



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 43 OF 2020

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS

OF FUNDAMENTAL FREEDOMS UNDER ARTICLE

47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL & LAND USE PLANNING

ACT, NO. 13 OF 2019 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

MBESA INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

AND

FAHAD IQBAL AHMED BAYUSUF.....1ST INTERESTED PARTY

MUSLIM FOR HUMAN RIGHTS.....2ND INTERESTED PARTY

RULING

1. The petition together with the Notice of Motion application herein both dated 1/7/2020 challenge the Respondent's enforcement notice dated 24/6/2020. The said enforcement notice purported to stop the construction works and development the Petitioner was doing on land parcel Nos. MN/I/3412; MN/I/5503 and MN/I/5504. The said development had commenced after the Respondent approved and gave the green light for the project to proceed. Taken aback by the aforesaid enforcement notice, the Petitioner herein sought legal redress through the petition herein, praying for the following orders:

i. A Declaration that the Respondent has violated the Petitioner's rights under Article 47 of the Constitution.

ii. A Declaration that the suspension vide a Letter dated 24th

June 2020 by the Chief Officer is null and void.

iii. Such other and or further relief as this Honourable court may deem fit and just to grant; and

iv. The costs of and occasioned by this Petition be provided for.

The Application

2. Together with the Petition the Petitioner filed application by way of a Notice of Motion dated 1/7/2020, praying for the following orders:

(i) That this application be certified as urgent and service thereof be dispensed with in the first instance;

(ii) That this Honourable Court be pleased to grant a conservatory order to stay the enforcement and implementation of the Enforcement Notice issued by the Respondent dated 24/6/2020 to stop development on Plot Number MN/I/3412, MN/I/5503 and MN/I/5504 located in Nyali area within Mombasa County pending the hearing and determination of this application interpartes.

(iii) That this Honourable Court be pleased to grant a conservatory order to stay the enforcement and implementation of the Enforcement Notice issued by the Respondent dated 24/6/2020 to stop development on Plot Number MN/I/3412, M/I/5503 and MN/I/5504 located in Nyali area within Mombasa county pending the hearing and determination of this constitutional petition herein.

(iv) That this Honourable Court do fix a date for the inter parties hearing of this application.

(v) that the costs of this application be provided for.

3. The application is premised on grounds set out therein and is supported by affidavit of **Hussein Sharriff Alwy** sworn on 1/7/2020. The Applicant's case is that it has an arguable case on the merits with a good chance of success; that the Applicant identified and acquired all that parcels of land known as Land Reference Numbers MN/I/3412, MN/I/5503 and MN/I/5504 which are situate at Nyali area. This acquisition was driven by the strategic location of the land and its close proximity to the beach for the purpose of construction of Apartments and associated amenities; that the Applicant applied and went through the relevant approval authorities, being National Environment Management Authority (NEMA) and the Mombasa County Government and others culminating to the issuance of licences and approval to commence construction; that having obtained the licenses and/or approvals, the Applicant pushed ahead with project, arranging for financing, mobilizing resources, promoting the project, arranging for financing and securing clients/customers. The Applicant thereafter finalized the building plans as well as other arrangements to ensure the timely completion of the project. As part of these arrangements the Petitioner submitted to the Respondent the detailed plans for issuance of a Certificate of Approval as well as stamping in line with the prior notification of approval which had already been given. On the 24/6/2020, having obtained all the requisite approvals, the Petitioner commenced construction works on the project only to be slapped with the aforesaid enforcement notice from the Respondent purporting to stop and or suspend the Petitioners approval based on a purported petition received from the neighbours. The said purported suspension is to last pending resolution of alleged 'outstanding matters'.

4. As a consequence of the suspension of the project the Applicant claims that it has incurred and continues to incur substantial loss, each day the project is delayed. The Applicant avers that unless the Respondent is restrained from enforcing and implementing the enforcement notice dated 24/6/2020, the Applicant stands to suffer grievous prejudice and financial embarrassment. The Applicant states that on a balance of probability it is just and fair that the injunction be granted as the Petitioner stands to suffer financial embarrassment beyond its viability if the project is stalled, while the Respondent will not suffer any prejudice or financial embarrassment should conservatory orders be issued as prayed.

5. Upon being satisfied that the Applicant had an arguable case, this Court on 3/7/2020 issued a Conservatory Order Staying the enforcement and implementation of the said enforcement notice issued by the Respondent on 24/6/2020, and allowed the project to proceed on Plot Nos.MN/I/3412, MN/I/5503 & MN/I/5504, pending the determination of the application inter-partes.

Intervening Proceedings

6. Upon the Petition and application being served, the Respondent filed a Notice of Preliminary Objection on 13/7/2020 stating as follows: -

1) *That this suit is inconsistent with Article 162(2) (b) and*

Section 13 of the Environment and Land Court No.19 of 2011 in that this Honourable Court lacks the requisite jurisdiction as the proper and special jurisdiction pertaining land use is vested on the Environment and Land Court.

2) *That this suit offends Section 72(3) of the Physical and Land Use Planning Act No.13 of 2019, that provides for a procedure to be adhered to and/or an avenue for the Petitioner herein to seek redress, however the Petitioner has failed to appreciate the provision of the Physical and Land Use Planning Act No.13 of 2019 and moved this Honourable court improperly.*

3) *That this is inconsistent with Section 78 of the Physical and Land Use Planning Act No.13 of 2019.*

4) *That no authority has been given to either Hussein Sharriff Alwy or the Firm of Balala & Abed Advocates to sign an Affidavit on behalf of the Petitioner and to represent the Petitioner respectively bearing in mind this is a Company and a Resolution has not been*

passed to support the representation thus their acts are ultra vires as a Board Resolution is a prerequisite when instituting legal proceedings.

5) That this Petition is a “fishing expedition” and a back door means to achieve orders unjustly as there are several matters (ELC Case No.70 of 2020 – Fahad Iqbal Ahmed Bayusuf –vs- Mbesa Investments Ltd & 2 Others), ELC Constitutional Petition NO.16 of 2020 – Lydia Kaguna Japeth & 2 Others –vs- Mbesa Investments Ltd & 2 Others) touching on the same subject matter before the Environment and Land Court thus this Honourable Court is being misused to circumvent the law.

The 1st Interested Party

7. Before the application could be heard the 1st Interested Party herein applied to be joined to these proceedings in that capacity on the grounds that his property being L.R.No.MN/1/5193 was within very close proximity to that of the Petitioner, and that any development in the Petitioner’s property will negatively affect the 1st Interested Party. The 1st Interested Party also stated that he had filed a suit in the Environment and Land Court on 1st July 2020 being **ELC Case No.3 of 2020 (Now No.70 of 2020) – Fahad Iqbal Ahmed Bayusuf v Mbesa Investments Limited & 2 Others**, which case is intricately connected with the Petition herein, and the 1st Interested Party sought to be enjoined to this Petition on those grounds.

8. By a Ruling of this Court delivered on 5/10/2020, the 1st Interested Party was joined to this Petition in that capacity. Having joined the 1st Interested Party to these proceedings, the Court also lifted the interim Conservatory Orders which were issued ex-parte on 3/7/2020, so that all parties could be heard on that issue on equal footing.

The 2nd Interested Party

9. Apparently annoyed by the lifting of the Order stopping the aforesaid construction or the project, the 2nd Interested Party, Muslims for Human Rights, sought to be joined to these proceedings as 2nd Interested Party ostensibly to protect the alleged rights of more than 200 workers who were employed in the construction or project site, and who alleged that their right to wages was violated pursuant to the lifting of the Conservatory Orders on 5/10/2020. Their application for joinder dated 16/10/2020 was unanimously consented to in terms of Prayers 1 and 2 by all parties herein, and Muslims for Human Rights was admitted herein as the 2nd Interested Party. This joinder then paved the way for the hearing of the Respondent’s Preliminary Objection aforesaid.

10. By the ruling of this Court delivered on 10/12/2020 the said Preliminary Objection was dismissed for lack of merit, thereby paving way for the hearing of the application dated 1/7/2020 the subject of this ruling.

Response to the application

11. The 1st Respondent opposed the application through a Replying Affidavit sworn on 4/2/2021 by **Dr. June Mwajuma**, the Chief Officer in charge of Physical Planning, Lands and Housing of the 1st Respondent herein.

12. The 1st Respondent’s case is that the Applicant had sought for approvals from the Respondent for the construction of three blocks: Two blocks comprising of 10 storeys and one block of 18 floors. The approvals issued to the Applicant had some conditions attached to it and the approval was granted on the following terms:

- The approval granted was a part approval allowing the Applicant to construct only the two blocks comprising of 10 storeys on Plot No. MN/I/5503 and Plot No. MN/I/5504.
- That before the process of acquiring an approval, the Applicant ought to have undertaken public participation during the Environment Impact Assessment.

13. The Respondent avers that vide a letter dated 30/4/2020 the Respondent informed the Applicant of the partial approval bearing in mind the complexity of the project; that the approval issued to the Applicant only touched on Plot No. MN/I/5503 and Plot No. MN/I/5504. However, in disregard thereof, the Applicant commenced development on Plot No. MN/I/3412 thereby breaching the condition of the approval; that apart from the said breach some residents made a complaint to the Respondent that public participation was not undertaken and as such it came to the attention of the Respondent that the Applicant had not carried out the mandatory public participation for the project, and that the Environment Impact Assessment had failed to incorporate the residents’ concerns. This alleged breach caused the Respondent to issue the enforcement notice dated 24/6/2020 stopping the project.

14. The Respondent avers that under the fourth schedule of the constitution it is mandated to ensure planning and development within the jurisdiction of County 001; and that the Physical and Land Use Planning Act 2019 gives powers to the Respondent to control development within the jurisdiction of County 001. Furthermore, any developer who wishes to undertake development within the jurisdiction of the Respondent, is obligated to first seek permission from the Respondent to undertake any such development and that the Applicant was granted permission to develop only Plot No. 5503 and Plot No. 5504. However, the Petitioner commenced development on Plot No. 3412.

15. The 1st Interested Party opposed the application via **grounds of opposition** dated 15/12/2020; **Replying Affidavit** sworn on 15/12/2020; and a **Response to petition** dated 25/1/2021. The 1st Interested Party’s case is that there was no public participation before the Petitioner was granted the approval to proceed with the development by the Respondent. This failure denied the 1st Interested Party a chance to object to the approval, which if allowed, would negatively affect the 1st Interested Party’s right to enjoy his property adjacent to the suit property. The 1st Interested Party further avers that the Applicant has filed in the **National Environment Tribunal** an appeal No. 30 of 2020 in which

the NEMA is the 1st Respondent, and the 1st Interested Party the 2nd Respondent. In that case the 1st Interested Party claims to have filed documents which show that there was no public participating before the Applicant herein was granted approval to proceed with the project.

16. The 1st Interested Party also states that the Applicant came to Court prematurely without first exhausting other available statutory channels of resolving the dispute, and that for this reason, the application should be dismissed.

17. The 2nd Interested Party supported the application by the Petitioner.

Submissions

18. Parties filed submissions to the motion. I have carefully considered those submissions and the application and opposing affidavits. From a reading of the submissions, I gather that the following issues arise for determination by this Court.

- (i) Whether this Court has the jurisdiction to hear the matter;
- (ii) Whether the Petitioner exhausted all available dispute resolution processes before coming to court;
- (iii) Whether the 2nd Interested Party has a right capable of constitutional protection in this matter;
- (iv) Whether the Enforcement Notice dated 24/6/2020 was constitutional.

(i) Whether this Court has the jurisdiction to hear and to determine this matter

19. The issue as to whether or not this Court has the jurisdiction to hear and to determine this matter was raised in the Preliminary Objection filed herein. That issue was conclusively determined by a ruling dated 10/12/2020. This Court found and holds that in the matter relating to the Enforcement Notice dated 24/6/2020, it has the jurisdiction. This Court has been made aware that there are indeed related matters in the ELC and in the National Environmental Tribunal. It is the finding of this Court that those matters in the aforesaid forums can go on and can be determined on their merits without affecting this Court's constitutional jurisdiction to determine the validity or otherwise of the Enforcement Notice dated 24/6/2020, so that if, for instance, this Court declares invalid the said Enforcement Notice, and allows the construction to go on, the said construction may still be stopped if either the aforesaid Tribunal or the ELC establishes that certain procedures, the substance of matters before them, were not adhered to, thereby negating the entire process.

(ii) Whether the Petitioner exhausted all available dispute resolution processes before coming to court

20. **Mr. Tajbhai** referred the Court to **Section 72(3)** of the **Physical and Land Use Planning Act No.13 of 2019**, which states as follows: -

“(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the Notice and the Committee shall hear and determine the Appeal within thirty days of the Appeal being filed”.

21. For that reason, **Mr. Tajbhai** submitted that the Applicant did not exhaust the available statutory mechanisms for settling the dispute, and decided to come to this Court prematurely. Counsel submitted that the Applicant was tasked to appeal to the County Physical and Land Use Planning Liaison Committee within 14 days after issuance of the Enforcement Notice. **Mr. Tajbhai** referred to **Republic v National Environment Management Authority, Civil Appeal No.84 of 2010**, where the High Court stated: -

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a Statutory Appeal procedure, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the Statutory Appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the Statutory Appeal procedure was suitable to determine it....”

22. Counsel further submitted that under **Section 9** of the **Fair Administrative Action Act No.4 of 2015**, the High Court or a Subordinate Court under **Subsection (1)** is expressly prohibited from, and **“shall not”**, review an administrative action or decision under that Act unless the mechanisms including internal mechanisms for Appeal or Review and all remedies available under any other written law are first exhausted.

23. On his part **Mr. Buti**, learned Counsel for the 1st Interested Party agreed with the submissions of **Mr. Tajbhai** on the **Physical and Land Use Planning Act, 2019**, and submitted that this Petition is premature as the Petitioner failed to exhaust statutorily available mechanisms to address the issue and so the application should be dismissed and petition struck out.

24. **Mr. Buti** further referred to **Section 78** of the **Physical and Land Use Planning Act**, which provides in mandatory terms that: -

78. The functions of the County Physical & Land Use Committee shall be to;

(d) hear Appeals with respect to Enforcement

Notices.

25. Therefore, Counsel submitted that any grievances the Petitioner may have had concerning the **Enforcement Notice** dated 24/6/2020, should have been addressed to the committee established under **Section 78** above.

26. In response **Mr. Saeed**, learned counsel for the Applicant submitted that the aforesaid Enforcement Notice dated 24/6/2020 was not in compliance with **Section 72(1) & (2)** of the **Physical and Land Use Planning Act**; and therefore the Applicant was not obligated to comply with Section 72(3) of the Act.

27. Section 72 of the Physical and Land Use Planning Act is as follows:

Section 72:

72.(1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—

a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained;

or

b) any condition of a development permission granted under this Act has not been complied with.

(2) An enforcement notice shall—

a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;

b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

28. I have looked at the Enforcement Notice dated 24/6/2020. Whilst the Respondent and the 1st Interested Party seek to rely on **Section 72(3)** of the Act, they have ignored **Section 72(1)** and **(2)**. I agree with Mr. Saeed that the **Enforcement Notice** dated 24th June 2020 issued by the Respondent, other than the heading, does not meet the requirements as provided by **Section 72(1)** and **(2)** of the **Physical and Land Use Planning Act**. The Respondent has issued a document purporting to be an Enforcement Notice yet the same is not in compliance with the prescribed law. Prima facie the Respondent cannot at this stage be allowed to rely on Section 72(3) of the Physical and Land Use Planning Act and ignore Section 72(1) & (2). Further, **Section 72(1) (a & b)** of the Act empowers the County Executive Committee member to issue an Enforcement Notice on only two grounds. Firstly, where a developer commences development on any land without the required development permission having been obtained. Secondly, where any condition of a development permission granted under the Act has not been complied with. However, in this matter the Respondent cites complaints from neighbours as the reason for the issuance of the Enforcement Notice. This, however, is not a reason required under **Section 72(1) (a & b)** of the Act. Having failed to meet any of the two grounds, the Respondent's actions to serve the Applicant with an Enforcement Notice is *prima facie*, questionable.

29. Further, and in concurrence with submissions of **Mr. Otieno**, learned counsel for the 2nd Interested Party, **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.

30. **Mr. Otieno** submitted, correctly in my view, that the Respondent has no power to even entertain the complaint by the 1st Interested Party or any neighbour once it had issued a development permit to the Applicant. **Section 78(b)** provides that only the County Physical and Land Use Planning Liaison Committee can hear Appeals from decisions arising from approvals of development plans. This therefore means that if

the 1st Interested Party was in any way aggrieved against the decision to issue the development permit to the Applicant, he had a right to lodge an Appeal to the Committee. The County Executive had no power to entertain an Appeal arising from the issuance of a development approval under the Act. It is therefore clearly arguable at this stage whether or not the development permit issued to the Petitioner has ever been lawfully challenged in any appropriate forum in the manner provided by the law.

31. However, and for avoidance of doubt, it should be noted that in our jurisprudence the doctrine of exhaustion is still a developing concept. In this matter even if it were to be true, which I think it is not, that indeed the Applicant herein had failed to exhaust available statutory avenues for the redress of the problem, still, that this not the end of the matter. Our case law has developed a number of exceptions to the doctrine of exhaustion. In ***R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) (supra)***, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

32. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

33. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in ***Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR***.

34. In the instant case, the Applicant alleges violation of its constitutional right. In ***William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR***, a 5 Judge bench observed that “**where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.**”

35. Indeed, this is why Article 165(1) of the Constitution vests in the High Court vast powers including the power to ‘*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*’ and the jurisdiction ‘*to hear any question respecting the interpretation of the Constitution.*’

36. Consequently, it is the finding hereof that *prima facie*, the Applicant has satisfied the dictates of the exhaustion doctrine, and deserves to be heard by this Court.

(iii) Whether the 2nd Interested Party has a right capable of constitutional protection

37. The 2nd Interested Party came to this Court to protect 200 workers whose fundamental rights and freedoms have been allegedly violated and are threatened with further violation through implementation of the impugned Enforcement Notice by the Respondent. The 2nd Interested Party pleads with this Court to have those alleged rights and freedoms preserved and protected from further violation pending the hearing and determination of the petition herein. The 2nd Interested Party wants the Court to restore the parties to the status quo ante the impugned order pending the hearing and determination of the petition. They argue that the Respondent has no powers to rescind an approval permit once it has issued the same unless the permit holder has acted in breach of a condition attached. In this case they claim that no such condition was breached.

38. In my view, the issue at this stage is simply whether or not the workers at the construction site have a right which this Court can purport to protect. *Prima facie*, in my view, the answer must be in the affirmative because before the purported enforcement notice was issued, the site construction workers were earning a living from the suit property. The workers' rights had already accrued when they were offered a job at the project site. Although quarry site workers may not have a title to the site, they become entitled when they are employed in the site where, *prima facie*, there is licence to operate. A denial of a primary licensee right affects the right to the casual workers. There is a derived right, which qualifies for constitutional protection. I am satisfied at this stage that the 2nd Interested Party has established a *prima facie* case for conservatory orders stopping the impugned Enforcement Notice pending the hearing and determination of the petition herein.

(iv) Whether the Enforcement Notice dated 24/6/2020 was constitutional

39. In this application, there is a single issue as to the constitutional validity of the enforcement notice issued by the Respondent on 24/6/2020.

40. To unravel this issue the starting point must be the **Article 165(3)(b)** of the **Constitution** which gives the High Court the jurisdiction;

“...to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened...”

41. As I understand it, the only issue which brought the Petitioner to this Court was to invalidate the Enforcement Notice dated **24/6/2020**. The issue then is to establish whether or not the said Enforcement Notice threatened a right or a fundamental freedom which was being enjoyed by the Petitioner, and, the 2nd Interested Party. As I have stated in the foregoing paragraphs, the Petitioner commenced the preliminary aspects of the project in **2015**. It invested money and time and expertise in the project all these years. It identified contractors, and suppliers of materials and indeed made provision for every aspect of the project, satisfying all forward and backward linkages in contract formations, supplies and other aspects of the project. This was an involving exercise, both in terms of financial input, and human resource involvement. Every aspect of the project was meticulously carried out, investigated and approved by the County Government of Mombasa, the Respondent herein. On **4/4/2020**, **NEMA** approved the project. These approvals then paved way for the Petitioner to commence construction in the project site, and sometime before **24/6/2020**, the construction started on the site, and the construction workers, whose interests are catered herein by the 2nd Interested Party, moved to site to earn their daily bread. In my view therefore, the Petitioner had acquired a bundle of rights when he secured all the approvals required under the law to start the project. As contracted workers in the site, the 200 construction workers whose interests are represented by the 2nd Interested Party equally acquired a bundle of rights, including the right to earn wages in a lawfully established construction site to which they have contracted their labour. These accrued rights for the Petitioner and for the workers represented by the 2nd Interested Party are what were, and are, threatened by the said Enforcement Notice issued by the Respondent on **24/6/2020**. They amount to economic rights which are protected under **Article 43** of the **Constitution**, and the Petitioner has every right to invoke **Article 165 (3)(b)** of the **Constitution** to have this Court protect these rights.

42. Even then, granted that the Respondent can indeed issue the said Enforcement Notice, the Petitioner has submitted, correctly in my view, that any such action must still be anchored in the law. The Petitioner avers that the said Enforcement Notice was issued in complete violation of **Article 47** of the **Constitution** and the Fair Administrative Action Act. **Article 47** of the **Constitution** states as follows: -

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall —

(a) provide for the review of administrative action by a

court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

43. The Petitioner avers that the manner in which the said Enforcement Notice was issued violated Petitioner’s fundamental rights under **Article 47**, and indeed this is the reason the Petitioner has come to this Court. This is a matter to be investigated by this Court in the petition, and not in this Ruling. Suffice it to say that this Court is satisfied that the Applicant has established a prima facie case for the grant of the conservatory orders sought in this application.

44. Consequently, the application dated 1/7/2020 is allowed in terms of prayer No. 3 thereof. Costs shall be for the Applicant and the 2nd Interested Party. The costs shall be paid by the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Said for Petitioner

Mr. Tajbhai for Respondent

Mr. Tajbhai holding brief Mr. Buti for 1st Interested Party

Mr. Otieno for 2nd Interested Party

Mr. Peris Court Assistant