



Coral Pearl Executive Apartments Limited & another v County Government of Mombasa & 2 others (Constitutional Petition 32 of 2021) [2022] KEELC 3000 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3000 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 32 OF 2021
LL NAIKUNI, J
MAY 18, 2022
IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR
COURT UNDER ARTICLE 23 (1) ,
ARTICLE 162 (1), (2) (B). ARTICLE 165
(2) (D) (II) OF THE CONSTITUTION OF
KENYA, 2010
AND
IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOM UNDER ARTICLE
10 (2) (B), 19 (2), 20 (4) (A), 28, 47
AND 50 OF THE CONSTITUTION OF
KENYA, 2010
AND
IN THE MATTER OF: BREACH OF THE PROVISIONS OF
ARTICLES 157 (11) AND 244 OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: ARTICLE 258 OF THE CONSTITUTION
OF KENYA, 2010 AND ALL ENABLING
POWERS AND PROVISIONS OF THE
LAW
AND
IN THE MATTER OF: SECTIONS 64(1), 65, 72 92 (1) AND 92



**(2) OF THE PHYSICAL AND LAND USE
PLANNING ACT, 2019
AND
IN THE MATTER OF: SECTION 135(1) OF THE CRIMINAL
PROCEDURE CODE CAP. 75**

BETWEEN

CORAL PEARL EXECUTIVE APARTMENTS LIMITED 1ST PETITIONER

DANCAN ODHIAMBO OMONDI 2ND PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

JEOPHITA JUNE MWAJUMA 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

RULING

I. Introduction

1. The petitioner's/applicant's notice of motion application for the determination by this Honorable Court is dated July 21, 2021. It is brought under the provision of article 23 of the Constitution of Kenya, rules 13, 19, 23 (1) and (2) and 24 of the Constitution of Kenya (Protection of fundamental rights and freedoms) Practice and Procedure rules 2013.

II. The Petitioner/Applicant's Case

2. The Petitioner/Applicant seeks for the following orders:-
 - a) Spend.
 - b) Spend.
 - c) Spend.
 - d) That pending the hearing and determination of this Petition, there be and is hereby issued a conservatory order restraining the Respondents, whether by themselves, agents, employees, servants and/or whomsoever is acting under their authority or instruction, from interfering with the 1st Petitioner's ongoing development and construction of a block of apartments known as Coral Pearl Executive Apartments on property known as LR No. MN/1/5222 situated in Nyali off Links Road in Mombasa County.
 - e) That pending the hearing and determination of this Petition, there be and is hereby issued a conservatory order staying further proceedings in Mombasa County Court Criminal Case No. M 079 OF 2021 Republic – Versus - Dancan Odhiambo Omondi and Mombasa County Court Criminal Case No. M 265 of 2021 Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu.



- f) That costs of this application be bore by the Respondents jointly and severally.
3. The application is grounded on the facts, testimonies and the averments on the face of the application and further 78th Paragraphed Support Affidavit of DANCAN ODHIAMBO OMONDI the 2nd Petitioner and director of the 1st Petitioner and the 27 annexures marked as “DOO – 1 to 27” annexed hereto. He averred that the 1st Petitioner commenced development of a block of apartments on Land Reference No. MN/1/5222 on 7th August 2019 after obtaining the necessary approvals and licenses from the relevant bodies. That the 1st and 2nd Respondents allege that the said developments have not been approved and have attempted to stop the 1st Petitioner from further construction without serving them with an enforcement notice as required by law. The 1st and 2nd Respondents in specific contend that the 1st Petitioner is undertaking an extension of the development by building the 8th and 9th floors which were not in the initial approved drawings.
 4. Mr. Odhiambo claimed that on 21st November 2020 the Acting County Director of Planning and Architecture, Mr. Paul Manyala solicited a bribe from him with a threat of shutting down the construction if the same was not made. After the 2nd Petitioner failed to pay up the bribe, his site was stormed by a group of county marshals on 9th February 2021 who arrested his workers on site on site. The workers were later released with no charge but the 1st Petitioner suffered loss of over Kenya Shillings One Million Fifty Hundred Thousand (Kshs. 1,500,000/=) loss in terms of materials and labor force.
 5. The deponent claims, despite all the intimidation from the county, he was yet to receive any enforcement notice. Upon further inquiry he was informed that the approvals that were restricted to only 7 floors had expired yet he was developing the 8th and 9th floors. To avoid further antagonizing by the 1st and 2nd Respondent, Mr. Odhiambo made an application for renewal and extension on 12th February 2021, marked “DOO -9” and paid for it on the E-CITIZEN platform and was provided by a receipt of payment marked as “DOO – 11”. The deponent further stated he was informed by the 2nd Respondent that his application has not been approved as he had not complied with paying the invoice and providing prerequisite documents.
 6. Mr. Odhiambo claimed that the 1st and 2nd Respondents were bent to frustrate his construction. On 27th February 2021 he was served by the 3rd respondent with summons to appear before the county court on 31st March 2021 to answer development related charges. The 2nd petitioner was subsequently charged in Mombasa County Court “Criminal Case No. M 079 OF 2021 Republic – Versus - Dancan Odhiambo Omondi” and was released on cash bail of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) on 19th May 2021. That on 13th May 2021 the 1st Respondent’s officers served the deponent with a Notice of Prosecution/Enforcement dated 13th May 2021 which ordered demolition for inter alia carrying out works without approvals, which prompted the 2nd petitioner to report the same to Nyali police station under OB/54/13/05/2021. The deponent further averred that on 3rd July 2021, the respondents raided his site and arrested three of his workers, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu and charged them on 5th July 2021 with the offence of developing an extension of a building without approvals in Mombasa County Court “Criminal Case No. M 265 of 2021 Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu”. The three were later released on a cash bail of Kenya Shillings Five Thousand (Kshs 5,000/=) each.
 7. Mr. Odhiambo, contended that the Respondents were maliciously prosecuting him in both cases as no enforcement notice had been issued to him as provided by Section 72 of the [Physical and Land Use Planning Act](#) 2019. He further maintained that the Demand Notice/Stop Order that was served upon him could not be used in development as it’s not a legally recognized document under the [Physical](#)



and Land Use Planning Act 2019. He argued that the Respondents were harassing and intimidating him and his site workers with criminal proceedings, despite having acquired all approvals and permits needed to develop. He maintained that the development was not in breach of the conditions set by County Executive Committee as the approvals given on 11th July 2018 allowed the 1st Petitioner a period of twelve (12) months within which to commence construction and twenty four (24) months within which to complete the same. That the 1st Petitioner commenced construction on 7th August 2019 and his arrest happened on 31st March 2021 within the stipulated twenty four (24) months period.

8. He continued to argue that his prosecution and that of the 1st Petitioner was in bad faith, driven by ulterior motives and breaches his constitutional rights. He contended that the approvals granted by the 1st Respondent on 11th July 2018 never put a limit on the number of floors to be developed and the approved plans included the 8th and 9th floors. He argued that through the approvals were made before the Physical and Land Use Planning Act 2019 came into force, the said Act still applies to the construction by virtue of Section 92 of the Act. That Section 64 of the Act, gave the Petitioners 3 years before the development permission lapsed and not 1 year as purported by the Respondents, and Section 65, provides that sanctions can only be imposed if development is not completed within 5 years after development permission is granted. He stated that the Respondents were in violation of the provision of Sections 64, 65 and 92 of the Physical and Land Use Planning Act 2019 and breached the provisions of Articles 3, 10, 19, 20, 28, 47, 50, 157 and 244 of the Constitution of Kenya, 2010. The deponent urged court to stop the criminal charges which were instituted in bad faith and in utter abuse of the court process which had made him incur a hefty costs amounting to a sum of Kenya Shillings Fifty Million (Kshs. 50, 000,000.00).

III. The 1st and 2nd Respondents case

9. The 1st and 2nd Respondents while opposing the application filed their responses to the Application. There were five (5) points Grounds of Opposition and 35th Paragraphed Replying Affidavit sworn by PAUL MANYALA, the Director of Planning of the 1st Respondent and filed on 29th September 2021. The 1st and 2nd Respondents claimed that the prayers of conservatory orders were serving private interest which amounted to abusing the due process of law and court.. Mr Manyala claimed that the Petitioners were misleading the court in stating that they were not served with an enforcement notice, which they ought to have presented their case to the liaison committee as opposed to seeking ex parte orders in court. That since the issuance of the ex - parte orders, the Petitioners continued with construction in violation of the Physical and Land Use Planning Act 2019.
10. The deponent stated that the approval made on 11th July 2018 was on conditions set out in the Notification of Approval, marked as “PM – 1” which the Petitioners have since violated. He stated that the 1st Petitioner failed to comply with Condition 1, which required them to notify the 1st Respondent of the intended construction within 48 hours prior to commencing construction, in order for the 1st Respondent to allocate a building inspector. On 9th February 2021 the 1st Respondent issued the 1st Petitioner with a Notice to stop Construction and produce the requisite documents. The 1st Respondent then discovered from the board on the site that the 1st Petitioner was constructing additional floors than was initially approved and issued a second notice, an enforcement notice on 13th May 2021.
11. Despite the two notices, the 1st Petitioner continued with construction prompting the 1st Respondent to arrest the 2nd Petitioner who was an agent of the 1st Petitioner and charged him on 5th July 2021 with inter alia failing to comply with the enforcement notice served under Section 72 of the Physical and



Land Use Planning Act 2019. Notwithstanding, the charges before court, the Petitioners continued with construction, which prompted the 1st Respondent to re-arrest the 2nd Petitioner. Mr. Manyala, argued that the Petitioners conceived the Honorable court to issue ex parte orders while concealing material evidence of illegally extending the number of floors initially approved. He urged court not to grant the conservatory orders, which were sought to serve private interest while putting the interest of the public at risk. He pressed court to dismiss the application with costs to the 1st and 2nd Respondents.

IV. The Petitioner/Applicant's Supplementary Affidavit

12. On 5th November 2021 while responding to the issues raised in the Grounds of Opposition and Replying Affidavit by the 1st and 2nd Respondents, the 2nd Petitioner filed a 25th Paragraphed Supplementary Affidavit sworn by DANCAN ODHIAMBO OMONDI dated 4th November, 2021. He vehemently refuted ever being served with any enforcement notice as the one served upon them and held that the alleged Notice of prosecution/enforcement was unknown in law and non consequential. The same notice was effected on one Saitoti who was not an authorized person of the 1st Petitioner for the purpose of service of documents. Further the 2nd Petitioner stated that he notified the 1st Respondent of the commencement of the construction, 48 hours prior through the online E-CITIZEN platform but the 1st Respondent failed to send its inspectors. He maintained that the approval PPA2 issued by the 1st Respondent did not limit or specify the number of floors to be constructed by the Petitioner.
13. The deponent accused the Mr. Manyala of annexing false drawing in his Replying Affidavit and argued that the same were different from the ones he submitted. Further Mr. Odhiambo averred that those drawings did not bear neither serial number of the application, the official QR Code for security, the official rubber stamp for the 1st Respondent nor his official architect stamp. He condemned Mr. Manyala for doctoring the drawings with the sole intention of misleading court that there was a limit on the number of floors and stop the construction.
14. The second supplementary affidavit was sworn by WILLIS OLUGA, the Learned Counsel on record for the Petitioners. He stated that he confirmed from the 1st Respondent's Department of Lands, Housing and Physical Planning and county attorney's office that Mombasa County Physical and Land Use Planning Liaison Committee did not exist as it had never been established nor formed. Therefore the Petitioner had no avenue to lodge an appeal after being served with an Enforcement Notice under Section 71 as read together with the provision of Section 75 of the Physical and Land Use Planning Act 2019.

V. Submissions

15. On 30th September, 2021 in the presence of all the parties, the Honorable Court directed that the Notice of Motion application be canvassed by way written submissions. Upon compliance, a ruling date was reserved accordingly.

A. The Petitioners written Submissions

16. On 5th November 2021, the Learned Counsel for the Petitioner filed submissions in support of the application. He submitted on two issues; jurisdiction and whether the orders prayers ought to be granted. On the first issue of jurisdiction counsel submitted that the Petitioners were not served with an enforcement notice as provided Section 72 of the Physical and Land Use Planning Act 2019. Even where they may have been served, the Mombasa County Physical and Land Use Planning Liaison Committee, where they were supposed to appeal to does not exist as it was not created. Counsel argued



that, where a remedy provided by law does not exist or is inaccessible, an aggrieved party can bypass that legal remedy and seek redress in court.

17. On the merits of the application, the Learned Counsel submitted that the 1st Petitioner was granted approval for its development and the said approval did not limit the number of floors to be built. Therefore the Respondents could not accuse the Petitioners of developing more than the approved floors. That the criminal charges against the Petitioners were an abuse of the criminal process geared towards malice and vendetta against the Petitioners. The Learned Counsel argued that on prima facie case, the Petitioners have demonstrated to court that the orders sought ought to be granted, and he urged court to allow the application.

B.The 1st and 2nd Respondent's Written Submissions

18. On 6th December 2021, the Learned Counsel for the 1st and 2nd Respondents filed submissions. The Learned Counsel submitted that conservatory orders are only granted to preserve public interest prior to hearing a suit in line with Article 23 of the Constitution and in this case, it served the public interest to dismiss the application. The Learned Counsel submitted that the Petitioner is using the oversight of the 1st Respondent to construct extra floors while failing to appreciate that the drawings were approved based on the structural plans they presented. The Learned Counsel submitted that the building cannot sustain extra floors and court should not allow the same to proceed and endanger the lives of the public at large. The Learned Counsel argued it's in the public interest to dismiss the application, in order to stop the Petitioners from further constructing. Further, the Counsel argued that the court has no jurisdiction to hear and determine the matter as the conditions set out in Section 72 of the Physical Planning and Land Use Act have not been adhered to. Court was urged to dismiss the application with costs,

VI. Analysis and determination

19. I have fully considered all the issues raised in both the Notice of Motion application and the main Petition by the Petitioner, the grounds of opposition and the replying affidavit, written submissions and the cited authorities by the Parties herein, the relevant provisions of the law and the Constitution of Kenya, 2010.
20. In order to arrive at a just, fair and an informed decision, this Honourable Court has framed the following issues for its determination. These are:-
 - a) Whether the Constitution Petition filed by the petitioner meets the well-established threshold for the well-known Constitutional Set up;
 - b) Whether the court can grant conservatory orders to restrain the Respondents from interfering with the 1st Petitioner's ongoing construction on Land Reference No. MN/1/5222.
 - c) Who will bear the Costs of the application.

ISSUE No a)

Whether the Constitution Petition filed by the petitioner meets the well-established threshold for the well-known Constitutional Set up;

21. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-



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

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

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

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

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

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

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

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

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

In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the Petitioner herein pleaded with reasonable precision as founded in the Anarita Karimi (Supra). To respond to this query, and despite of the Petitioner making such general allegation that there has been breach, violation and denial of the provisions of Articles 3, 10, 19, 20, 28, 47, 50, 157 and 244 of the Constitution of Kenya, 2010 perpetrated



by the 1st, 2nd and 3rd Respondents, the honorable court is completely not satisfied at all that the Petitioners have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and for the prayers sought. In order for the suit to be sustained, I authorize that the Petition be converted into an ordinary suit – a Plaint and the 1st and 2nd Respondents Replying Affidavit to Statement of Defence.

ISSUE No. b). Whether the court can grant conservatory orders to restrain the Respondents from interfering with the 1st Petitioner’s ongoing construction on Land Reference No. MN/1/5222.

23. Under this sub – heading, it is the Petitioners’ case that the 1st Respondent granted approval to the 1st Petitioner on 11th July 2018 to construct a block of apartments known as Coral Pear Executive Apartments on L.R No. MN/1/522, the suit property. Other than the 1st Respondent, the Petitioners obtained the requisite approvals and licenses, from NEMA the 1st Respondent acquired an EIA Licence on 8th October 2019 and from the national Construction Authority (NCA) a certificate of compliance on 30th October 2019. The Petitioners claim that the 1st Respondent had since stopped the said construction on the allegation that the 1st Petitioner was undertaking an extension of the development by building the 8th and 9th floors which were not in the original approved plans/drawings. The Respondents had since issued the Petitioners with an enforcement notice to stop the construction and had charged the 2nd Petitioner alongside his site workers with development related charges.
24. In response, the 1st and 2nd Respondents urged court not to grant the conservatory orders sought by the Petitioners as they were sought to serve private interest as opposed to public interest. Mr. Paul Manyala, the 1st Respondent’s director of planning claimed that the approved plans were subject to Form PPA, conditions which the Petitioners had violated. Further, he claimed that the 2nd Petitioner failed to produce the approved documents when requested to by the 1st Respondent’s officers hence the issuance of the notice to stop construction. The 1st Respondent maintained that the Petitioners could be allowed to construct additional floors which were not approved in the initial plans. On the ground that the additional floors would compromise the building and endanger the lives of the public at large. The Respondents denied maliciously prosecuting the Petitioners in the county court and claimed that they were simply carrying out their mandate under the provisions of the [Physical and Land Use Planning Act](#).
25. I now examine the material before court as to whether it supports the petitioners’ prayer of conservatory orders. The circumstances under which the court will grant conservatory orders were discussed by Odunga J in Michael Osundwa Sakwa – Versus - Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR:-

“What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her.”



26. It is trite law that conservatory orders are meant to protect a Petitioner from the results of violations of constitutional rights and freedoms. A “prima facie case” in this case, would therefore be the establishment of a legal wrong caused by the Respondents to the Petitioner, which has resulted into violation of rights. The aim of a conservatory order would be to protect the petitioner from the preventable perils or risks of human rights violations. Essentially, conservatory orders will not be sought to protect private rights, proprietary interests and related rights in land are best preserved through interlocutory injunctions granted by court under Order 40 of the Civil Procedure Rules, 2010.
27. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR held that:-
- “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
28. While in the case of *Judicial Service Commission Versus - Speaker of the National Assembly & Another* [2013] eKLR the court expressed itself as follows in regard to Conservatory orders:
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
29. Now turning back to the evidence, I have perused the Supplementary affidavit sworn by Dancan Odhiambo Omondi, the 2nd Petitioner on his and on behalf of the 1st Petitioner’s. He claims that the approved plans of 11th July 2018 did not specify the number of floors on the apartment, and it was therefore unfair for the 1st Respondent to turn around and condemn the Petitioners for extending to the 8th and 9th floor. I have perused the said set of drawings which are marked C, the first is the Site Location Plan and Site Plan which was approved by the 1st Respondent on 11th July 2018, the second is the Scheme Design Drawings for a Typical Floor Plan, and third is the Scheme Design Drawings for the Roof Plan; all the three drawings were approved by the 1st Respondent on 11th July 2018, and were subject to Form PPA-2. The last drawing is the Structural Drawing which lays out inter alia; the foundation layout details, elevation and lift plan, septic tank layout as well as the payment details; does not bear the stamp of approval from the 1st Respondent.
30. I now turn back to the averments of the Replying affidavit by 1st Respondent sworn on 5th August 2021, annexure PM-1 is Form PPA-2, which is the Notification of Approval of the Application for Development Permission dated 11th July 2018. The form clearly indicates that the development was approved for ‘Proposed Coral Pearl Executive Apartments on Plot No MN/1/5222 Section-I-/Zone Mombasa Main Land North situated at Nyalı along/off Links Road Nyalı.’ The notification has not indicated with precision the number of floors that the apartment was approved to have. The next annexure of the 1st Respondent is the 1st Petitioner’s application marked “PM -3A”, on the part



of Development particulars is the category of application which has been described as ‘Residential Building (Multi dwelling more than two floors)’ and the description of the plan is, ‘15 No. Apartment Block Consisting of 2 and 3 bedroom flats.’ Further on the application there is the Floor Information which also does not indicate the number of floors the Constructor (read the Petitioners) were to construct. However on PM-3B, the structural drawings that the 1st Respondent claim the Petitioners submitted for approval, shows that the approved floors went to the 7th floor and a pent house on top.

31. In my view, it is treacherous, wrongful and deceitful of the Petitioners to claim that the approval drawings did not specify the number of floors the apartment would have. There is nothing like limitless construction, the approving authority can only approve a specific number of stories in a building. What this Court wonders is does the Petitioners mean that they were allowed to build to infinitum, a replica to the biblical “Babel of Towers”? The loading of a seven storey building is not the same as that one for 9 storey building as the Petitioners want the court to believe. As we awaiting the hearing of the main suit by way of tendering evidence by way of ‘Viva voce’ means, , the onus is on the Petitioner to demonstrate to court how many floors were allowed by the 1st Respondent when the approval was granted on 11th July 2018. If indeed the Petitioners claim their drawings were not limited on the number of floors, those drawings were are no longer a design worth of approval. This Court strongly feels empirical documentary evidence must be produced in a suit, preferably a Plaint on these very significant issues pertaining to the whole matter before it. This can not be achievable at this inter locutory stage or through mere affidavit.
32. The Petitioners are disputing the drawings that have been submitted by the 1st Respondent, the Petitioners claim those drawings are not authentic. From the above analysis of the facts, I am of the view that the Petitioners have not presented before court a prima facie case for any interlocutory interim orders. There is no justification, why this court should restrain the 3rd Respondent from continuing with the prosecution of the 1st Petitioner over development related charges. From the evidence on record, the application that was submitted by the 1st Petitioner indicated the number of apartments that would be on the block of building.
33. Further, I am not persuaded that there are any public rights to be conserved, clearly from the analysis made the Petitioners are seeking to preserve and advance private rights at the interest of the public good. When the private interest of the Petitioners to continue building the apartments on the suit property are weighed against those of the public interest to be protected against faulty buildings, there is no doubt in my mind which weighs more. As held by the Supreme Court in Peter Munya (supra), Conservatory orders are not interlocutory injunctions that are linked to private rights. They are granted on the inherent merit of the case, bearing in mind the public interest and constitutional values. There is no aspect of public interest in this case, dispute is how many floors were approved by the 1st Respondent who is the regulatory authority on developments within the city of Mombasa.

VII. Conclusion & disposition

34. Based on the detailed analysis of the issues framed here and the facts arising from the filed application by the Petitioner/Applicant I wish to make the conclusions on this matter. I am doing so in the interest of natural justice, equity and conscience and for the furthering of the overriding Objective. In so doing, I do hereby invoke my inherent powers, under the provision of Article 159 (1) and (2) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap. 21, Sections 3 and 13 of the Environment & Land Act, No. 19 of 2011, Sections 101 of the Land Registration Act. No. 6 of 2012 and Section 50 of the Land Act. No. 3 of 2012 and order the Petitioners to do the following:-



- a) THAT an order having the Notice of Motion application dated 21st July is unmerited and hence it be and is hereby dismissed with costs to the 1st and 2nd Respondents.
- b) THAT an order for the Petitioner to table before Court within 30 days from the date of this ruling a Design Report of the building of Coral Pearl Executive Apartments on Plot No MN/1/5222 from Nyali Consulting Engineers, the structural engineers who designed the apartment drawings for approval.
- c) THAT an order for the Petitioner to forthwith stop all the on-going development and construction of the Proposed Coral Pearl Executive Apartments on Plot No MN/1/5222 Section-I-/Zone Mombasa Main Land North situated at Nyali along/off Links Road Nyali until the case is heard and determined.
- d) THAT an order of this Court for the Petitioner to convert the main Petition dated 21st July 2021 into a Plaint within 30 days from the date of this ruling, as the same stands the risk of being struck out for failing to comply with the Constitutional requirements set out in case of Anarita Karimi Njeru(No.1) (1979) 1 KLR 154 and the Replying Affidavits by the 1st and 2nd Respondents into Statement of Defence.
- e) THAT the matter to be mentioned on 21st June, 2022 for purposes of ascertaining compliance, holding of Pre – Trial Conference under the provision of Order 11 of the Civil Procedure Rules, 2010 and taking a hearing date on priority basis to the urgency of the matter.
- f) THAT the costs of the application is awarded to the 1st & 2nd Respondents.

35. IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna, the Court Assistant.

Non Appearance for the Petitioner/Applicant.

Non Appearance for the Respondent

