Ndegwa v Amakoye & 3 others (Environment & Land Case 287 of 2010) [2024] KEELC 3537 (KLR) (8 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 287 OF 2010

LL NAIKUNI, J

APRIL 8, 2024

BETWEEN

ROSE WANGARI NDEGWA ..... PLAINTIFF

AND

SHADRACK AMAKOYE ..... 1ST DEFENDANT

MIMI APARTMENTS LIMITED ..... 2ND DEFENDANT

WESTCON CONTRACTORS LIMITED ..... 3RD DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA ..... 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Rose Wangari Ndegwa, the Plaintiff herein through a Plaint dated 18th August, 2010 against Mr. Shadrack Amakoye, Mimi Apartments Limited, Westcon Contractors Limited and Municipal Council of Mombasa the Defendants' herein.

2. Upon service of the pleading and Summons to Enter appearance dated 20th August, 2010, the 1st, 2nd and 3rd Defendant filed a statement of defence on 21st September, 2010 dated 15th September, 2010 and the 4th Defendant filed a statement of defence on 12th October, 2010 dated 8th October, 2010. The 3rd Defendant further filed another statement of defence on 2nd July, 2021 dated 30th June, 2021. In the course of the proceedings, the Plaintiff withdrew the suit against the 3rd Defendant herein.

3. Nonetheless, on 27th January, 2023 all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, the suit was fixed for full trial on the 13th February, 2023.

4. This matter proceeded on for hearing by way of adducing "viva voce" evidence with the Plaintiff's witness (PW – 1) testifying in Court on 13th February, 2023 at 12.30 pm. After which the Plaintiff closed their case. The 2nd Defendant called DW 1 on the same day and closed their case. The 1st, 3rd and 4th Defendant did not call any witnesses.

II. The Plaintiff's case

5. From the filed pleadings, the Plaintiff is described in the Plaint as an adult of sound mind residing and working for gain at Mombasa. The Plaintiff claimed that he is the owner of the property comprised in Grant No. C. R. 18132 known as L.R. No. MN/1/3160 situate at New Nyali, behind Nakumatt Nyali, Mombasa (Hereinafter referred to as "The Suit Premises"). The suit premises included a 3 bedroom master ensuite house, a garden, garage and other improvements.

6. Currently, there was pending before this Court another Civil Suit being - "HCCC (Mombasa) No. 8 of 2007 (Rose Wangari Ndegwa-Versus - Housing Finance Company of Kenya Limited, Francis Nyamai Mwanzia, Tabitha Muthio Mwanzia and the Registrar of Titles, Mombasa) to cancel and nullify the sale of the suit premises to the 2nd and 3rd Defendants in that suit.Though the suit premises were sold and was subject of the aforesaid civil suit the Plaintiff was in possession and occupation of the suit premises. In yet another Civil suit being "HCCC (Mombasa) No. 158 of 2007 (Francis Nyamai Mwanzia and Tabitha Muthio Mwanzia – Versus - Rose Wangari Ndegwa) for vacant possession had not been heard and the proceedings were stayed awaiting the outcome of these suits herein.

7. Further to paragraphs 4 and 5 above the suit premises was and had been since the years 1980s the Plaintiff's home. The Plaintiff stated that having lived in the suit premises and become comfortable therein and accustomed to the suit premises, the general lay out of the area, the flow of the air, the wind from the sea and the environment in and around the suit premises the Plaintiff was unable to find similar comfort and convenience elsewhere in Kenya.

8. However, the Plaintiff stated that in the year 1987 owing to health complications she underwent an operation during which one of her lungs was removed. The Plaintiff had survived on only one lung since then. Further, the Plaintiff was asthmatic. Due to her asthmatic condition and the use of one lung instead of 2 the Plaintiff stated that she was extra ordinarily keen not to expose that one lung to pollution or other toxins as it was the only lung she had. As a result of her asthmatic condition and in the special circumstances that she had only one lung the Plaintiff was extremely sensitive to dust and other pollutants.

9. According to the Plaintiff she was a member of the New Nyali Residents Association, an association of home owners in New Nyali whose aims and objects included the stewardship and advocacy to a safe neighborhood and greener tomorrow. The Association had objected to the development. The New Nyali fell within the Municipal Council of Mombasa and was subject to planning permission. Development in that zone was restricted to levels. The 1st and/or 2nd Defendants were the owner and/or developer of Plot No. L.R. MN/I/3161. This Plot neighbors the suit premises and shared a common boundary with the suit premises.

10. The 3rd Defendant was the contractor employed by the 1st and/or 2nd Defendants. The Defendants commenced the development of high rise apartments rising up to 4 levels and containing 11 apartments together with other developments within Plot No. MN/I/3161 (Hereinafter referred to as "The Development"). The New Nyali area where the development was taking place is planned for a single dwelling residence and not multiple dwelling residences. The Plaintiff averred that her daughter was visiting from the United Kingdom and had no privacy in her bedroom as the construction directly overlooked her bedroom. After her return to the United Kingdom the Plaintiff would not be able

to have visitors in that bedroom or to use that bedroom herself because of the proximity of the developments by the 1st, 2nd and 3rd Defendants and with tenants or other purchasers looking in into that bedroom. The Plaintiff and her guests were unable to have any privacy because of the builders looking into the bathrooms, the bedrooms and the rest of the suit premises from the high rise construction. The Development was illegal and unlawful.

11. The Plaintiff relied on the following particulars of illegality:-

    a. The new Nyali area was restricted to a 2 level development. The Defendants were developing or building flats up to 4 storeys or 4 levels.

    b. The Defendants were building without approved plans.

    c. The Defendants were developing their plot without using dust screens.

    d. The Defendants failed to obtain relevant licences and to comply with lawful orders issued by the National Environment Management Authority.

    e. No development in the area was allowed above 2 levels.

12. According to the Plaintiff, the Defendants commenced the development without fencing of the Plot thereby allowing their workers to access the Plaintiff's garden and urinate thereon and otherwise use that garden as a toilet. Further to the above the Defendants refused to erect a fence and allowed dust to enter into the Plaintiff's house in the suit premises. As a result of the Defendants' refusal to erect dust screens cement and other dust is freely moving from the development into the suit premises, covering the Plaintiff's furniture, bedding, kitchen and the entire suit premises in a layer of cement and other toxic dust. By reason of the matters aforesaid the Plaintiff's health has deteriorated and the Plaintiff was unable to enjoy a clean and healthy environment within the suit premises or the environs of the suit premises. The Plaintiff averred that she could not receive or entertain visitors into the suit premises as a result of the dust, the noise and the workers looking into the suit premises from high up in the development. Furthermore the Plaintiff was unable to have quiet, safe healthy and peaceful enjoyment of the suit premises. The Plaintiff added that the Defendants had been carrying on construction works during evenings and on Sundays contrary to the law.

13. There could be no amount of damages that would compensate her for the loss of her remaining lung or for the discomfort caused to her. The Plaintiff stated that she was unable to enter the suit premises during the day. The Plaintiff added that in the night the dust particles entering the suit premises during the day continue circulating and pollute the suit premises at all hours whether in the day or in the night. The Plaintiff added that the Defendants have constructively evicted the Plaintiff from the suit premises during day light. Furthermore these dust particles adhere to clothing, cooking utensils, bath rooms, bedding and all other movables together with the walls of the suit premises. These particles gave the house a new shade of paint and was constant irritants. It was relatively cheaper or cost effective to erect and maintain dust screens. According to her it was not socially acceptable for her to move into a rented house when she had her own house or to receive and entertain guests in hotel rooms. Further, the Plaintiff stated that she would not find the same amount of comfort in hotel room that she used to enjoy in the suit premises before the development commenced. Therefore, the Plaintiff stated that moving into a rented house or hotel room was not an alternative.

14. All written warnings and demands to the Defendants, to the Municipal council of Mombasa to stop the construction, to the National Environment Management Authority to restrain the construction had been disregarded. The Plaintiff added that an improvement order issued by the National Environment Management Authority has similarly been disregarded. The Defendants were putting up what they described as up market apartments for sale for prices ranging from a sum of Kenya

Shillings Eight Million Five Thousand (Kshs. 8,500,000/-) to a sum of Kenya Shillings Nine Million (Kshs. 9,000,000/-). The Defendants except to get a total of sum of Kenya Shillings Ninety Six Million (Kshs. 96,000,000/-) from the sale of those apartments. The Plaintiff averred that the Defendants were actuated and driven only by the profit motives and desires to make as much profit as possible at little or no costs going towards environment protection. Therefore, the Plaintiff claimed for punitive and aggravated damages to be assessed on the basis of the total earning from the development. Despite demands and notice of intention to sue having been given, the Defendants had failed and neglected to admit liability whereupon this suit had become necessary. There was no suit pending and there had been no previous proceedings in any court between the Plaintiff and Defendants over the same subject matter.

15. The Plaintiff prayed for Judgment against the 1st, 2nd & 3rd Defendants jointly and severally for:-

a. A declaration that the development on Plot No. LR. No. MN/I/3161 is illegal and unlawful and is proceeding on the basis of unapproved building plans or in the alternative if any such building plans have been approved the approval was fraudulent, ultra vires and null and void on the grounds that the planning for the area does not allow more than 2 levels.

b. A declaration that the 4th Defendant has failed to enforce building bylaws against the 1st ,2nd and 3rd Defendants and that that failure has severely affected the value, beauty and aesthetics of the area including increasing the number of occupants that should occupy that size of plot thereby exposing the area to the overwhelmed in terms of services including electricity, water, sanitation and garbage collection as well as the number of vehicles using the road at any given time.

c. A declaration that it was illegal and unlawful for the Defendants to disregard the improvement order dated 15th July, 2010.

d. A declaration that the refusal by the Defendants to erect dust screens severely interfered with the Plaintiffs right to a clean and healthy environment under Section 3 of the Environmental Management and Coordination Act.

e. A declaration that owing to the fact that the Plaintiff has only one lung the Defendants owed her a higher duty of care particularly after the numerous demand letters.

f. A declaration that in the New Nyali area of Mombasa in and around the suit premises and the development no development is allowed by the Municipal Council of Mombasa above 2 levels and that therefore the proposed 4 level development is an illegal structure.

g. A mandatory injunction compelling the Defendants jointly and severally to demolish any structure on the development that has exceeded or gone up above 2 levels that is to say any structure above the roof of the first floor.

h. A perpetual injunction restraining the 1st, 2nd and 3rd Defendants jointly and severally from continuing with any further activity, building, construction or development on Plot No. LR. No. MN/I/3161 above 2 levels.

i. A perpetual injunction restraining the 1st, 2nd and 3rd Defendants jointly and severally from continuing with any further activity, building, construction or development on Plot No.LR. No. MN/I/3161 without the necessary approvals, licenses or directions of the 4th Defendant and the National EnvironmentManagement Authority.

j. General damages for pain and suffering.

k. Punitive and aggravated damages.

l. Such special damages as may be incurred should the Plaintiff be compelled to move out of the suit premises for the duration of the development.

m. Costs of this suit.

16. Hence, the Plaintiff's case commenced in earnest whereby PW 1 testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Kinyua Advocate.

17. PW – 1 was sworn and testified in English language. She identified herself as ROSE WANGARI NDEGWA. She was a holder of the Kenyan national identity card bearing all the details (date of birth, place of issue, location and sub – location) as noted by Court. She told the court that she lived in Nyali, 3rd Avenue which was right behind the City Mall (formerly the Nakumatt within the County of Mombasa). She knew of Mini Apartments, the 2nd Defendant herein. She filed a witness statement dated 17th January, 2012 which she relied on as her evidence in this case. Additionally, she had filed a list of bundle of documents dated 10th November, 2011 which she relied on as her exhibits. They were produced and marked as Plaintiff Exhibits Numbers 1 to 18. Westcon Contractor Company Limited were the contractor of the project. Mr. Albert Amokoe was the registered owner of the land No. MN/I/3161 Mini Apartments. The Mini Apartments were floors which were complete. There were on the 5th Floor. It was a problem as when she went to check with the Municipal Council, the Council indicated that it had only allowed them to undertake 1 to 2 Floors – restricted to 2 levels. The project was to consist of 11 apartments, it was to contain the ground and a Pent House, according to the licence when it was issued on 1st February, 2011. When referred to the witness statements of John Bosco she stated that he was the manager of the 3rd Defendant company paragraph 3 from the bottom line.

18. She was referred to the witness statements by Mr. Festus Soi, she stated the cause of action was on the construction of a building without approval by NEMA. While it was authorized for 1 to 2 floors only, it had gone to 4 floors plus the Pent house. She complained of dust yet the construction structure was without dust screen. The workers turned her fence into a urinal. They never had a urinal for workers. With reference to the statement of Mr. Dismus Oyonyo, PW - 1 told the court that paragraph 5 NEMA Licence was issued on 1st February, 2011.

19. According to PW - 1, the contents of Paragraph 7 showed that there was no public participation. She was the neighbor hers being Plot No. MN/I/3160 but she was never consulted by the developer who was on Plot No. MN/I/3161. Her property was never secured. She saw through the fence. They never limited the pollution. The Plaintiff had gone to the Defendants asking them to reinforce the dust from being emitted. At some point, they had tried fencing it off using galvanized iron sheet to prevent the emission. They indicated that later on they ran short of the said material. With reference to her letter dated 11th March, 2020 addressed to the Plaintiff's previous Advocates by the 3rd Defendant. They offered to rectify the situation within 3 days but they never di so. At page 5 of the list of documents dated 6th March, 2010, PW - 1 stated that it was a response to the letter by the Plaintiff which was indicated on paragraph 2 and 3 of the letter.

20. PW - 1 stated that page 11 of the letter indicated that those were a set of photographs of the 2 floors. Pages 17 and 18, PW - 1 confirmed that it was a letter by the Nyali Residents Associates. The Association complained to the authorities about these construction activities. She never knew what happened thereafter. Referred to pages 24 and 26 – the PW - 1 reiterated that it was a letter dated 30th June, 2008 from Nairobi Chest Clinic and another dated 22nd February, 2010 from Dr. J.B.O. Okanga. He was her doctor. The letters were about her health condition. She was operating on one

lung which was also asthmatic. PW – 1 stated that the medical condition was likely to be accelerated from construction works and the dust emitted from the site in her neighborhood.

21. At the time of her rendering her testimony in this case, PW - 1 stated that there were 5 complete floors. She indicated not having any problem with that but it should stop there. She would not have had problems if they would have taken care of the dust i.e. dust pollution. They would even be building on Sundays.

22. PW - 1 urged the Honourable Court to grant her the prayers sought. She was seeking for general damages pleaded from the Plaint dated 18th August, 2010. She confirmed that she was asthmatic and that she had one lung. She had lived on the property from they year 1990s. They offered to build a wall. There had been no effort on out of court negotiations. She had given in a lot.

B. Cross examination of PW - 1 by Tanui Advocate

23. PW - 1 confirmed that at the time of filing the case, she was occupying her property i.e. Plot No. MN/I/3160. She confirmed that her property was in dispute. At the moment, the dispute was being adjudicated in court. She insisted that she was the legal owner of the suit property. She had been unwell for 36 years i.e. without one lung and 12 years as Asthmatic. With reference to page 24, PW - 1 told the court that the letter dated 30th June, 2008 was addressed to Dr. Okanga which was written way off before the construction had begun. The letter dated 9th July, 2009 was from Nyali Residents Association which held that the property had been fenced off.

24. PW - 1 ascertained that there were 5 floors from what she saw with her own eyes. Page 4 of the Plaint at paragraph V indicated that it was only four (4) levels. With reference to the Defendants list of documents dated 13th April, 2012 and documents dated 25th June, 2009. Paragraph approval of NEMA to the 11 resident's apartments. She had not provided any evidence on the wall being used as urinal. She had not provided any costs implication to her medical treatment such as receipts. She had provided evidence to show that her health was purely used by environmental causes. As at now, she had held that she would not have the development stopped at the 5th Floor so long as they met the required conditions. She was not abandoning the prayers in the filed Plaint. She used to be a member of the Nyali Resident Association.

C. Re - examination of PW - 1 by Mr. Kinyua Advocate.

25. PW - 1 affirmed that she had no problem if the floors were up to 5 floors so long as they meet all the prerequisite conditions. She did not then press for demolition upto the pent house. The suit was filed along time ago. A lot had changed. By the time of filing the case, she saw that they had intended to do 11 floors from the Bill Board. She took the pictures of the bill board erected outside the project. She knew for a fact that they had not done four (4) floors. With reference to the letter by NEMA dated 29th June, 2009, PW - 1 told the court that these were conditions and not a license. The 1st condition was not complied with.

26. The Plaintiff closed her case on 13th February, 2023.

III. The 1st, 2nd and 3rd Defendants' case

27. The 1st, 2nd and 3rd Defendants entered appearance and filed their Statement of Defence dated 15th September, 2010 where the Defendants averred that notwithstanding the generality of the truth of Paragraph 6 of the Plaint, the Defendants are not privy to "the Civil case - High Court Case (Mombasa) No. 158 of 2007 (Francis Nyamai Mwanzia and Tabitha Muthio Mwanzia – Versus - Rose Wangari

Ndegwa). The Defendants were strangers to the allegations contained in contents of Paragraphs 7, 8, 9, 10, 11 and 12 of the Plaint.

28. The Defendants admitted to the contents of Paragraphs 14 and 15 of the Plaint. In response to Paragraphs 13 and 16 of the Plaint, the 1st Defendant stated that he (OPDI) Residential to Apartments on 3 floors and a pent house. An approval of Physical Planning, Ministry of Lands subject to submission of the approved building plans. Further to the foregoing paragraph, the 1st Defendant duly complied with the conditions imposed both by the 4th Defendant and the Department of Physical Planning, Ministry of Lands and duly took out the architectural plans for the proposed construction. The said plans were duly approved on 14th November, 2008 vide TPC Minute No. 108/08. The architectural plans were correctly drawn and provided sufficient information to show whether or not it complied with the existing By-laws, Building Code and the Physical Planning Act, Cap. 286 Laws of Kenya and the Regulations thereto. The Plans never disclosed a contravention of the By - laws or any other written law hence their approval.

29. In response to Paragraph 17 of the Plaint, the Defendants stated that the change of user on L.R. No. MN/I/3161, Nyali Mombasa was duly approved by the 4th Defendant after due consultation with the relevant authorities including the Department of Physical Planning, Ministry of Lands and the allegations by the Plaintiff that the development was taking place in an area meant for a single dwelling residence and not multiple dwelling residences were totally untrue and baseless. In any event, there were several other buildings coming up in the neighborhood which had been similarly approved. Following the approval of the proposed development, they had duly complied with the conditions imposed thereon and there has never been any change to the existing design or structure to which the approved plans relate at the date of approval.In response to the contents of paragraph 18 of the Plaint, the Defendants stated that the Change of User on L.R. No. MN/I/3161, Nyali Mombasa complies with the Nyali - Shanzu Zoning Plan Tourist Zone'. Thus, the allegations by the Plaintiff that she was unable to have any privacy due to the high rise construction were unfounded.

30. In response to the contents of Paragraph 19 of the Plaint, the Defendants stated that the Development on L.R. No. MN/I/3161, Nyali Mombasa is legal and inaccordance with the relevant By-laws, the Building Code and the Physical illegality set out in paragraph 18 (i)-(v) of the Plaint. They had always discharged their statutory duty in ensuring that the construction works were carried out in conformity with the existing by – laws, guidelines and any other written law including taking mitigation measures such as the prevention of pollution and ecological deterioration, provisions of sanitary accommodation of the workers and strict adherence to the safety of the occupants in the neighborhood. The Defendants were strangers to the allegations raised in Paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the Plaint.

31. According to the Defendants, the Change of User from OPDH to Apartments was designed for public interest to address the increasing need of housing within the deny that they were actuated and driven by profit motives by putting up the Apartments as alleged in the averments made out under Paragraph 30 of the Plaint. The Defendants denied the contents of Paragraph 31 of the Plaint and were strangers to the contents of Paragraph 30 of the Plaint. The Defendants stated that the Plaintiff's suit against them was unfounded in law and fact and disclosed no reasonable cause of action. The Defendants prayed that the Plaintiff's suit against them be dismissed with costs.

32. The 1st and 2nd Defendant called DW - 1 on 13th February, 2023 who testified as follows:

D. Examination - in - Chief of DW - 1 by Mr. Tanui Advocate.

33. DW – 1 was sworn and testified in the English language. He identified himself as DISMAS KIMUNGUI WANYOINYI. He was a holder of the a Kenyan National Identity card bearing all the details (date of birth, place of issue, location and sub – location) noted by Court. He told the court that he worked with the Regent Management Limited as a Project Manager of Mini Apartment plot on Land Registration No. MN/I/3161. He knew the Plaintiff vey well. She was his neighbor. He was also a member of the Nyali Residents Associates. He had not met Mr. Shadrack Makoye. The Mini Apartments together with the 1st Defendant entered into a partnership with the Regent Management Limited for the development of apartments. He was the registered owner of Plot No. MN/I/3161. With reference to a public notice, DW - 1 told the court that the Notice of Change of user advertisement published on 29th March, 2008 on "Daily Nation" newspaper. As per the date of the Notice Mr. Shadrack Makoye was the registered owner to the property No. MN/I/ 3161.

34. With reference to brief report by the Physical Planner one Abubakar A. Moddy. It was on page 10 of the Defendants documents. Also, DW – 1 was referred to Page 11 which were the recommendation for the change of user. It held that there were no adverse effect by this development. It was Mr. Shadrack Amokoye who applied for the Change of User. With reference to the Notification of approval dated 29th May, 2008, DW - 1 told the court that by then the project had not started. To his recollection the floor was up to 3 floors and the Pent House.

35. According to DW - 1, with reference to page 13 dated 17th April, 2008 by that time the construction had not started – (Refer) entitled to Change of User – Plot No. MN/I/3161 by Mr. P.N. Mutwiwa – District Land Officer. Page 15 of the Defendant's documents was the Designers approvals. By this time the constructions had not started. Page No. 19 – referred to NEMA to letter dated 29th June, 2009. There were 9 apartments currently i.e. the units were massive. There were 4 Floors, Floors constituting of the grounds, 2 floors and the Pent House – i.e. Ground, 1st and 2nd Floor a Pent House approved by NEMA. At page 21 was the letter dated 6th July, 2007 by Shadrack Amokoye Bulimo to NEMA) i.e. acceptance of approval conditions with regard to the nuisance and noise pollution.

36. He never received any complaint from anyone. The contractor was to do this work as per the NEMA conditions. He was never privy to any complaint. He wrote a witness statement dated 30th June, 2012. He had also filed a list of documents dated 13th April, 2012 which he produced as Defendants Exhibits 1 to 12. The project had been carried out with the approvals. There was a Pit Latrine being used by the Guards.

E. Cross examination of DW - 1 by Mr. Kinyua Advocate.

37. DW - 1 confirmed that he was last in the construction site on 27th September, 2022. By then there were 5 floors – Ground, 1st, 2nd, 3rd and 4th Floor. Chenusiani Company Limited was the Company that Shadrack Amokoye sold his shares to. He was not aware of the time when this happened and whether it was communicated to Rose Wangari, the Plaintiff herein. With reference to the Defendant's documents, DW - 1 told the court that the Change of User was for 3 floors to 5 floors i.e. Ground and 2nd and Pent House. There were 3 wings, the Pent House was not to sit on the 3 wings. The intention was to be on each wings and its part of the drawings. It's not correct to say that the idea of a Pent House on each wings. They had five (5) floors on each wing.

38. With reference to the Architectural designs on Pages 15, 16 and 17 of the bundle, DW - 1 told the court that he just got involved in this project in the year 2015 as the Project Manager of Regent Management. They had an EIA License which was gotten by Mr. Amakoye. They never had the EIA. He was not able

to say whether the Plaintiff had a right to participate. He did not know whether she was consulted or not. From his witness statement, he had indicated that she could have objected if she was not consulted. From her statement, he was not sure what she said. He held that NEMA documents/ approach were not transferable. The construction was stopped in the year 2015.

39. DW - 1 told the court that there was EIA done but only involving some people. These were the owners of the bar on Malindi road and the guard. From the year 2010, the constructions had been going on with the NEMA approvals. On Page 22 – The NEMA Licence was issued on 1st February, 2011. On Page 3 – the property was registered to Albert Alexander Ekirata – from 1st April, 1979. He referred to Mr. Shadrack transferred to Mini Apartments Management Limited. On 22nd October, 2010. Shadrack Amakoye was a Partner n Mini Apartment. Late on he sold the shares in the year 2015. Referred to Letter dated 17th April, 2008 – Page 13.

40. At page 14, DW - 1 confirmed that the letter dated 29th May, 2008 was a notification of Approval of the application for development permission by the Municipal Council of Mombasa. On being referred to page 19, DW - 1 told the Court that the NEMA's letter was on condition for approval dated 29th June, 2009. They had complied with this condition. On Page 22 were conditions of license for 24 months. The approvals came earlier but the license was on 1st February, 2011. The NEMA license was necessary. He was saying that the construction could start before the EIA license was issued. The witness was referred to the condition attached particularly condition No. 6 i.e. when the contractor said that the Mabati's ran short.

41. DW - 1 testified that the condition i.e. was an improvement order that were put in place were the provisions of the toilet i.e. pit latrine, he was not sure when the pit latrine was constructed. He was in Court as a witness for Mimi Apartment and not on behalf of Mr. Shadrack Amokoye – 1st Defendant and the directors for Mimi Apartments were:-

    a. Chemisiano Management and

    b. Regent Management

42. He was an employee of M/s. Regent Management

F. Re – examination of DW - 1 by Mr. Tanui Advocate.

43. DW - 1 told the court that from the years 2007 to 2008 the property was for Mr. Shadrack Amokoye. In the year 2009, the Mimi Apartment started where he had partnership. At page no. 4, there was a letter dated 11th March, 2010 of the Plaintiff's documents i.e. by M/s. Weston Contractors Limited. The Galvanized iron sheet used earlier in 1st Phase had ran out of stock. The EIA report conditions approval in 29th June, 2009. The EIA Licence was issued on 20th February, 2021 so long as the conditions had been approved and met the construction would commence. Once the 2nd and 3rd Defendants had accomplished the conditions were met the construction was commenced.

44. On 13th February, 2023 the 1st and 2nd Defendants closed their case.

IV. The 3rd Defendant's case

45. The 3rd Defendant filed Statement of Defence dated 30th June, 2021 where the 3rd Defendant averred that it was a stranger to the averments contained in Paragraphs 5, 6, 7, 8, 9,10,11 and 12 of the Plaint. The averments contained in Paragraph 15 of the Plaint and clarifies that it was contracted by the Project Manager, Regent Management Limited to construct Mimi Apartments on property known as L.R No. MN/I/3161. In response to Paragraphs 15 and 16 of the Plaint, the 3rd Defendant clarified that its

work was to carry out construction works on the apartments which construction works was carried out diligently and professionally following the laid down procedures as per the plan drawn by the Architect Batiment Group Limited.

46. The 3rd Defendant was a stranger to the averments contained in Paragraph 17 of the Plaint and added that before it was contracted by project Manager, Regent Management Limited, the Architect and the owner of the parcel of land ensured that the construction of Mini Apartments had Defendant's task was limited to the construction works which it duly underway and duly handed over the site to Regent Management Limited works on the construction site as from the 4th December, 2015. The 3rd Defendant was a stranger to the averments contained in paragraphs 18 and 19 of the Plaint particularly denying each and every particulars of illegality as set out in sub-paragraphs (i) to (v).

47. In response to Paragraph 20 of the Plaint, the 3rd Defendant averred that before it commenced the construction works on the suit property, it duly secured the construction site by building a wall made of iron sheets around the construction site to secure the construction materials and to prevent trespassers from trespassing on the construction site and later on embarked on the construction works as per the drawn plan and instructions of the Architect being Batiment Group Limited. The 3rd Defendant denied in toto the averments contained in paragraph 21 of the Plaint and averred that it duly secured the area by building a wall made of iron sheets and also used dust screens. In addition to paragraph 10 above, the 3rd Defendant clarified that it ensured that it had put in place all the requisite measures to limit pollution. The 3rd Defendant was a stranger to the averments contained in Paragraphs 21, 22, 23 and 24 of the Plaint.

48. The 3rd Defendant denied the contents of Paragraph 25 of the Plaint and clarified that they only carried out the construction works on Monday to Friday strictly during working hours that is being 8am to 5 pm and on Saturdays from 8:00 am to 1:00 pm. The 3rd Defendant clarified that it never carried out any construction works during Sundays and public holidays. The 3rd Defendant denied the contents of Paragraphs 26, 27, 28, 29 and 30 of the Plaint. The 3rd Defendant denied that the Plaintiff made any demand or gave notice of intention to sue to it as alleged in Paragraph 31 of the Plaint and put the Plaintiff to strict proof thereof. In view of the foregoing the 3rd Defendant shall contend that the Plaintiff was not entitled to costs.

49. According to the 3rd Defendant, the Plaintiff never had any cause of action against it and shall apply at the earliest opportunity to have this suit against it struck out with costs. The 3rd Defendant admitted to the jurisdiction of the Court.

V. The 4th Defendant's case

50. The 4th Defendant entered appearance and filed their statement of defence dated 8th October, 2010 where the 4th Defendant denied the allegations contained in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 20, 21, 22, 23, 24, 25, 26, 27,28 and 30 of the plaint. Save that the said New Nyali area is situate within the Mombasa District. The Defendant denied the allegations contained in Paragraphs 13 and 17 of the Plaint and in particular that development in that area was restricted to 2 levels or single dwelling residence as opposed to multiple dwelling residences. In response to the allegations contained in Paragraph 29 (as read together with Paragraph 19) of the Plaint the Defendant states that by virtue the 1st Defendant having duly obtained the requisite Change of User then the development by the 1st, 2nd and 3rd Defendants could not be termed as illegal or unlawful; wherefore the defendant lacked the legal mandate, or at all, to stop the said construction.

51. The 4th Defendant denied that it was ever furnished with a demand or notice of intention to institute the proceedings herein. The 4th Defendant maintained that the Plaintiff's suit as against it herein lacked merit was grossly misconceived and the same was bad in law. The jurisdiction was the Court was admitted.

VI. Submissions

52. On 13th February, 2023 after the Plaintiff and Defendants marked a close of this case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that, the Honourable Court noted that despites all the timeframe granted, only the 1st and 2nd Defendants complied accordingly and on 16th January, 2024, the Honourable court reserved a date to deliver its Judgement on 12th March, 2023. However, it was deferred to 27th March, 2024 and finally to 4th April, 2024 accordingly.

A. The Written Submission by the Plaintiff.

53. Through the Learned Counsels for the Plaintiff the Law Firm of Messrs. Kinyua Muyaa & Company Advocates filed their written Submissions dated 14th February, 2024. Mr. Kinyua Advocate as a way of an introduction, commenced his submissions by informing Court that a clean environment was one of the fundamental rights and freedoms in the Bill of Rights. Under the provision of Article 42 of *the Constitution* of Kenya, 2010 provided that every person has the right to a clean and healthy environment. The people of Kenya took that right so seriously that they added Articles 69,70 and 72. Dust emissions and foul stench were a direct violation of the right to a clean and healthy environment.

54. The Learned Counsel averred that the Plaintiff is the owner of property on 3rd Avenue, New Nyali, Mombasa. The 3rd Avenue led directly to the beach from the City Mall. Her house was half way between City Mall and the ocean. On the other direction was the Nyali Center. The 1st and 2nd Defendants were developing property adjoining the Plaintiff's house. The Plaintiff had built and lived in her own house from the years 1980s. He asserted that the 1st Defendant was the owner of the property the subject matter of these proceedings. He transferred it to the 2nd Defendant after he obtained some approvals. The 3rd Defendant was the contractor appointed by the 1st and 2nd Defendants. The Plaintiff withdrew her suit against the 3rd and 4th Defendants.

55. He stated that the 1st, 2nd and 3rd Defendants initially had common representation and had filed a common List & Bundle of Documents. The withdrawal of the suit against the 3rd Defendant left the List & Bundle intact as the ones the 1st and 2nd Defendants relied on the documents by the 3rd Defendant. There were only 2 witnesses. The Plaintiff testified on her behalf and the 1st and 2nd Defendants called 1 witness, Mr Dismas K. Wanyonyi. At the conclusion of the hearing parties agreed to file written submissions and these are the Plaintiff's submissions.

56. The Learned Counsel, opined that the best part start was by highlighting the impunity on the part of the 1st and 2nd Defendants as illustrated by the testimony of DW - 1, Dismas K. Wanyonyi in the following passages:-

    a) That the 1st Defendant sold some of the shares in the 2nd Defendant to Regent Management in October 2010. That was two months after this suit was filed and an injunction was sought. The 1st Defendant cut his losses and spread his risks knowing the outcome of this suit.

    b) They had commenced the project prior to the Environmental Impact Assessment.

c) They were licensed to develop three floors, that was to say, ground floor plus two floors but they constructed five floors and were still going up until they stopped in the year 2015.

d) The Plaintiff sought orders of injunction] in which she was not successful.

e) Though only one pent house was authorized they intended to build a pent house atop each of the three wings. As the building stopped on the 5th floor. It could be inferred that the pent houses would have been built on the 6th floor.

f) That they now had five floors on each wing.

g) He got involved in the project in the year 2015 as Project Manager of Regent Management. Regent Management was the shareholder of the 2nd Defendant.

h) That the 1st and 2nd Defendants never had the Environmental Impact Assessment Report (EIA).

i) That the 1st and 2nd Defendants could not say whether the Plaintiff, the immediate neighbor, had any right to participate in the EIA or whether she was consulted or not.

j) That the licenses and approvals were not transferrable and that the construction was stopped in the year 2015.

k) Environmental Impact Assessment involved the owners of a bar on the main Malindi Road and the questionnaire was completed by a security guard in one of the properties miles away. The project sharing a boundary wall with the Plaintiffs house was on Third Avenue, New Nyali.

1) Construction was going on from year 2009 even though the license was not issued until year 2011.

m) The license was for 24 months only.

n) That construction could start before the EIA license was issued.

o) That they could not protect the Plaintiff from dust pollution because the iron sheets they were using ran out. On page 4 of the Plaintiff's List & Bundle of Documents filed on 7th December, 2011. A letter written by the 3rd Defendant to the Plaintiff former Law firm, Messrs. Karigithu Kinyua & Co. Advocates on 11th March, 2010 in answer to one of their demand letters, saying that the galvanized iron sheets they were using in the first phase were out of stock and they expected to receive them from their supplier, Coast Metal Traders Limited. The letter concluded with a promise to fence off and seal up the area upon receipt of those iron sheets. They never sealed out the area and construction continued on and off for 6 years.

p). He could not say when the pit latrines were built. The Court would keep in mind that his involvement commenced from the year 2015, the year the construction stopped while the development had been going on from the year 2009.

q). The preferred brand of the galvanized iron sheets that had been used earlier in phase one had ran out of stock but the building had to go on.

54. The Learned Counsel submitted that the 1st, 2nd and 3rd Defendants had filed a List & Bundle of Documents dated 13th April, 2012. Item 2 on that Bundle was a tiny advertisement in the Saturday Nation of 29th March, 2008 which was the public notice on change of user of Plot No. MN/I/3161 that:- "the owner of the above-mentioned plot wish to change user from (OPDH) Residential to

apartments on 3 floors. Any individuals or institutions with objections were requested to do so in writing within 14 days of this notice addressed to the Town Clerk Municipal Council of Mombasa P.O. Box 90440 Mombasa".

He asserted that it could be seen that from the evidence that the change of user was for 3 floors. That what was approved was 3 floors but what was partially built was 5 floors with provision for additional floors, following the same floor plan. Other material and relevant documents in that bundle include: -

i. The planning brief. On page 10 could be seen a discussion of the neighborhood and references to multi storey buildings on Plot numbers MN/I/1953, 5213 and 5207. These were not on 3rd Avenue, New Nyali and are nowhere near Plot Number 3160 and 3161. It was a confirmation that those who were consulted on the EIA own properties miles away.

ii. The approval by the Municipal Council of Mombasa dated 29th May, 2008 on page 14 for apartments on 3 floors.

iii. The NEMA Conditions for Approval dated 25th June, 2009 on page 19 addressed to the 1st Defendant and Condition Number 1 was approval limited to 11 residential apartments on three wings arch shaped design (ground, 1st and 2nd floors) and a pent house. Please note it was 3 floors and 1 pent house and not 5 floors and 3 pent houses.

iv. The 1st Defendant letter to NEMA (Page 21 of his Bundle) with the acceptance of the conditions for approval and confirming that he would comply with all the conditions.

55. The Learned Counsel opined that the EIA License was on page 22. It was for ground, 1st and 2nd floors and a pent house. The License was valid for 24 months from 1st February, 2011 but it was known that construction commenced in the year 2009. That explained the filing of this suit in August 2010. It lapsed in the year 2013. The conditions for the license continued to page 23 and they included the conditions that the 1st Defendant:-

a) Would follow the approved development plans.

b) Would ensure strict adherence to Environmental Management Plan throughout the project cycle.

c) Would ensure that regulation measures were adhered to during the construction phase and shall comply with NEMA's improvement orders throughout the project cycle.

56. He submitted that the 1st and 2nd Defendant refused to comply with all the improvement orders. All the demand letters to the Defendants fell on deaf ears necessitating the filing of this suit. Some of those letters in the Plaintiff's List & Bundle of Documents were filed on 7th December, 2011. He was of the view that from the Plaintiff's Bundle of Documents filed on 7th October, 2011. The Court's copy of the property guide through which Regent management had advertised the sale of those apartments. It could be seen that those were not three floors. By the time of filing this suit two floors had been built and the third floor was under construction. The buildings was visible from the photographs because there were no galvanized iron sheets.

57. He informed Court that the Plaintiff had reached out to the new Nyali Residents Association who wrote to the Town Clerk, Municipal Council of Mombasa on 10th November, 2009 to no avail. They had previously written to the Town Clerk on 29th May, 2009, 9th July, 2009, 24th July, 2009 and 22nd September, 2009.These letters proved that the Plaintiff did everything in her power to avoid litigation and as the evidence showed her decision to file suit was merited. Further, he stated that the Plaintiff's medical condition was described in the letters/reports from the Nairobi Chest Clinic and Doctor J. B.

O. Okanga on pages 24 to 27. She operated on one lung and any threat to her remaining lung was a direct threat to her life. That remaining lung was itself asthmatic and anyone exposing the Plaintiff to any amount of dust would be passing a death sentence upon her. The Defendants were made aware of her medical condition as those letters were annexures in her Affidavit in support of her application for orders of injunction made in August 2010. There was evidence that the Defendants successfully opposed that application. The Judge who dismissed the application never had the information this Court now has nor heard the witnesses that the Court has heard.

58. According to the Learned Counsel, there was no doubt that the 1st and 2nd Defendants were liable. This was because they violated the conditions of the licenses. They commenced construction before they obtained the licenses. They failed to provide toilet facilities to their construction workers and turned the Plaintiff's fence into a urinal. They refused to obtain galvanized iron sheets to contain the dust on the excuse that the brand they were using was no longer in the market. They built above the approved number of apartments and floors and some of the construction went on, on Sundays and at night. Furthermore, they disobeyed improvement orders and disregarded all entreaties by the Plaintiff and the new Nyali Residents Association. The 1st and 2nd Defendants were vicariously liable for the acts and omissions of their contractor and agent, Westcon Contractors Limited (the former 3rd Defendant). The 1st Defendant never escaped liability by purporting to transfer his license to the 2nd Defendant and by selling his shares in the 2nd Defendant to Regent Management Limited.

59. He contended that it was important to refer to the Plaintiff's evidence that even though the Defendants violated the terms of the licenses and exposed her to a real threat to her life she never wished the building to be demolished so long as it could be completed in accordance with the license and without causing any nuisance to her and in particular the absence of their preferred brand of galvanized iron sheets should not be an excuse for not containing dust and the debris and construction may only occur during day light and not on Sundays. The Court would recall that the Plaintiff made that offer in her testimony but it was rejected.

60. Accordingly, the Plaintiff was entitled to the declarations in prayers (a), (b)(c), (d) and(f)of the Plaint, the injunctions sought in prayers (g), (h) and (i), general damages for pain and suffering, punitive and aggravated damages and costs. The Plaintiff sought special damages as may be incurred should she be compelled to move out of the suit premises for the duration of development. She never moved out any more because she could not afford to and impunity and power could not be a sword to remove elderly people from their homes. When an elderly person living with disability and suffering from asthma was dislocated from their home the dislocation would be traumatic and would worsen their condition. That was why it would found out that the Plaintiff chose to remain in her house in spite of the real risk to her life. The 1st and 2nd Defendants acted in that manner because of their knowledge that the Plaintiff's house was sold by a financial institution and in their minds her views and her health were of no relevance even though she had a suit to recover title to her property. She had always lived on her property since she built it in the year 1980s.

61. According to the Learned Counsel, the 1st , 2nd and 3rd Defendants filed a Statement of Defence dated 15th September, 2010 basically denying everything but stating in paragraph 7 that they were licensed to build residential apartments in 3 floors and a pent house. It was now known that they built apartments in 5 floors and they were still going up when they stopped in the year 2015. In the rest of the defence they falsely claimed to have complied with all terms of the license but the evidence of DW - 1 disabused that notion and proved that the defence was false. The Court has evidence that there was no compliance. That the 1st and 2nd Defendants deliberately violated the conditions of the license in spite of multiple warnings from the Municipal Council of Mombasa, from Nema, from the Plaintiff and the New Nyali Residents Association.

62. He argued that the Plaintiff had already suffered a lot and thus submitted that the Plaintiff was entitled to damages under the following heads:-

a) Pain and suffering....a sum of Kenya Shillings Three Million (Kshs.3,000,000.00/=)

b) Punitive and aggravated damages.....Kenya Shillings Twelve Million (Kshs.12,000,000.00/=)

63. The Learned Counsel asserted that there was justification for a sum of Kenya Shillings Twelve Million (Kshs. 12,000,000.00/=) as punitive and aggravated damages. The 1st and 2nd Defendants were in a stronger financial position and had enough power and muscle to override all regulatory agencies and the New Nyali Residents Association. They did that so as to maximize profits and those punitive damages must then have a bearing on what drove them into that level of impunity. The Court may perhaps take judicial notice that the damages sought in the sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00) were hardly 50% of the value of an apartment on 3rd Avenue, New Nyali, a stone throw away from City Mall, a 5 minute walk to the ocean and 10 minute walk in the other direction to Nyali Centre. One may not think of a better address than the location of those apartments. Considering that the approvals were limited to 11 apartments on 3 floors and 1 pent house and that the development stopped on the 5th floor and they intended to put up three (3) Pent houses instead of one (1) then the damages proposed were reasonable. There would had been an additional 7 apartments and two (2) Pent houses and all the Plaintiff was asking was a percentage of 1 apartment as compensation and to punish the 1st and 2nd Defendants for their impunity. The Court could infer the exact number of additional apartments because the three (3) conjoined structures followed the same floor plan from the ground.

64. In assessing these damages, the right to a clean and healthy environment as a constitutional right and not merely statutory or common law were to be kept in mind. When the people required Parliament, in the provision of Articles 42 (b) and 72 of *the Constitution* of Kenya, 2010to enact legislation to fulfill the obligations to a clean and healthy environment they were aware of pre-existing statutes on the environment and building codes. In the case before the Court the Defendants never plead ignorance. They just say that they could not find the brand of their preferred galvanized iron sheets and that it was more profitable to build more apartments with more floors than had been approved.

65. The powers of this Court under Article 23 (3) of *the Constitution* on the infringement, denial and violation of the right to a clean and healthy environment include a declaration of rights, an injunction, a conservatory order and an order for compensation. When you determine the damages please keep in mind that the issue is not whether damages will be ordered but how much and under what categories. He urged the Court to also keep in mind that a person unable to peacefully enjoy her house because of the stench, the noise and the dust will require compensation beyond the physical injury or any expense. The 1st and 2nd Defendants knew of the mitigating measures they were required to take in order not to infringe on those rights but they chose not to. He would ask for the costs of this suit and interest on those damages.

66. In conclusion, he apologized for the delay in preparing these submissions. The reason being, apart from heavy work in the Court of Appeal and the Superior Courts, he suffered a mental block and could not find inspiration. He hoped the Court would accept this explanation and excuse the delay.

B. Written Submissions by the 1st & 2nd Defendants

67. Through the Law firm of Messrs. Lilan & Koech Associates, LLP Advocates, the 1st and 2nd Defendants herein filed their written Submissions dated 12th June, 2023. Mr. Ligani Advocate commenced his submission by providing Court with the background of the matter. He stated that the Plaintiff herein

filed the instant suit vide the Plaint dated 18th August 2010 seeking for the reliefs specifically set out in the Plaint. The 1st, 2nd and 3rd Defendants in response to the suit filed their joint Statement of Defence dated 15th September 2010 and later amended it on 30th September 2010.

68. The Learned Counsel further informed Court that on 25th May 2023 when the matter came up for mention for compliance on filing of submissions, the Court directed parties to file and exchange their respective written submissions. He stated that the 1st and 2nd Defendants intended to rely on these submissions and the record of this court. He averred that the instant suit arose from the construction of the property on L.R. No. MN/I/3161 (Hereinafter referred to as 'the Construction Project") by the 2nd and 3rd Defendants having bought said property from the 1st Defendant. The Plaintiff claimed, "inter alia', that the Construction Project was erected illegally and without first obtaining the necessary approvals. The 1st, 2nd and 3rd Defendants on the other hand claimed that the Construction Project was developed and constructed after having obtained all the necessary approvals and in compliance with all the conditions stated in each of the approvals. During the hearing of the case which was conducted on the 13th February 2023 in open Court, the witnesses for the Plaintiff and the 1st and 2nd Defendants testified and closed their respective cases. The Plaintiff was her only witness. Mr. Dismus Wanyonyi testified on behalf of both the 1st and 2nd Defendants.

69. During the examination -in-chief, the Plaintiff adopted her Witness Statement dated 17th January 2012. She also produced the documents in the order listed on her Bundle of Documents (the 1st bundle only). However, the Plaintiff never produced her supplementary documents filed in court. The Plaintiff testified that she was the owner of the property known as L.R. No. MN/I/3160 which was next to the Construction Project, situate at New Nyali, behind Nakumatt Nyali, Mombasa. She further testified that the Construction Project done on parcel numbers L.R. No. M.N/I/3161 which belonged to the 1st and 2nd Defendants was also situate at New Nyali, behind Nakumatt Nyali, Mombasa. She testified that in the year 1987 owing to health complications she underwent an operation during which one of her lungs was removed and had since lived on only one lung. That she was also asthmatic. That her asthmatic condition started around the year 2009 when Mimi Apartments started constructing the house next to her property. She stated that the 1st and 2nd Defendants never had any dust screens nor were there any urinals or toilet on the said property. Instead, the workers were urinating on her property. That they were also constructing even at night and over the weekends, contrary to the regulations. She insisted on compensation for trespass. That she had no problem if the construction would continue, but not more than 5 floors. She also testified that the basis of award of punitive and aggravated damages would be the advertised selling price to the tune of a sum of Kenya Shillings Ninety Six Million (Kshs.96,000,000/=).

70. On cross examination, she admitted that her ownership of the property was disputed. She also admitted that there was an ongoing court case in which her ownership of the property where she now resided in was disputed. She also admitted that she had not produced any evidence in court indicating that the construction workers had urinated on her property or that there were no toilets provided by the 1st and 2nd Defendants to the construction workers. She conceded that there was fencing done before the construction as evidenced from one of the letters of the Nyali Residents Association. She also admitted that there were other properties in the neighborhood that were more than 10 floors. She never produced any evidence (medical report(s) linking her illness (asthma) to the construction. She also admitted that she never made the claim on behalf of the Residents Association. Further, she admitted that there was a change of user that was published in the newspapers. She testified that the construction was no longer ongoing and that she had no problem if the construction would continue, but not more than 5 floors.

71. During re-examination, she stated that there was no fence around the construction site. The Contractor had informed her that the iron sheets for constructing the fence had run out. She also testified that there was no Environmental Impact Assessment Report done for the construction. She stated that she was not consulted before approval of change of user. She further stated that her medical condition aggravated because of the construction and that the Defendants should be punished for non-compliance, hence prayer for aggravated damages.

1st & 2nd Defendants evidence during hearing

72. The Witness for both the 1st and 2nd Defendant was one Mr. Dismus Wanyonyi. He was an employee of Regent Management Limited and the Project Manager for the 2nd Defendant, with regards to the Construction Project on the suit property. He adopted his Witness Statement dated 30th June 2022 as his evidence in chief and produced all the Documents in the Defendants' List & Bundle of Documents as exhibits. He testified that the 2nd Defendant, Mimi Apartments bought property L.R. No. MN/I/3161 from Shadrack Amakoye, the 1st Defendant. He stated that the said Shadrack had obtained a change of user before construction started. That the 1st Defendant then submitted and had the plans approved, for the construction of apartments on 3 floors plus a penthouse which equaled to 4 levels. He added that in recent years, the area around the suit properties had had a lot of mixed development of various uses and densities, such as multi-storied apartments buildings on Plot Nos MN/1953, 5213 and 5207, Section L Mainland North, which had been developed with 3 floors and approvals had been obtained for 28 apartments on Plot No 3220. While referring to page 4 of the Planning Brief of Abubakar Maddy of April 2008, at page 11 of the 1st and 2nd Defendants List and Bundle of Documents, he testified that the Change of user was consistent and compatible with the legislation for the area and the surrounding. He stated that a change of user was granted on 29th May 2008 and all conditions thereon were met. This was before the construction had begun. He added that the Architectural Plans were submitted and approved on 14th November 2008. He testified that the Environmental Impact Assessment Report was considered by NEMA before issuing EIA License on 1st February 2011. He added that NEMA approval conditions of construction were already accepted and complied with by 6th July 2009, before construction had commenced.

73. Upon cross - examination, he stated that the EIA license was issued after construction had commenced sometimes in the year 2009. He added that the 1st and 2nd Defendants had not produced the EIA Report. He stated that the 1st Defendant must have consulted the neighbors and residents during the EIA report. He also testified that approval was given for 11 Residential Apartments on Three Wings Arch Shaped Design (Ground, 1st & 2nd Floors) and 1 Penthouse. This translated to 4 levels, which were constructed by the Defendants. That there were toilets in the construction site that was used by the workers. He further stated that Approval documents could not be transferred. Approval plans were obtained by the 1st Defendant hence could not be transferred to Mimi apartments. That the Defendants had complied with the architectural plans.

74. On re-examination, he stated that there was published a Notice of Change of User in the Newspaper. That the ownership of the property had changed, but the project was the same. Hence the approvals applied. He also clarified that the EIA license could be issued any time, even after construction had commenced. That the other approvals were obtained before construction. He reaffirmed that the 1st Defendant obtained the EIA report and submitted it to NEMA, which considered it before issuing the EIA license. He stated that the 1st , 2nd and 3rd Defendants acted within the law in undertaking the development and all the bodies involved gave their respective approvals. He added that it would be unfair and unjust to order demolition of the houses when the Defendants had complied with the law.

He stated that the claim for damages was unfounded. That the court should allow the 2nd and 3rd Defendants to proceed with the project having complied with all statutory requirements.

75. The Learned Counsel relied on four (4) issues that he intended the Court to make its determination. These were namely, firstly whether the suit was in contravention of the doctrine of exhaustion. It was noteworthy that the law that regulates land use and physical planning at moment is the *Physical and Land Use Planning Act* 2019 which commenced operation on 5th August 2019. Therefore, the Physical Planning Act 1996 was in force when the instant suit was filed.

The provision of Section 10(1) of the said the Physical Planning Act 1996 provides:

> Functions of Liaison Committees.
>
> (1) The functions of the National Physical Planning Liaison Committee shall be-
>
> (a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee;
>
> (b) to determine and resolve physical planning matters referred to it by any of the other liaison committees;...

Section 13 of the said Act provides:

> 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.
>
> (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.

The provision of Section 15 of the said Act further provides:

> Appeals to the National liaison Committee and to High Court
>
> (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.

76. The Learned Counsel submitted that it was now well settled that where the law provides for an alternative mechanism for dispute resolution, the said mechanism must first be exhausted before going to court. He averred that the instant suit was rushed to court prematurely. The Physical Planning Act 1996 (under Sections 10 (1), 13, 15 among others) provided for a mechanism by which the Plaintiff could have resorted to challenge the approvals if she was dissatisfied with the approvals granted to the 1st Respondent. Under the said provisions of the Physical Planning Act 1996, the Liaison Committees had the power to approve or reject any application made regarding land use. To buttress on the issue of

exhaustion of existing dispute resolution mechanisms, the Counsel cited the Court of Appeal in "the Speaker of National Assembly – Versus - Karume (1992) KLR 21cited with approval in Julia Wairimu Njuguna – Versus - Mungal Kiongo & another [2019] eKLR held that:-

> " 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."

77. Similarly, he relied on the case of:- "Geoffrey Muthinja Kabiru & 2 Others – Versus - Samuel Munga Henry &1756 Others (2015) eKLR, it was held 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."

78. Further, he invited this honourable court to consider the decision of the court in the case of "Maanzoni Owners Association (Suing through his officials Isaac Kimilu-Chairman, Robert Mugo Wa Karanja-Treasurer & Susan Wanjiku Ngigi -Secretary) – Versus - Pamela Tutui & 2 others [2021] eKLR where it was held that:-

> " .....the question of whether the application for the said change of user should be allowed or not should be determined by the bodies created under the *Physical and Land Use Planning Act*."

In light of the above decisions and the facts of this case, he submitted that the Claimant should have first brought her grievances against the Defendants to the bodies created under the Physical Planning Act 1996 before resorting to file the instant suit in court.

79. Secondly, whether the Defendants complied with the law and procedure in erecting the Construction Project. Mr. Dismus Wanyonyi, Project Manager for the 2nd Defendant testified that the 1st Defendant sought the necessary change of user of the Construction Project from residential to apartments with three (3) floors and a penthouse. He added that the proposed change of user was published in the newspaper advertisement on 29th March 2008 inviting any person who wished to object to the proposed development to do so. The 4th Defendant considered and approved the application for change of user vide its letters dated 2nd April 2008 and 29th May 2008 with conditions, 'inter alia', that the 4th Defendant was to approve the building plans before commencement of the development. The 1st Defendant submitted the building plans for approval by the 4th Defendant and the same were stamped as approved. (Reference was made to the building plans in the 1st , 2nd and 3rd Defendants' List & Bundle of documents stamped as "APPROVED" by the 4th Defendant). He noted that the witness for the 1st and 2nd Defendants testified that in recent years, the area around the suit properties had had a lot of mixed development of various uses and densities, such as multi-storied apartments buildings on Plot Nos 1953, 5213 and 5207, Section L Mainland North, which had been developed with 3 floors and approvals have been obtained for 28 apartments on Plot No 3220. He also noted that during the cross-examination, the Plaintiff admitted that there were other properties in the neighborhood that

were more than 10 floors. She added that she had no problem if the construction would continue, but not more than 5 floors. In light of the above, he contended that the fact that the 2nd Defendants complied with the provisions of the Physical Planning Act 1996 culminating in the approval for the development mentioned above; and that the Development Project conforms to the surrounding developments in the neighborhood. It would therefore be unfair to demolish the Development Project when similar developments are existing and ongoing in the neighbourhood of the suit property. In terms of compliance with the provisions of Environmental Management and Coordination Act 1999, the 1st Defendant conducted an environmental impact assessment and submitted a report.

80. The National Environment Management Authority (NEMA) reviewed the EIA Report submitted by the 1st Defendant and issued a conditional approval of the project vide the NEMA letter dated 25th June 2009. Vide the said NEMA letter, the 1st Defendant was required to confirm in writing that he would comply with the conditions stated in the letter in order for NEMA to process the EIA licence. The 1st Defendant wrote to NEMA on 6th July 2009 and confirmed that he would comply with the conditions stated in the said NEMA letter. Subsequently, and having complied with the conditions stated in the NEMA letter, the 1st Defendant was issued with EIA licence. It was noteworthy that in the said EIA Licence, NEMA approved the construction of 11 residential apartments on three wings arch shaped design (GR, 1st&2nd floors) and a pent house. In view of the foregoing, we submit that the Construction Project were constructed in compliance with all the requirements of law including the Physical Planning Act 1996 and Environmental Management and Coordination Act 1999 (sections 58 and 63) which project is also compatible with the surrounding areas.

81. Thirdly, on whether the Plaintiff is entitled to damages claimed. He noted that during cross-examination, the Plaintiff admitted that her ownership of the property was disputed and that there was an ongoing court case in which her ownership of the property she now resides in is disputed. He averred that the Plaintiff had no locus standi to institute the suit herein and had no locus standi to maintain the same as her ownership of the said property was in dispute. On this point, the Counsel relied on the decision of the court in the case of:- "Law Society of Kenya – Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, where the Court held that:-

> " Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law".

82. Further, he cited the case of "Alfred Njau and Others – Versus - City Council of Nairobi (1982) KAR 229", the Court also held that:--

> " the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings"

His contention was that the Plaintiff never had the right to be to appear and be heard in these proceedings as she lacked legal standing to do so. On the allegations of unsanitary conditions of the construction site, he noted that the Plaintiff on cross-examination admitted that she had not produced any evidence in court indicating that the construction workers had urinated on her property or that there were no toilets provided by the 1st and 2nd Defendants to the construction workers. She conceded that there was fencing done before the construction, from one of the letters of the Nyali Residents Association. Additionally, she also admitted never having produced any evidence (e.g. medical report(s) linking her illness (asthma) to the construction.

83. The Learned Counsel averred that the Plaintiff's evidence fell short of the strict requirements of the provision of Section 107 of the *Evidence Act* Cap 80 Laws of Kenya which provides that:-

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The witness for the 1st and 2nd Defendants on the other hand testified that they complied with all the sanitary, health and safety requirements as required by the law which was evidenced by the respective approvals issued by various regulatory bodies including NEMA.

In light of the above, his contention was that the Defendants complied with all the requirements of the law and that all the allegations, including the alleged deterioration of the health of the Plaintiff remained unproven and baseless.

On the prayer for punitive and exemplary damages, he drew the court's to the words of Lord Devlin in the case of "Rookes – Versus - Barnard [1964] AC 1129 cited with approval in Godfrey Julius Ndumba Mbogori & another Versus - Nairobi City County [2018] eKLR to the effect that:-

> "Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the Defendants' conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the Plaintiff and iii) where exemplary damages are expressly authorized by statute".

84. He submitted that the 1st and 2nd Defendants' conduct never fell into any of these three categories that would warrant issuance of punitive and exemplary damages. He asserted that it would be grossly unjust to penalize the 1st and 2nd Defendants to pay damages, leave alone punitive damages, when they complied with all the requirements of the law while undertaking the Construction Project.

85. Finally, whether Plaintiff's Further List of Documents should be disregarded as evidence. He noted that the Plaintiff never produced her Further List of Documents during the hearing. To support his point, he relied on the decision of the Court of Appeal in the case of "Kenneth Nyaga Mwige – Versus - Austin Kiguta & 2 others [2015] eKLR" where the Court held that:-

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence;"

86. In light of the words of the court above, the Counsel averred that the failure by the Plaintiff to adduce the documents in her Further List of Documents renders the said documents not part of the court's record and therefore not part of the Plaintiff's evidence. He urged that the said documents should be disregarded and do not form part of the evidence to be relied upon by the court in the determination of this suit.

In conclusion and light of the foregoing, he prayed for the Court to find that the Plaintiff failed to proof her case against the 1st and 2nd Defendants to warrant issuance of prayers sought. Thus, the instant suit should be dismissed with costs to the 1st and 2nd Defendants.

VII. Analysis and Determination

87. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

88. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -

    a. Whether the Honourable Court had Jurisdiction to deal with the matter based on the Doctrine of Exhaustion.

    b. Whether the Plaintiff had the "Locus Standi" to institute this suit against the 1st, 2nd, 3rd and 4th Defendants herein.

    c. Whether the impugned construction and project on Plot No.L.R.NC 3161/1/MN had the requisite NEMA approval

    d. Whether the impugned construction and project on Plot No.L.R.NC 3161/1/MN had the requisite development permission in terms of change of user under the relevant law;

    e. Whether the suit property, Plot No.L.R.NC 3161/1/MN, neighbors the Plaintiffs' properties;

    f. Whether the activities complained of were a nuisance to the Plaintiff leading to threatening, denial and violation of the Plaintiff's right to a clean and healthy environment;

    g. Whether the Plaintiff is entitled to damages.

    h. Who bears the costs of the suit?

ISSUE No. a). Whether the Honourable Court had Jurisdiction to deal with the matter based on the Doctrine of Exhaustion.

89. Under this Sub – title, the Honourable Court wishes to deal with the two – prong broad objections raised by the 1st and 2nd Defendants. Firstly, on whether this Court bears the jurisdiction to deal and entertain with the subject matter on the basis of the doctrine of exhaustion taking that the Plaintiff instituted this suit prematurely. First and foremost, she ought to have lodged her complaint before the Physical and Plaining Land Use Liaison Committee of the County of Mombasa under the provision of the Physical and Planning Land Use Act (hereinafter referred to as "The Liaison Committee"). Secondly, whether the Plaintiff has "the Locus Standi" (legal capacity) to sue the Defendants in the matter claiming damages from it against them.

90. The Honourable Court will deal with these objections raised on pure issues of law exclusively and in distinctly as follows. On the issue of Jurisdiction was dealt with in "the locus classicus' and now celebrated case of:- "The Owners of Motor vessel Lillian 'S' -Versus - Caltex Kenya Limited. [1989] KLR 1" where the Court, Nyarangi JA held:-

> "Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it

upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given"

91. The provision of Article 162 (2) (b) of *the Constitution* of Kenya, 2010 empowers Parliament to "establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land." In this regard and pursuant to Article 162(3) or *the Constitution*, Parliament enacted the *Environment and Land Court Act*, Act No. 19 of 2011. Section 13 of the *Environment and Land Court Act* outlines the jurisdiction of the Environment and Land Courts as follows:-

(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.

92. Further, still on the same point, in the case of "County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR" whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

"SUBPARA 10-

The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-"Hon (Lady) Justice Kalpana H Rawal - Versus - Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- "Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows:-

".....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost....."

93. Additionally, I have held before in the case of:- "Mary Musuki Mudachi & another – Versus - Anthony Muteke Mudachi & 2 others; Elijah K. Kimanzi & 6 others (Interested Parties) [2021] eKLR" that:-

> " While I fully concur and associate myself with the ration made out under Pheonex of EA Assurance Limited case (Supra) my interpretation of the ratio on jurisdiction was where a case for instance of the Commercial or running down or Succession or employment and labour related and so forth was instituted before the Environment and Land Court or the vice versa then clearly that stated case becomes a nullity of jurisdiction and it's the one that cannot be salvaged by neither consent of parties, the Oxygen principles or the Overring Objectives or the prepositions found under Article 159 of *the Constitution* of Kenya. The instant case is extremely distinguishable from what was envisaged under that decision of the Court of Appeal. For these very reason, therefore, it is completely wrong for the Defendants to emphatically state that the Environment and Land Court at Mombasa has no jurisdiction to hear and determine this case. The court is clothed with the legal jurisdiction to hear and determine the case."

94. While fully agreeing with the Learned Counsel for the 1st and 2nd Defendants on "the Doctrine of Exhaustion" as founded by the Court of Appeal in "Kibos Distillers Limited & 4 others - Versus - Benson Ambuti Adega (Supra) where Court stated that inter alia:-

> " Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by *the Constitution* or statute.....Jurisdiction of the court or a tribunal flows from *the constitution* or statute and it cannot be conferred by the art and craft of counsel or litigant drawing pleading to confer or oust the jurisdiction given to another institution or tribunal by statute."

95. Our courts have on an umpteen times stated categorically that where Parliament has, through legislation, established primary dispute adjudication mechanisms and organs, the mechanisms must be exhausted. Indeed, in the case of the Court of Appeal decision in "Speaker of the National Assembly – Versus - James Njenga Karume [Supra), the Court stated:-

> " .....Where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be strictly followed....."

On the same breath, I fully concur with the robust legal reasoning and ratio in the case of "Geoffrey Muthinja Kabiru (Supra) where the Court of Appeal (P. N. Waki, R.N Nambuye & P.O Kiage J JA) explained the constitutional rationale and basis for the doctrine and held 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

96. Nonetheless, the above not with standing, I have great legal and factual reservation when it comes to the issue of the Liaison Committee and in accordance with the provisions of the *Physical and Land*

use Planning Act No 13 of 2019. The law demands that any claim in relation to decision making and communication on issuance and/or refusal and/ or revocation of a development permission to be lodged with the County Physical and Land Use Planning Liaison Committee under the provision of Section 76 of the Act for each county in all the 47 Counties. It is well established jurisprudence that jurisdiction is the foundation upon which a court or Tribunal hears and determines a case. The provision Section 78 of the Act provides that:-

> " The functions of the County Physical and Land Use Planning Liaison Committee shall be to—
>
> (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
>
> (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
>
> (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
>
> (d) hear appeals with respect to enforcement notices.

Section 61 (3) provides that:-

> "An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed".

As per Section 61(4) -

> "An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court".

97. In the case of Mombasa Judicial Review No. 14 of 2019, Lashad Mohamed Mubarak - Versus - County Government of Mombasa [2020] eKLR Justice Sila Munyao noted:-

> " 10. It will be seen from the above, that apart from providing the framework for development control, the statute also provides a mechanism for dispute resolution with respect to physical and land use planning"
>
> "13. It will be seen from the above, that a person who is aggrieved by a decision of the County Executive Member over a planning application, has liberty to appeal to the County Physical and Land Use Planning Liaison Committee. I believe that this right of appeal is not only on the grant or refusal to grant development permission in the first instance, but also a decision to revoke or modify a planning permission. There is therefore a right of appeal that has been granted by statute. This right of appeal would encompass all matters that a person feels aggrieved against, whether it is procedural or on merits. (Emphasis is mine)"

98. Clearly, from the above, the original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies on the Change of User lies with the County Physical and Land use Planning Liaison Committee and this Court only has appellate jurisdiction. As regards the issue of the Change of User, I reiterate that according to the provision of Section 61 (1), (2) and 3) read with Section 93 of the *Physical and Land Use Planning Act*, No. 13 of 2019, the person aggrieved by the decision on the County Executive Committee is to pursue an appeal to the Liaison Committees and they are to receive a notice of the decision approving the Change of User. In the instant case, no such communication exists. In saying so, I am compelled to fully rely on the authority of:- "John Kabukuru Kibicho & another – Versus - County Government of Nakuru & 2 others [2016]eKLR" whereby the Court held thus:-

> " 27. The substantive issue in this suit concerns a planning permission that allowed a Change of User of the suit property. I agree with the Respondents on the argument that a person faced with a planning decision, has a right to appeal that decision to the Liaison Committees. However, I do not agree with the contention that the Petitioners herein ought to have channeled their grievance to the Liaison Committees. They had absolutely no opportunity to do so. In as much as the 1st Respondent deposed that the Petitioners were informed of the decision allowing the change of user, I have no proof of such. I have not seen any letter or any form of communication from the 1st Respondent to the Petitioners, informing them that their objection against the Change of User was rejected. If there was such communication, then the issue of the Petitioners not channeling their grievance through the Liaison Committees would probably have had some weight.
>
> 28. But how did the Respondents expect the Petitioners to pursue an appeal to the Liaison Committees when they had no notice of the decision approving the Change of User? The Respondents cannot be allowed to use their own failure to communicate their decision, to shut out the Petitioners from accessing this court, yet their failure to communicate, effectively barred the Petitioners from appealing their decision to the Liaison Committees within the stipulated time. Having not been notified of the decision, the Petitioners could clearly not have accessed the Liaison Committees within the statutory period. I therefore do not agree with the Respondents that the petitioners had the avenue of presenting their grievance to the Liaison Committees and I cannot allow the Respondents to use their own omissions to slam shut the door of justice in the face of the Petitioners. I do hold that the Petitioners had a right to access this court.
>
> 29. I do not think there is serious argument that this court cannot hear a dispute such as this. This dispute is before the Environment and Land Court which is the court established on the strength of Article 162 (2) (b) of *the Constitution*, with mandate to hear disputes concerning land and the environment. The jurisdiction is elaborated in the *Environment and Land Court Act*, 2011 which at Section 13 sets out the jurisdiction of this court."

99. In a bid to oust the jurisdiction of the Liaison Committee and demonstrate that this Honourable Court has jurisdiction to hear and determine the suit, it is common knowledge that the Liaison Committee for the County of Mombasa has not existed nor decision made by the County Executive

Member to warrant invoking the jurisdiction of the said Committee under the provision of Section 61(3) of the Physical and Planning Land Use Act 2019. Thus, there would be no where to appeal against the decision of the County executive committee member. Therefore, it is my understanding that the jurisdiction of the Committee can only be invoked in instances where there is a decision of the County Executive Committee Member. To put it differently the Liaison Committee can only sit and preside over an appeal against the decision of the County Executive Committee member and not a decision by any other person or officer within the county.

Unless otherwise stated, I reiterate that the Liaison Committee for the County of Mombasa has not yet been established pursuant to the provision of the Law. In that the given void and circumstances, the provision of Section 93 of the Physical Land Use Planning Act comes to effect. It provides:-

> " All disputes relating to physical and land use planning, before establishment of the National and County Physical and Land Use Planning Liaison Committees shall be heard and determined by the Environment and Land Court".(emphasis mine)

100. I take cue from the famous decision to invoke the original and inherent jurisdiction of this Court relating to environmental planning and protection by the decision of in Mombasa Judicial Review No. 14 of 2019, Lashad Mohamed Mubarak versus County Government of Mombasa [2020] eKLR (supra) by Judge S. Munyao establishing the circumstances of invoking the inherent jurisdiction of the Environment and Land Court under section 93 of the Act when he noted:-

> ". ..... Where the parent statute has provided a mechanism for resolving disputes, the court ought to be slow to invoke its inherent jurisdiction, and unless there are special circumstances, for example, that the body that is meant to hear the dispute has not been constituted, then the court ought ordinarily to defer jurisdiction to the specific dispute mechanism body that has been provided for in the statute".

Therefore, I hereby find that this Honourable Court is equipped with the requisite jurisdiction to here and determine the matter before it.

ISSUE No. b). Whether the Plaintiff had the "Locus Standi" to institute this suit against the 1st, 2nd, 3rd and 4th Defendants herein.

101. Under this Sub – heading and as already indicated above, an objection was raised by the 1st and 2nd Defendants on this issue. The learned Counsel for the 1st and 2nd Defendants did so while countering that the Plaintiff was not entitled to a claim of taking that she had no "Locus Standi" to claim ownership to the said property and hence by extension to have instituted this suit against the said 1st and 2nd Defendants herein. He stated that during the cross-examination, the Plaintiff admitted that her ownership of her property Plot No. MN/I/3160 was disputed and that there was an ongoing court case in which her ownership of the property she now resides in is disputed. Thus, his contention was that the Plaintiff never had the right to be to appear and be heard in these proceedings. On the allegations of unsanitary conditions of the construction site, he noted that the Plaintiff on cross-examination admitted that she had not produced any evidence in court indicating that the construction workers had urinated on her property or that there were no toilets provided by the 1st and 2nd Defendants to the construction workers. She conceded that there was fencing done before the construction, from one of the letters of the Nyali Residents Association. Additionally, she also admitted never having produced any evidence (e.g. medical report(s) linking her illness (asthma) to the construction. He averred that the Plaintiff had no locus standi to institute the suit herein. To buttress on this point, the Counsel relied

on the decision of the court in the cases of "Law Society of Kenya – Versus - Commissioner of Lands & Others (Supra) and "Alfred Njau and Others (Supra).

102. On this second objection raised by the Learned Counsel for the 1st and 2nd Defendants, the Honourable Court wishes to state as follows. Firstly, the term "Locus Standi" means a right to appear in Court and conversely to say that a person has no "Locus Standi" means that he has no right to appear or be heard in such and such proceedings. While fully being in concurrence with the Learned Counsel for the 1st and 2nd Defendants that indeed its trite law that Locus Standi signifies a right to be heard. A person must have appropriate and sufficiency of interest to sustain his/her standing to sue in Court of Law.

103. Secondly, on applying this legal principles to the instant case, I hold that by all means and intents, the Plaintiff bears appropriate and full legal standing with sufficient interest to have instituted this suit against the Defendants herein. Undisputedly, the records bear that currently, there was pending before this Court another Civil Suit being - "HCCC (Mombasa) No. 8 of 2007 (Rose Wangari Ndegwa- Versus - Housing Finance Company of Kenya Limited, Francis Nyamai Mwanzia, Tabitha Muthio Mwanzia and the Registrar of Titles, Mombasa) to cancel and nullify the sale of the suit premises to the 2nd and 3rd Defendants in that suit.Though the suit premises were sold and was subject of the aforesaid civil suit the Plaintiff was in possession and occupation of the suit premises. In yet another Civil suit being "HCCC (Mombasa) No. 158 of 2007 (Francis Nyamai Mwanzia and Tabitha Muthio Mwanzia – Versus - Rose Wangari Ndegwa) for vacant possession had not been heard and the proceedings were stayed awaiting the outcome of these suits herein. For these reason, it would be "Sub Judice" contrary to the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 for the 1st and 2nd Defendants to be seen to be engaging on the said matters. I discern that the parties herein should hold their horses awaiting the outcome of the Court from the said proceedings. In the meantime, the Court reiterates that the Plaintiff has "the Locus Standi" to have instituted this suit against the Defendants and hence the objection is disallowed.

ISSUE No. c). Whether the impugned construction and project on Plot No.LR. NC MN/I/3161 had the requisite NEMA approval

104. Under this Sub – heading the Honourable Court will endeavor to assess on the issues of applying and obtaining of the prerequisite of the statutory approvals and compliance for the impugned development. On this issue, and in all fairness and justice, it is critical and imperative that the Honourable Court endeavors to re – produce the evidence adduced in Court as clearly as possible, almost verbatim. According to the Plaintiff, the Defendants failed to obtain relevant licences and to comply with lawful orders issued by the NEMA. PW - 1 stated that with reference to the Defendants list of documents dated 13th April, 2012 and documents dated 25th June, 2009 under the paragraph approval of NEMA to the 11 residentials apartments. During the re – examination and with reference made to the letter by authored by NEMA dated 29th June, 2009, PW - 1 testified that what were contained from the said letter were simply pre - conditions to be fulfilled by the 1st, 2nd and 3rd Defendants. It was not a EIA license issued by NEMA as it were and or should have been the case thereof. According to her, the 1st condition was never complied with at all and hence tere was no way that the others would be deemed to have been complied with whatsoever.

105. According to DW - 1, while making reference to page 13 to the letter dated 17th April, 2008 entitled - Change of User – Plot No. MN/I/3161 by Mr. P.N. Mutwiwa – District Land Officer held that by that time the construction had not started. On Page 15 of the Defendant's documents was the Designers approvals. By this time the constructions had not started. DW – 1 on Page No. 19, referred to the letter by dated 29th June, 2009. From the evidence adduced in Court was that there were 4 floors consisting of the ground floor and 2floors and one Pent house. So far, there were 9 apartments. It was aimed at

attaining 11 apartments in the long run. Currently, it was a massive development. At page 21 was the letter dated 6th July, 2007 by Shadrack Amokoye Bulimo to NEMA. It was an acceptance of approval conditions with regard to the nuisance and noise pollution. DW – 1 stated the Mr. Shadrack Amokoye had never received any complaint from anyone. The contractor was to do this work under the ambit of the conditions stipulated by NEMA. He was never privy to any complaint. He wrote a witness statement dated 30th June, 2012. He had also filed a list of documents dated 13th April, 2012 which he produced as Defendants Exhibits 1 to 12. The project had been carried out with the approvals. There was a Pit Latrine being used by Guards. He was not aware of the time when this happened and whether it was communicated Rose Wangari. With reference to the Defendant's documents, DW - 1 told the court that the Change of User was made from 3 floors to 5 floors meaning the ground and 2nd Floors and the Pent House. There were 3 wings, the Pent House was not to sit on the 3 wings. The intention was to be on each wings and its part of the drawings. It was not correct to say that the idea of a Pent House on each wings. They had five floors for each wing.

106. DW - 1 told the court that he just got involved in this project in the year 2015 as the Project Manager of Regent Management. They had an EIA License was with Mr. Amakoye. They never got EIA License. He was not able to say whether she had a right to be involved in public participation. He did not know whether she was consulted or not. From his witness statement, he had indicated that she could have objected if she had not been consulted. DW - 1 told the court that there was EIA done but on some people. These included the owners of the bar on Malindi road and the guard. From the year 2010, the constructions had been going on with the NEMA's approvals. On Page 22 – The NEMA Licence was issued on 1st February, 2011. At page 14, DW - 1 confirmed that the letter dated 29th May, 2008 was a notification of Approval of the application for development permission by the Municipal Council of Mombasa. With reference to page 19, DW - 1 confirmed that the letter by NEMA letter dated 29th June, 2009 was on condition for approval and not a License. On Page 22 were conditions of license for 24 months. The approvals came earlier but the license was issued on 1st February, 2011. He admitted that the NEMA license was necessary. He was saying that the construction can start before the EIA license was issued.

107. On the issue, as to whether the report was to be undertaken as Environmental Impact Assessment Study or Environmental Impact Assessment project, I do find that the relevant provision in section 58(1) of the EMCA that provides for application for an Environmental Impact Assessment Licence. This section stipulates: -

> (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
>
> (2) The proponent of a project shall undertake or cause to be undertaken at his own expense, an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

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(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conductor prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorized to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

108. This section should be read with Part 11 of the regulations, thus regulations 7, 8, 9 and 10 of the Environmental (Impact Assessment and Audit) regulations, 2003. These regulations provide as follows: -

7

(1) A proponent shall prepare a project report stating -

(a) the nature of the project;

(b) the location of the project including the physical area that may be affected by the project's activities;

(c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;

(d) the design of the project;

(e) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;

(f) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation

(g) an action plan for the prevention and management of possible accidents during the project cycle;

(h) a plan to ensure the health and safety of the workers and neighboring communities;

(i) the economic and socio-cultural impacts to the local community and the nation in general;

(j) the project budget; and

(k) any other information the Authority may require.

(2) In preparing a project report under this regulation, the proponent shall pay particular attention to the issues specified in the Second Schedule to these Regulations.

(3) A project report shall be prepared by an environmental impact assessment expert registered as such under these Regulations.

8. A proponent shall submit at least ten copies of the project report to the Authority or the Authority's appointed agent in the prescribed form accompanied by the prescribed fees.

9.

(1) Where the project report conforms to the requirements of regulation 7(1), the Authority shall within seven days upon receipt of the project report, submit a copy of the project report to -

(a) each of the relevant lead agencies;

(b) the relevant District Environment Committee; and

(c) where more than one district is involved, to the relevant Provincial Environment Committee, for their written comments which comments shall be submitted to the Authority within twenty-one days from the date of receipt of the project report from the Authority, or such other period as the Authority may prescribe.

(2) On receipt of the comments referred to in subparagraph (1) or where no comments have been received by the end of the period of thirty days from the date of receipt of the project report, the Authority shall proceed to determine the project report.

10

(1) On determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.

(2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations.

(3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures,

the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations.

(4) A proponent who is dissatisfied with the Authority's decision that an environmental impact assessment study is required may within fourteen days of the Authority's decision appeal against the decision to the Tribunal in accordance with regulation 46.

109. The import of the above is that where the NEMA is satisfied that the project will have no significance on the environment or that the project report discloses sufficient mitigation measures, the authority may issue a licence in the prescribed form. But where the authority finds that the project will have significant impact on the environment and the project report discloses no sufficient mitigation measures the authority shall require the proponent undertake an environmental impact assessment study in accordance with regulations.

110. Graphically clear, it is very evident from the testimony of the Defendants' witness that even though NEMA made a decision to approve the Defendants' development the same was done without undertaking a proper Environmental Impact Assessment (EIA) study. This was a serious anomaly and irregularity. Should the authority found that the project was out of character with the environment and would have a significant impact on the environment or that the submitted report did not disclose sufficient mitigation measures. In this case, the authority did not find so and therefore, the report received was a project report as opposed to an E.I.A. study report.

111. The witness was referred to the condition attached particularly condition No. 6 i.e. when the contractor said that the galvanized Mabati's ran short and hence the project proceeded on without this important safety precaution measure in place. This was a total misnomer and negligence on to the required conditions. Based on the above evidence, it is my finding that the impugned construction and business development project never had the requisite approvals. These included the NEMA EIA Study; EIA License and other approvals as required under the provision of Section 58 of the EMCA although the same did not put into consideration the public input on the impact of the development.

ISSUE No. d). Whether the impugned construction and project on Plot No.L.R.NC MN/I/3161 had the requisite development permission in terms of change of user under the relevant law

112. Under this sub title, the provision of Section 2 of the repealed Physical Planning Act, "development" was defined as:

> " (a) the making of any material change in the use or density of any building or land or the subdivision of any land which for the purpose of this Act is classified as Class "A" development; and
>
> (b) the erection of such buildings or works and the carrying out of such building operations as the Minister may from time to time determine, which for the purpose of this Act is classified as class "B" development."

113. A reading of the above definition reveals that change of user of a parcel of land was a Class "A" development. Under the provision of Section 33 of the Act, it required a development permission. Secondly, the Change of User required a development permission granted by the relevant authority pursuant to an application presented in the prescribed form under the provision of Section 32 of the Act. Thirdly, the development permission granted under the provision of Section 33 was in a prescribed form. The application was to be in the form prescribed under the Fourth Schedule [Form PPA1] while the development approval itself was to be in the form prescribed in the Fifth Schedule [Form PP 2].

114. According to the Plaintiff she was a member of the New Nyali Residents Association, an association of home owners and residential premises within the vicinity of the New Nyali whose aims and objects included the stewardship and advocacy to a safe neighborhood and greener tomorrow. Ironically, both the Plaintiff and the Defendants are bona fide members to this Association and hence they ought to under stand its objectives better than any one else. It is on record and from the numerous correspondences, that the Association has numerously objected to the development from being carried on. The New Nyali falls within the Municipal Council of Mombasa and is subject to planning permission. Development in that zone is restricted to certain levels. The 1st and 2nd Defendants are the owners and/or developer of Plot No.L.R.NC MN/I/3161. This Plot neighbors the suit premises and shares a common boundary with the suit premises – Plot NO. MN/I/3160. It is common knowledge that the New Nyali area where the development is taking place is planned for a single dwelling residence and not multiple dwelling residences.

114. The Defendants admitted to the contents of Paragraphs 14 and 15 of the Plaint. In response to Paragraphs 13 and 16 of the Plaint, the 1st Defendant states that he (OPDI) Residential to Apartments on 3 floors and a Pent house. An approval of Physical Planning, Ministry of Lands subject to submission of the approved building plans. Further to the foregoing Paragraph, the 1st Defendant duly complied with the conditions imposed both by the 4th Defendant and the Department of Physical Planning, Ministry of Lands and duly took out the architectural plans for the proposed construction. The said plans were duly approved on 14th November, 2008 vide TPC Minute No. 108/08. The architectural plans were correctly drawn and provided sufficient information to show whether or not it complied with the existing By-laws, Building Code and the Physical Planning Act, Cap. 286 Laws of Kenya and the Regulations thereto. The Plans did not disclose a contravention of the By-laws or any other written law hence their approval.

115. In response to the contents of Paragraph 17 of the Plaint, the Defendants stated that the Change of User on L.R. No. MN/I/3161, Nyali Mombasa was duly approved by the 4th Defendant after due consultation with the relevant authorities including the Department of Physical Planning, Ministry of Lands and the allegations by the Plaintiff that the development is taking place in an area meant for a single dwelling residence and not multiple dwelling residences are totally untrue and baseless. In any event, there are several other buildings coming up in the neighborhood which have been similarly approved. Following the approval of the proposed development, they have duly complied with the conditions imposed thereon and there has never been any change to the existing design or structure to which the approved plans relate at the date of approval.In response to paragraph 18 of the Plaint, the Defendants stated that the Change of User on L.R. No. MN/I/3161, Nyali Mombasa complies with the Nyali-Shanzu Zoning Plan Tourist Zone'. Thus, the allegations by the Plaintiff that she is unable to have any privacy due to the high rise construction are unfounded.

116. In response to paragraph 19 of the Plaint, the Defendants stated that the Development on L.R. No. MN/I/3161, Nyali Mombasa is legal and inaccordance with the relevant By-laws, the Building Code and the Physical illegality set out in paragraph 18 (i)-(v) of the Plaint. They had always discharged their statutory duty in ensuring that the construction works are carried out in conformity with the existing by – laws, guidelines and any other written law including taking mitigation measures such as the prevention of pollution and ecological deterioration, provisions of sanitary accommodation of the workers and strict adherence to the safety of the occupants in the neighborhood. The Defendants were strangers to the allegations raised in paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of the Plaint.

117. In view of the foregoing, I discern that as much as the Change of User was obtained and published in the local newspapers, public participation as required by law including the Plaintiff was not

undertaken. Additionally, in as much as the Change of User may have been undertaken, it did not comply with the regulations of the New Nyali area where the development is taking place is planned for a single dwelling residence and not multiple dwelling residences.

ISSUE No. e). Whether the suit property, Plot No. L.R.NC MN/I/3161, neighbors the Plaintiffs' properties

118. The suit property is Grant No. C.R. 18132 known as L.R. No. MN/I/3160. The Plaintiff is the registered owner of the said property. The Plaintiff produced a certificate of title to the suit property. DW - 1 confirmed that he was the registered owner of LR. No. MN/I/3161.He knew the Plaintiff, she was his neighbor. He was also a member of the Nyali Residents Associates. He had not met Mr. Shadrack Makoye. The Plaintiff averred that her daughter is visiting from the United Kingdom and has no privacy in her bedroom as the construction directly overlooks her bedroom. After her return to the United Kingdom the Plaintiff will not be able to have visitors in that bedroom or to use that bedroom herself because of the proximity of the developments by the 1st, 2nd and 3rd Defendants and with tenants or other purchasers looking in into that bedroom. The Plaintiff and her guests are unable to have any privacy because of the builders looking into the bathrooms, the bedrooms and the rest of the suit premises from the high rise construction. The Development is illegal and unlawful. This aversions were not contested by the Defendants.

119. Besides the evidence produced in court, PW 1 testified that the development neighbors her property which was in close proximity to her property.

ISSUE No. f): Whether the activities complained of were a nuisance to the Plaintiff which threatened, denied and violated the Plaintiff's right to a clean and healthy environment;

120. Under this sub title, the Plaintiff has contended that he impugned construction works polluted the environment in that when the construction and other building materials were being poured on the construction site, they emitted excessive volume of dust into the residential environment, besides causing noise pollution According to the Plaintiff, the Defendants commenced the development without fencing of the Plot thereby allowing their workers to access the Plaintiff's garden and urinate thereon and otherwise use that garden as a toilet. Further to the above the Defendants refused to erect a fence and allowed dust to enter into the Plaintiff's house in the suit premises. As a result of the Defendants' refusal to erect dust safety screens, cement and other dust is freely moving from the development into the suit premises, covering the Plaintiff's furniture, bedding, kitchen and the entire suit premises in a layer of cement and other toxic dust. By reason of the matters aforesaid the Plaintiff's health conditions has deteriorated. She was unable to enjoy a clean and healthy environment within the suit premises or the environs of the suit premises. The Plaintiff averred that she could not receive or entertain visitors into the suit premises as a result of the dust, the noise and the workers looking into the suit premises from high up in the development. Furthermore the Plaintiff is unable to have quiet, safe healthy and peaceful enjoyment of the suit premises. The Plaintiff added that the Defendants have been carrying on construction works during evenings and on Sundays contrary to the law.

121. According to the Plaintiff there could be no amount of damages that would compensate her for the loss of her remaining lung or for the discomfortcaused to her. The Plaintiff stated that she is unable to enter the suit premises during the day. The Plaintiff added that in the night the dust particles entering the suit premises during the day continue circulating and pollute the suit premises at all hours whether in the day or in the night. The Plaintiff added that the Defendants have constructively evicted the Plaintiff from the suit premises during day light. Furthermore these dust particles adhere to clothing, cooking utensils, bath rooms, bedding and all other movables together with the walls of the suit premises. These particles give the house a new shade of paint and are constant irritants. It was relatively cheaper or cost

effective to erect and maintain dust screens. According to her it is not socially acceptable for her to move into a rented house when she has her own house or to receive and entertain guests in hotel rooms. The Plaintiff states further that she would not find the same amount of comfort in hotel room that she used to enjoy in the suit premises before the development commenced. The Plaintiff therefore stated that moving into a rented house or hotel room is not an alternative.

122. On their part the Defendants were unable to tell the Court if the Plaintiff consented to the development and what time of harm the same construction had done to her, denying them the opportunity to provide credible controverting evidence. A clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of *the Constitution* of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at Article 42 within the Bill of Rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. The provision of Article 42 of *the Constitution* of Kenya, 2010 states as follows:-

> Every person has the right to a clean and healthy environment, which includes the right—
>
> (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
>
> (b) to have obligations relating to the environment fulfilled under Article 70.

123. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under the provision of Article 69 of *the Constitution* of Kenya which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In short, the obligation to ensure a clean and healthy environment imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

124. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by the provision of Article 42 and 70 of *the Constitution* of Kenya, 2010 provides that if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.

125. In the given circumstances, therefore, the Honourable Court does fully accept and persuaded by the evidence of PW - 1 but only in as far as to the extent that there was nuisance and pollution of the environment. Indeed, it was her evidence that she never intended for the developed structure to be demolished but only reach where it had so far done and no more. I agree more.

ISSUE No. g):- Whether the Plaintiff is entitled to damages.

126. The evidence presented to the Court points to the liability of the 1st 2nd and 3rd Defendants. There is evidence that the 1st, 2nd and 3rd Defendant were privy to the impugned project. Although there appears

to have been no prompt intervention by the 4th Defendant, there was no sufficient evidence to warrant an order of liability on part of the 4th Defendant. Indeed, the 4th Defendant subsequently acted to forestall further damage to the environment.

127. The result is that the Court finds that the Plaintiff has proved her case against the 1st, 2nd and 3rd Defendants. Consequently, the Plaintiff is entitled to reliefs in terms of prayers (a) to (m) of the filed Plaint as against the 1st, 2nd and 3rd Defendants save for prayer (g) and (i).

128. Lastly, the Plaintiff sought general, punitive and aggravated damages. On general damages, the Plaintiff averred that she had been had been unwell for 36 years i.e. without one lung and 12 years as Asthmatic. With reference to page 24, PW - 1 told the court that the letter dated 30th June, 2008 addressed to Dr. Okanga which was written way off before the construction had begun. In this case taking into consideration all the factors related to this case and all that the Plaintiff has gone through due to the development of the 1st, 2nd and 3rd Defendant's project, I hereby award a sum of Kenya Shillings Ten million (Kshs. 10,000,000/-) to the Plaintiff to be paid by the 1st, 2nd and 3rd Defendants jointly and severally.

129. On Punitive damages or aggravate damages, also known as exemplary damages, are a type of legal recompense that a defendant found guilty of committing a wrong or offense may be ordered to pay. These are awarded in addition to compensatory damages and are not meant to compensate the injured party but rather to punish the defendant whose conduct is considered grossly negligent or intentional. The purpose of punitive damages is to deter the defendant and others from committing similar acts in the future.

130. I rely on the case of "Rookes – Versus - Barnard [1964] AC 1129" where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute. Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the Plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the Defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.

131. In the circumstances of this case, the Plaintiff has demonstrated that her claim fell within any of the categories contemplated above to justify an award of exemplary damages as against the 1st, 2nd and 3rd Defendants. I proceed to award the exemplary damages of a sum of Kenya Shillings One Million Five Hundred Shillings (Kshs1,500,000/).

ISSUE No. h): Who bears the costs of the suit

132. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide

otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

133. In the present case, the Plaintiff has been able to establish her case as pleaded from the filed pleadings. Therefore, they are entitled to be awarded costs of the suit to be borne jointly and severally by the 1st, 2nd and 3rd Defendants accordingly. Similarly, I will not award the 4th Defendant costs because this suit would not have been necessary if they had acted on the Plaintiffs' grievances promptly.

VIII. Conclusions and Disposition

134. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:

a. THAT notwithstanding the Doctrine of Exhaustion as founded under the provision of Sections 73 and 74 of the *Physical and Land Use Planning Act*, No. 13 of 2016, the Honourable Court has Jurisdiction to entertain this matter based on the provision of Section 93 of the said Act.

b. THAT Judgement be and is hereby entered in favour of the Plaintiff against the 1st, 2nd and 3rd Defendants herein in terms of the Plaint dated 18th August, 2010. The case against the 4th Defendant be and is hereby dismissed.

c. THAT a declaration be and is hereby made that the development on Plot No. LR. No. 3161/I/MN is illegal and unlawful and is proceeding on the basis of unapproved building plans or in the alternative if any such building plans have been approved the approval was fraudulent, ultra vires and null and void on the grounds that the planning for the area does not allow more than 2 levels.

d. THAT a declaration be and is hereby made that it was illegal and unlawful for the Defendants to disregard the improvement order dated 15th July, 2010.

e. THAT a declaration be and is hereby made that the refusal by the Defendants to erect dust screens severely interfered with the Plaintiffs right to a clean and healthy environment under the provision of Article 42 of *the Constitution* of Kenya, 2020 and Section 3 of the Environmental Management and Coordination Act.

f. THAT a declaration be and is hereby made that that in the New Nyali area of Mombasa in and around the suit premises and no development was then allowed by the then Municipal Council of Mombasa (now defunct) above 2 levels and that therefore the proposed 4 level development was and remains irregular and an illegal structure.

g. THAT a perpetual injunction be and is hereby entered restraining the 1st and 2nd Defendants jointly and severally from continuing with any further activity, building, construction or development on Plot No. LR. No. 3161/1/MN above 2 levels.

h. THAT an order be and is hereby made that the Plaintiff is awarded Kenya Shillings Ten Million (Kshs 10,000,000/-) being General damages for Pain and Suffering to be paid by the 1st and 2nd Defendants jointly and severally.

i. THAT an order be and is hereby made that the Plaintiff be and is hereby awarded Punitive damages of sum of Kenya Shillings One Million, Five Hundred Shillings (Kshs 1,500,000/-) to be paid by the 1st and 2nd Defendants jointly and severally.

j. THAT prayers (g) and (h) above shall incur interest at Court rate from the date of this Judgment until fully paid.

k. THAT Costs of the suit to be awarded to the Plaintiff to be borne by the 1st and 2nd Defendants jointly and severally accordingly. Similarly, there will be no award of costs to the 4th Defendant costs because this suit would not have been necessary if they had acted on the Plaintiffs' grievances promptly.

IT IS SO ORDERED ACCORDINGLY.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....8TH ....DAY OF .....APRIL.....2024.

.....**.....**

HON. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

a. M/s. Firdaus Mbula – the Court Assistant.

b. M/s. Muyaa Advocate holding brief for Mr. Kinyua Advocate for the Plaintiff.

c. Mr. Willy Enock Advocate for the 1st & 2nd Defendants.

d. No appearance for the 3rd Defendant as there was no suit against them.

e. No appearance for the 4th Defendant.

JUDGMENT: ELC CIVIL SUIT NO. 289 OF 2010 Page 18 of 18 HON. JUSTICE L.L. NAIKUNI (ELC JUDGE)