



Ali & 2 others v Stay City Apartments Limited & 3 others (Constitutional Petition E017 of 2023) [2024] KEELC 3881 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E017 OF 2023**

LL NAIKUNI, J

MAY 2, 2024

IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 20(3)(A),22, 23(3)(A)(B)(D), 24, 70, 165 (3)(D), 258, 259(1)(A)(B)(C)(D) FOR VIOLATION OF ARTICLES 10,35,42 & 69 OF THE CONSTITUTION OF KENYA,2010 AND IN THE MATTER OF: INTERPRETATION OF SECTION 58 & 59 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999

BETWEEN

**DR. RISHAD ALI 1ST PETITIONER
KETAN DOSHI 2ND PETITIONER
SALIM SAID 3RD PETITIONER**

AND

**STAY CITY APARTMENTS LIMITED 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT
THE COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT
THE NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT**

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination on two (2) applications by parties herein. These are the Notice of Motion application dated 27th June, 2023 moved by Dr. Rishad Ali, Ketan Doshi and Salim Said, the Petitioners herein and another dated 3rd November, 2023 filed by Stay City Apartments Limited, the 1st Respondent herein.



2. Upon service of these Notice of Motion applications, the 2nd, 3rd and 4th Respondent filed their responses to the Notice of Motion application dated 27th June, 2023 on 5th October, 2023. There was no response to the Notice of Motion application dated 3rd November, 2023.
3. During the pendency of this proceedings, the Honourable Court through a correspondence dated 11th April, 2024 authored by the Advocates for the 1st Respondent to the Deputy Registrar, ELC requesting that the Court conducts a site visit (Locus in Quo”) . prior to the delivering of this Ruling on 30th April, 2024. Although the request was vehemently opposed by the Petitioners mainly on grounds of its timings, but in the interest of Justice, Equity and Conscience, the Honourable Court finds the opposition unmeritorious and shall be providing guidelines on how this visit will be conducted from this Ruling thereof.

II. The Petitioners/ Applicants’ case.

4. The Petitioners/ Applicants was brought under the provision of Articles 2, 3,10, 20, 21, 22, 23, 24, 40, 42, 47 and 69 of *the Constitution*, Rule 10 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013 where they sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the Petition or until further orders, this Honourable Court be please to issue a conservatory orders in the form of a temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself , servant, agents, officers, contractors and or anyone claiming under her from proceeding with or carrying out deleterious and destructive activities particularly excavating or carrying out construction on property known as Mombasa/Block XXVI/361.
 - d. That any other or further interim relief or reliefs pending Petition as deemed just and expedient by the court in the circumstances.
 - e. That costs of the Application be provided for.
5. The application was premised on the grounds, testimonial facts and the averments made out under the thirty five (35) Paragraphed Supporting Affidavit of DR. RASHID ALLI, the 1st Petitioner herein sworn and dated on 27th June, 2023 and the eight (8) exhibits annexed thereto. He averred as follows:-
 - a. The Petitioners are owners of properties, known respectively as Mombasa/Block XXVI/644 and Mombasa/Block XXVI/645 along Marsabit Road in Kizingo. The 1st Respondent is the legal owner of the Suit Property, Mombasa/Block XXVI/361, which is situated along the same road on which the above mentioned properties of the Petitioners stand, and is immediately adjacent to the 1st Petitioner’s property on left side. He produced a copy of the official search and mark it Exhibit-2 for the kind perusal and consideration of this Honourable Court.
 - b. On the morning of 4th February, 2023, the Petitioners woke up to massive demolitions and excavations on the Suit Property which resulted to a massive noise and air pollution. Upon inquiry, the Petitioners were shown unapproved building plans for the construction of a sixteen (16) floor storey building on the Suit Property. He produced copies of the unapproved plans and marked them as Exhibit - 3 for the kind perusal and consideration of this Honourable Court.



- c. The Petitioners immediately informed the 1st Respondent that the by-laws governing the locality in which the Suit Property is situated provided that the locality was a low density buildings and sparse population, with open green spaces surrounding the buildings and some vacant undeveloped plots along a road which was not a through road but ending as a cul de sac. He produced a copy of the by-laws and marked them as Exhibit - 4 for the kind perusal and consideration of this Honourable Court.
- d. Despite of the information aforesaid, the 1st Respondent proceeded with the excavation and as a result, the Petitioners and other residents of the locality, issued or caused to be issued a complaint letter to the 2nd, 3rd and 4th Respondents demanding immediate action to be taken against the impugned development. He produced a copy of the letter and marked it as Exhibit - 5 for the kind perusal and consideration of this Honourable Court.
- e. On 13th February, 2023, the 4th Respondent wrote back to the Petitioners informing them that the impugned development was not registered and that the site was found to be non-compliant. The 4th Respondent proceeded to order suspension of the ongoing works. He produced a copy of the letter dated 13th February, 2023 by the 4th Respondent and marked it as Exhibit - 6 for the kind perusal and consideration of this Honourable Court.
- f. On 23rd February, 2023, the 2nd Respondent formally wrote to the residents of Marsabit Road informing them inter alia that they had also found the site to be non-compliant and that they had issued a stop order against the ongoing works. He produced a copy of the letter dated 23rd February, 2023 by the 4th Respondent and marked it as Exhibit - 7 for the kind perusal and consideration of this Honourable Court.
- g. Despite of the stop order and suspension by the 2nd and 4th Respondents respectively, the 1st Respondent proceeded with the demolition and excavations on the Suit Property with impunity and in total disregard to the rights of the Petitioners. He produced a video of the ongoing works together with a Certificate pursuant to the provision of Section 106B of the Evidence Act, Cap. 80 and marked it as Exhibit - 8 for the kind perusal and consideration of this Honourable Court.
- h. The Petitioners were aware that the 2nd, 3rd and 4th Respondents had colluded with officers of the 1st Respondent and had issued development approvals without ensuring there was effective public participation prior to considering approvals for the project, failing to hold consultative meetings with affected stakeholders and/or to adequately brief and notify the affected parties of any decisions regarding the 1st Respondent's developments.
 - i. The 1st and 2nd Respondents' intended development project had been undertaken in total disregard to the environmental considerations and the same interfere with the natural status of the area "inter alia";
 - i. The 1st Respondent's developments was seventeen (17) storeys higher than those of the Petitioners and therefore greatly interfered with the Petitioners' right to privacy;
 - ii. The 1st Respondent intended to build 53 apartments without proper social amenities including sewer system, water supply, access road and proper drainage;
 - iii. The Respondents had not provided proper mechanism to caution the Petitioners from the noise and air pollution as a result of the mega development; and



- iv. The heavy machines used in this massive development was likely to affect the Petitioners houses in the long-term.
- j. The Petitioners contend that the Respondents also failed to enforce the applicable principles of the law, by-laws, guidelines and laws and regulations governing such developments within Mombasa County. By failing to ensure compliance with the applicable laws and regulations as indicated above, the Respondents had fundamentally trampled upon the Petitioners' rights as would be shown hereunder:-
 - i. Violation of the provision of Article 10 of *the Constitution* on Public Participation
- k. Article 10 provides for national values and principles of governance which bind all state organs, state officers and public officers including the 3rd and 4th Respondents and their officers. Among the national values and principles is the principle of public participation which provides that all state organs, state officers and public officers shall allow participation of the people before making any decision that affects the people.
 - i. The Petitioners were aware that the 2nd, 3rd and 4th Respondents had, in total violation of the provision of Article 10 of *the Constitution*, colluded with the 1st Respondent and had issued development approvals without ensuring there was effective public participation prior to considering approvals for the project, failing to hold consultative meetings with affected stakeholders and/or to adequately brief and notify the affected parties of any decisions regarding the 1st Respondent's developments.
 - ii. Violation of the provision of Article 47 of *the Constitution* on Fair Administrative Action
- m. Article 47 of *the Constitution* was instructive that every person had the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In particular, if a right or fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person had the right to be given written reasons for the action.
- n. In compliance with the provision of Article 47 (3) thereof, Parliament enacted the *Fair Administrative Action Act*, 2015 whose Section 4 was instructive inter alia where an administrative action was likely to adversely affect the rights or fundamental freedom of any person, the administrator shall give the person affected by the decision;
 - i. Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - ii. An opportunity to be heard and to make representation in that regard; and
 - iii. Information, material and evidence to be relied upon in making the decisions or taking administrative action.
- o. The project in question was so massive whose spill-over effect to the neighborhood could not go unnoticed. The Respondents failed to carry out public participation or ensuring strict compliance with the conditions provided in the title deed the Petitioners right to fair administrative action as provided under the provision of Article 47. In furtherance to the foregoing, the 2nd Respondent issued development approvals to the 1st and 2nd Respondents in violation of the Physical Planning Act, Cap. 286 of the Laws of Kenya, the applicable Building Codes and in disregard of the objections raised by the Petitioners. In doing so, the Respondents



violated the Petitioners right to fair administrative action under the provision of Article 47 of *the Constitution* of Kenya.

iii. Violation of the right to clean and healthy environment.

p. The right to clean and healthy environment is a constitution safeguard pursuant to Article 42 as read with the provision of Articles 69 and 70 of *the Constitution* of Kenya. As already indicated, the 1st Respondent's development had been undertaken in total disregard to the environmental considerations inter alia lack of proper sewer and drainage system. He had also demonstrated the 1st Respondent had not put forth proper mechanism to protect the Petitioners from noise and air pollution. In view of the foregoing, the Petitioners' right to clean and healthy environment would greatly be affected.

iii. Right to Property

q. The Petitioners further contends that the proximity of the 1st Respondent's developments fundamentally encroach and impede on their right to easements and related property rights as espoused under the provision of Article 40 of *the Constitution*. The 1st Respondents had already started the construction and unless restrained in the manner requested, the Respondents were likely to further violate the Petitioners fundamental rights and freedom rendering the entire Petition nugatory.

r. This Honorable Court is clothed with immense powers to protect arbitral threat to and violation of fundamental rights and freedoms of the Petitioners. Further legal arguments would be made at the hearing of the Application.

s. It was in the interest of and justice demands that the prayers sought herein were granted.

II. The Response to the Notice of Motion application dated 27th June, 2023

6. The 1st Respondent through its director/ shareholder opposed the notice of motion application dated 27th June, 2023 through a 22 Paragraphed Replying Affidavit sworn by WARSAME ABDI YUSUF with seven (7) annexures marked as "WAY - 1 to 7" annexed thereto and where the deponent averred that:-

a. The Application was grossly misleading on the actual status quo of the construction works on the property known as MOMBASA/BLOCK XXVI/361 (Hereinafter referred to as "the Suit Property").

b. Beyond doubt prior to the commencement of any construction works in the suit property, the Respondent carried out public participation process as envisaged in Article 10, *Constitution of Kenya, 2010*. The Area Assistant Chief was notified and two public barazas were called on 11th March 2023 and 19th March 2023 (Annexed in the affidavit and Marked as "Exhibit WAY - 2" was a copy of the minutes of the Public Barazas Consultation Meetings).

c. Further to the foregoing, noting that the attendance was not as expected, the 1st Respondent advanced the process by administering questionnaires at the household level wherein approximately thirty - one (31) residents and/or participants were engaged with no objection raised on the proposed construction works in the suit property (Annexed in the affidavit and Marked as "Exhibit WAY - 3" was a copy of Public Consultation Questionnaires).

d. Having undertaken this vital measures to engage the public on the proposed construction project on the suit property, and no objections raised, the 1st Respondent had properly met the requirement of public participation as per the provisions of the law;



- e. Out of abundance of caution, the 1st Respondent indeed, by their own volition, conducted a comprehensive report from experts on the Environmental Impact Assessment (Hereinafter referred to as “the EIA Report”) of the proposed development on the suit property; the said report, backed the sustainability of the project and its ability to increase affordable and quality residential houses, improve land value aesthetic, increase income and employment, improve security and promote social cohesion.
- f. The aforesaid EIA Report was submitted to National Environment Management Authority and subsequently an Environment Impact Assessment Licence No. NEMA/EIA/PSL/26095 was issued to the 1st Respondent accordingly (Annexed in the affidavit and Marked as “Exhibit WAY – 4” was a Copy of the Licence).
- g. On or about the month of February, 2023 the 1st Respondent had not commenced substantive constructions works on the suit property; there existed an old structure which efforts had been made to demolish it whilst the 1st Respondent engaged relevant stakeholders in both registering and acquiring proper approvals;
- h. An application for the approval of the development permission in respect of the suit property was submitted as early as 08th December, 2022 and the same was approved on 10th January, 2023 under permit number P/2022/00685 (Annexed in the affidavit and Marked as “Exhibit WAY – 5” was a copy of the approval).
- i. An application for registration of the construction works under the suit property had actually been filed on the National Construction Authority Online project Registration System under the developer name 'Stay City Apartments'. The Application for Development permission of the proposed project was lodged containing Architectural Drawings, PPA2 Form, KRA PIN of the developer, Certificate of Incorporation and Developer Commitment Form.
- j. The process of registration was not under the control of the 1st Respondent therefore any delays occasioned could not be attributed to it, be that as it may, the 1st Respondent succeeded in getting the requisite Certificate of Compliance from the National Construction Authority (Annexed in the affidavit and Marked as “Exhibit WAY – 6” was copy of the Certificate of Compliance).
- k. The subject Certificate of Compliance from the 4th Respondent fundamentally approved that the 1st Respondent had met the statutory requirements for the proposed development on the suit property;
- l. The Petitioners’ application never disclosed any reasonable cause of action against the 1st Respondent who had complied accordingly with the statutory requirements;
- m. Public consultation and participation was fully carried out as per the requirements of the law and any contrary averment by the petitioners’ is greatly misleading;
- n. The 1st Respondent had acquired all requisite approvals for the proposed project hence the proceedings’ were brought in bad faith noting that necessary efforts had always been placed by the 1st Respondent in ensuring full compliance and adherence to the guiding laws;
- o. The area where the suit property was located currently attracted high-rise and/or storey buildings and the current project was no exception; as a matter of fact, there existed a bigger project nearby to the suit property;



- p. An independent Geotechnical Investigation (Survey) on the Proposed Stay-city Apartments, Kizingo (Mombasa) was carried out by distinguished experts under their instructions. The said survey's primary objective was to test the physical properties of the soil and provide substantive recommendations for foundation requirements, excavation stability, drainage and concrete design. To sum up, the survey report established that the said project was feasible (Annexed in the affidavit and Marked as "Exhibit WAY – 7" was a copy of the Geotechnical Investigation Report).
- q. The Respondents averment that the "proximity" of the proposed project to their area of residence fundamentally encroached and/or impeded their right to easements and related property rights was a far-fetched impression that lacked any substantive backing noting that the Respondent's project never extended beyond the boundaries of the suit property therefore irrational that the Petitioner held the view that their rights would be curtailed.
- r. The 1st Respondent had engaged potential customers to occupy the suit premises once finalized and owing to the current proceedings the interests of those customers stood prejudiced noting that the project timelines would not be attained as agreed under contract;
- s. The Applicant's Application dated 27th June, 2023 was devoid of merit and it was in the interest of justice that the same be dismissed with costs;

II. The Notice of Motion application dated 3rd November, 2023 by the 1st Respondent.

- 7. The 1st Respondent brought the application under the dint of Sections 1A, 1B, 3A of the Civil Procedure Act, CAP 21 Laws of Kenya, Order 51 Rule 14 & 15, Order 40 Rule 7, Article 159 of the Constitution of Kenya (2010). It sought for the following orders:-
 - a. Spent;
 - b. That this Honourable Court be pleased to discharge its temporary conservatory order granted on 12th July, 2023 in form of a temporary injunction against the 1st Respondent accordingly;
 - c. That in the alternative the Honourable court be pleased to issue an order for security of costs of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000/-) as provided by the 1st Respondent's Response to Petition and Counter - Claim dated 6th November, 2023 to be deposited in a joint interest account pending the hearing and determination of the Petition;
 - d. That costs of this application be awarded to the Applicant; and
 - e. Any other orders that the court may deem fit
- 8. The application was premised on the grounds, testimonial facts and the averments made out under the twenty (20) Paragraphed Supporting Affidavit of WARSAME ABDI YUSUF, the 1st Respondent's director herein sworn and dated on 3rd November, 2023 and the eight (8) annexures marked as "WAY 1 to 8" annexed thereto. He averred as follows:-
 - a. On 12th July, 2023 the Petitioners' obtained orders ex-parte in nature allowing conservatory orders in form of a temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and or anyone claiming under it from proceedings with or carrying out deleterious and destructive activities particularly excavating or carrying out construction on property known as Mombasa.block XXVI/361;



- b. The 1st Respondent was only made aware of the orders when it was served with court pleadings and the consequent conservatory court order thus never had the opportunity to challenge and/or contest the said ex-parte order until 5th October 2023 when the matter was before the Honourable court and further compliance directions issued.
- c. The substance of the Petition and interim Application dated 27th July, 2023 was that the 1st Respondent had undertaken to develop the suit property without proper approvals and/or proper public participation;
- d. The 1st Respondent had since responded accordingly to the Application dated 27th June, 2023, the Petition dated 27th June, 2023 and further filed a counter-claim to rebut the claims by the Petitioner's and provided corresponding evidence accordingly;
- e. The assertions by the Petitioners' were largely misleading to the Honourable court noting that the 1st Respondent had always been on the course of normalizing all proper documents and/or approvals as per the requisite laws;
- f. For avoidance of doubt, the 1st Respondent had in its possession Copies of Public Consultation Meetings ("Exhibit WAY – 2"), Copies of Public Consultation Questionnaires ("Exhibit WAY – 3"), Copy of National Environment Management Authority (NEMA) Licence ("Exhibit WAY – 4"), Copy of Approval of the Development ("Exhibit WAY – 5"), Copy of Certificate of Compliance ("Exhibit WAY - 6") & Copy of Geotechnical Survey Report ("Exhibit WAY – 7");
- g. The above documents were acquired by the 1st Respondent in strict adherence to the procedures and guiding laws of the Republic of Kenya and produced in its Response to the Petition accordingly;
- h. The allegations by the Petitioners' of lack of public participation were false noting that the same was done as evidenced in "Exhibits WAY – 2" and "Exhibit WAY – 3";
- i. All the requisite approvals were obtained accordingly as per "Exhibits WAY – 4", "WAY – 5" and "WAY – 6";
- j. The 1st Respondent had entered into pre-contractual obligations with potential purchasers and/or investors who had deposited a cumulative sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43, 050, 000/-) which was at the risk of imminent loss owing to the injunctive orders issued by the court on 12th July, 2023 that put the proposed project at a stand-still;
- k. In light of the above, it was only proper that the conservatory order against the 1st Respondent was discharged failure to which it stood to suffer harm that was beyond repair;
- l. For avoidance of doubt, the 1st Respondent engaged potential investors who invested in the project and deposited initial amounts for the purposes of development of the project, the said investors were currently in the course of pulling out of the investment and continue to place the 1st Respondent at a precarious position; (Annexed in the affidavit and marked as "Exhibit WAY – 8" were Copies of Sale Agreements).
- m. Unless there was security for the damages that the 1st Respondent stood to suffer, then the conservatory order shall stand punitive, unjust and improper;



- n. It was within the inherent power and duty of the Honourable Court to protect and preserve such assets and investments whose damages were irreparable.
- o. The immediate intervention by this Honourable Court was of essence to avoid any further injustice.
- p. It was just, fair and in the interest of justice that the Application was expeditiously heard and determined.
- q. The application was made in good faith without any malice intentions as regards the parties involved in the primary suit.
- r. It was important that the application was heard on a priority basis.

II. Submissions

9. On 31st January, 2024 while all the parties were in Curt directions were granted to have the Notices of Motion applications dated 27th June, 2023 and 3rd November, 2023 be disposed of by way of written submissions. Subsequently, the Learned Counsels were accorded an opportunity to orally highlight their submissions a duty both Mr. Saad Advocate and Mr. Bwire Advocate duly executed so effectively and diligently. The Honourable Court is sincerely grateful to the said Counsels for exhibiting high degree of resilience and professionalism on how they conducted the matter. Pursuant to that on 12th February, 2024, the Honourable Court reserved 30th April, 2024 as the date to deliver its Ruling thereof.

A. The Written Submission by the Petitioners/Applicants

10. The Petitioners/Applicants through the Law firm of Messrs. John Bwire & Associates Advocates their written Submissions dated 3rd February, 2024. Mr. Bwire Advocate commenced the submission by stating that by way of a Notice of Motion Application (Hereinafter referred to as “the Conservatory Application”) dated 27th June, 2023, the Petitioners sought conservatory orders in the nature of temporary injunction to restrain the 1st Respondent from carrying out construction activities on property known as Mombasa/Block XXVI/361. The Application was brought under the provision of Articles 2, 3,10, 20, 21, 22, 23, 24, 40, 42, 47 and 69 of *the Constitution* of Kenya, 2010 and Rules 10 and 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure) Rules, 2013. The Application was certified urgent and pursuant to directions by this Court that it be served for hearing on 12th July, 2023, the Petitioners immediately caused the Application, the Petition as well as the hearing notice to be served on all the Respondents.
11. Consequently, the Petitioners filed a Return of Service of a duly licensed court process server-one Mr. Daniel Thoya. On 12th July, 2023, the date of hearing the Application, all parties save for the 1st Respondent attended court and agreed to the issuance of a temporary restraining order pending filing of the Respondents' responses. Further, parties present agreed that the Application be heard on 5th October, 2023 from which the Petitioners, acting on abundance of caution caused to be served on the 1st Respondent a copy of the court order 6 and pleadings. On 5th October, 2023, all Respondents save for the 1st Respondent filed their responses. The Counsel for the latter sought for more time to file a response. Parties agreed to the extension of the interim orders until 30th January, 2024.
12. On 9th November, 2023 the Petitioners were served with an Application dated 3rd November, 2023 (Hereinafter “The Security Application”) under Certificate of Urgency by the 1st Respondent seeking the afore - stated orders. The Security Application was premised on grounds inter alia:



- a. the conservatory orders were issued ex parte without according the 1st Respondent an opportunity to contest the said orders;
 - b. the 1st Respondent had entered into a pre-contractual obligation with the Purchasers who had deposited a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs.43,050,000.00/=); and
 - c. the allegations by the Plaintiff were unfounded considering public participation was done and approvals properly granted.
13. Likewise, according to the Learned Counsel, it was not until 9th November, 2023 that the Petitioners were served with the 1st Respondent's Replying Affidavit dated 3rd November, 2023 to the Application dated 27th June, 2023. It was on the basis of the foregoing that they submitted as follows:-
14. On the issues for determination, the Learned Counsel stated that as already submitted above, there were two pending applications to wit, the Conservatory and the Security Applications. With respect to the Conservatory Application, it was settled law as highlighted in the case of "Board of Management of Uhuru Secondary School – Versus - City County Director of Education and 2 others (2015)eKLR", and also the case of "Wilson Kaberia Nkunjia – Versus - The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition N0.154 of 2016 (2016) eKLR" after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows:-
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*;
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.
15. Therefore in determining whether or not the conservatory orders were merited, the Learned Counsel submitted on all the three conditions set forth in the aforesaid cases. With respect to the Security Application, they noted that the prayer to discharge the interim conservatory orders was spent, and the only issues for determination with respect to the Security Application were;
- a. Whether this Court has jurisdiction to grant security, as sought, in a constitutional petition; and
 - b. Whether a proper case has been made to award an order of security.
16. The Learned Counsel submitted on the specific issues of each application sequentially starting with the substantive application seeking conservatory orders.
17. On the application for conservatory orders, the Learned Counsel submitted that as indicated above, in determining whether or not the Application for conservatory orders was merited, the Court must consider the principles highlighted above in the "Wilson Kaberia Case" and which wished to submit as hereunder;
18. On whether the Petition raised a prima facie case, the Learned Counsel submitted that as aptly demonstrated above, for conservatory orders to be issued in a Constitutional Petition such as this one, an applicant was required to demonstrate a prima facie case with probability of success and further that unless the orders are granted there was a real danger that the Applicant would be prejudiced by



Court's refusal to grant the orders. It followed, therefore, that at the stage of making a conservatory order, the Court was not called upon to make a definite finding on facts or the law but instead was required to evaluate the material placed before it and decide whether an applicant had made a prima facie case with likelihood of success and further whether by declining to grant the orders the Applicant would be prejudiced.

19. In answering the question as to whether or not, the Petition raises a prima facie case, they had, in these submissions, asked and answered the following questions;
 - i. Whether the necessary development approvals were obtained before commencement of the project;
 - ii. Whether, prior to the issuance of the development approvals, there was effective and sufficient public participation; and
 - iii. Whether the impugned development conforms to requirements of a clean and healthy environment.
20. On the first question as to whether the necessary development approvals were obtained before commencement of the impugned project, the Learned Counsel referred the Court to a letter dated 4th February, 2023 by the Petitioners marked as Exhibit - 5 complaining of the impugned development to the 3rd Respondent and copied to the 2nd and 4th Respondents. In response to the complaint, the 4th Respondent by a letter dated 13th February, 2023 by the 4th Respondent and marked as Exhibit - 6 of the affidavit in support of the Conservatory Application which stated inter alia that:- “the development project was not registered with the 4th Respondent; and the site was found to be non-compliant in accordance with the NCA Act of 2011”.
21. Exhibit - 7 of the Application was a letter dated 23rd February, 2023 by the 2nd Respondent which indicates that there was ongoing demolition activities on Plot XXVI/361 and that:- “there was no evidence that the persons undertaking the activities or his associates had acquired necessary approvals from the NEMA prior to commencing the works.” After the complaint by the Petitioners dated 4th February 2023 (Exhibit - 5) aforesaid, the 1st Respondent purportedly obtained a permit dated 6th June, 2023 from the 2nd Respondent (See Annexure WAY - 5 of the 1st Respondent's Replying Affidavit), and on 1st September, 2023, months after the Petitioners had filed the Petition, the 1st Respondent allegedly obtained a permit from the 4th Respondent (See Annexure WAY - 6 of the 1st Respondent's Replying Affidavit).
22. In addition to the letter dated 13th February 2023 (See Exhibit-6), the 4th Respondent had expressly deposed that the 1st Respondent project was, despite the commencement of the registration, an illegal development. According to the Learned Counsel, it was not in dispute that the 1st Respondent commenced the impugned development prior to obtaining all development approvals. Having demonstrated that the development never had approvals at the time of inception, the impugned project was illegal.
23. The Learned Counsel submitted that their position aforesaid was supported by the case of: “Communist Party of Kenya – Versus -Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties) [2022] eKLR” the court held that before one undertook a project which was likely to affect people, he/she should seek the necessary permissions before commencement. In the case of:- “Omega International Kenya Limited – Versus - Kenya Tourist Development Corporation Civil Appeal No. 59 of 1993” where it was observed that permits obtained commencement of the project were unconstitutional. The second question



under this head was whether there was sufficient public participation before commencement of the development. The provision of Article 10 (2) of *the Constitution* of Kenya, 2010 outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Additionally, Article 69 (1) (d) of the same Constitution provides that the State shall encourage public participation in the management, protection and conservation of the environment.

24. The Learned Counsel cited the Principle 10 of the Rio Declaration on Environment and Development (1992) which provides:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in the decision-making process...”

25. It followed that in such a case, sufficient public participation involved the undertaking of all reasonable steps or measures to ensure that a good substratum of the people likely to be affected by a project were made aware of the intended action.

26. According to the Learned Counsel, engagement with the public was essential. Public participation informed the public of what was to be expected. It allowed for the community to express concerns, fears and even to make demands. In any democratic state, participation was integral to its legitimacy. When a decision was made without consulting the public the result could never be an informed decision. The case of “Mui Coal Basin Local Community & 15 Others – Versus - Permanent Secretary Ministry of Energy and 17 Others [2015] eKLR” provided “inter alia” the following tenets of sufficient/adequate public participation:-

“public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation could be prescribed and the Courts would not use any litmus test to determine if public participation had been achieved or not. The only test the Courts use was one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case? (Minister of Health and Another - Versus - New Clicks South Africa (Pty) Ltd and Others 2006(2)SA 311(CC))”

27. The provision of Section 61 (d) of Physical Land Use Planning Act mandates the 3rd Respondent in decision making and communication to take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area. Clearly, this was not done. As already indicated above, the impugned project commenced before approvals were granted. To this extent alone, it was evident that no public participation was done before the commencement of the project. The 1st Respondent had in his Replying Affidavit produced Minutes (See Annexure WAY - 2) of an alleged meeting held on 19th



- March, 2023 and purported questionnaires (See bundle marked Annexure WAY-3) filled between 7th March, 2023 and 20th March, 2023 to demonstrate public participation.
28. However according to the Learned Counsel it was evident from Exhibit - 6 and 7 of the Application that the project had commenced in January 2023 way before the purported public participation had taken pace in March, 2023. To demonstrate that the purported public participation was an afterthought and aimed at sanitizing an already illegal construction, the 1st Respondent had produced as Annexure WAY - 5 a purported approval from the 3rd Respondent which showed that he had allegedly obtained approval on 10th January, 2023 whereas the purported public participation was in the month of March, 2023. In fact, the Learned Counsel submitted that they would demonstrate during the site visit that the majority of the alleged members of the public who filled the purported questionnaires never lived in the locality where the impugned development was situated. In fact, the purported persons never existed and it was not shocking that copies of their identity cards were not annexed to the questionnaires.
29. It was therefore their submissions that the purported public participation/ seeking the views and concerns of the members of the public was an afterthought, a mockery of the constitutional values and principles of governance and which decision had been made to sanitize the already illegal construction that had already commenced. The position by the Petitioners was buttressed by the case of:- “Robert N Gakuru & Others – Versus - Governor Kiambu County & 3 others [2014] eKLR” where the court held inter alia with regards to scope of public participation:
- “Public participation had to be real and not illusory or viewed as a mere formality...with regards to the contents of the newspaper publication, there was inadequate facilitation for purposes of public participation, as the advertisement did not contain sufficient information on the import of the Finance Bill, which would enable meaningful public participation.”
30. As rightly put in the case of “Abdalla & 5 others – Versus - Khansa Developers Limited & 3 others (Constitutional Petition 16 of 2022)[2023] KEELC 15889(KLR)” where this court stated:
- “I have no difficulty stating that our Constitution is emphatic in unambiguous terms, that where public participation is required, public views must be sought and considered in the decision-making process. I am of the view, it does not matter how public participation is done, the basic line is that any public participation should meet the test of meaningful and qualitative public participation and not just mere cosmetic one. Consultations should also be qualitative and meaningful and no just cosmetic. In the instant Petition, there is undisputed evidence, that the alleged public hearing and consultation did not take place as required for the quantitative and meaningful consultation to be applicable and reliance,”
31. According to the Learned Counsel, they asked and answer to demonstrate that there was a prima facie case was whether the development conformed to requirements of a clean and healthy environment. The Learned Counsel began submitting on this issue and placed reliance on the case of “Ken Kasinga – Versus - Daniel Kiplagat Kirui & 5 Others (2015) eKLR”, where the court observed thus:
- “Where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat.”



32. According to the Learned Counsel, clean and healthy environment are provided for under the provision of Article 42 as read with the provision of Articles 69 and 70 of *the Constitution* of Kenya, 2010. The provision of Article 42 guarantees every person the right to a clean and healthy environment, including the right to have the environment protected for the benefit of present and future generations. The provision of Article 69 (2) mandates every person to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The provision of Article 70 furthers Article 42 by providing that the right to a clean and healthy environment is enforceable as a right and a person to whom that right has been infringed can approach the court for a remedy. Further, the provision of Section 3 of Environmental Management and Coordination Act, 1999 gives effect to the entitlement to a clean and healthy environment enshrined under Article 42 of *the Constitution*.
33. The Learned Counsel submitted that firstly, the development was started before an environmental impact assessment, and had been declared by the 4th Respondent as an illegal construction even with the purported approvals. The locality had already been declared by this Court, a decision which was yet to be reversed, as a low density area and as one that could not withstand the massive structure as that of the 1st Respondent (See “the Khansa Developers Case (Supra)). To the extent that the development started before approvals and to the extent that there was no proper public participation, the Learned Counsel submitted that the development was likely to violate or is likely to violate the Petitioners right to clean and health environment as guaranteed by the provision of Articles 42, 69 and 70 of *the Constitution* of Kenya, 2010.
34. Lastly, under this head was the question whether the development was in conformity to the locality's by-laws. By definition, by-laws were laws of local or limited application, passed under the authority of a higher law specifying what things may be regulated by the by-law and ought to be complied with by those they apply to. The locality's by-laws for the locality in question enacted by the 3rd Respondent provide that the locality was a low-density area characterized with not only single-dwelling units but also low-rising buildings. The 1st Respondent intended to construct a sixteen (16) - floor storey building on the suit property, an act that is in total contrast to the by-laws.
35. Additionally, as evidenced, the Petitioners are the legal owners of properties known respectively as Mombasa/Block XXVI/644 and Mombasa/Block XXVI/645 in Kizingo along Marsabit Road whereas the 1st Respondent is the owner of suit property i.e. Mombasa/Block/XXVI/361 situated along the same road as the Petitioners' properties. The 1st Respondent's property was immediately adjacent to the 1st Petitioner's property on the left side. The foregoing, coupled with the fact that 1st Respondent intended to construct fifteen(15) stories higher than those of the Petitioners would greatly interfere with the Petitioners' right to privacy particularly in bedrooms and swimming pools.
36. The Learned Counsel placed reliance on the case of “Kiriinya M. Mwenda – Versus - Runda Water Limited & Another (2014) eKLR”, where the Court held that:-
- “.....I wish to point out that the petitioner's right to own, use and develop his property is not absolute. He lives in a community of other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The Petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them”.
37. Having demonstrated that the impugned development commenced before approvals and that the purported public participation was an afterthought, it was the Learned Counsel's submission that the



Petitioners had proved a prima facie case and owing to the environmental hazards that came with such massive development. They further submitted that unless the court granted the conservatory order, there was a real danger that he would suffer prejudice as a result of the violation or threatened violation of *the Constitution* to wit Articles 10, 42, 69 and 70 of *the Constitution* of Kenya, 2010.

38. On whether, if a conservatory order was not granted, the Petition alleging violation of, or threat of violation of rights would be rendered nugatory. The Learned Counsel averred that having demonstrated a prima facie case, the next issue that this Court must consider was whether the Petition would be rendered nugatory if the conservatory orders were not granted. To support his point, the Learned Counsel referred Court to the Civil case of: “David Ndii & others – Versus - Attorney General & others [2021eKLR”, where the Learned Judges in granting Conservatory Orders held that:-
- “..... Such orders (conservatory) are granted to preserve the substratum of the Petition and therefore, where it is contended that there is a threat of violation of *the Constitution*, any stage in the chain of a constitutional process under challenge may properly be the subject of a conservatory order as long as that action is consequential to the process under challenge...”
39. The Petitioners had come before the Honourable Court complaining among other things that the 1st Respondent was putting up 16 storey building in a low density area without proper amenities including a sewerage system, access roads and water. The Petitioners had further argued that the development was so massive that it had caused alot of air and noise pollution and also cracked in their buildings. It had also been demonstrated that despite those concerns, the 1st Respondent commenced the development without development approvals and without proper public participation. The 2nd and 3rd Respondents had not filed any responses, and in essence not disputed the Petitioners assertions. The 4th Respondent on the other hand had supported the Petitioners that the impugned development was started before approval and even if it had now been registered, it was still illegal.
40. It was therefore the Learned Counsel’s submission that if the impugned development proceeds, it would defeat the substratum of the Petition which was to stop the illegal development commenced before approvals and without sufficient public participation.
41. On the issue of the public interest being considered before grant of a conservatory order. The Learned Counsel submitted that the last issue the Court was asked to consider before allowing the Application was whether or not public interests favored the issuance of the orders sought. There was a larger public interests in ensuring that the effective public participation, approvals were obtained before commencement of the projects, and the rights to the large to health and clean environment were guaranteed. To the extent that the development had been expressly termed as illegal by the 4th Respondent, the public interests was in favour of allowing the conservatory orders.
42. The Learned Counsel argued that the 1st Respondent had entered into pre-contractual obligation with purchasers who deposited a sum of a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43, 050,000.00/=) as alleged in its Application dated 3rd November, 2023. He asserted that this was neither an element nor a consideration in granting conservatory orders. They repeated that no sum of money was large enough to supersede the constitutionally guaranteed rights of the Petitioners to right and clean environment. A proper case had been made for issuance of interim conservatory orders.
43. On the application for security. The Learned Counsel submitted that by way of a Notice of Motion application dated 3rd November, 2023, the 1st Respondent sought orders that the interim conservatory orders be discharged, and in the alternative, the Petitioners be ordered to pay security for costs amounting to Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs.



43,050,000.00/=). It was alleged in the Application that the 1st Respondent had received a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=) from potential purchasers of the apartments, and it was at risk of losing the said sum. Before substantively responding to the Application, it was important to note that the 1st Respondent had filed a Cross - Petition dated 6th November, 2023 claiming the sum of a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=). Having outlined the aforesaid background, it was important for the court to ask and answer the following questions:-n

- a. What was an order for security for costs, and whether the sum sought amounts to security for costs;
- b. Whether security for costs could issue in Constitutional Petition seeking protection of fundamental rights and freedom; and
- c. Whether the 1st Respondent had met the threshold for an award of security for costs.

44. While responding to the above queries, the Learned Counsel observed that, Security for costs was provided under the provision of Order 26 Rule 1 of the Civil Procedure Rules, 2010 which provides that:-

“in any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party.”

The Black's Law Dictionary Ninth Edition at Page 1478 defines security for costs to mean money, property, or a bond given to a court by a Plaintiff or an Appellant to secure the payment of court costs if that party loses.

Thus, what was clear from the foregoing was that security for costs was as the name suggested security for cost of litigation. Therefore, security for costs should not be confused to losses or damages, if any, a party would incur as a result of a litigation.

45. As already indicated, the 1st Respondent alleged that it was paid a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=) and that it risked losing this money as a result of the litigation. In the Learned Counsel's view, sum of a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=) could only be claimed as loss of income or profit or damages for breach, but certainly could not be security for costs. In any event, costs for a subject matter of a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=) could not be a sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=). Furthermore, the Learned Counsel opined that their argument above was substantiated by the fact the 1st Respondent had already claimed the said sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000.00/=) by way of Cross - Petition as what they termed as damages for loss attributed to removal and/or withdrawal of deposits to finance the project.

46. It was therefore their submission that the application before the Honourable Court was a claim for damages disguised as an application for security for costs. The orders sought could only be issued after a full hearing. Even for argument sake, they were to assume the Application was for security for costs, which it was not, the next question the Court had to ask was whether security for costs could be issued in a public interests suit seeking to protect fundamental rights. In the case of “Okiya Omtatah Okioti



– Versus - Commissioner General, Kenya Revenue Authority & 2 others [2017] eKLR” the Court held that;

“What is significant is that this is a constitutional Petition seeking to enforce constitutional Rights and brought in public interest. It is common knowledge that courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Worse still, an order for security of costs before trial will in my view create a barrier to public interest litigation. Such an order, in my view cannot pass the constitutional muster viewed from the lens of our constitution which allows any person to approach the court either on his behalf or on behalf of another person citing violation or threat of a constitutional right.”

47. The general rule, as advanced by courts, in public interests litigation was Court never award security for costs unless the Petition was overtly vexatious. The case before the Honourable Court seeks to protect the fundamental rights and freedom of the people of Kizingo from an already condemned development. Security for costs could not issue under the circumstances. In a nutshell, Security for costs could not issue in a Constitutional Petition. Besides, it was still their submissions that the application before this Court never met the threshold for an award of an order of security for costs.

48. According to the Learned Counsel, it had been established in the case of “Jayesh Hasmukh Shah – Versus - Narin Haira & another (2015) eKLR” in which the court held:-

“It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.”

49. In the case of “Kenya Education Trust – Versus - Katherine S.M. Whitton Civil Appeal No 310 of 2009” it was held that in an application for security for costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It was not enough to allege that a Respondent would be unable to pay costs in the event that he was unsuccessful.

50. The Learned Counsel told the court that he had carefully read the entire Application and Supporting Affidavit, there was nowhere that it was alleged that the Petitioners case was frivolous or the Petitioners would not be able to pay costs in the event the Petition was dismissed with costs. An argument had been advanced by the 1st Respondent that some depositors have withdrawn their money. No evidence has been demonstrated of the said deposit or withdrawal. The Sale Agreement annexed is not evidence of payment or withdrawal of money. The Learned Counsel therefore submitted that the Application for Security of Costs dated 3rd November, 2023 is not merited and should be dismissed with costs.

51. In conclusion, the Learned Counsel submitted that the Application for conservatory orders dated 27th June, 2023 is merited and should be allowed with costs. On the other hand, the Application for security for costs lacked merit and should be dismissed with costs.

V. Analysis and Determination

52. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust written and oral submissions, the myriad cited authorities by the Learned Counsels, the relevant provisions of *the Constitution* of Kenya, 2010 and the law. I have also perused all the orders that have been mentioned in this application.



53. In order to arrive at an informed, fair and reasonable decision, this Honourable Court has framed four (4) broad salient issues for its determination. These are:-
- a. Whether the Notice of Motion application dated 27th June, 2023 is merited after discerning:-
 - i. The nature of conservatory orders;
 - ii. The guiding principles in conservatory application; and
 - iii. The applicability of the principles to the application
 - b. Whether the Honourable Court can issue orders to discharge of conservatory orders granted on 12th July, 2023 in form of a temporary injunction against the 1st Respondent accordingly;
 - c. Whether a call for security of costs by the applicant in the Notice of Motion application dated 3rd November, 2023 should issue.
 - d. Who bears the costs of the Notice of Motion application dated 27th June, 2023 and the Notice of Motion application dated 3rd November, 2023?

ISSUE No. a). Whether the Notice of Motion application dated 27th June, 2023 is merited

54. Under this sub title the Honourable Court has deciphered that the main substratum of the matter is on granting Conservatory orders and Security of costs pending the hearing and final determination of the main Constitutional Petitioner. In the process, the Honourable Court shall evaluate the merits of the conservatory orders in the Notice of Motion application dated 27th June, 2023. I, hereby, discern the following areas of discussions: -
- i. The nature of conservatory orders;
 - ii. The guiding principles in conservatory applications; and
 - iii. The applicability of the principles to the applications.
55. The Court will deal with the above sequentially. On the nature of conservatory orders, this Court references the case of “Civil Application No. 5 of 2014 Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 Others (2014) eKLR”, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.

56. I further make reference to the case of:- “Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Limited – Versus - MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR” defined a conservatory order as follows: -

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.



57. Additionally, in the case of:- “Judicial Service Commission – Versus - Speaker of the National Assembly & Another [2013] eKLR” the Court had the following to say about the nature of conservatory orders: -

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

58. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason by the Respondents that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

59. The foregoing was fittingly captured by Ibrahim, J (as he then was) in the case of:- “Muslim for Human Rights (Milimani) & 2 Others – Versus - Attorney General & 2 Others (2011) eKLR”. The Learned Judge, correctly so, stated as follows: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusively or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

60. The decisions in the case of:- “Centre for Rights Education and Awareness (CREAW) & 7 Others – Versus - Attorney General (2011) eKLR”, “Platinum Distillers Limited – Versus - Kenya Revenue Authority (2019) eKLR” and “Kenya Association of Manufacturers & 2 Others – Versus - Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR” also variously vouch for the cautionary approach. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, this Honourable Court will, therefore, restrain myself from dealing with such issues.

61. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled. The locus classicus is the Supreme Court in the case of:- “Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 Others case (supra)” where at paragraph 86 stated the Court stated as follows: -

(86) Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

62. Further, in the case of:- “Board of Management of Uhuru Secondary School – Versus - City County Director of Education & 2 Others [2015] eKLR”, the Court summarized the principles for grant of conservatory orders as:-



- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
63. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.
64. On the applicability of the principles to the instant application by the Petitioners herein, the Court shall examine if there is a prima facie case. A prima facie case was defined in “Mrao – Versus - First American Bank of Kenya Limited & 2 Others (2003) KLR 125” to mean: -
- “... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
65. In a ruling rendered on 8th February, 2021 in the case of:- “David Ndi & others – Versus - Attorney General & others [2021] eKLR”, the Court had the following to say about a prima-facie case: -
- “The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.”
66. What constitutes a prima-facie case was further dealt with by the Court of Appeal in the case of:- “Mirugi Kariuki – Versus - Attorney General Civil Appeal No. 70 of 1991 (1990 - 1994) EA 156, (1992) KLR 8”. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -
- It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders.



Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added).

67. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by the provision of Articles 22 (1) and 258(1) of *the Constitution* of Kenya, 2010 which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when *the Constitution* has been contravened, or is threatened with contravention.
68. In the Petition, the Petitioners have come before the Honourable Court complaining among other things that the 1st Respondent is putting up 16 storey building in a low density area without proper amenities including a sewerage system, access roads and water. The Petitioners have further argued that the development is so massive that it has caused-a lot of air and noise pollution and also cracks in their buildings. It has also been demonstrated that despite those concerns, the 1st Respondent commenced the development without development approvals and without proper public participation. The 2nd and 3rd Respondent have not filed any responses, and in essence not disputed the Petitioners assertions. The 4th Respondent on the other hand has supported the Petitioners that the impugned development was started before approval and even if it has now been registered, it is still illegal.
69. On the basis of the foregoing, the Court is persuaded that there is prima facie evidence that the Petitioner's constitutional rights to clean and healthy environment are likely to be infringed. The Honourable Court has carefully considered the record. There is no record that the development commenced after sufficient public participation. Public participation is an innovation, knowledge sharing and intensive consultation with the public on the project. It is has to be real and not illusionary nor a mere formality nor cosmetic exercise to scratched from the surface and the periphery to fulfil an abstract prescribed form. From this definition, the Court takes cognizance that public participation never took place and hence favors the issuance of the orders sought. There was a larger public interests in ensuring that the effective public participation, approvals are obtained before commencement of the projects, and the rights to the large to health and clean environment are guaranteed. To the extent that the development has been expressly termed as illegal by the 4th Respondent, the public interests is in favour of allowing the conservatory orders.
70. The issues raised in the Petition cannot, therefore, be wished away. They are serious constitutional issues worth consideration. It is on that background that this Court finds that the Petition raises a prima-facie case in the circumstances of this case.
71. The second requirement for the granting of conservatory orders dictates that an Applicant must demonstrate that if the application is not allowed, the substratum of the Petition will be lost and as such the main claim will be rendered nugatory. In other words, the Applicant will suffer prejudice. Put differently, an Applicant must show, albeit on the face of it, that if not granted conservatory orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms or *the Constitution* will irredeemably be lost and there would be no need to further pursue to main Petition.
72. The Applicant submitted that since conservatory orders are meant to preserve the status quo, it was necessary to allow the application. It was contended that if no orders are granted, then the ordinary citizens will be unable to be compensated in the event the Petition is successful.



73. The Respondent argued that the Petitioners' application does not disclose any reasonable cause of action against the 1st Respondent who has complied accordingly with the statutory requirements. Public consultation and participation was fully carried out as per the requirements of the law and any contrary averment by the Petitioners' are greatly misleading. The 1st Respondent has acquired all requisite approvals for the proposed project hence the proceedings' are brought in bad faith noting that necessary efforts have always been placed by the 1st Respondent in ensuring full compliance and adherence to the guiding laws.
74. In this case, it is in public interest that *the Constitution* and the law are respected and followed. Therefore, an allegation that *the Constitution* is violated or is threatened with violation ought not to be lightly taken. However, Courts must always exercise restraint so as not to deal with the main issues at interlocutory stages.
75. The Court has carefully considered this aspect of the dispute. One of the parties, concededly, stand to suffer prejudice either way this Court decides on this issue. As the Petitioners have successfully established 'a prima facie case', the Honourable Court is persuaded and shall proceed to allow the conservatory orders in the Notice of Motion application dated 27th June, 2023. Conversely, in the event the Petition is unsuccessful, the Court can always discharge the said orders.

ISSUE No. b). Whether the Honourable Court can issue orders to discharge of conservatory orders granted on 12th July, 2023 in form of a temporary injunction against the 1st Respondent accordingly;

76. Under this sub title the essential application, the provision of Article 23 (3) of *the Constitution* of Kenya, 2010 affords a party to proceedings brought pursuant to Article 22, asserting violation or threat of violation of any Constitutional right or fundamental freedom, the avenue of moving the court for any relief, including temporary reliefs among them conservatory orders. In the case of "Nancy Makokha Baraza – Versus - Judicial Service Commission & 9 Others [2012] eKLR" the court expressed itself on the phrase " a court may grant appropriate relief...." as follow:-

"The ...Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises."

77. In the above cited case, the court gave the provision of Article 23 (3) a robust interpretation and was of the view that depending on the circumstances of each case the court should always be in a position to fashion such relief as will be necessary to protect and enforce *the Constitution*.
78. A perusal of the orders issued on 12th July, 2023 shows that the Court satisfied itself that there was a prima facie case warranting the specific orders that he issued. I reiterate that it would, in the circumstances of this case, be improper for this court to purport to overturn the said orders. In any event, it is trite law that before granting orders to set aside or disturb conservatory orders, the court must be satisfied that the applicant will be irreparably injured if the orders are not set aside.
79. In addition to the above consideration, the court is also bound to consider where the public interest lies and in this case, the Honourable Court finds that nothing can be of greater public interest than the court playing its constitutional mandate of ensuring that the individual rights and freedoms under *the Constitution* are protected and that all laws especially those creating offences conform to *the Constitution*.



80. Given the circumstances of this case, the Honourable Court is not satisfied that the applicant in the Notice of Motion application dated 3rd November, 2023 has demonstrated that the orders setting aside the conservatory orders are merited. This court observes that in filing the instant application instead of pursuing the main petition whose hearing had already been fast tracked, the applicant has contributed to an unnecessary delay in the finalization of the main petition that would have settled the ultimate question on whether or not the impugned sections of the Act are unconstitutional.
81. Above the Court had already opined itself and granted the Petitioners the conservatory orders in the interim, therefore by virtue of that the prayer to set aside and discharge interim orders granted on 12th July, 2023 in form of a temporary injunction fails thereof.

ISSUE No. c). Whether a call for security of costs by the applicant in the Notice of Motion application dated 3rd November, 2023 should issue.

82. Under this Sub title, as indicated above, the Honourable Court has been called upon to grant the Security of Costs pending the final determination of the main Petition. An order for security for costs is a discretionary one as per the provisions of the provision of Order 26 Rule 1 of the Civil Procedure Rules, 2010. The provision of the law confers discretion on the court, in recognition that there may be situations where a call for security for costs may be undeserved. In fact, even where a company is foreign or insolvent, the court may still decline to order for provision of security if circumstances do not merit the same. The discretion is however to be exercised judiciously by taking keen reference to the circumstances of each case. Such matters as;

- (a) absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs;
- (b) the general financial standing or wellness of the Plaintiff;
- (c) the bona fides of the plaintiff's claim; or
- (d) any other relevant circumstance or conduct of the plaintiff or the defendant need be weighed; the list is not exhaustive. The court had this to say in the case of Guff Engineering (east Africa) LTD – Versus - AMRIK SINGH KALGI, at page 281 quoting the dictum of Lord Denning MR in Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632 and at page 284 quoting Maughan L J in Gill All Weather Bodies Ltd - Versus - All Weather Motor bodies Ltd.

“...if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered... Some of the matter which the court might take into account, such as whether the company’s claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.

...the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company’s wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.

83. In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay for costs. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proved. This was the holding in the case of “Kenya Education Trust – Versus - Katherine S.M. Whitton Civil Appeal No 310 of 2009”. Guided by the foregoing legal principles, the issue for determination herein,



is whether or not an order for security for costs is deserved against the Petitioners. As observed above, one of the principles for consideration is the ability of the Petitioners to pay for costs in the event that he is not successful and that is the ground relied upon by the 1st Respondent/applicant herein.

84. In the instant case, the 1st Respondent alleges that it has entered into pre - contractual obligations with potential purchasers and/or investors (alternatively also known as “Off Plan Development” in the current market & commercial parlance) who had deposited a cumulative sum of Kenya Shillings Forty-Three Million and Fifty Thousand Shillings Only (Kshs. 43,050,000/-) which is at the risk of imminent loss owing to the injunctive orders issued by the court on 12th July, 2023 that put the proposed project at a stand-still. For avoidance of doubt, the 1st Respondent engaged potential investors who invested in the project and deposited initial amounts for the purposes of development of the project, the said investors are currently in the course of pulling out of the investment and continues to place the 1st Respondent at a precarious position; (Annexed in the affidavit and Marked as Exhibit WAY - 8 are Copies of Sale Agreements. Unless there is security for the damages that the 1st Respondent stands to suffer, then the conservatory order shall stand punitive, unjust and improper. It is within the inherent power and duty of the Honourable court to protect and preserve such assets and investments whose damages are irreparable.
85. The rationale for security for costs was discussed in the case of “Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji (Supra)” as follows;
- “The principles applicable in an application for security for costs are clearly enunciated in a number of cases but to cite a few Lalji Ganji Nathoo – Versus - Nathoo Vassanje (1960) EA, 315, Boor Mohammed Abdulla – Versus - Reinchodbhal J. Patel & Another (1962), Musera & another – Versus - Stallion Insurance Company Limited 2005, 1 KLR 431, that of Kearly Development – Versus - Tarmac Construction (1995) 3 ALL ER 534 and ocean view Beach Hotel Limited – Versus - Salim Sultan Molio & others (2012) eKLR.”
86. The test in an application for security for costs is not whether the Petitioners have established a prima facie case but whether the 1st Respondent has shown a bona fide defence. This was the holding in the case of “Shah – Versus - Sheti Civil Appeal No.34 of 1981”. The same principles were espoused in the case of “Jayesh Hasmukh Shah – Versus - Narin Haira & another (2015) eKLR” in which the court held;
- “It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bona fides of the plaintiff’s claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account”.
87. In an application for security for costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. This was the holding in the case of “Kenya Education Trust – Versus - Katherine S.M. Whitton (Supra)”.
88. It should, however, be noted that much will depend on the circumstances of each case though the final result must be reasonable and modest. In the case of “Marco Trols & Explosive Limited – Versus -



Mamunje Brothers Limited (1988) eKLR 730” this point was enunciated by the court in the following terms;

“ The exercise of the court’s power is discretionary. However, the onus is on the applicant to prove such inability or lack of good faith that would make the order for security reasonable”.

89. Being guided by those legal principles, the only issue for determination is whether or not an order for security for costs can issue against the Petitioners. The court notes that the Applicant has just made a general statement that the Respondent may not be able to settle the costs in the event that he does not succeed in his suit. To that extent, it did not discharge its evidential burden as dictated by the requirement and provision of the Law.
90. On the issue of whether the 1st Respondent has a bona fide defence, the Court has not had the pleasure of perusing the response to the Petition as it was not on record. As was held in the case of “Shah – Versus - Shah (supra)”, the test in an application for security for costs is whether the defendant has a bona fide defence. The Honourable Court is alive to the fact that at this stage, the court should not consider the merits of the case or the Respondent’s defence as that is the mandate of the court when they hear the full Petition. The only way the court can establish the veracity of those assertions is by taking evidence at the main trial. It would be not only unreasonable, unfair but also not equitable in the circumstances of this case, to order the Petitioners to deposit the sought for, security for costs.
91. The Honourable Court is of the considered view that the prayer for security of costs is unmerited and therefore having determined that the prayer on discharge of interim orders issued on 12th July, 2023 is unmerited, I proceed to find that the application dated 3rd November, 2023 is unmerited.

ISSUE No. d). Who bears the costs of the Notice of Motion application dated 27th June, 2023 and the Notice of Motion application dated 3rd November, 2023

92. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).
93. In this case, the Petitioners have the costs of the Notice of Motion application dated 27th June, 2023 and Notice of Motion application dated 3rd November, 2023.

VII. Conclusion & Disposition

94. The Upshot of this is that the has made put a case to have partially and thus, for avoidance of doubt, I therefore proceed to make the following findings:
 - a. That the Notice of Motion Application dated the 27th June, 2023 be and is hereby found to have merit and is allowed entirely.
 - b. That Notice of Motion dated 3rd November, 2023 be and is hereby found to lack merit and the same is dismissed.
 - c. That pending the hearing and determination of the Petition or until further orders, this Honourable Court be and hereby pleased to issue a conservatory orders in the form of a temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself , servant, agents, officers, contractors and or anyone claiming under her from



proceeding with or carrying out deleterious and destructive activities particularly excavating or carrying out construction on property known as Mombasa/Block XXVI/361.

- d. That for expediency sake the main Petition to be heard and disposed of on 30th September, 2024 through written submissions as follows:-
 - i. The Petitioners granted 21 days leave to file and serve their written Submissions.
 - ii. Thereafter the 1st, 2nd, & 3rd Respondents granted 14 days leave to file and serve their written submissions.
 - iii). There be a mention on 20th May, 2024 for highlighting if the submissions and taking a Judgement date.
- e. That pursuant to the request made by the 1st Respondent, the Honourable Court shall conduct a Site Visit (“*Locus in Quo*”) on 20th May, 2024 at 3.00pm in accordance with the provisions of Order 18 Rule 10 and 40 Rule 10 of the Civil Procedure Rules, 2010 accordingly. Matter to be mentioned virtually at 9.00am to confirm the visit plans. Parties to make prior security arrangements through the Coast County Commander.
- f. That the costs of the Notice of Motion applications dated 27th June, 2023 and 3rd November, 2023 be awarded to the Petitioners.

It Is Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF MAY 2024.

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**HON. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus, the Court Assistant.
- b. Mr. Bwire Advocate for the Petitioners.
- c. Mr. Mohammed Abdul Advocate for the Respondents

