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.*"

111. The Interested Parties counsel cited *Republic vs Kenya Revenue Authority, Ex-Parte United Millers Limited* ***[54]*** for the proposition that a litigant should not be allowed to benefit from an illegality. In addition, he cited *Multi-Line Motors (K) Limited v Migori County Government* [55]for the proposition that the applicant was under a strict duty to comply with all the provisions of the law and the regulations made thereunder. He submitted that to quash the impugned decision and restore the impugned approval is tantamount to this court being used to allow the applicant to infringe on the Interested Parties' constitutional and legal rights, and the provisions of the PPA, EMCA, FAA Act and Articles 40(1) 2(a), 42, 43(1)(b)(d),47(1)(2), 69(1)(d)(2),70(1).

112. Counsel argued that public participation *Regulation 17 of (Impact Assessment Audit) Regulations of 2003* provides all the legally prerequisite steps that need to be looked into in matters such as this:

> *(l) During the process of conducting an environmental impact assessment study under these Regulations, the* ***proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.***
>
> *(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall –*
>
> *(a) Publicize the project and its anticipated effects and benefits by –*
>
> *(i) Posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;*
>
> *(ii) Publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and*
>
> *(iii) Making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks;*
>
> *(b) Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;*
>
> *(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and*
>
> *(d) Ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.*

113. He argued that the applicant failed to publish notice of its intention to effect a change of user as mandated under Section 41(3) and 52 of the PPA. Also, he argued that the Respondent failed to publish Gazette Notice on the proposed Change of User and Development permission, and call for public participation. He submitted that public participation is key in safeguarding the environment, a position emphasized in

international instruments and practice and emphatically pronounced in *Principle 10 of the Rio Declaration on Environment and Development (1992).* He relied on *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya*[56]for the holding that participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them. He argued that in determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. He argued that the applicant and the Respondent failed to conduct public participation, and, if the approval is upheld it will greatly undermine the spirit of public participation, human rights and principles of democracy.

114. Counsel argued that the Respondents actions violate or threaten the Interested Parties right to property and to a clean environment guaranteed under Articles 40 (1) 42, 68 (1) (d) (g) and 70 of the Constitution. He submitted that the Respondents have completely failed to adhere to the Development Ordinances. He added that Zonal policies were made having in mind the infrastructure capacity of each zone, and, that the project is being proposed without a commensurate upgrading of the existing level of infrastructure to support the development, which will ultimately have a negative social and environmental effect. He cited *Ken Kasinga v Daniel Kiplagat Kirui & 5 Others**[57]* for the holding that *where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment.* Lastly, he cited *Republic –vs- Kenya National commission on Human Rights ex parte Uhuru Kenyatta**[58]* for the proposition that the court has an onerous responsibility of maintaining the delicate balance between an individual right and those of the public and that sometimes private rights have to bow to public interest.

115. Our Constitution requires a purposive approach to statutory interpretation.[59] In this regard, I find useful guidance in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[60] where Ngcobo J stated:-

> "*The technique of paying attention to context in statutory construction is now required by the Constitution ... As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights."*

116. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. [61] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> "*Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."**[62]*

117. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. [63] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others**[64]* Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> "*In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

118. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the enabling Act, which reads *"An Act of Parliament to provide for the preparation and implementation of physical development plans and for connected purposes*." From the clear wording of the preamble, it is not possible to de-link the preparation and implementation of development plans. To conclude otherwise would be being unfaithful to the statute.

119. Perhaps, it would be fitting to recall the words attributed to Elie Wiesel, a holocaust survivor who remarked that "....we must always side with the Rule of Law." [65] This is because law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change.[66]

120. I find it fit to cite *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another**[67]* in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[68] who said that:-

> *"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline." (Emphasis added).*

121. Thus, when an application of for a development permission is declined or cancelled, the reasons must be defendable in a court of law. The question is, whether the cited reasons in this case are defendable under the enabling statute. To address these questions, it is imperative

to examine the relevant law and the legal procedures governing change of user and grant or refusal to grant development permission. It is manifest that clarity on an issue so central to the proper exercise of this approval power is necessary.

122. PART V of the repealed PPA bears the short title Control of Development. Section 29 provides for powers of local authorities (in this case the County Governments). It reads:- "Subject to the provisions of this Act, each local authority shall have the power— (*a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area; (b) to control or prohibit the subdivision of land or existing plots into smaller areas; (c) to consider and approve all development applications and grant all development permissions; (d) to ensure the proper execution and implementation of approved physical development plans; (e) to formulate by-laws to regulate zoning in respect of use and density of development; and (f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.*

123. The decision-maker must be satisfied of two things before granting approval. *First,* he or she must be satisfied that there is compliance with the necessary legal requirements. *Second*, he or she must also be satisfied that none of the disqualifying factors under the law will be triggered by the erection of the proposed building. This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights and the purposes of the governing statute. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighboring properties which may be adversely affected by the erection of a building authorized by the approval of the plans in circumstances where they were not afforded a hearing. If construed in this way, the law strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighboring properties. The interpretation promotes the property rights of the landowner and those of its neighbors.[69]

124. On the other hand, the Respondent is bound to approve plans, unless it is positively satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors under the law.

125. In the context of change of user from residential or single-dwelling to multi-dwelling, the process involves the initial application and approval stage at the local authorities (Respondent) and the final approval and processing of the title at the Department of Lands. Prior to initiating the process at the local authorities (the Respondent), the developer is required to place an advertisement in at least two (2) local dailies of wide circulation giving fourteen (14) days' notice of the intended change of user and inviting comments and/or objections, if any. Upon expiry of the notice period and subject to no adverse comments/objections, the developer can then submit the application at the local authorities (Respondent).

126. Development control is the power to decide whether or not specific development takes place on specific sites to control the intensity of development that is permitted and to control its layout and design.[70] The legitimacy of urban development control is derived from the police power which is exercised by the government.[71] Development control is a mechanism for ensuring the orderly and progressive implementation or delivery of objectives of the land use plans.[72]

127. This Respondent has extensive powers that relate to the process of approving plans and inspection of construction works post approval. The purpose of the Planning Scheme is to promote the coordinated and harmonious development of the area in such a way as will most effectively tend to promote health, safety, order, amenity convenience and general welfare, as well as efficiency and economy in the process of development, and the improvement of communications. Any proposal or application to develop or use land and/or buildings within a local authority area must have regard to the provisions of the Planning Scheme for particular Zone.

128. The provisions relevant to this case relate to: zoning, related issues; and the regulation of the use of side spaces. In terms of zoning, land use zone is a portion of land located within the local authority area in terms of which certain uses of land, buildings and structures are imposed and regulations pertaining to their use and development are specified. In the Planning Scheme buildings are permitted to have a certain height of storeys. The mechanisms involved include compliance or development that requires planning permission, standards, building codes, and zoning regulations. The scope of development control is wide. The following excerpt from *The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance**[73]*** is useful:-

> "…*development control is the process, laid down in legislation, which regulates the development and use of land and buildings. Development control serves as a way, whereby, policies are being implemented and unauthorized growth prohibited, promotes local authorities to prevent incompatible land use.*
>
> *Development control is an attempt to ensure that what is arranged beforehand is carried out to the letter or decisions are made to reconcile conflicting interests. Development control is to ensure compatibility of various land uses in rural and urban areas. Development control involves conscious efforts that are geared towards the actualization of proposed land uses on the ground. Development control facilitates appropriate development, recognizes its significance in building and protecting a healthy economy and a sustainable environment. It also examines the potential impact of the proposed development, protects the public interest from inappropriate development and also involves compliance of all procedures, building codes, standards to ensure that physical plans conform to approved plans. Development control is the executive arm of the planning process. It is the means whereby policies are implemented, specific land use proposals brought to fruition and unlawful development prevented. It is a process laid down in legislation, which regulates the development and use of land and buildings. It is a professional activity carried out by town planners in order to ensure compliance with approved master plan thereby ensuring orderliness. It reduces the negative effects that accompany physical development. It can either be pre-development, during development or at post-development stage of a project which is sited in an unapproved location. It is a highly sensitive exercise which must be done with precaution, precision, firmness and with deep sense of responsibility by the authorities concerned. Fairness, justice and equity should be the watchdogs in development control programmes." (Foot notes omitted)*

129. Building regulations and by-laws provide the mandatory techno-legal framework for regulating building activity from planning, design to completion of construction.[74] These bylaws and development control rules govern the following aspects, namely; building permission, zoning sub-division of land, land use, open spaces, built-up area and height limitation, floor space index, lighting and ventilation, structural design materials and methods of construction etc.[75]

130. A reading of section 29 of the PPA shows that the Respondent is vested with powers to prohibit and to control use and development of land. In my view, the decision maker is enjoined to be satisfied, prior to approving the plans, that the erection of the building to which the plans apply will not disfigure the area; be unsightly or objectionable; be dangerous to life or property; or derogate from the value of adjoining properties. The existence of any one of these factors, disqualifies the plans concerned from approval. A consideration of these issues requires a proper interpretation of the relevant sections of the Building Code.

131. The power to grant development permission does not cease after the development permission is granted. The Respondent has a statutory duty to ensure proper execution and implementation of approved physical development plans. It follows that where there is a breach of the approval conditions or there is discovery of crucial material justifying cancellation of the approval, the Respondent is mandated to revoke or cancel the approval.

132. The Building Code (Adoptive by- laws) Building Order, 1968, grants the Respondent powers to approve or reject building plans. The Code provides that a person who erects a building or develops land or changes the use of a building or land, or who owns or occupies a building or land shall comply with the requirements prescribed in the said code.[76] The Code also gives specifications for *inter alia* siting buildings, foundations, building materials to be used and specifications on walls and foundations.[77]

133. Section 10 of *The Local Government (Adoptive By-Laws) (Building) Order 1968* provides grounds for disapproval of plans. It reads that:- "Subject to any power of relaxation conferred upon the council by these By-laws, the council shall disapprove the plans for the erection of a building if – (a) the plans are not correctly drawn or do not provide sufficient information or detail to show whether or not the submission complies with these By-laws; (b) such plans disclose a contravention of these By-laws or of any other written law.

134. My reading of the above provision and the PPA is that County governments have a duty to use planning controls to ensure that development is allowed only where it is needed, while ensuring that the character and amenity of the areas are not adversely affected. The planning system plays an important role in modern society. It is meant to protect amenity and the environment in the public interest.

135. More important is the fact that the development control process is a continuous flow between measuring and action. All development control policies are to ensure coordination and compatibility of land uses to bring about improvement in the general welfare of people. This ultimate goal is achieved through the attainment of the following set of objectives, namely, take corrective action, avoid overcrowding, protect natural environment, ensure physical efficiency and cleanliness of settlements, safe guard life and property; ensure harmonious location of land uses, and reduce or avoid exposure to pollution. Through development control, measures are instituted to regulate activities that pollute the natural and built environment. These activities are located at places where their effects could be minimized. The broad objective of urban development and planning regulations is to ensure the orderly development of urban areas. Land use planning is deciding in advance what to do, where, when, with what, how, on or under the land. It is a thought process that guides land use activities on space. This process has to be guided by a set of rules, regulations and standards.

136. There are three main objectives of urban planning law,[78]namely, prevention of development of land along lines contrary to public interest; planning for the enlightened and orderly arrangement on the available land of such things necessary to the community, as houses, roads, open spaces, industries, shops, offices, schools and places of recreation and entertainment and by stages to bring the use of land into conformity with the planned arrangement.[79]These objectives are achieved by the statutory requirement that planning permission is necessary before any development may be carried out; and this brings into focus the role of law in urban planning. The role of law is to ensure a process that underlies various kinds of controls and inducements that are used to shape future land development and to preserve existing land development without chaotic change. Physical Planning Law, Building and Planning Codes and regulations are some of the legal tools used to control land use and planning.

137. Mr. Amoko's argument that the Respondent having granted the approval could not be cancelled ignores the established position that planning is a continuous process which takes into account new problems. Development permission is granted subject to certain conditions. In my view, the list of conditions cannot be exhaustive and each case will depend on its set of facts and circumstances. In the instant case, objections were raised and it turned out that the applicant had not undertaken public participation. Mr. Amokos argument ignores the fact that planning goes through several steps. Even during construction in the event of breach of the conditions or substandard work, an enforcement action can be taken.

138. Urban Planning is a unique discipline and goes through not one but several legal processes all of which are monitored. A breach of any of the mandatory steps can attract legal sanctions. Whereas there are many theories of Urban Planning, the dynamic nature of urban planning is explained by the rational theory of planning. The following excerpt from *The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance*[80] is useful:-

> "*Rational planning theory is a procedural theory that focuses on the process of planning rather than on an object or end goal.*[81] *To successfully achieve rational planning, there are steps that must be followed.*[82] *First, a problem must be defined. Second, there needs to be identification of alternative options to solve this problem. Third, there must be detailed evaluation of each alternative. The fourth step is to implement the best alternative, and the fifth step is to monitor the effects of the chosen alternative. Rational planning does not end with the fifth step. Rational planning takes into consideration new problems arising or the fact that the initial problem or goal was not actually reached with the pre-determined best alternative. Therefore, rational planning may loop back to any step at any time as it is a continuous process.*[83] *Rational planning is systematic by nature.*

139. Even critics of the Rational Planning theory like Charles Lindblom, agree that any decision made should be closely related to the policies that are currently in place.[84] The question that follows is whether the impugned decision is closely related to the policies in place including the purposes of the governing statute. What comes to mind is Lord Diplock's enumeration in *Council of Civil Service Unions v. Minister for the Civil Service*[85] of a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision *ultra vires.* These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality.*[86]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give

effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as *"unreasonableness"* in *Wednesbury* case.[87] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

140. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

141. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

142. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense, the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

143. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.

144. It is axiomatic that the exercise of public power is only legitimate when lawful.[88]A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational.[89]Decision-makers should not pursue ends which are outside the ''objects and purposes of the statute.'' It is said that power should not be ''exceeded'' or that the purposes pursued by the decision-maker should not be ''improper,'' ''ulterior,'' or ''extraneous'' to those required by the statute in question. It is also said that ''irrelevant considerations'' should not be taken into account in reaching at a decision.

145. The requirement to enforce urban planning law and building regulations is not in dispute. The issues that led to the cancellation of the grant of approval have to my mind not been shown to be outside the law.

146. The role of the court in cases of this nature was well explained in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [90]as follows:-

> "*[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*

147. In other word, so long as statutory body remained within the powers conferred upon it by Parliament, a Judicial Review court will not intervene. The broad rationale for urban development and planning regulations is to ensure the orderly development of urban areas.[91] In particular it aims at providing a good living environment for all by ensuring safety, amenity, accessibility, energy conservation and environmental protection; providing a safe, healthy, useable, serviceable, pleasant and easily maintained environment for all commercial, industrial, civic and community land users.[92] In addition, it is aimed at preventing disturbance to neighboring environment particularly by the industrial land users. It also ensures that any conflicting requirements of different land uses are reconciled particularly among mixed land users; and provides orderly and progressive development of land in urban areas and preserves amenities on that land as well as promoting environmental control and socio−economic development.[93]

148. Urban law, development and planning regulations are meant to ensure that no person develops any land within a planning area without planning consent or otherwise than in accordance with planning consent and any conditions specified there in.[94] Day to day design and planning activities are guided and shaped by established use of design and improvement standards and guidelines. The guidelines and regulation are meant to be used by planners, designers, developers and planning boards in plans and designs preparation and reviewing and evaluation of developments. The objective of standard application is to plan, design and develop the proposed project in light of data collected about site dimensions, its environs and the character of the surrounding area. In addition the intent in applying standards is to promote quality development.

149. If a County Government considers that any development has been carried out without the grant of planning permission, or that any

condition or limitation to which such permission was subject has not been complied with, an enforcement notice or a revocation as in this case can issue. A reading of the PPA and the Building Code leave me with no doubt that the impugned decision falls within the Respondent's legal mandate. I find no traces of illegality in the impugned decision. The law as I understand it is that once a Judicial Review court fails to sniff an illegality, it will not invalidate a decision. I decline the invitation to interfere with the impugned decision because there is no basis to warrant such intrusion.

d. Whether the impugned decision is tainted with procedural impropriety

150. Mr. Amoko submitted that fair process is characterized by full and adequate notice as well as a real opportunity to make representations before a public authority takes any adverse action against a person. He submitted that this is an essential part of the bundle of rights encapsulated in the famous canonical phrase "due process" that locally as far as the administrative action is concerned, now has constitutional anchor in Article 47 of the Constitution.

151. Mr. Amoko submitted that the applicant was denied the due process rights it was entitled to before the Architectural Plans were cancelled. He argued that the Respondent never notified the applicant it was considering cancelling the approval, and neither did it disclose the factual and legal basis for the proposed action or invite the applicant to make whatever representations it wished to make before making a decision or taking action. He argued that Article 47 reinforced by section 4(3) and (4) of the FAA Act prohibits unilateral, arbitrary actions which the Respondent engaged in. He argued that the Respondent violated the said provisions. To buttress his argument, counsel cited *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 others*[95] and in *Ernst & Young LLP v Capital Markets Authority & another*[96] for the holding that it is imperative that individuals who are affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made. He submitted that as a matter of constitutional and statutory imperatives as well as the application of common law principles of fundamental fairness, the letter of purported cancellation of the approval is unlawful and must be quashed.

152. The Respondents counsel did not address this issue.

153. Counsel for the Interested Parties submitted that fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. He argued that the Respondent complied with Article 47 of the Constitution and section 4 of the FAA Act in that the decision was communicated in writing and reasons thereof were provided.

154. The applicant's argument on the issue under consideration collapses on two grounds. *First*, the right to a fair administrative action is context sensitive and it will depend on the decision in question. Whether or not a person was given adequate Notice depends on the circumstances and the type of the decision to be made.

155. The courts look at all the circumstances of the case to determine how the demands of fairness should be met.[97]The foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

156. I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[98] which succinctly elucidated the law in cases of this nature. It held that fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[99]

157. Upon applying the legal principles discussed above to the facts and circumstances of this case, I find that the governing law provides for issuance of an Enforcement Notice, or refusal of grant of development permission. In the same vein, where the permission has been cancelled as in this case, the affected person is entitled to be served with the decision. It is not disputed that the cancellation was communicated. The law provides for a mechanism of challenging the decision and time frame for doing so. Sincerely, if at all the applicant never understood the communication or the reasons given or if it required any other information, it had a statutory right to request for details before the time provided under the law to challenge the decision lapsed. It never did so. It understood the decision and instead of approaching the right forum provided under the law, it moved to this court.

158. Administrative justifiability should be objectively determined. The court must assess the surrounding facts and circumstances and consider the relevant facts. In order to prove justifiability, an administrative action must be objectively tested against the requirements of suitability, necessity, and proportionality. They involve the test of reasonableness. The constitutional test embodies the requirement of proportionality between the means and end. Justifiable administrative action refers to good, proper and suitable administrative action. There must be a reasonable explanation between the means and ends of the administrative action. This means that there must be a reasonable connection between the administrative action and the reasons given for such an action. I find that the letter dated 30th April 2018 meets this test. In addition, the reason(s) given is not vague. It cites clear provisions of the law and the Building Code. That was sufficient communication. As stated earlier, the Respondent's mandate does not end with granting of a development permission. Its statutory mandate is continuous and it includes revoking development permission where the law and circumstances so demand as in this case. I find that the argument citing violation of Article 47 of the Constitution and section 4 of the FAA act is unsustainable.

e. Whether the Respondent abused its powers

159. Mr. Amoko placed reliance on *R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* [100] for the proposition that that statutory power can only be exercised validly if they are exercised reasonably, and, no statute ever allows anyone on whom it confers a power to exercise such a power arbitrarily, capriciously or in bad faith.

160. He submitted that the Respondent granted the approval as far back as 24th July, 2017, and, without any further communication as to whether the applicant had violated the conditions attached to the approval, the Respondent sighted flimsy reasons of non-compliance by the applicant, including failure to adequately address a letter relating to traffic impact, nine (9) months after approval was given. He argued that the Respondent's action is a glaring example of the exercise of its power arbitrarily, capriciously and in bad faith. He added that after the approval, the applicant continued to obtain necessary approvals and to comply with the approval requirements.

161. Both the Respondent's counsel and counsel for the Interested Party did not address this ground of assault.

162. It is an elementary principle that the primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation a State agency in exercising powers is it required to fulfil. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and functions or acting outside of their jurisdiction.

163. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and functions or acting outside of their jurisdiction

164. As was held in *cited Republic vs National Water Conservation & Pipeline Corporation & 11 others*[101]*once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. The applicant has not demonstrated that the impugned decision is tainted with illegality or that the Respondent abused its powers.* The duty of the court is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law; and, had in consequence taken into consideration the matters which upon the true construction of the Act it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. From the material before me, there is nothing to show that the Respondent abused its powers under the law or improperly exercised its powers.

Disposition

165. In view of my analysis enumerated herein above, and my conclusions herein before detailed, I find and hold that this judicial review application is unmerited. Accordingly, I hereby dismiss the applicant's Notice of Motion dated 11th July 2018 with costs to the Respondent and the Interested Parties.

Signed and dated and at Nairobi this 27th day of January 2020

John M. Mativo

Judge

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[1] Act No. 42 of 2011.

[2] Act No. 17 of 2012

[3] Cap 286, Laws of Kenya. **Note:** This Act was repealed by the Physical and Land Use Planning Act No. 13 OF 2019, Date of assent: 16th July, 2019, Date of commencement: 5th August, 2019.

[4] Act No. 4 of 2015.

[5]{2018} e KLR. CA

[6] Citing Fordham Judicial Review Handbook (5th edition) at paragraphs 36.3.6 (F).

[7] Appeal (civil) 1346 of 2005.

[8] {2018} e KLR.

[9] {2017} e KLR.

[10] {2016} e KLR.

[11] {2008} 1 KLR 425.

[12] Criminal Appeal No. 5 of 2008.

[13] {2015} e KLR

[14] Cap 80, Laws of Kenya.

[15] Civil Appeal no 108 of 2016 (2017) eKLR.

[16] No. 13 OF 2019.

[17] See for example JR 363 of 2018 and JR 102 of 2018 and Misc. App. No. 220 of 2019.

[18] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017]. eKLR

[19] {1992} KLR 21.

[20] {2015} eKLR.

[21] {2015} eKLR.

[22] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017].

[23] Ibid.

[24]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[25] Ibid.

[26] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[27] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[28] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[29]Act 3 of 2000.

[30] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[31] See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J

[32] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[33] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[34] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[35] Ibid para 44.

[36] Ibid paras 42, 43 and 45.

[37] Act No. 4 of 2015.

[38] Ibid.

[39] {1989} e KLR.

[40] {2017} e KLR.

[41] HCCC No 1 of 2017 {2017} e KLR.

[42] {2014} e KLR.

[43] *Samuel Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[44] Act No. 19 of 2011.

[45]Chapter 12A, Laws of Kenya.

[46] {2012} eKLR.

[47] {2013} eKLR.

[48]{2018} eKLR.

[49] Act No.19 of 2011.

[50] {2008} 2 E.A. 300.

[51] {1963} EA 478 at 478.

[52] {2017} e KLR.

[53]Kiambu HCCC No 9 of 2018 {2018} e KLR.

[54] {2015} e KLR.

[55] {2019} e KLR.

[56] JR Misc. App. No. 374 of 2012.

[57] Nakuru ELC Constitutional Petition No. 50 of 2013.

[58] HC Misc. App. NO. 86 of 2009.

[59] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[60] {2004} ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[61] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[62] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[63] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[64] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[65]Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Liuthania, delivering a speech at the Farewell Dinner for the 4th Congress of the World Conference on Constitutional Justice, 13th September 2017.

[66] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[67] {2018}eKLR.

[68] Published in Just Law {2004}.

[69] *Walele v City of Cape Town and Others* {2008} ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at para 19.

[70] Reade E., (1987): British Town and County Planning, Milton Keynes, Philadelphia, Open University Press.

[71] Ibid.

[72] Abubakari A., Romanus D. Dinye,(2011), Urbanization and the Challenges of Development in Ghana: A case Study of Wa Township, Journal of Sustainable Development in Africa (Volume 13, No. 7, 2011), Pp 210-235.

[73] Mativo John M., A thesis submitted in partial fulfilment of the requirements for the award of the degree of Master of Laws, University of Nairobi.

[74] T.N.Boob, Dr. Y.R.M. Rao, Violation of Building Bye-Laws and Development Control Rules: A Case Study IOSR Journal of Mechanical and Civil Engineering (IOSRJMCE) ISSN : 2278-1684 Volume 2, Issue 4 (Sep-Oct 2012), PP 48-59 www.iosrjournals.org.

[75] Ibid.

[76] Sections 3,4,5,6,7,8 of the Bye-Laws.

[77] Section 7

[78] Lionel A. Bludel and George Dobry, Town and Country Planning, London Sweet & Maxwell, 1963, Chapter 1, page 1.

[79] Ibid.

[80] Mativo John M., A thesis submitted in partial fulfilment of the requirements for the award of the degree of Master of Laws, University of Nairobi.

[81] Faludi, A. (1973). Planning Theory.Pergamon Press.

[82] Taylor, N. (1998). Urban Planning Theory since 1945.SAGE Publications.

[83] Ibid.

[84] Allmendinger, P. (2009) Planning Theory. Palgrave, Basingstoke, Macmillan, New York.

[85] {1985} AC 374.

[86] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[87] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[88] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[89] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[90] 2012(4) SA 618 (CC).

[91] Republic of Botswana, Ministry of Lands, Housing and Environment, Department of Town Planning and REGIONAL Development, Physical Development Manual , PDGM Services (Pty) Ltd. 2002.

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] {2014} e KLR.

[96] {2017} e KLR.

[97] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and

forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[98] {2015} e KLR.

[99] Ibid.

[100] {1999} 1 EA 245, 249.

[101] {2015} eKLR.