



**Coral Pearl Executive Apartments Limited & another v County
Government of Mombasa & 2 others (Constitutional Petition
32 of 2021) [2022] KEELC 14647 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 32 OF 2021**

LL NAIKUNI, J

OCTOBER 24, 2022

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 1st and 2nd Petitioners/Applicants herein - Coral Pearl Executive Apartments Limited and Dancan Odhiambo Omondi moved this Honorable Court through filing a Notice of Motion application dated June 6, 2022 for its determination. The said application is an immediate follow up of a close and succession Ruling delivered on May 18, 2022 by this Court over the same and identical subject matter.
2. Being adversely aggrieved by the afore mentioned ruling, the 1st and 2nd Petitioners brought the said application under the dint of the provision of Article 156 of the Constitution of Kenya and Sections 1A, 3A and 80 of the Civil Procedure Act, Cap 21.

II. The 1st and 2nd Petitioners/Applicants case.

3. The 1st and 2nd Petitioners/Applicants herein sought for the following orders sought:-
 - a. Spent.



- b. Pending the hearing and determination of this application, there be and is hereby issued an order of injunction 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.
 - c. Pending the hearing and determination of this application, there be and is hereby issued 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.
 - d. The ruling of this court delivered on May 18, 2022 be reviewed, varied and/or set aside by substituting thereof with the following orders:
 - i. An order of injunction 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 pending hearing and determination of this Case.
 - ii. An order be and is hereby issued 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 V Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu pending the hearing and determination of this case.
 - b. The case be set down for hearing on priority basis.
 - c. Costs of this application be provided for.
4. The application is premised on the grounds, testimonial facts and 18 Paragraphed Supporting Affidavit of Dancan Odhiambo OmondI, the 2nd Petitioner/Applicant herein. He has indicated that he was Director of the 1st Petitioner/Applicant herein and the annexures annexed thereof. Mr Omondi deponed that he was informed by his Advocate on record that the Honorable Court did deliver a Ruling on May 18, 2022 without notice whereby neither the Advocates for the Petitioners nor Respondents were present when the ruling was being delivered and they only came to learnt about the said ruling through a Judiciary Short Message Services (SMS) called the JUDICIARYKE on 2May 5, 2022 at 5.15pm. He stated that immediately the Advocate started searching for the file. Eventually, the said Advocate only managed to locate on May 31, 2022. Upon reading the ruling he found out that it allegedly had seven (7) errors apparent on the face of the record mainly perpetrated by this Honorable Court whatsoever. According to the Learned Counsel, the ostensible errors needed to be corrected by the court These were the alleged errors:-
- a. The Court at the interlocutory stage, through the averments in the filed Notice of Motion application dated July 21, 2021 made conclusive findings. It held that the Petition had not met the threshold for a Constitutional Petition as had failed to demonstrate so with reasonable precision.



- b. The Honorable Court indicated at Paragraph 22 of the Ruling its desire to address two broad issues under framed sub - headings but ended up addressing only one issue.
 - c. At Paragraph 31 of the Ruling, the Court concluded that the approval drawings for the building failed to specify the number of floors of the apartment yet the Petitioner wanted to construct into infinity. But the Petitioner had pleaded desire build only upto the 8th and 9th floor.
 - d. Further, under of Paragraph 32 of the Ruling it held that the 1st Petitioner had indicated that “the number of floors” to be no building while in actual sense it should have been ‘the number of apartments’.
 - e. Under Paragraph 31, the Court correctly made a finding that there was need for the production of empirical documentary evidence before it reached a conclusion. However, it erroneously concluded it was a case a number of floors and not apartments or Units.
 - f. Under Paragraph 26 of the Ruling, the court correctly ruled that the conservatory orders were meant to protect a Petitioner from the results of violations. However, it error to conclude that the Petition was more concerned on the breach, denial or threat of Constitutional rights and freedoms of the 2nd Petitioners from preventable perils or human risks violation than to protect proprietary interest.
 - g. Finally, the Court proceed to grant formal Orders No. (b), (c) and (d) of the Ruling without any application or prayer made by any party seeking those orders. In so doing, it failed to accord the Petitioners an opportunity to be heard
5. The Deponent further maintained that these were errors on the face of the application and Court’s records. They ought to be corrected. He held that the orders sought if not granted, then the Petitioners will be exposed to criminal prosecution. Resultantly, this would reduce this case to a nugatory and a mere academic exercise. He contended that he stood to suffer loss and prejudice with the stoppage of the constructions. He stated that due to its inability to continue with the development as a consequences of the Respondent’s actions, the 1st Petitioner was currently suffering huge losses caused by attrition and wastage of building materials and the 1st Petitioners had of to pay workers on a daily basis yet the output from the workers was not consistent and meaningful because they are unable to concentrate on the constructions works. The court was urged to intervene and prevent his imminent prosecution and the potential stoppage of and interference with the 1st Petitioner’s development by allowing this application which was brought without any undue delay as prayed.

III. The Grounds of Opposition by the 1st & 2nd Respondents

6. On June 20, 2022, the Learned Counsels for the 1st and 2nd Respondents the office of the County of Attorney for the County Government of Mombasa filed their Six (6) Pointers Grounds of Opposition dated even date, in response to the application by the 1st & 2nd Petitioners dated June 6, 2022. Through the Learned Counsel on record, M/s Kisingo Advocate, raised the following six (6) issues. These were:-
- a. That there was no error nor discovery of new and important matter or evidence had been adduced to justify the Application.
 - b. omission on the face of the court’s record to be corrected;
 - c. That the alleged grounds for review were not self – evident and required all elaborate argument to be established;



- d. That the Petitioners were through an application asking the Honorable Court to sit on an appeal on its own ruling.
- e. That the Court lacked jurisdiction to handle the matter. Indeed, its the Petitioners who had failed to comply with the Orders of the Court issued pursuant to the Ruling delivered on May 18, 2022.
- f. That the application was an abuse of the Court process and a waste of Court's time. They urged to dismiss the application with costs.

Submissions

7. On June 21, 2022, while all the parties were present in Court, they were directed to have the Notice of Motion Application dated June 6, 2022 be canvassed by way of written submission with stringent timelines provided thereof. Pursuant to that, by the time of writing this Ruling, the Honorable Court noted that it was only the 1st and 2nd Petitioners/Applicants who were able to fully comply within the stipulated timelines.
8. In the fullness of time, and going forward, this Honorable Court has overemphasized that timelines set out by Court have to be strictly adhered with. Nonetheless, as provided for by law under Order 50 Rule 6 and 7 of the Civil Procedure Rules, 2010 or other available provisions of law, parties would always be at liberty to move Court with reasonable sufficient or justifiable cause for the extension and/or enlargement of the time. Unfortunately, this never happened in the case of the 1st and 2nd Respondents. In the given circumstances, the Honorable Court will just proceed to render its ruling accordingly due to the high stakes matters have and for the sake of expeditious dispensing of Justice and disposal of matters before Court.

The Written Submission by the 1st and 2nd Petitioners/Applicants

9. On September 19, 2022, the Learned Counsel for the 1st and 2nd Petitioners/Applicants herein, the esteemed Law firm of Messrs. Oluga & Company Advocates filed their written submissions dated even date in support of the Notice of Motion application dated June 6, 2022. Mr Oluga Advocate submitted on two (2) broad issues in his submission. These were, Firstly, on whether the court had powers to review, vary or set aside the orders of May 18, 2022. The Counsel submitted that the court had discretionary powers to discharge, vary or set aside its own orders under the provision of Section 80 of the *Civil Procedure Act*, Cap 21 and Order 45 of the *Civil Procedure Rules, 2010*. To buttress its argument, the Learned Counsel relied on a case and decision while making a determination over the same subject matter by this very court, the case of *Lydia Kaguna Japheth & 2 others – Versus - Mbesa Investment Limited & 2 others Constitutional Petition No 16 of 2020 (unreported)* where I held that:-
10. Therefore, the Counsel based on the above, there was no doubt that this Court has power to grant, review, vary or set aside its own order. Thus, the Counsel opined that the answer to the first issue was affirmative.
11. Secondly, whether the 1st and 2nd Petitioners/Applicants had met the threshold for review. The Learned Counsel submitted that review can be granted for an error apparent on the face of the record or for any sufficient reason. He relied on the case of *Nyamongo & Nyamongo – Versus - Kogo (2001) EA 170* where the court held that “An error apparent on the face of the record cannot be defined precisely of exhaustively, there being an element of un definitiveness inherent in its very nature and must be determined judicially on the facts of each case. Where an error on a substantial point of lase stares one



in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.

12. In order to apply this distinct principle to the instant case, the Learned Counsel in detailed outlined the errors that were apparent on the face of the record exacerbated by the Honorable Court, which 'inter alia' by the Honorable Court by making final determination on the issues at the interlocutory stage which ideally ought and meant to be decided at the Main Petition stage.
13. The Counsel further submitted that the court ordered the Petitioners to table a design report within 30 days yet the same were already before Court filed through the Supplementary Affidavit filed in this Honorable Court on 4th November 2021. The Counsel argued that the errors were on the face of the record were self-evident and did not require elaborate arguments. Certainly, they were not ground of appeal and therefore the court was and would not be sitting on its own appeal by granting the orders as prayed.
14. The Counsel outrightly dismissed the argument advanced by the 1st and 2nd Respondents to the effect that there was no discovery of new and important matter as these were not issues raised from this application. On the contrary, they only relied on the ground of the error apparent on the face of the record which court has powers to grant. The court was urged to allow the application as prayed.

Analysis and determination

15. The Honorable Court has had to keenly take into account the filed pleadings being the Supporting Affidavits, the Grounds of Opposition by the Respondents, the Written Submissions by the 1st and 2nd Petitioners herein, the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and statutes in relation to the filed Notice of Motion application dated June 6, 2022.

For the Court to be in a plausible position to reach an informed, just, fair and equitable determination on this subject matter, I have condensed the issues into the following three (3) salient sub headings. These are:-

- a. Whether this Honorable Court has the powers to deal with matters of Review, Vary or Set aside its own orders as provided for under the provisions.
- b. Whether the Notice of Motion Application dated June 6, 2022 filed by the 1st and 2nd Petitioners/Applicants herein meets the threshold for being granted the orders for this Court to review, Vary or Set aside its Orders it issued on the May 18, 2022 and whether they are entitled to the reliefs sought thereof.
- c. Who will bear the Costs of the Application.

ISSUE No a).

Whether this Honorable Court has the powers to deal with matters of Review, Vary or Set aside its own orders as provided for under the provisions.

16. Under this Sub-heading, the Honorable Court takes cognizance of the fact that this being a Constitution Petition filed by the 1st and 2nd Petitioners/Applicants herein, its imperative that the Court tries as much as possible to cite the provisions from the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (What is now termed as 'The Mutunga Rules'). However, in more seldom -occasions the Courts is compelled using its inherent powers to invoke the Oxygen Principles under Section 1, 1A,3 and 3A of the Civil Procedure Act, Cap 21 to resuscitate certain delicate situations. The powers of Court on the Review, vary or setting aside



its own decisions are such peculiar instances where Court has been compelled to invoke the provisions of the Civil Procedure Act, Cap 21 and the Civil Procedure Rules, 2010.

' Under Rule 22 of the Mutunga Rules, it provides for the "Setting Aside, Varying or Discharge – An Order issued under this Rule may be discharged, varied or set aside by the Court either on its own motion or an application by a party dissatisfied with the order'

It means this court has discretionary powers to discharge, vary or set aside its own orders either on its own motion ('Suo Moto') or on an application by a party. In that case the 1st Respondent were within their right to have moved court under the filed application dated December 16, 2021 seeking the orders above stated.

While this Court was faced with the same issue, I decided in a case which the Learned Counsel for the Petitioners has extensively relied and cited on, as follows- in the case of: Lydia Kaguna Japheth & 2 others – Versus - Mbesa Investment Limited & 2 others Constitutional Petition No 16 of 2020 (unreported) where I held that:-

' Under the provision of Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (What is now terms as 'The Mutunga Rules') provides as follows:

'Setting Aside, Varying or Discharge – An Order issued under Rule 22 may be discharged, varied or set aside by the Court either on its own motion or an application by a party dissatisfied with the order'

It means this court has discretionary powers to discharge, vary or set aside its own orders either on its own motion ('Suo Moto') or on an application by a party. In that case the 1st Respondent were within their right to have moved court under the filed application dated December 16, 2021 seeking the orders above stated.

Further, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying court orders. These are found mainly under the provisions of Section 80 of the Civil Procedure Act, Cap 21 and Order 45 (1) & (2) of the Civil Procedure Rules, 2010. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.'

17. As stated herein, in addition the powers and principles for governing review and setting aside and varying Court Orders are well stipulated under the provision of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010 grant the court the power of review. Section 80 Civil Procedure Act, Cap. 21 provides as follows:-

80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

Rule 1 (1)Any person considering himself aggrieved-



- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.'

18. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. While Section 80 gives the powers for review, Order 45 set out the rules and grounds for review as well as the jurisdiction and scope of review. They limit review to the following grounds-

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;

Further, to qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions an Applicant ought to fulfill any of the following ingredients.

- i. be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- ii. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- iii. The review has to be by the Court which passed the decree or made the order without unreasonable delay.

In the case of:- *Republic – Versus - Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulabi Said Salad [2019] eKLR* it was held:-

' The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil



Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.'

19. An error apparent on the face of record is an error which is striking, can be seen from merely looking on the record and does not require a tedious reasoning process which are subject to different opinions. There is little time to deliberate on the incorrectness this error on the face of the record, it clearly manifests itself that no court would permit such error to remain in the record. The error must be able to be pointed out without changing the fundamental substance of the ruling as the error can be easily pointed out without much debate from either side of the suit.
20. I wish to further refer to the case of:- Republic – Versus - Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad (supra) where it was held that:-

' Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long - drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self - evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.'

Based on the these legal rationale from the provisions of the Law and precedents, this Honorable Court is fully satisfied that it has Jurisdiction, where no appeal has been preferred to grant the orders of review, vary and/or setting aside its own orders strictly based on the set out conditions herein. In doing so, it should not be misconstrued that the Honorable Court is sitting as an appeal of its own case.

ISSUE No b).

Whether the Notice of Motion Application dated June 6, 2022 filed by the 1st and 2nd Petitioners/Applicants herein meets the threshold for being granted the orders for this Court to review, Vary or Set aside its Orders it issued on the May 18, 2022 and whether they are entitled to the reliefs sought thereof.

21. Under this sub heading, the Court now wishes to apply these principles of review, varying and/or setting aside to the instant case above. Of the three (3) alternative pre - conditions required to be fulfilled, the 1st and 2nd Petitioners/Applicants have picked on only one of them. That is one on 'an error apparent on the face of the ruling' delivered by this Honorable Court on May 18, 2022. Rightfully so, they are within their rights. Without prejudice, and out of tremendous humility and admiration to the position taken by the 1st and 2nd Petitioners/Applicants, it is my own perception that the endeavored long enumerated list of what they have conveniently termed as being 'errors apparent from the face of the record' but where to me I discern are nothing but conglomeration of exaggerated, verbose, alarmic and windy expressions to boot. It is instructive to note that, a mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident



and does not require an elaborate argument to be established. Therefore, based on this, I dare say that out of the seven (7) purported concoction of what the Petitioners are claiming to be errors apparent on the face of record, are and here I fully concur with the contention by the Learned Counsel for the 1st and 2nd Respondents to the effect, were the mere self - evident argumentative, hilarious, matters of evidence proving facts and academic issues which strictly and legally speaking would not be subject for review by this Court at all. Thus, to that extend, I proceed to out rightly disqualify some of those alleged errors.'

22. Nonetheless, for the benefit of doubt, In my view, and on close examination from the long list of what the Petitioners terms as errors, in all fairness I concur there that exists three (3) glaring errors apparent on the face of the record summarized.
- a. Court making certain pre – mature conclusive determination before the hearing and determination of the intended Main Petition.
 - b. The need for Court to fully comprehend the structural designs of the construction works of the apartment by the Petitioners. For instance it being the number of apartments/Units as opposed to the number of floors.
 - c. Court fully appreciating and confirming the already filed empirical documentary evidence. For instance the Architectural designs, Plans and drawings and so forth which were already filed in Court through the Supplementary Affidavit.
23. Although in the real sense these are not issues to be terms as errors that need to be corrected, but in my view they are fundamental aspects of the matter which may prejudice the Petitioners case. Hence, I discern for the need to have them streamlined before or as the matter proceeds on to the full hearing of the main Petition. To that extent I am persuaded the application should succeed. On the other hand, the position taken by the Respondents from their Grounds of Opposition dated June 20, 2022 is worth being given credence and attention. Equally, with profound respect to the Respondent, out of the long six pointer list, I have summarized them into the following three (3) issues. These are:-
- a. The Court lacking jurisdiction to handle the matter.
 - b. The lack of error or omission on the face of the court's record or discovery of new and important matter or evidence to justify a review;
 - c. The Court being asked to sit on an appeal on its own ruling.
24. Undoubtedly, the Honorable holds that all these summarized three (3) issues of opposition have already been adequately addressed in this Ruling. For that reason, the Court need not belabor the point further. However, while I dare do disagree with the Learned Counsel for the 1st and 2nd Respondents on their advanced contention, I beg to refer the Counsel to the legal ration founded from the two decisions of:- “Republic – Versus - Cabinet Secretary for Interior and Co-ordination of National Government (Supra), and the case of *Njoroge & 104 others (suing in representative capacity for Kariobangi South Civil Servants Estate tenant Purchasers) v Savings & Loan Kenya Ltd & another [1988] eKLR*, it was held:-
- ' A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established.



Of course these authorities are not necessarily binding on me but they have a persuasive authority, especially as Order 47 rule 1 of the Indian Civil Procedure is identical with our Order 44 rule 1. I accept them as providing the necessary guiding principles on this subject. In the circumstances an application for a review should not be taken as a form of appeal. To warrant a review of an error alleged to be on the face of a record, such an error ought to be so clear as to be without any disputes. Where the very existence of an error on a record is contestable by parties, I think, such a matter is a ground which should be canvass on an appeal.'

25. Additionally, from the pleadings filed herewith, the Honorable Court is fully persuaded that there is a high likelihood that the stoppage of the construction by the Respondents may have subjected the Petitioners into un toward, substantial loss and damage in terms of material finances, time and work force. Possibly, the workers may have been demoralized and left the site out of despair. Evidently, the Petitioners have been subjected to wanton arrests and charged in criminal proceedings which is ongoing. The Petitioners highly feel the need to be accorded fair hearing during the main Petition by being granted these orders whatsoever.
26. For these reasons, therefore, I conclude that the 1st and 2nd Petitioners/Applicants have established to be having a 'prima facie case' to be successfully granted the orders as prayed from the Notice of Motion application date June 6, 2022.

ISSUE No c).

Who will bear the Costs of the Application.

27. The issue of Costs is normally at the discretion of the Honorable Court. Costs mean the award that a party is granted after any legal action, proceeding or process in any litigation suit. The Law indicates that the Costs follow the events. By events, it means the results or outcome of the said legal action, proceeding or process in the litigation matter.

The upshot herein is that Notice of Motion application by the 1st and 2nd Petitioners/Applicants dated June 6, 2022 has succeeded and hence entitled to costs.

IV. Conclusion & Disposition

28. Consequently, after conducting such an elaborate analysis of the framed issues herein, the Honorable Court ifs fully satisfied that the 1st and 2nd Petitioners/Applicants have fully established their case on a preponderance of probability. Thus, I proceed to order as follows:-
 - a. Thatthe Notice of Motion application dated June 6, 2022 by the 1st and 2nd Petitioners/Applicants herein be and is hereby allowed.
 - b. Thatthere be and is hereby issued an order of injunction 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 pending the hearing and determination of this Petition.
 - c. Thatan order be and is hereby issued that Conservatory order staying further proceedings in Mombasa County Court Criminal Case No M 079 of2021 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 pending the hearing and determination of this Petition.

- d. That an order be and is hereby made that the ruling of this court delivered on May 18, 2022 be reviewed, varied and/or set aside by substituting thereof with the following orders:
- i. An order of injunction 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 pending hearing and determination of this Petition.
 - ii. An order be and is hereby issued 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 V Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu pending the hearing and determination of this Petition.
- e. That for expediency sake the main Petition to be set down for hearing on December 2, 2022, to be through affidavits and/or adducing of 'Viva Voce' evidence and then written Submissions. Parties to be at liberty to file and exchange any further documents within the next twenty-one (21) days from this date.
- f. That Costs of this application be provided for.

It is ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF OCTOBER 2022.

HON. JUSTICE (MR) L. L. NAIKUNI, JUDGE

ENVIROMNENT AND LAND COURT AT

MOMBASA

In the presence of:-

- a. M/s. Yumnah & Mr. Omar, Court Assistants
- b. Mr. Oluga Advocate for the 1st and 2nd Petitioners/Applicants
- c. No Appearance for the Respondents

