



REPUBLIC OF KENYA



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**Coral Pearl Executive Apartments Limited & another v County
Government of Mombasa & 2 others (Constitutional Petition
32 of 2021) [2024] KEELC 1231 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1231 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 32 OF 2021

LL NAIKUNI, J

FEBRUARY 26, 2024

**IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR
COURT UNDER ARTICLE 23 (1), ARTICLE 162 (1), (2) (B),
ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 10 (2) (B), 19 (2), 20
(4) (A), 28, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: BREACH OF THE PROVISIONS OF ARTICLES
157 (11) AND 244 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ARTICLE OF THE CONSTITUTION OF KENYA
2010 AND ALL ENABLING POWERS AND PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF: SECTIONS 64 (1), 65, 72, 92 (1) AND 92
(2) OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019**

AND

IN THE MATTER OF: SECTION 135 (1) OF THE CRIMINAL PROCEDURE CODE CAP.75

BETWEEN

CORAL PEARL EXECUTIVE APARTMENTS LIMITED 1ST PETITIONER

DANCAN ODHIAMBO OMONDI 2ND PETITIONER

AND



COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
JEOPHITA JUNE MWAJUMA 2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment of this court pertains the filed Constitution Petition dated 21st July, 2021 by Coral Pearl Executive Apartment Limited and Dancan Odhiambo Omondi, the 1st and 2nd Petitioners herein against the County Government of Mombasa, Jeophita June Mwajuma and the Director of Public Prosecution, the 1st, 2nd and 3rd Respondents herein. *The Constitution* Petition is brought under the dint of the provisions of Articles 10(2)(b), 19 (2), 20 (4) (a), 23(1), 28,47, 50, 157, 162(1), 165(2)(d) (ii), 244 and 258 of *the Constitution* of Kenya 2010.
2. Upon service, all the Respondents filed their replies accordingly. The Honourable Court will be dealing with the issues raised thereon at a later stage of the Judgement. Thereafter, directions was taken on having the main Petition be disposed off by way of written submissions. It is instructive to note right from the inset that this has been a rather emotive and highly contested matter.

II. The Petitioner's Case

3. The Petitioners sought for the following orders:-
 - a. A declaration be and is hereby made the Respondents' actions of purporting to stop the 1st Petitioner's development and prosecuting the 2nd Petitioner and the 1st Petitioner's workers are inconsistent with and in contravention of *the Constitution* of Kenya 2010 and the law.
 - b. A declaration be and is hereby issued that the criminal charges levelled against the 2nd Petitioner herein, Dancan Odhiambo Omondi, Humphrey Kamandi, Benjamin Ochieng and Gabriel Okumu in Mombasa County Court Criminal Case No. M 079 of 2021: Republic – Versus - Dancan Odhiambo Omondi and Mombasa County Court Criminal Case No. M. 265 of 2021: Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu are illegal, null and void.
 - c. An order of certiorari be and is hereby issued removing into this Honourable Court and quashing the criminal proceedings against the 2nd Petitioner in Mombasa County Court Criminal Case No. M 079 of 2021:Republic – Versus - Dancan Odhiambo Omondi as well as the criminal proceedings in Mombasa County Court Criminal Case No. M. 265 of 2021: Republic v. Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu.
 - d. An order of prohibition and permanent injunction be and is hereby issued restraining the Respondents. Whether by themselves agents and servants and/or whosoever is acting on their authority or instruction, from stopping or in any other manner whatsoever interfering with the 1st Respondent's development of apartment blocks known as known as CORAL PEARL EXECUTIVE APARTMENTS on the property known as L.R.No.MN/1/5222 situate in Nyali off Links Road in Mombasa County.
 - e. The costs of this Petition be paid by the Respondents jointly and severally.



- f. Any further relief or order that this Honourable Court shall deem just and fit to grant.

III. The Legal foundation of the Petition

4. The Petition was founded on the following legal basis:

- a. Although the approval of the development was granted by the 1st Respondent on 11th July 2018 before enactment and commencement of the *Physical and Land Use Planning Act*, 2019, when the said Act came into force on 5th August 2019, the 1st Petitioner's development became a subject of the Act by virtue of the transitional clause at section 92 (1) thereof which clearly provides that any approval for development granted in accordance with the provisions of any written law in force immediately prior to the commencement of the Act shall be deemed to be a development permission granted under the Act.
- b. Under section 92 (2) of the *Physical and Land Use Planning Act*, 2019, a development approval granted under the provisions of any written law in force immediately before the commencement of the Act lapses if the development is not commenced within twenty-four (24) months of the commencement of the Act. Naturally and effectively, the *Physical and Land Use Planning Act*, 2019 extended the time within which developments approved before its enactment could be commenced. Since the Act commenced on 5th August 2019, it means that the 1st Petitioner had up to 5th August 2021 (24 months) to commence its development. Therefore, as at March 2021 when the Respondents attempted to stop the construction and charged the 2nd Petitioner in court, the period within which the development was to be commenced was still running and had not yet lapsed. They attempted to stop the construction and proceeded to charge the 2nd Petitioner.
- c. Under section 64(1) of the *Physical and Land Use Planning Act*, 2019, a development permission lapses if the project is not commenced within three years after the permission is granted and not 12 months as the Respondents purported and sought to enforce.
- d. Under section 65 of the *Physical and Land Use Planning Act*, 2019, sanctions can only be imposed on a developer who fails to complete the building works within five (5) years after the development permission is granted. The Respondents imposed sanctions on the Petitioners by attempting to stop the development and by charging the 2nd Respondent in court yet five years had not lapsed since the development permission was granted on 11th July 2018.
- e. From the foregoing, it is clear that the Respondents violated the provisions of sections 64 (1), 65, 92 (1) and 92 (2) of the *Physical and Land Use Planning Act*, 2019 by charging the 2nd Petitioner and the workers in court and by attempting to stop the 1st Petitioner's development.
- f. By charging and prosecuting the 2nd Petitioner and the 1st Petitioner's workers in court contrary to sections 64 (1), 65, 92 (1) and 92 (2) of the *Physical and Land Use Planning Act*, 2019, the Respondents breached the 2nd Petitioner's constitutional rights, acted illegally, unreasonably, in bad faith, in utter abuse of the legal process/the criminal justice system and against the interests of administration of justice as demonstrated hereunder:
- i. Under Article 157 (11) of *the Constitution* of Kenya, the 3rd Respondent, in exercising the power to institute criminal charges, must have regard to the interests of administration of justice and theneed to prevent and avoid abuse of the legal process and of thecriminal justice system.



- ii. The 2nd and 3rd Respondents, being public officers, are required by Article 47 of *the Constitution* of Kenya, 2010 to act in a manner that is lawful, reasonable and procedurally fair. The 2nd and 3rd Respondents failed to observe fairness because they have persecuted the 2nd Petitioner against the law and have abused the criminal justice system with a view to intimidate and coerce the Petitioners to pay a bribe.
- iii. The prosecution of the 2nd Petitioner is in violation of the 3rd Respondent's mandate under Article 157 (11) of *the Constitution*.
- iv. The Respondents' action is in breach of Article 3 of *the Constitution* of Kenya which mandates them to respect, uphold and defend *the Constitution*.
- g. The Respondents acted in bad faith and in utter abuse of the legal process by interfering with and seeking to stop the 1st Petitioner's development and by prosecuting the 2nd Petitioner in a manner that is in utter violation of the provisions of the *Physical and Land Use Planning Act*, 2019.
- h. Under Article 244 of *the Constitution*, the 2nd and 3rd Respondents are mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of their office. The 2nd and 3rd Respondents failed to observe the tenets of Article 244 by accusing the Petitioners of acts of commission and omissions which are in true sense permitted by the law (*Physical and Land Use Planning Act*, 2019).
- i. It is absolutely reckless and unreasonable for the Respondents to pursue and charge the Petitioners for being in compliance with the *Physical and Land Use Planning Act*, 2019.
- j. The Respondent's interference with the 1st Petitioner's project as well as the prosecution of the 2nd Petitioner and the 1st Petitioner's workers should be in utter abuse of legal process and in breach of the law and the rules of natural justice.
- k. The 2nd Petitioner's prosecution is in bad faith, driven by ulterior motives against the interest of the criminal justice system and is in utter breach of the 2nd Petitioner's rights as guaranteed by *the Constitution* of Kenya, 2010 for the main reasons that:
 - i. No enforcement notice was served upon the Petitioners as required by the law or at all.
 - ii. The Respondents had a grudge against the 2nd Respondent who had declined to pay the bribe solicited by the 1st Respondent's officers and the 3rd Respondent.
 - iii. While the subject development was being undertaken by the 1st Petitioner which is a limited liability company with more than one director and shareholder, the Respondents have continued to single out the 2nd Petitioner because of a personal vendetta they have with him.
 - iv. The 1st Petitioner's development had valid approval issued by the 1st Respondent which was still valid at the time of the attempted stoppage of the development and the 2nd Petitioner's arraignment in court.
 - v. The 1st Petitioner's floors as alleged by the Respondents but rather was constructing those floors which had been approved by the 1st Respondent.



- vi. The development was commenced and is being undertaken within the timelines outlined in the 1st Respondent's approval and provided for in the [*Physical and Land Use Planning Act*, 2019](#).
 - l. Under Article 165 ((2) (d) (ii) of [*the Constitution*](#) of Kenya 2010, this Superior Court of the same status as the High Court has jurisdiction to determine whether the Respondents' actions of purporting to stop the 1st Petitioner's development and prosecuting the 2nd Petitioner and the 1st Petitioner's workers which the Respondents purported to have done under the law and [*the Constitution*](#) are inconsistent with and in contravention of [*the Constitution*](#) of Kenya 2010.
5. The Petition also was founded on the following Constitutional provisions:
- a. Under Article 40 of [*the Constitution*](#) of Kenya 2010, the 1st Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop the property. By interfering with the subject development and making it impossible for the 1st Petitioner to progress with the construction, the Respondents violated the 1st Petitioner's right to own property as guaranteed under the said Article 40 because the Respondents have literally curtailed the 1st Petitioner's ability to freely use and enjoy its property without any justification under [*the Constitution*](#) and statute.
 - b. Preferring criminal charges against a person is a serious matter which not only threatens one's liberty but also has the potential of denting the person's image in the society. The 2nd Petitioner is a professionally qualified architect who is highly respected in Mombasa County, the whole Republic of Kenya and beyond. By arresting and charging the 2nd Petitioner in a baseless, reckless and unfair manner and in utter disregard of the law, the Respondents have caused the 2nd Petitioner's reputation to be demeaned in a way that is in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20 (4) (a) and Article 28 of [*the Constitution*](#) of Kenya, 2010.
 - c. Under Article 50 (2) of [*the Constitution*](#) of Kenya, 2010 every accused person has the right to be informed of the charge with sufficient detail to answer it; the right to be present when being tried; and not to be tried for an offence in respect of an act or omission for which the accused person had previously been either acquitted or convicted. The Respondents breached the 2nd Petitioner's rights as guaranteed under the said Article 50(2) for the following reasons:
 - i. The 2nd Petitioner's name was included in the charge sheet for Criminal Case No. M. 265 of 2021 without being informed or notified. The 2nd Petitioner only learnt of the charges against him when his co-accused gave him a copy of the charge sheet. Thus, the 2nd Petitioner was not informed of the charge against him at all contrary to Article 50 (2) (b) of [*the Constitution*](#) of Kenya, 2010.
 - ii. The 2nd Petitioner was not invited or summoned to attend court on 5th May 2021 and was not present when the charges against him in Criminal Case No. M. 265 of 2021 were read out. The charges were read in the absence of the 2nd Petitioner despite his name appearing in the charge sheet as the first accused person. The charges and proceedings in Criminal Case No. M. 265 of 2021 are therefore in violation of the 2nd Petitioner's right to be present when being tried as guaranteed by Article 50 (2) (f) of [*the Constitution*](#) of Kenya, 2010.
 - iii. The charge levelled against the 2nd Petitioner in Criminal Case No. M. 265 of 2021 is "developing extension of a building without first obtaining development permission"



which relates to the subject development and is the same charge under Count 2 in Criminal Case No. M. 079 of 2021. The 2nd Petitioner was therefore charged with the same offence which he had previously been charged with in utter violation of his right not to be charged with a previous offence as guaranteed by Article 50 (2) (o) of the Constitution of Kenya, 2010.

- iv. Furthermore section 135 (1) of the Criminal Procedure Code requires charges relating to the same facts to be in one charge sheet.

IV. The Replying Affidavit by the 1st and 2nd Respondents.

6. The 1st and 2nd Respondents herein filed a Replying Affidavit sworn by PAUL MANYALA and the annexures attached thereto. It is instructive to note that the said replies seem to be concentrating on the averments arising from the interlocutory application by the Petitioner and not the main Petition. Nonetheless, he averred as follows:-
 - a. He was the Director of Planning of the 1st Respondent herein while the 2nd Respondent was the Chief Officer in charge of Land, Planning and Housing.
 - b. He was duly authorised by the 1st and 2nd Respondents to swear this Affidavit. Further that he was conversant with the facts pertaining to this case. The continued existence and use of the Conservatory orders by the Petitioners endangered the life of the general public and future occupants of the development project being undertaken by the Petitioners namely Coral Pearl Executive Apartments situated on property known as L.R No. MN/1/5222 situated in Nyali off Links Road in Mombasa County.
 - c. The Petitioners in particular mislead the Court into;
 - i. Believing that they were not served with an enforcement Notice while in effect, they were issued with not one but two Notices in respect of the development project.
 - ii. the Petitioners ought to have presented their grievances to the liaison committee upon being issued with a Notice in accordance with section 72 of the Physical and Land Use Planning Act of 2019
 - iii. Permitting the Petitioners as litigants to circumvent the conditions pertaining to the health and safety of buildings in Mombasa County which the 1st Respondent through it's officers seeks to ensure.
 - iv. Granting the Petitioners orders ex-parte and allowing the construction of the apartments in effect, interfered with the 1st and 2nd Respondents legal mandate to ensure compliance with the provisions of the Physical and land use Planning Act 2019 (Planning Act) thereby perpetuating impunity.
 - d. Since being issued with the ex-parte conservatory orders, the Petitioners had been constructing the building on the suit property while violating the conditions set out under the Physical Planning and Land Use Act of 2019 after having made themselves appear as the aggrieved party before Court thereby circumventing the law whose compliance the 1st Respondent sought to ensure.
 - e. In that regard, he stated as follows pertaining to the Main Petition:-



- f. The 1st Petitioner, through the 2nd Petitioner made an Application for construction and also presented a building Plan for approval by the 1st Respondent which was approved on 11th July, 2018.
- g. The approval came with conditions which were stated in the Notification of approval of the application for development permission (PPA - 2) issued on 11th July, 2018. He annexed a copy of the Notice and present it to Court as “PM-1.
- h. The 1st Petitioner failed to notify the 1st Respondent of the intended construction within 48 prior to commencing construction effectively failing to comply with condition number 1 of the PPA - 2.
- i. The reason for the 48 hour notice prior to commencing construction was to enable the 1st Respondent to allocate a building inspector to ensure that buildings are constructed in a manner that does not pose a danger to the members of the public.
- j. In addition, the 48 hour Notice was required to ensure that development projects were generally in compliance with the conditions stated in the PPA - 2 form.
- k. Failure to provide the Notice meant that the building was not allocated an inspector and as such, construction proceeded without it being inspected by the 1st Respondent’s building inspectors contrary to condition no. 8 of the PPA - 2.
- l. Regardless, the 1st Respondents officers visited the construction site and requested the 1st Petitioners agents including the 2nd Petitioner to produce documents pertaining to the construction which they failed to do.
- m. 1st Petitioner failed to co - operate with 1st Respondent’s officers, upon which it’s officers issued the 1st Petitioner with a Notice to stop the construction works and also produce the requisite documents which Notice was received on 9th February, 2021. Hereby annexed a copy of the Notice and mark it as “PM – 2”.
- n. After failing to provide the documents requested by the 1st Respondent’s officers, the officers used the information on the board displayed on site to look into the details pertaining to the construction from the 1st Respondent’s records and found out that, although the Petitioners constructed additional floors thereby effectively compromising the building.
- o. The refusal to provide documentation was an attempt by the Petitioners to hide the fact of their non-compliance with the PPA - 2 form.
- p. The Petitioners were on 9th Floor of the said construction despite the Application for approval and building plan submitted to the 1st Respondent giving contradictory information. He hereby annexed a copy of the Application and building plan and present it to Court as “PM -3 (a) and PM- 3 (b)” respectively. The Petitioners had exceeded the number of floors applied for.
- q. Ideally the Petitioners ought to had sought permission by way of an Application to the 1st Respondent prior to constructing additional floors for the 1st Respondent to ascertain whether the building had the capacity to sustain extra weight from the additional floors.
- r. Despite being issued with a Notice on 9th December, 2021, the Petitioners continued with construction prompting the 1st Respondent to issue a second Notice, an enforcement notice on 13/5/2021. He hereby annex a copy of the Notice and present it to Court as “PM – 4”.



- s. Just like the first Notice, the second Notice was ignored by the Petitioners prompting the 1st Respondent to arrest the 2nd Respondent who was an agent of the 1st Respondent.
- t. On 5th July, 2021 the 2nd Petitioner was charged with failing to comply with the enforcement Notice served under the provision Section 72 (1) as read with Section 72 (2) of the Planning Act, developing extension of a building without first obtaining development permission contrary to the provision Section 57 (1) as read with Section 57 (2) of the Planning Act and contravening conditions imposed by County Executive Committee Members contrary to Section 67 of the Planning Act. Hereby annex a copy of the Charge Sheet and mark it as “PM – 5”.
- u. Contrary to the allegation by the Petitioners to the effect that they were not served with an enforcement notice, the 2nd Petitioner could not have been charged in Court without ensuring that the requisite enforcement notice was issued.
- v. However, the Petitioners, blatantly mislead the Court, into believing that the 1st Respondent never them issued with an enforcement Notice while in effect, two Notices had been issued by the 1st Respondent which they ignored.
- w. Whilst the 1st Respondent was trying hard to fulfil it's mandate, the Petitioners through the 2nd Respondent went on social media platforms trading innuendos that made the Governor of County of Mombasa, the 2nd Respondent and appeared as malicious and corrupt individuals for doing their job prompting the 2nd Respondent and I to sue for defamation.
- x. The Petitioners upon being charged in Court still continued construction prompting the 1st Respondent to re – arrest the 2nd Petitioner which led the Petitioners to institute the proceedings that culminated in issuance of an ex-parte Order stopping the 1st Respondent from effecting it's mandate under the *Physical and Land Use Planning Act*.
- y. As of now, the Petitioners were constructing with impunity after having hoodwinked the Court into issuing them orders by concealing material facts as such, it was correct to say that the Petitioners misled the Court into granting illegal orders.
- z. The illegal extension of the number of floors was an attempt to deny the 1st Respondent revenue since any additional floors ought to be paid for.
- aa. Ideally, the conservatory orders were meant to protect the interests of members of the public. However, in the present case, they Petitioners were using them to selfishly serve private interests while putting the interests of members of the public in jeopardy due to the risk that the construction poses.
- ab. Further, the 2nd Respondent herein was a Public Officer who had been sued in her personal capacity contrary to what the law says regarding such circumstances. One could only wonder what would happen should the 2nd Respondent quit working for the 1st Respondent
- ac. Therefore, it was proper that the suit against the 2nd Respondent be struck out to enable the Petitioners sue the Chief Officer.
- ad. The suit in it's entirety was an abuse of the Court process and should be dismissed with costs to the 1st and 2nd Respondents herein.



V. The issues in dispute

7. The Petitioners relied on the following issues in dispute:-
 - a. The stoppage of the 1st Petitioner's development and the prosecution of the 2nd Petitioner are illegal, irregular and in breach of the Petitioners' constitutional rights and freedoms.
 - b. The attempted and purported stoppage of the 1st Petitioner's development, the continued harassment and intimidation of the Petitioners and their workers and the prosecution of the 2nd Petitioner in two different cases for the same offence alongside the 1st Petitioner's workers is being undertaken and pursued in an illegal, irregular and malicious manner and in breach of the Petitioners' constitutional rights and freedoms with a view to achieving selfish and ulterior motives rather than the genuine purpose of the law.
 - c. The Petitioners contend that the 1st and 2nd Respondents' actions of harassing, intimidating, purporting to stop and generally interfering with the 1st Petitioner's development is illegal and unconstitutional and the Petitioners invite the Honourable Court to make a finding under Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said actions by the 1st and 2nd Respondents are inconsistent with and in contravention of *the Constitution* of Kenya 2010.
 - d. The Petitioners also contend that the Respondents' actions of arresting and charging the 2nd Petitioner and the 1st Petitioner's workers is illegal and unconstitutional and the Petitioners invite the Honourable Court to make a finding under Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said arrest and prosecution said under the circumstances herein is inconsistent with and in contravention of *the Constitution* of Kenya 2010.
 - e. The harassment, interference and the purported/attempted stoppage of the 1st Petitioner's development as well as the criminal prosecutions of the 2nd Petitioner and the 1st Petitioner's workers were instigated and undertaken by the Respondents in an irregular and illegal manner and is intended to achieve ulterior motives, namely, to coerce the Petitioners to give in to the bribery demands by the Respondents and their officers.

VI. Brief Facts

8. The brief facts of the case are that the 1st, 2nd and 3rd Respondents allege that the Petitioners are undertaking an extension of the development by building 8th and 9th floors which were allegedly not approved and the allegations that the 2nd Petitioner did not comply with an enforcement notice are baseless and not true. Contrary to the Respondents' allegations, the 1st Petitioner's development was at all material times being undertaken and continues to be undertaken in compliance with the law.
9. The 1st Respondent granted approval to the 1st Petitioner's development on 11th June, 2018. The approval did not have limitation/restriction on the number of floors to be built by the 1st Petitioner while the approved plans clearly included 8th and 9th floors. The construction of 8th and 9th floors was not an "extension" but part and parcel of the development as approved. Further, the 1st Petitioner's development as approved by the 1st Respondent comprised of nine (9) floors which is what the 1st Petitioner has been constructing and developing at all material time. Without serving any enforcement notice as required by the law, the 1st and 2nd Respondents purported and attempted to stop the 1st Petitioner from continuing with the development.
10. Prior to the interference with and the purported stoppage of the 1st Petitioner development and charging of the 2nd Petitioner and the 1st Petitioner's workers in court, the 1st Respondent's officers had



solicited for bribes and attempted to extort resources from the Petitioners. The interference of the 1st Petitioner's development by the 1st and 2nd Respondents and the prosecution of the 2nd Petitioner and the workers was therefore driven by malice and intended to achieve ulterior motives, namely, to coerce the Petitioners to give in to the bribery demands by the 1st Respondent and its officers rather than to achieve the ends of justice. The 1st Petitioner's development was at all material times being undertaken in compliance with the law and with the full approval of the 1st Respondent and relevant bodies. The 1st Respondent granted approval to the 1st Petitioner's development on 11th June, 2018. The approval did not have any limitation/restriction on the number of floors to be built by the 1st Petitioner while the approved plans clearly included 8th and 9th floors. The construction of 8th and 9th floors was NOT an extension of the building as alleged by the Respondents but part and parcel of the development as approved. The Respondents alleged that the development was in breach of the conditions imposed by County Executive Committee Member which allegation is false, malicious and contrary to the law because the 1st Respondent's approval dated 11th July, 2018 granted the 1st Petitioner 12 months within which to commence construction and 24 months within which to complete the same. The 1st Petitioner commenced construction on 7th August, 2019 and therefore as at 31st March, 2021 when there was the first attempt to stop the construction and when the 2nd Petitioner was charged in court, the 24-month period had not lapsed.

11. Similarly, the arraignment in court and prosecution of the 2nd Petitioner and the 1st Petitioner's workers is driven by sheer malice, is in bad faith and is intended to achieve ulterior and collateral purpose, namely, to pressure the Petitioners to cede to the illegal bribery demands by the Respondents and their employees/officers and the prosecution is not intended to achieve legitimate objectives of administration of justice and the criminal justice system.
12. The prosecution of the 2nd Petitioner and the 1st Petitioner's workers is in bad faith, driven by ulterior motives, is against the interest of the criminal justice system and is in utter breach of the 2nd Petitioner's rights as guaranteed by *the Constitution* of Kenya, 2010 for the main reasons that:
 - i. Despite having charged the 2nd Petitioner in Criminal Case No. M. 079 of 2021 on 31st March 2021 with, inter alia, with the offence of developing extension of building without development permission, the Respondents again charged the 2nd Petitioner in Criminal Case No. M. 265 of 2021 on 5th July 2021 with the very same offence of developing extension of building without development permission.
 - ii. No enforcement notice was served upon the Petitioners as required by section 72 of the *Physical and Land Use Planning Act*, 2019 or at all.
 - iii. The Respondents have a grudge against the Petitioners who had declined to pay the bribe solicited by the 1st Respondent's officers.
 - iv. While the subject development was being undertaken by the 1st Petitioner which is a limited liability company with more than one director and shareholder, the Respondents targeted, singled out and charged the 2nd Petitioner because of the personal grudge they had with the 2nd Petitioner.
 - v. The 1st Petitioner's development had a valid approval issued by the 1st Respondent which was still valid as at March 2021, at the time of the attempted stoppage of the development and arraignment in court of the 2nd Petitioner and is still valid as at the date of this petition.
 - vi. The 1st Petitioner was not undertaking an "extension" of 8th and 9th floors as alleged by the Respondents but was constructing the building as approved by the 1st Respondent.



Specifically, the approval granted by the 1st Respondent on 11th July, 2018 did not put a limitation on the number of floors to be developed by the 1st Petitioner and the approved plans/drawings included 8th and 9th floors as part of the development.

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



Gabriel Okumu and charged them on 5th July 2021 with the offence of developing an extension of a building without approvals in Mombasa County Court “Criminal Case No. M 265 of 2021 Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu”. The three were later released on a cash bail of Kenya Shillings Five Thousand (Kshs 5,000/=) each.

- f. The 1st 2nd and 3rd Respondents were maliciously prosecuting him in both cases as no enforcement notice had been issued to him as provided by Section 72 of the [Physical and Land Use Planning Act](#) 2019. He further maintained that the Demand Notice/Stop Order that was served upon him could not be used in development as it’s not a legally recognized document under the [Physical and Land Use Planning Act](#) 2019. He argued that the Respondents were harassing and intimidating him and his site workers with criminal proceedings, despite having acquired all approvals and permits needed to develop. He maintained that the development was not in breach of the conditions set by County Executive Committee as the approvals given on 11th July 2018 allowed the 1st Petitioner a period of twelve (12) months within which to commence construction and twenty-four (24) months within which to complete the same. That the 1st Petitioner commenced construction on 7th August 2019 and his arrest happened on 31st March 2021 within the stipulated twenty-four (24) months period.
- g. He continued to argue that his prosecution and that of the 1st Petitioner was in bad faith, driven by ulterior motives and breaches his constitutional rights. He contended that the approvals granted by the 1st Respondent on 11th July 2018 never put a limit on the number of floors to be developed and the approved plans included the 8th and 9th floors.
- h. He argued that through the approvals were made before the [Physical and Land Use Planning Act](#) 2019 came into force, the said Act still applies to the construction by virtue of Section 92 of the Act. That Section 64 of the Act, gave the Petitioners 3 years before the development permission lapsed and not 1 year as purported by the Respondents, and Section 65, provides that sanctions can only be imposed if development is not completed within 5 years after development permission is granted.
- i. He stated that the Respondents were in violation of the provision of Sections 64, 65 and 92 of the [Physical and Land Use Planning Act](#) 2019 and breached the provisions of Articles 3, 10, 19, 20, 28, 47, 50, 157 and 244 of [the Constitution](#) of Kenya, 2010.
- j. The deponent urged court to stop the criminal charges which were instituted in bad faith and in utter abuse of the court process which had made him incur a hefty costs amounting to a sum of Kenya Shillings Fifty Million (Kshs. 50, 000,000.00).

VII. Submissions

- 14. On 19th June, 2023 in the presence of both parties the Court directed that the Petition be dispensed off by way of written submissions. Pursuant to that on 17th October, 2023 after the Honourable Court confirmed compliance the Honourable Court issued a judgment date on notice accordingly.

A. The Written Submissions by the 1st and 2nd Petitioners

- 15. On 12th May, 2023, the Learned Counsel for the 1st and 2nd Petitioners herein, the Law firm of Messrs. Oluga & Company filed their written submissions. Mr. Oluga Advocate commenced his submission by providing the Honourable Court with a brief background of the matter. He stated that 1st Petitioner is a limited liability company that deals in real estate development while the 2nd Petitioner is the 1st



Petitioner's Director. At all material times to the institution of this Petition, there was a development project undertaken by the 1st Petitioner on the suit property. It comprised a block of apartments known as Coral Pearl Executive Apartments on the property known as L.R. No. MN/1/5222 situate in Nyali off Links Road in Mombasa County.

16. He informed Court that the 1st Petitioner obtained the requisite approvals and licenses from the relevant bodies, including the 1st Respondent herein before commencing the development. While development was progressing, the Respondents alleged that it was being undertaken illegally and without necessary approvals. The Respondents made it impossible for the 1st Petitioner to proceed with the development by deliberately frustrating the works. However, the Respondents never served the Petitioners with an enforcement notice as required by law and never followed the legal procedure for stopping the development.
17. The 1st and 2nd Respondents' authorised officers, employees and county askaris visited the 1st Petitioner's development many times. Without following the laid down procedure, the said officers purported to stop the development under the guise that the same was being undertaken without approval by the 1st Respondent. Specifically, the Respondents alleged that the Petitioners were undertaking an extension of the development by building 8th and 9th floors which floors they alleged were not part of the approved plans/drawings. Further, the Respondents arrested and charged the 2nd Petitioner, who was the Director of the 1st Petitioner in the County Court of Mombasa with various offences relating to the development, to wit, "Mombasa County Court Criminal Case No. M. 079 of 2021: Republic – Versus - Dancan Odhiambo Omondi (Hereinafter referred to as "The Criminal suit No. 1").
18. As if the charging of the 2nd Petitioner was not enough, the Respondents rounded up the 1st Petitioner's workers on Saturday 3rd July 2021, arrested three of them and charged the trio in court on 5th July 2021 alongside the 2nd Petitioner (for the second time) with the offence of developing extension of building without development permission, to wit, "Mombasa County Court Criminal Case No. M. 265 of 2021: Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu. (Hereinafter referred to as "The Criminal suit No. 2")

Despite having previously charged the 2nd Petitioner in Criminal Case No. 1, on 5th July 2021 the Respondents again caused the arrest and charged the 2nd Petitioner in Criminal Case No. 2 with the same offence of developing extension of building without development permission. The charging and re - charging of the 2nd Petitioner with the same offence was not only illegal but was also sheer abuse of the criminal process and is a clear manifestation of the malice and vendetta which the Respondents had against the Petitioners. Upon being served with the Petition, the 1st and 2nd Respondents filed Grounds of Opposition dated and filed on 29th September 2021. However, the Grounds of Opposition were only in respect of the Petitioners' interlocutory application dated 21st July 2021. The 1st and 2nd Respondents also filed a Replying Affidavit sworn on 5th August 2021 by PAUL MANYALA, the Director of Planning for the 1st Respondents. Likewise, the 3rd Respondent filed Grounds of Opposition dated 2nd August 2021 and filed on 4th August 2021. Although the 3rd Respondent's Grounds of Opposition indicated in the opening Paragraph that it was in respect of the Petitioners' interlocutory application dated 21st July 2021, Ground 1 thereof showed that it was in respect of both the application and the main Petition. With the leave of Court, the Petitioners filed a Supplementary Affidavit sworn by the 2nd Petitioner in response to the issues raised in the Replying Affidavit of PAUL MANYALA.

19. The Learned Counsel contended that the stoppage of the development undertaken by the Petitioner and the prosecution of the 2nd Petitioner was illegal, irregular and in breach of the Petitioners'



constitutional rights and freedoms. The attempted and purported stoppage of the 1st Petitioner's development, the continued harassment and intimidation of the Petitioners and their workers and the prosecution of the 2nd Petitioner in two different cases for the same offence alongside the 1st Petitioner's workers was being undertaken and pursued in an illegal, irregular and malicious manner and in breach of the Petitioners' constitutional rights and freedoms with a view to achieving selfish and ulterior motives rather than the genuine purpose of the law.

20. He averred that that the 1st and 2nd Respondents' actions of harassing, intimidating, purporting to stop and generally interfering with the Petitioner's development was illegal and unconstitutional and he invited the Honourable Court to make a finding under Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said actions by the 1st and 2nd Respondents was inconsistent with and in contravention of *the Constitution* of Kenya 2010. He argued that the harassment, interference and the purported/attempted stoppage of the 1st Petitioner's development as well as the criminal prosecutions of the 2nd Petitioner and the 1st Petitioner's workers were instigated and undertaken by the Respondents in an irregular and illegal manner and was intended to achieve ulterior motives, namely, to coerce the Petitioners to give in to the bribery demands by the Respondents and their officers.
21. According to the Learned Counsel, the Honourable Court should determine the following two board issues. These are, firstly whether this Honourable Court has jurisdiction to hear and determine this Petition. He asserted that the gist of the 1st and 2nd Respondents' Grounds of Opposition dated was that this Honourable Court lacked jurisdiction to hear and entertain the matter pursuant to the provision of Section 72 of the *Physical and Land Use Planning Act*, 2019. However, the said Grounds of Opposition were in respect of the Petitioners' interlocutory application dated 21st July 2021 and not the main Petition.
22. However, since the 1st Respondent also alluded to the issue of jurisdiction at Paragraph 6 (b) of its Replying Affidavit, the Learned Counsel decided to address it. His understanding of the objection by the 1st Respondent was that the Petitioner should have raised the issues raised in this Petition at the Mombasa County Physical and Land Use Planning Liaison Committee instead. As a response, the Counsel stated that that challenge never lied because the Petitioners were NOT served with an enforcement notice as demonstrated below from the filed Supporting and Supplementary Affidavits:
 - i. In this case, no enforcement notice was served upon the Petitioners as required by Section 72 of the *Physical and Land Use Planning Act*, 2019 or at all. Section 72 of the *Physical and Land Use Planning Act*, 2019 requires a county executive committee member to serve the owner, occupier, agent or developer of property or land with an enforcement notice. It is only a person who has been served with an enforcement notice who may appeal to the County Physical and Land Use Planning Liaison Committee. The document which the 1st Respondent is relying on to demonstrate the Petitioners were served with an enforcement notice is a strange document which is unknown in law. The document, which has been exhibited in the Replying Affidavit as annexure "PM-4" is called "Notice of Prosecution/Enforcement." Section 72 does not provide for service of "Notice of Prosecution/Enforcement". What is provided for at Section 72 of the *Physical and Land Use Planning Act*, 2019 is "Enforcement Notice" and NOT "Notice of Prosecution/Enforcement." Therefore the document which the Respondents are relying on is unknown in law, it is illegal and unlawful. It is only a proper enforcement notice that gives a person the right to appeal to the County Physical and Land Use Planning Liaison Committee and not just any other document. The Petitioners case in this Petition is that they were not served with a proper enforcement notice and therefore they could not appeal to the County Physical and Land Use Planning Liaison Committee.



The Petitioners have expressly pleaded that the Respondents have not served the Petitioners with the enforcement notice and have not followed the legal procedure for stopping the development [paragraphs 8, 24, 31 (ii) and 43 (i) of the Petition as well as grounds 3, 14, 21 (ii) of the application].

23. The second reason why the right to appeal to the County Physical and Land Use Planning Liaison Committee did not accrue to the Petitioners was because the provision of Section 72 of the *Physical and Land Use Planning Act*, 2019 requires the County Executive member to serve the “owner, occupier, agent or developer of property”. The so called “Notice of Prosecution/Enforcement” was received by one SAITOTI E. who was not an authorised person of the 1st Petitioner’s for purposes of service of documents because he is not a Director, shareholder, agent or authorised officer of the 1st Petitioner. The persons who was served is not “owner, occupier, agent or developer.” The Petitioners’ right to appeal to the County Physical and Land Use Planning Liaison Committee could only accrue if an enforcement notice was served upon them in the manner provided for in section 72 of the Act. In this instance, the purported notice, in addition to the fact that it was unknown in law, was not served upon the Petitioners and therefore, the Petitioners’ right to appeal to the County Physical and Land Use Planning Liaison Committee did not arise.

24. The third reason why this court must reject the Respondents’ challenge of jurisdiction was because there was no County Physical and Land Use Planning Liaison Committee in Mombasa County. None had ever been constituted and none was in existence. The Petitioners could not appeal to a non-existent entity. It was now well settled that where a remedy was provided in law but the same was not available or accessible, an aggrieved party could bypass that legal remedy and seek redress in court. To buttress on that point, the Learned Counsel cited the case of:- “Okiya Omtatah Okiiti – Versus - Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR where Mativo, J. held that where a remedy provided for in law is practically a mirage, the court cannot shut its eyes. The Judge held as follows:-

“39. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person’s right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved.”

25. Similarly, in the case of:- “Savraj Singh Chana – Versus - Diamond Trust Bank (Kenya) Limited & another [2020] eKLR, Korir, J. held that the doctrine requiring exhaustion of legal remedies has exceptions. The Judge pronounced himself as follows:-

“Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route.”

He noted that the above authorities were filed in court together with the Petitioner’s application for conservatory order filed on 5th November 2021. Since the Mombasa County Physical and Land Use Planning Liaison Committee never existed, even if the issues raised in this case fell under the jurisdiction of the said Committee, it was not practically possible to refer the dispute to it because it never existed. This case therefore fell under the exceptions which would entitle the court to assume jurisdiction.

26. The fourth reason why the objection to this court’s jurisdiction is not well founded was because the issues raised in the Petition could not be determined by the Committee. The order seeking a declaration



that the criminal proceedings against the 2nd Petitioner could only be granted by this Honourable Court in the manner and context in which they have been sought (use and occupation of land).

27. The Learned Counsel also submitted that the issues raised in the 3rd Respondent's Grounds of Opposition were baseless and could not be cited to challenge this court's jurisdiction. Whether the orders sought were premature; whether the Petitioners had demonstrated how the 3rd Respondent violated his powers under the provision of Article 157; whether there was material non-disclosure; and whether the action taken by the 3rd Respondent violated the Petitioners' rights were all issues that touched on the merit of the Petition and could not be issues for Preliminary objection to this court's jurisdiction.
28. On whether the Petitioners' rights were guaranteed by the remedies available under the provision of Sections 204, 210, 211 and 215 of the Criminal Procedure Code as alleged by the 3rd Respondent, the Learned Counsel asserted that those provisions related to the proceedings before the trial court. The 2nd Petitioner could not wait to go through the trial when the charges levelled against him were in the first place in breach of his constitutional rights as pleaded in the Petition. Hence, he held that this Honourable Court has jurisdiction to stop the charges rather than wait for the 2nd Petitioner to go through the motions of trial and seek redress before the trial court by invoking Sections 204, 210, 211 and 215 of the Criminal Procedure Code which only come to play after the 2nd Petitioner had answered the malicious charges and had stood trial.
29. Secondly, whether the court should grant the orders sought in the Petition. He responded in affirmative. He submitted that the orders sought in the Petition were merited and should be granted. The Respondents alleged that the 1st Petitioner's development was being undertaken illegally and without necessary approvals and that the 1st Petitioner exceeded the number of floors approved by the 1st Respondent. On that issue, the Learned Counsel submitted as follows:
 - i. There was no doubt that the 1st Petitioner was granted approval for its development. Both the Petitioners and the 1st Respondents had exhibited the approval; save that the one exhibited by the Respondent though similar in content to the one exhibited by the Petitioners, never bore the requisite official stamp. There was therefore no doubt that the 1st Petitioner was granted approval by the 1st Respondent.
 - ii. On the second allegation that the Petitioners had exceeded the number of permitted floors. He held that it was not true that the 1st Petitioner's development was limited to 7 floors. The approval exhibited by both sides never specified the number of floors and clearly indicated that the number of floors was left blank as follows - "No of floors-". The 1st Respondent could not accuse the Petitioners of developing more than approved floors. There was no limit on the number of floors in the approval. The drawings exhibited by PAUL MANYALA in the Replying Affidavit to purport that the number of floors was limited to 7 never belonged to the 1st Petitioner and was not the ones which the Petitioners submitted for approval on behalf of the 1st Petitioner. The Supplementary Affidavit by the 2nd Petitioner had clearly explained why the drawings submitted by the 1st Respondent was fake and the proper drawings which never showed that the floors were only 7 had been exhibited. For the reason given at above, he urged Court to allow the Petition should be allowed. Despite having previously charged the 2nd Petitioner in Criminal Case No. M.079 of 2021 on 31st March 2021, the Respondents again charged the 2nd Petitioner in Criminal Case No. M. 265 of 2021 on 5th July 2021 with the same offence of developing extension of building without development permission. Clearly, this was evidence of malice. The charging and re-charging of the 2nd Petitioner with the same



offence was not only illegal but was also sheer abuse of the criminal process and was a clear manifestation of the malice and vendetta which the Respondents had against the Petitioners. The allegation that the 1st Petitioner never notified the 1st Respondent was purely false. The 1st Respondent was notified as pleaded and evidenced in the Supplementary Affidavit. The 1st Respondent despite being notified of the commencement of construction and being expressly requested to send an inspector, deliberately declined to do so. The law never provided for a “Stop Order.” The said document was illegal and supported the Petitioners’ position that the orders sought in the application should be allowed.

30. On contrary to the 1st Respondent’s allegation that they were enforcing the law and protecting the public, the Respondent’s was abusing the legal process to achieve ulterior motives. How could they allege that the Petitioners were building more than approved floors yet the copy of the approval they themselves have filed in court never provided on the number of floors to be build. The attempted and purported stoppage of the 1st Petitioner’s development, the continued harassment and intimidation of the Petitioners and their workers and the prosecution of the 2nd Petitioner in two different cases for the same offence alongside the 1st Petitioner’s workers was being undertaken and pursued in an illegal, irregular and malicious manner and in breach of the Petitioners’ constitutional rights and freedoms with a view to achieving selfish and ulterior motives rather than the genuine purpose of the law.

In a nutshell, the Learned Counsel stated that they had demonstrated the following which warranted the granting of the orders sought:

- i. The criminal prosecution of the 2nd Petitioner was malicious.
- ii. The approval of the 1st Petitioner’s development never provided any limit on the number of floors.
- iii. The 1st Respondent had relied on fake documents which was a clear manifestation of their malice.
- iv. The 2nd Respondent never filed any response despite being sued in her personal capacity and despite weighty and serious allegations of abuse of office being raised against her.

For the foregoing reasons, he urged the Honourable Court to allow the Petition.

B. The Written Submissions by the 1st and 2nd Respondents.

31. On 19th June, 2023, the Learned Counsel for the 1st and 2nd Respondents being from the offices of the County Attorney for the County Government of Mombasa filed their written Submissions. M/s. Kizingo Advocate started by providing an introduction of the matter. She stated that the Respondents adopted the Affidavit of Paul Manyala sworn in response to the Notice of Motion Application as their response to the Petition. It was worth noting that, the Petitioner relied on that Affidavit in their submissions to the Petition as well. She provided the Court with brief facts of the case. She held that the 1st Petitioner, through the 2nd Petitioner made an Application for construction and also presented a building Plan for approval by the 1st Respondent which was approved on 11th July, 2018. The approval came with conditions which were stated in the Notification of approval of the application for development permission (PPA 2) issued on 11th July, 2018. The Petitioners failed to comply with the conditions attached to the Approval in the following ways. The 1st Petitioner failed to notify the 1st Respondent of the intended construction within 48 prior to commencing construction effectively failing to comply with condition number 1 of the PPA - 2. The reason for the 48 hour notice prior to commencing construction is to enable the 1st Respondent to allocate a building inspector to ensure that buildings was constructed in a manner that did not pose a danger to the members of the public.



32. The Learned Counsel averred that failure to provide the Notice meant that the building was not allocated an inspector and as such, construction proceeded without it being inspected by the 1st Respondent's building inspectors contrary to condition no. 8 of the PPA - 2. Regardless, the 1st Respondents officers visited the construction site and requested the 1st Petitioners agents including the 2nd Petitioner to produce documents pertaining to the construction which they failed to do. Attempts by the Petitioners to cure failure to Notify the 1st Respondent of commencement of construction. Upon being notified of their failure to notify the 1st Respondent of their intention to commence construction, the 2nd Petitioner attempted to cover up the mistake by presenting annexure B in the Supplementary Affidavit. Anyone familiar with filing online applications/forms can tell that the Application was made after filing of suit for purposes of covering the mistake made by the Petitioners. The red markings on the Application showed the mandatory information that ought to be shared by the Applicant and disappear after providing the required information and submitting the Application. The fact that the red markings are showing in the "Application" proved that it was never submitted at the appropriate time.
33. The Learned Counsel contended that the 1st Petitioner failed to co - operate with 1st Respondent's officers, upon which its officers issued the 1st Petitioner with a Notice to stop the construction works and also produce the requisite documents which Notice was received on 9th February, 2021. After failing to provide the documents requested by the 1st Respondent's officers, the officers used the information on the board displayed on site to look into the details pertaining to the construction from the 1st Respondent's records and found out that, the Petitioners constructed additional floors without the 1st Respondent's approval thereby effectively compromising the building.
34. With regard to the criminal charges, the Learned Counsel submitted that the preamble to the Physical Planning and Land Use Act stipulates it's purpose as follows:

“ An Act of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes.

Despite being issued with a Notice on 9th February, 2021, the Petitioners continued with construction prompting the 1st Respondent to issue a second Notice, an enforcement notice on 13th May, 2021. Just like it was on the first notice, the second one was ignored by the Petitioners prompting the 1st Respondent to arrest the 2nd Respondent who was an agent of the 1st Respondent.

On 5th July, 2021 the 2nd Petitioner was arrested and charged with failing to comply with the enforcement Notice served under the provision of Section 72 (1) as read with Section 72 (2) of the Planning Act, developing extension of a building without first obtaining development permission contrary to Section 57 (1) as read with Section 57(2) of the Planning Act and contravening conditions imposed by County Executive Committee Members contrary to Section 67 of the Planning Act. This was clear from the copy of the Charge Sheet provided as annexure marked as "PM – 5" of the Affidavit by the Respondents.

35. The Learned Counsel averred that there was misrepresentation of facts as to issuance of a Notice. She stated that the Petitioners failed to produce documents pertaining to the construction during a site visit by the 1st Respondents. It was clear that the Petitioners misrepresented facts when they filed the Petition stating that they were not issued with an enforcement Notice to gain Court's sympathy by presenting themselves as persons affected by the arbitrary actions of the 1st Respondent thus hoodwinking the Court into granting the ex-parte orders which were unfortunately confirmed upon review. The attempts to discredit the Notices could pass as attempts to cover up the misrepresentation



to enable the, continue to reap the benefits of misleading the Court. This should not be entertained at all costs.

36. With regard to the Petitioners' justification for constructing extra floors. The Learned Counsel submitted that the Petitioner's excuse for not sticking to the number of floors presented in the structural plan as per Paragraph 12 of the Supplementary Affidavit of the 2nd Petitioner was that:

“ Even the PPA 2 exhibited in the Replying Affidavit of PAUL MANYALA did not specify the number of floors. The 1st Respondent cannot blame the Petitioner for developing more than approved floors because there was no limit on the number of floors on the approval”

The Petitioners was using the oversight by the 1st Respondent to construct extra floors. However, what they failed to acknowledge was that the approval was obviously based on the structural plan they presented. This meant the extra floors had not been approved by the 1st Respondent and the “new structure” was unknown to the 1st Respondent and was therefore illegal as it never corresponded to the structural plan presented by the Petitioners. She opined that the fact that the building exceeded seven storeys meant that the development where the building works was inconsistent with the plans approved by the 1st Respondent. In this regard, the Petitioners violated the provision of Section 67 of the Physical Planning and Land Use Act which Provides as follows:

“ 67.

- (1) A person commits an offence if that person-
 - (a) Uses or permits to be used any land or building in contravention of any conditions imposed by a county executive committee member when granting development permission; or
 - (b) Commences, undertakes or carries out-
 - (i) A development where development permission has been revoked;
 - (ii) A development where development permission has been modified and the development does not comply with the modifications in the development permission; or
 - (iii)) A development where the building works are inconsistent with the plans approved by the county executive committee member.
(Emphasis added)

37. According to the Learned Counsel, the Petitioners filed the present suit upon being charged for as indicated above and were initially denied conservatory orders before seeking for review of the Orders upon which the Court allowed their Application. The implication of the Order had been that:

“



“(1) The Petitioners have continued with the construction of additional floors on suit property despite the structural drawings provided during application for approval indicating that they intended to construct a seven storey building. Therefore, the Petitioners unilaterally “amended” the structural drawing and abused the Court process to obtain Conservatory Orders to allow them to continue with the illegal construction of additional floors on the suit property in contravention of section 57(1) and (2) of the Physical Planning Act which provides as follows:

(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.

(2)

(2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.

38. In addition, the Petitioners were also in violation of the terms specified in the Approval relating to the seven storeys as indicated previously in these submissions. By failing to comply with not one but two notices issued by the 1st Respondent, the Petitioners violated the provision of Section 72(1) and (2) of the Physical Planning and Land Use Act and are liable under section 72(5) of the Act which provides as follows:-

(5) A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.

The Petitioners never possessed an approved building plan backed up by structural plans approved by the 1st Respondent for the over 9 floors constructed on the suit property.

39. It was the contention by the Learned Counsel that the Petitioners had not shown any statutory breach on the part of the Respondents to warrant them filing this Petition. To buttress on that point, she cited the case of “Crystal Charlotte Beach Resort v Registrar of Lands, Bondo & 5 others [2022] eKLR which observed as follows:

“The 5th Respondent has also confirmed in the Replying Affidavit that the structures that are still standing after the floods are those that were built as suspended structures in accordance with the structural drawings and that the structures that submerged are those that were built on ground level which were never authorized. The Petitioner by building structures not approved by the 5th Respondent and the 4th Respondent acted contrary to the law. (Emphasis added). The essentials of a cause of action in event of a statutory breach, is highlighted in Halsbury's Laws of England 3rd Ed.Vol. 36 para. 689 in the following words:

“In order to succeed in an action...for breach of statutory duty the plaintiff must establish a breach of a statutory obligation, which on the proper construction of the statute was intended to be a ground of civil liability to a class of person of whom he is one; he must establish an injury or damage of a kind



against which the statute was designed to give protection and must establish that the breach of statutory obligation caused, or materially contributed to, his injury or damage.....Although the Petitioner herein had stated that the Respondents owed him a duty of care and that the government was aware that flooding would occur cyclically, the government ought to have ensured that the information is availed to the public. This court is of the view that since the Petitioner had constructed structures contrary to the structural drawings submitted for approval, the structures built contrary to the law (emphasis added) were destroyed by the floods while the suspended structures were not destroyed by the floods, the Petitioner cannot hold the Respondents liable.”

40. Similarly, the Learned Counsel averred that the extra floors were constructed illegally as they were constructed contrary to the structural drawings submitted for approval by the 1st Respondent. The Petition was in bad faith as it was motivated by the need to avoid non - compliance with the provisions of the Physical Planning and Land Use Act. It was motivated by the Petitioners need to stop the 1st Respondent from questioning them for violating the provisions of the Physical Planning Act. As at the time of filing of this Petition, photos of the construction which was the subject matter of the suit showed that the Petitioners had constructed more than 9 floors and was not easy to tell how far they would go in view of the conservatory granted pending hearing and determination of the Petition especially since the interim orders permitted them to continue construction without interference from the Respondents who were tasked with ensuring that the buildings in Mombasa never endangered the lives of residents within the County.
41. The Learned Counsel urged the Court to dismiss the Petition as allowing it will lead to a legal quagmire for the following reasons:
- (1) There would be no blaming the 1st Petitioner should the building collapse. This was because, the 1st Respondent would easily deny responsibility by saying that it wanted to do its duty as the public entity in charge of ensuring compliance with the Physical Planning and Land Use Act but it's efforts were curtailed by virtue of pronouncements of the Court. There would be no reason to disallow the 1st Respondent from performing it's legal mandate.

Members of the public reasonably expect that laws would be enforced in such a manner to ensure that persons such as the Petitioners never usurped the powers of the 1st Respondent bestowed upon it by Statute and take matters into their own hands when it came to issues that concerned the safety of buildings. Kenya was by no means a banana republic and the Petitioners should not be allowed to send a message to the wider public that the Court would aid individuals in blatant disregard of laid down laws to serve their personal interests.

42. The Petitioners were seeking the permission to be allowed to continue endangering the lives of members of the public while preserving private interests disguised as public interests pending hearing and determination of the Petition. The Counsel averred that, the Petitioners sought to have what they claimed was a “right” resulting from the oversight by the Respondent to justify the extra floors. They wanted the Court to help them perpetuate and sustain an illegality. The resultant effect was having a building whose ability to sustain extra floors had not been ascertained by the 1st Petitioner with the potential of it collapsing thus threatening the lives of members of the public which if lost, could not be recovered. No amount of compensation could bring back someone to life. It was therefore in the interest of the greater public that the Petition was disallowed. It would be better to decline to allow the Petition by considering the interests of the larger public. The expiry of the Approval pertaining to the seven storey building was issued on 11th July, 2018. The Approval for the seven storey building



having been granted on 11th July, 2018, the Petitioners ought to have completed construction within 24 months from the date the approval was granted. It was worth noting that the period never started running when the construction commenced as alleged by the Petitioners. Therefore, it was the Learned Counsel's contention that the fact that the Petitioners commenced construction on 7th August, 2019 which was one year after the approval for the seven storey building was granted meant that they ought to have completed construction by 11th July, 2020 unless the period was extended by the 1st Respondent upon application by the Petitioners. There was no evidence that an Application for extension of time was ever made by the Petitioners.

43. The Petitioners sought to rely on the provision of Section 92 of the Physical Planning and Land Use Act which provides as follows to escape the condition on the approval touching on time:

92.

- (1) Any approval for development granted in accordance with the provisions of any written law in force immediately prior to the commencement of this Act shall be deemed to be a development permission granted under this Act.
- (2) Despite the provisions of sub-section (1), if a development for which approval was granted under the provisions of any written law in force immediately before the commencement of this Act shall not have been commenced within twenty-four months of the commencement of this Act that development approval shall lapse.
- (3) Where an application for development had been made under the provisions of any written law prior to the commencement of this Act and approval has not been granted, that application shall be deemed to be an application for development permission under this Act and shall be deemed to have been made on the date of the commencement of this Act.

44. The Counsel submitted, that there was nothing in the transition provisions under the Physical Planning and Land Use Act above to suggest that the Act aimed at ensuring that the timelines provided in the approvals issued under the old Act should be revised to commensurate to the commencement of the present Act. The provisions of Section 92 was aimed at ensuring that approvals issued under the old law was recognized under the new law and that was just about it. At no point did the Act sanction retrospective application of its provisions as suggested by the Petitioners. To buttress on this point, the Counsel referred Court to the case of:- "Golden Line International Limited – Versus - Bluesea Shopping Mall Limited & 3 others [2016] eKLR where the Court noted that the issue of retrospective application of the law was settled by the Supreme Court in the case of "Samuel Kamau Macharia & An. – Versus - Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR where it was held:-

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect/ is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature”.

45. The Counsel urged the Court to find that reliance by the Petitioners on Section 92 of the Act to support the argument by the time for completing construction started running on 7th August, 2019 as opposed to when the approval was issued would amount to retrospective application of the law and therefore untenable.
46. On the allegations of a grudge, the Learned Counsel held that the Petitioners sensationally claimed that the 1st Respondent stopped their construction owing to the fact that some of the 1st Respondents



Officers had a personal grudge with them. The Counsel asserted that the allegations was a desperate attempt by the Petitioners to play victim in the face of obvious violations of the Physical Planning and Land Use Act. The allegations never justified the Petitioners noncompliance with the Act. Therefore, she urged the Court to find that the allegations which formed the basis for a defamation suit against the Petitioners had no bearing on the issues that led to the issuance of the stop Order.

47. In conclusion, the Learned Counsel stated that it was the Petitioners who were guilty of breach of Statute. They filed this Petition to stop the 1st Respondent from exercising its statutory mandate against them as such, the Petition never revealed existence of a cause of action against the Respondents. The issue of existence of personal vendetta had not been proved and even if it was it never absolved the Petitioners from complying with the provisions of the Act. Thus, the allegations of vendetta were a desperate efforts by the Petitioners to discredit the 1st Respondent in an attempt to stop it from enforcing conditions set out under the Act that were violated by the Petitioners namely violation of sections 52, 67 and 72 of the Physical Planning and Land Use Act. The Petitioners lacked valid approvals for the over 9 floors constructed on the suit property and was therefore undertaking illegal construction which was likely to injure the general public in the event that it collapses as the building's ability to withstand the weight of additional floors was not ascertained by the 1st Respondent. The Petitioners had no valid approvals and structural plans for the over 9 storeys they had constructed as such the construction was illegal for want of approval. The Petitioners denied the 1st Respondent revenue by failing to seek approval of the extra floors. The approval fees was charged according to the number of floors and the Petitioners presenting and paying for 7 floors while proceeding to construct over nine floors was not only illegal but also an attempt to fleece members of the public. The Petitioners violated various conditions stipulated under the approval issued in respect of the 7 storey building as indicated previously in these submissions and was guilty of approaching the Court with unclean hands. The Petitioners sought protection of the Court under the provisions of the Physical Planning and Land Use Act, *the Constitution* and related laws while at the same time failing to abide by those laws forgetting that the constitutional rights they claim was not absolute and would not protect any individual who disobeyed then law and only sought it's selective application to suit their interests. The 1st Respondent was correct in charging the Petitioners for violating the provisions of the Physical Planning and Land Use Act, Therefore, this Petition ought to be dismissed for lack of merit to enable the Petitioners face the full force of law in regard to the criminal charges that prompted filing of this Petition. The Learned Counsel urged Court to find that the Petition lacked merit based on the submissions above and dismiss it with costs.

C. The Written Submission by the 3rd Respondent

48. On 16th June, 2023, the Office of the Honourable Attorney general for the 3rd Respondent filed their written Submissions. M/s. Maureen Ayumba a Senior Prosecution Counsel commenced her submissions by providing the Court with some brief facts of the case. She stated that the Petitioners filed their Petition dated 21st July, 2021. Thereafter, the 3rd Respondent filed grounds of opposition on 4th August, 2021 opposing the said Petition. On 12th May, 2023 the Petitioners filed their submissions to the main Petition and it was on that basis that they wished to respond. The Learned Counsel submitted on two (2) broad issues for the determination by the Honourable Court as follows:-
49. Firstly, whether the commencement of criminal prosecution was for ulterior motive. The Learned Counsel averred that the Petitioners had submitted that the action of charging the 2nd Petitioner and 1st Petitioner's workers were based on ulterior-motive and in breach of *the Constitution*.

Despite the Petitioner having submitted that the prosecution was a means to extort from the Petitioners financially. She submitted that there was no evidence brought forth to show that the 3rd Respondent



had any hand in any bribery attempts and had acted in contravention of the provision of Article 47 of *the Constitution* of Kenya, 2010. She contended that the provision of Sections 107 (1), (2) and 109 of the *Evidence Act* lay a burden on the Petitioners to lay a basis of each infringement through factual proof. The provisions require whoever desired any court to give Judgment as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed. To support her argument, the Counsel cited the case of:- “In Communications Commission of Kenya & 5 Others – Versus - Royal Media Services Limited & 5 Others [2014] eKLR as follows:-

“ Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance”.

50. The Counsel opine that this principle emerged clearly from the High Court decision in the case of:- “Anarita Karimi Njeru – Versus - Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle played a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
51. According to the Counsel, there was no factual proof to suggest that the petitioners were extorted by officers of the 3rd Respondent. The decision to charge as made by the 3rd Respondent was sound and could not be construed to be in contravention of article 47 of *the Constitution*.
52. The Counsel’s contention was that if there was any act of bribery instigated by officers of the 1st Respondent then the same was never brought to the attention of the 3rd Respondent. Moreover, the Petitioners had an option to seek that the matter be reviewed through raising a complaint with the 3rd Respondent which they never did. She asserted that the Petitioners had failed to demonstrate to the court how the 3rd Respondent in his actions acted contrary to public interest, the interests of the administration of justice or failed to prevent and avoid abuse of the legal process. Notably if there was any act of bribery instigated by officers of the 1st Respondent then the same was never brought to the attention of the 3rd Respondent. She submitted that the 3rd Respondent had a constitutional mandate under the provision of Article 157 of *the Constitution* to ensure that offences were prosecuted and those culpable attended to as the law required. That in the performance of its duty the 3rd Respondent also had a duty to ensure that the Petitioners were not subjected to an unwarranted criminal process. The fact that the 3rd Respondent upon review of the matter found it suffice to pursue charges against the Petitioners could not be construed as an act of biasness. Therefore, the Learned Counsel held that the Petitioners had failed to show how the institution of the charges was an abuse of the criminal process. The Petitioners had failed to prove that the commencement of the criminal proceedings infringed the provision of Articles 10, 47 and 157 of *the Constitution* of Kenya, 2010.
53. Secondly, the Learned Counsel submitted on whether the Petitioners were entitled to the reliefs sought. The Counsel averred that the Petitioners had sought for an order of Certiorari to quash the decision to charge the 1st Petitioner workers and 2nd Petitioner in criminal case M079/2021 and M265/2021. They had also sought for declaratory reliefs that the criminal charges levelled in criminal case number 1 and 2 were illegal null and void. She held that the provision of Article 157 of *the Constitution* establishes



the Office of the Director of Public Prosecutions, the exercise of prosecutorial powers is provided under article 157(6) to 157(12) as follows:-

- “(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--
- a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority: and
 - c) subject to clause (7) and (8), discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph(b).
- 7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
- 8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
- 9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
- 10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- 11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

54. Furthermore, the provision of Section 4 of the Office of Director of Public Prosecutions Act No.2 of 2013 provide for the manner in which the DPP ought to discharge its mandate as follows:

- “(4) In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles-
- (a) the diversity of the people of Kenya;
 - (b) Impartiality and gender equity;
 - (c) the rules of natural justice;
 - (d) promotion of public confidence in the integrity of the Office:



- (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- (g) protection of the sovereignty of the people;
- (h) secure the observance of democratic values and principles; and
- (i) promotion of constitutionalism.

55. Thus, the Learned Counsel submitted that the provision of Article 157(6) and (10) of *the Constitution* allowed the 3rd Respondent to commence criminal proceedings without anyone's direction. Although the 3rd Respondent was not bound by any directions or control by any institution, she was privy to the fact that this Honourable court has the power under the provision of Article 165 (3) (d) to cause such interference, however it was a must to be shown that the 3rd Respondent had improperly discharged its function amounting to an abuse of the court process to cause such interference by the courts. To buttress on this point, the Counsel cited the Court of Appeal case of:- "in Diamond Hasham Lalji & another – Versus - Attorney General & 4 others [2018] eKLR stated as follows:-

"Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the Courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases."

In Municipal case M79/2021, the 2nd Petitioner was charged with failure to comply with an enforcement notice served under Section 72 (1) as read with Section 72 (2) of the Physical and Land Planning Act 2019 and 2nd count of developing extension without first obtaining development permission.

56. The Petitioners' dispute that the notice as served upon them was not a proper enforcement notice, in accordance with the *Physical and Land Use Planning Act* 2019 however, she submitted that the *Physical and Land Use Planning Act* 2019 does provide a template of the enforcement notice but under the provision of Section 72 (2) give specifications of what an enforcement notice should contain.

Section 72(2) provides:-

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 other activities.

Notably under the definition section of the *Physical and Land Use Planning Act* 2019 "an enforcement notice" is construed as:-

"enforcement notice" means a notice served by a planning authority on a developer under the provisions of section 72 of the Act communicating the intention of the planning authority



to correct a breach or act on development that has been undertaken without planning permission or in contravention of planning permission granted;

57. That the Petitioners had not contended that they were not served with an enforcement notice as contemplated under the provision of Section 72 of the [Physical and Land Use Planning Act](#) 2019. The Learned Counsel argued that though the notice that was served to the Petitioners' read "notice of prosecution/enforcement" what was of utmost importance in making the decision to prosecute, was whether the requirements of specification in the document that was served upon the Petitioners met the requirements of the provision of Section 72(2) of the Physical and Land Planning Act 2019 which the Petitioners had failed to dispute.

58. Further, the Learned Counsel asserted that although the Petitioners contended that the notice served upon them was not served by a County Executive Committee Member, she submitted that the notice marked as "PM - 4" was signed by Honourable Taufiq Balala from Mombasa County executive and the Petitioners had failed to establish that the said person was not a committee member.

That under the [Physical and Land Use Planning Act](#) No 13 of 2019 "an enforcement officer" is provided as:-

"enforcement officer" means an officer mandated by the planning authority to take action on any development that contravenes development permission or takes place without development permission or breaches the development specifications of the drawings and plans

59. She submitted in checking compliance with the provision of Section 72 (1) of the [Physical and Land Use Planning Act](#) 2019 of importance was that the document originated from the Mombasa County Executive Committee and the service was through use of its enforcement officer namely Mr Abbas and therefore there was full compliance by the 1st respondent with the statutory requirements which the prosecution considered in making the decision to charge the petitioners with the said offence.

Notably, though the Petitioners had submitted that service was never effected to them since the notice was served upon Mr. Saitoti, the burden lay upon them to confirm the fact that Mr. Saitoti was not an unauthorized officer, which burden they had failed to discharge under the provision of Section 107 of the [Evidence Act](#). She further submitted that the 1st Petitioner's workers and the 2nd Petitioner were charged with developing an extension of building without first obtaining development permission. According to the evidence presented by the 1st Respondent officers to the 3rd Respondent there was an indication that the Petitioner construction was upto seven floors, this was according to the plans submitted in the investigation file. Moreover, the PPA - 2 form dated 11th July, 2018 which was submitted in the investigation file gave a condition that the Petitioners were to execute the proposal in strict conformity with the architectural plans and structural plans approved by the Director of Planning and County Engineer.

60. Thus, it was the 1st Respondent's contention that the continued construction wasn't approved and would endanger lives as a building inspector was not allocated. The Petitioners' contention was that the approval plans submitted by the 1st Respondent were fake. It should be noted that the 3rd Respondent's function and duty were informed by investigations done by officers of the 1st Respondent hence the decision to charge. It ought to be borne in mind that even when various complaints were filed to enforcement agencies, there was an underlying duty by enforcement agencies to conduct investigations to establish the veracity of the complaints, which would then cause the 3rd Respondent to make decision to charge, dependant on evidentiary value as contained in the respective investigative files as the case herein. However, she submitted that in making a decision to charge a two stage test must be



borne in mind, the evidential test which allows charging on threshold basis of evidence which may not be complete and public interest test. She asserted that the 3rd Respondent had reasonable grounds to believe the Petitioner had committed an offence hence the decision to charge. To support this legal position she cited the case of:- Hon. Rudd in “Kagane – Versus - Attorney General & another 1969 EA 643 reiterated as follows:-

“to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he Instituted the prosecution whether the material consisted of the facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

61. The Counsel submitted that on a merit analysis, the only proper avenue to address the issues of genuineness of the approvals as alleged by the Petitioners and the 1st Respondent would be the trial court. The Counsel further relied on the case of:- “Republic -Versus - Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR the Court expressed itself as follows: -

“... The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial...”

She further submitted that the 2nd Petitioner contended that he had been charged in criminal case no. 1 and criminal case No. 2 for the same offence of developing extension of a building without development permit. On this issue, the Counsel admitted that although the Petitioner was charged twice based on the commission of the same offence, from the particulars of the offence, the acts were construed to have occurred on separate dates, hence a continuous offence. It was quite feasible that multiple criminal offences may arise out of the same transaction. In such situations the court generally ought to take into account two tests:

- i. Same evidence test
- ii. Same transaction test

That the date and time of commission of an offence is a matter of fact as envisaged, that was subject to proof before a court of law. The mere fact that the 2nd Petitioner had been charged in two criminal cases borne out of a continuous act, did not invalidate the trial process. The Applicant had not demonstrated that the Respondents failed to act independently or acted capriciously, in bad faith or abused the process in a manner as to trigger the High Court's intervention.

62. That the prayers sought by the Petitioners against the 3rd Respondent sought to curtail the 3rd Respondent from undertaking his statutory and constitutional mandate to prosecute a criminal matter as provided, whereas, the 3rd Respondent had acted within the confines of Article 157 of Constitution. To back her up, she referred Court to the case of:- “Hon. James Ondicho Gesaml – Versus - The Attorney General & Others, Petition No. 376 of 2011, it was observed that:-

“.....The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges...In my view, requiring that the Petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by *the Constitution* does not in any way amount to an attack on his human dignity in violation of his constitutional rights.” Indeed, according to the Counsel



what was left was for the trial court to independently assess the evidence that would be presented by the prosecution witnesses, to ascertain whether there was reasonable cause to convict or acquit. To that end it could not therefore be construed that the commencement of criminal proceedings against the Petitioners was malicious. Notably, there was nothing to infer that the Petitioners would not be accorded a fair trial or enjoy equal protection of the law.

63. In conclusion, the Learned Counsel submitted that the Petitioners had not satisfied the tests for judicial review set out in the provision of Section 4 of the *Fair Administrative Action Act*. The Petitioners had failed to prove illegality, irrationality, impropriety or unreasonableness on the part of the 3rd Respondent hence were not entitled to the orders sought. For these reasons, the Counsel urged the Honourable Court to find that the Petition herein had no merit and hence should be dismissed.

VIII. Analysis and Determination

64. I have carefully considered all the filed pleadings pertaining to the Petition dated 21st July, 2021, the Supporting affidavit, the Replies by the Respondents herein, the written submissions and the plethora of cited authorities by the parties, the provisions of *Constitution of Kenya, 2010* and the law.
65. For the Honourable Court to reach an informed, fair, reasonable and Equitable decision, it has crystalized the subject matter into the following four (4) salient issues for its determination:-
- a. Whether the Petitioners through its filed Petition dated 21st July, 2021 have met the threshold of a Constitutional Petition.
 - b. Whether the Petitioners' fundamental rights and freedoms have been infringed upon;
 - c. Whether the Petitioners are entitled to Compensation; and
 - d. Who should bear the costs of the Petition?

ISSUE No. a.) Whether the Petitioners through its filed main Petition dated 21st July, 2021 have met the threshold of a Constitutional Petition.

66. Under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a petitioner must disclose facts relied upon, constitutional rights and freedoms violated, nature of injury caused, capacity to bring the petition, details relating to related civil/criminal matter and the reliefs sought.
67. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

“ This Constitution shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and
 - d. Contributes to good governance.....”
68. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. Further, it is important to fathom



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

69. In the instant case, under the contents of Paragraphs 1 to 5 of the main Petition dated 21st July, 2021 describes the parties to this Petition, whereas the contents of Paragraphs 6 to 14 gives the factual basis of the petition starting from the development of apartments trading in the names and style known as Coral Pearl Executive Apartments to the point where the 2nd Petitioner has been charged and recharged with the offence of developing an extension of a building without development permission.
70. At Paragraph 15 the Petition avers that the stoppage of the 1st Petitioner’s development and the prosecution of the 2nd Petitioner were illegal, irregular and in breach of the Petitioners’ constitutional rights and freedoms. The Petitioners further contend at Paragraphs 16 and 17 that the attempted and purported stoppage of the 1st Petitioner’s development, the continued harassment and intimidation of the Petitioners and their workers and the prosecution of the 2nd Petitioner in two different cases for the same offence alongside the 1st Petitioner’s workers is being undertaken and pursued in an illegal, irregular and malicious manner and in breach of the Petitioners’ constitutional rights and freedoms with a view to achieving selfish and ulterior motives rather than the genuine purpose of the law. The 1st and 2nd Respondents’ actions of harassing, intimidating, purporting to stop and generally interfering with the 1st Petitioner’s development is illegal and unconstitutional and the Petitioners invite the Honourable Court to make a finding under Article 165 (2) (d) (ii) of *the Constitution* of Kenya, 2010 that the said actions by the 1st and 2nd Respondents are inconsistent with and in contravention of *the Constitution* of Kenya 2010.
71. Additionally, at the contents made out at Paragraphs 45 to 48 of the Petition dated 21st July, 2021 the Petitioners lay out the Constitutional violations by the Respondents contending that under Article 40 of *the Constitution* of Kenya 2010, the 1st Petitioner has a right to acquire and own property anywhere within the Republic of Kenya and to develop it accordingly. The said right includes the right to occupy, use and develop the property. By interfering with the subject development and making it impossible for the 1st Petitioner to progress with the construction, the Respondents violated the 1st Petitioner’s right to own property as guaranteed under the said Article 40 because the Respondents have literally curtailed the 1st Petitioner’s ability to freely use and enjoy its property without any justification under *the Constitution* and statute. Preferring criminal charges against a person is a serious matter which not only threatens one’s liberty but also has the potential of denting the person’s image in the society. The 2nd Petitioner is a professionally qualified architect who is highly respected in Mombasa County, the whole Republic of Kenya and beyond. By arresting and charging the 2nd Petitioner in a baseless, reckless and unfair manner and in utter disregard of the law, the 1st, 2nd and 3rd Respondents have caused the 2nd Petitioner’s reputation to be demeaned in a way that is in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20 (4) (a) and Article 28 of *the Constitution* of Kenya, 2010. The Petitioners argued that under Article 50 (2) of *the Constitution* of Kenya, 2010 every accused person has the right to be informed of the charge with sufficient detail to answer it; the right to be present when being tried; and not to be tried for an offence in respect of an act or omission for which the accused person had previously been either acquitted or convicted.
72. Thus, through the Petition proceeded to seek for 6 (six) key prayers as set out herein above of this Judgement. The threshold of what amounts to constitutional petition was set out in “Anarita Karimi Njeru – Versus - Republic [1979]eKLR” and “Trusted Alliance Society of Human Rights – Versus -



Attorney General & 5 Others [2013] eKLR”. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:

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

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

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

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

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

74. In the case of “Meme – Versus - Republic [2004] 1 E.A. 124”, the court held a petitioner must set out with reasonable degree of precision the complaint and the manner in which the rights have been infringed with clear focus on fact, law and *the Constitution*. This was the same position in “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Others [2013] eKLR” and “John Mbogua Getao – Versus - Simon Parkoyiet Mokare & 4 others [2017] eKLR”.

75. The Petitioner is required to demonstrate that an impugned decision or action violates or threatens to violate the bill of rights or *the Constitution* for that matter. The test is whether the decision, act or omission complained about falls within the ambit of an administrative action in line with the provision of Section 2 of the *Fair Administrative Action Act*, 2015.

76. In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the Petitioners herein pleaded with reasonable precision as founded in the “Anarita Karimi (Supra)”. To respond to this query, and despite of the Petitioners making such general allegation that there has been breach, violation and denial of the provisions of Articles 3, 10, 19, 20, 28, 47, 50, 157 and 244 of *the Constitution* of Kenya, 2010 perpetrated by the 1st, 2nd and 3rd Respondents, the Honorable court is completely satisfied at all that the Petitioners have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and for the prayers sought. The next question would be whether the Petitioners had proved the alleged breach of the rights particularized in the Petition as to fair administration in furtherance to the rights of the Petitioners on the suit property.



ISSUE No. (b) Whether the Petitioners’ fundamental rights and freedoms have been infringed upon

77. Under this Sub – title, the Petitioners have alleged that its fundamental rights were infringed upon. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Another (Supra)” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

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

78. The Petitioners have contended that although the approval of the development was granted by the 1st Respondent on 11th July 2018 before enactment and commencement of the *Physical and Land Use Planning Act*, 2019, when the said Act came into force on 5th August 2019, the 1st Petitioners development became a subject of the Act by virtue of the transitional clause at the provision of Section 92 (1) thereof which clearly provides that any approval for development granted in accordance with the provisions of any written law in force immediately prior to the commencement of the Act shall be deemed to be a development permission granted under the Act.

79. The Petitioners contended that under Article 40 of *the Constitution* of Kenya 2010, the 1st Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop the property. By interfering with the subject development and making it impossible for the 1st Petitioner to progress with the construction, the Respondents violated the 1st Petitioner’s right to own property as guaranteed under the said Article 40 because the Respondents have literally curtailed the 1st Petitioner’s ability to freely use and enjoy its property without any justification under *the Constitution* and statute. Preferring criminal charges against a person is a serious matter which not only threatens one’s liberty but also has the potential of denting the person’s image in the society. As pleaded, the 2nd Petitioner is a professionally qualified architect who is highly respected in Mombasa County, the whole Republic of Kenya and beyond. By arresting and charging the 2nd Petitioner in a baseless, reckless and unfair manner and in utter disregard of the law, the Respondents have caused the 2nd Petitioner’s reputation to be demeaned in a way that is in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20 (4) (a) and Article 28 of *the Constitution* of Kenya, 2010.

80. Under Article 50 (2) of *the Constitution* of Kenya, 2010 every accused person has the right to be informed of the charge with sufficient detail to answer it; the right to be present when being tried; and not to be tried for an offence in respect of an act or omission for which the accused person had previously been either acquitted or convicted. The Respondents breached the 2nd Petitioner’s rights as guaranteed under the said Article 50(2) for the following reasons:

- i. The 2nd Petitioner’s name was included in the charge sheet for Criminal Case No. M. 265 of 2021 without being informed or notified. The 2nd Petitioner only learnt of the charges against him when his co-accused gave him a copy of the charge sheet. Thus, the 2nd Petitioner was not informed of the charge against him at all contrary to Article 50 (2) (b) of *the Constitution* of Kenya, 2010.
- ii. The 2nd Petitioner was not invited or summoned to attend court on 5th May 2021 and was not present when the charges against him in Criminal Case No. M. 265 of 2021 were read out. The charges were read in the absence of the 2nd Petitioner despite his name appearing in the charge sheet as the first accused person. The charges and proceedings in Criminal Case No. M. 265



of 2021 are therefore in violation of the 2nd Petitioner's right to be present when being tried as guaranteed by Article 50 (2) (f) of *the Constitution* of Kenya, 2010.

- iii. The charge levelled against the 2nd Petitioner in Criminal Case No. M. 265 of 2021 is “developing extension of a building without first obtaining development permission” which relates to the subject development and is the same charge under Count 2 in Criminal Case No. M. 079 of 2021. The 2nd Petitioner was therefore charged with the same offence which he had previously been charged with in utter violation of his right not to be charged with a previous offence as guaranteed by Article 50 (2) (o) of *the Constitution* of Kenya, 2010.
 - iv. Furthermore the provision of Section 135 (1) of the Criminal Procedure Code requires charges relating to the same facts to be in one charge sheet.
81. The Petitioners had a right to be treated in a credible and accountable manner by the Respondents as state organs under Article 10 of *the Constitution* of Kenya, 2010 which right as aforesaid, been violated by the Respondent. Similarly, the Petitioners had alleged that its fundamental right to enjoy a fair administrative action by the Respondent as provided in Article 47 of *the Constitution* of Kenya, 2010 has been violated by the Respondent. Article 47 of *the Constitution*, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 82. The Petitioners’ inherent right to natural justice as codified in Article 50 of *the Constitution* of Kenya, 2010 has been violated by the Respondents. Article 50(1) of *the Constitution*, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
 83. The Petitioners right to develop the suit property as provided under Article 40 of *the Constitution* of Kenya 2010 had been violated by the Respondents in the manner in which the Petitioners are undertaking an extension of the development by building 8th and 9th floors which were allegedly not approved and the allegations that the 2nd Petitioner did not comply with an enforcement notice are baseless and not true. Contrary to the Respondents’ allegations, the 1st Petitioner’s development was at all material times being undertaken and continues to be undertaken in compliance with the law. The 1st Respondent granted approval to the 1st Petitioner’s development on 11th June, 2018. Even on admission by the 1st Respondent, the approval did not have limitation/restriction on the number of floors to be built by the 1st Petitioner while the approved plans clearly included 8th and 9th floors.
 84. The Petitioners have held that the construction of 8th and 9th floors were not an “extension” but part and parcel of the development as approved. Further, the 1st Petitioner’s development as approved by the 1st Respondent comprised of nine (9) floors which is what the 1st Petitioner has been constructing and developing at all material time. Without serving any enforcement notice as required by the law, the 1st and 2nd Respondents purported and attempted to stop the 1st Petitioner from continuing with the development.
 85. Prior to the interference with and the purported stoppage of the 1st Petitioner development and charging of the 2nd Petitioner and the 1st Petitioner’s workers in court, the 1st Respondent’s officers had solicited for bribes and attempted to extort resources from the Petitioners. The interference of the 1st Petitioner’s development by the 1st and 2nd Respondents and the prosecution of the 2nd Petitioner and the workers was therefore driven by malice and intended to achieve ulterior motives, namely, to coerce the Petitioners to give in to the bribery demands by the 1st Respondent and its officers rather than to achieve the ends of justice.



86. The 1st Petitioner's development was at all material times being undertaken in compliance with the law and with the full approval of the 1st Respondent and relevant bodies. The 1st Respondent granted approval to the 1st Petitioner's development on 11th June, 2018. The approval did not have any limitation/restriction on the number of floors to be built by the 1st Petitioner while the approved plans clearly included 8th and 9th floors. The construction of 8th and 9th floors was NOT an extension of the building as alleged by the Respondents but part and parcel of the development as approved.
87. The Respondents alleged that the development was in breach of the conditions imposed by County Executive Committee Member which allegation is false, malicious and contrary to the law because the 1st Respondent's approval dated 11th July, 2018 granted the 1st Petitioner 12 months within which to commence construction and 24 months within which to complete the same. The 1st Petitioner commenced construction on 7th August, 2019 and therefore as at 31st March, 2021 when there was the first attempt to stop the construction and when the 2nd Petitioner was charged in court, the 24-month period had not lapsed.
88. Similarly, the arraignment in court and prosecution of the 2nd Petitioner and the 1st Petitioner's workers is driven by sheer malice, is in bad faith and is intended to achieve ulterior and collateral purpose, namely, to pressure the Petitioners to cede to the illegal bribery demands by the Respondents and their employees/officers and the prosecution is not intended to achieve legitimate objectives of administration of justice and the criminal justice system.
89. The prosecution of the 2nd Petitioner and the 1st Petitioner's workers is in bad faith, driven by ulterior motives, is against the interest of the criminal justice system and is in utter breach of the 2nd Petitioner's rights as guaranteed by *the Constitution* of Kenya, 2010.
90. The Petitioners' right to the suit property as provided under Article 40 of *the Constitution* of Kenya, 2010 has been violated by the Respondent in the manner in which the Petitioner's house and perimeter wall were destroyed without prior notice having been given to the Petitioner by the Respondent. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.
91. From the facts of the case, the 1st Petitioner commenced development of a block of apartments on Land Reference No. MN/1/5222 on 7th August 2019 after obtaining the necessary approvals and licenses from the relevant bodies. That the 1st and 2nd Respondents allege that the said developments have not been approved and have attempted to stop the 1st Petitioner from further construction without serving them with an enforcement notice as required by law. The 1st and 2nd Respondents in specific contend that the 1st Petitioner is undertaking an extension of the development by building the 8th and 9th floors which were not in the initial approved drawings.
92. It was alleged that on 21st November 2020 the Acting County Director of Planning and Architecture, Mr. Paul Manyala solicited a bribe from him with a threat of shutting down the construction if the same was not made. After the 2nd Petitioner failed to pay up the bribe, his site was stormed by a group of county marshals on 9th February 2021 who arrested his workers on site on site. The workers were later released with no charge but the 1st Petitioner suffered loss of over Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=) loss in terms of materials and labor force.
93. Despite all the intimidation from the county, he was yet to receive any enforcement notice. Upon further inquiry he was informed that the approvals that were restricted to only 7 floors had expired yet



he was developing the 8th and 9th floors. To avoid further antagonizing by the 1st and 2nd Respondents, Mr. Odhiambo made an application for renewal and extension on 12th February 2021, marked “DOO -9” and paid for it on the E-CITIZEN platform and was provided with a receipt of payment marked as “DOO – 11”. He was informed by the 2nd Respondent that his application had not been approved as he had not complied with paying the invoice and providing prerequisite documents.

94. The Petitioner submitted that the 1st and 2nd Respondents were bent to frustrate his construction. On 27th February 2021 he was served by the 3rd Respondent with summons to appear before the county court on 31st March 2021 to answer development related charges. The 2nd Petitioner was subsequently charged in Mombasa County Court “Criminal Case No. M 079 OF 2021 Republic – Versus - Dancan Odhiambo Omondi” and was released on cash bail of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) on 19th May 2021. That on 13th May 2021 the 1st Respondent’s officers served the deponent with a Notice of Prosecution/Enforcement dated 13th May 2021 which ordered demolition for inter alia carrying out works without approvals, which prompted the 2nd Petitioner to report the same to Nyali police station under OB/54/13/05/2021. The deponent further averred that on 3rd July 2021, the Respondents raided his site and arrested three of his workers, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu and charged them on 5th July 2021 with the offence of developing an extension of a building without approvals in Mombasa County Court “Criminal Case No. M 265 of 2021 Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu”. The three were later released on a cash bail of Kenya Shillings Five Thousand (Kshs 5,000/=) each.
95. The Petitioner claimed that the Respondents were maliciously prosecuting him in both cases as no enforcement notice had been issued to him as provided by Section 72 of the *Physical and Land Use Planning Act* 2019. He further maintained that the Demand Notice/Stop Order that was served upon him could not be used in development as it’s not a legally recognized document under the *Physical and Land Use Planning Act* 2019. He argued that the Respondents were harassing and intimidating him and his site workers with criminal proceedings, despite having acquired all approvals and permits needed to develop. He maintained that the development was not in breach of the conditions set by County Executive Committee as the approvals given on 11th July 2018 allowed the 1st Petitioner a period of twelve (12) months within which to commence construction and twenty-four (24) months within which to complete the same. That the 1st Petitioner commenced construction on 7th August 2019 and his arrest happened on 31st March 2021 within the stipulated twenty-four (24) months period.
96. All in all, the Respondents had failed to act in an accountable manner so as to ensure that it does not interfere with the Petitioner’s property rights guaranteed under Article 10, 40 and 47 of *the Constitution* of Kenya, 2010. By and large, the court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about. Unfortunately, this is not what happened in the given circumstances whatsoever. I rely onto case of: “Republic – Versus - Kombo and 3 Others ex-parte Waweru [2008] 3 KLR (EP) 478” which was cited by the Petitioner it was held, inter alia, that:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him



planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

97. This Honourable Court is of the strong opinion that the Petitioners have demonstrated a violation of their legal and constitutional rights, and it is entitled to all the reliefs sought. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent and pleading for the prayers sought.
98. Be that as it may this Honourable Court will still proceed to examine whether the Petitioners are entitled to the compensation that they seek in the Petition.

ISSUE No. c.) Whether the Petitioners are entitled to compensation

99. Under this sub – heading, it is the Petitioners’ case that the 1st Respondent granted approval to the 1st Petitioner on 11th July 2018 to construct a block of apartments known as Coral Pear Executive Apartments on L.R No. MN/1/522, the suit property. Other than the 1st Respondent, the Petitioners obtained the requisite approvals and licenses, from NEMA the 1st Respondent acquired an EIA Licence on 8th October 2019 and from the national Construction Authority (NCA) a certificate of compliance on 30th October 2019. The Petitioners claim that the 1st Respondent had since stopped the said construction on the allegation that the 1st Petitioner was undertaking an extension of the development by building the 8th and 9th floors which were not in the original approved plans/drawings. The Respondents had since issued the Petitioners with an enforcement notice to stop the construction and had charged the 2nd Petitioner alongside his site workers with development related charges.
100. I now examine the material before court as to whether it supports the Petitioners’ prayer of conservatory orders. The circumstances under which the court will grant conservatory orders were discussed by Odunga J in “Michael Osundwa Sakwa – Versus - Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR”:-

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

101. It is trite law that conservatory orders are meant to protect a Petitioner from the results of violations of constitutional rights and freedoms. A “prima facie case” in this case, would therefore be the establishment of a legal wrong caused by the Respondents to the Petitioner, which has resulted into violation of rights. The aim of a conservatory order would be to protect the Petitioner from the preventable perils or risks of human rights violations.



102. The Supreme Court in “Gatirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 others [2014] eKLR” held that:-

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

103. The Petitioners claim that the approved plans of 11th July 2018 never specified the number of floors on the apartment, which they casually term as being “an oversight” and it was therefore unfair for the 1st Respondent to turn around and condemn the Petitioners for extending to the 8th and 9th floor. In the given circumstances, I have been compelled to critically peruse the said set of drawings which are marked “C” and draw my own logical conclusion over it. The first one is the Site Location Plan and Site Plan which was approved by the 1st Respondent on 11th July 2018. The second one is the Scheme Design Drawings for a Typical Floor Plan, and third one is the Scheme Design Drawings for the Roof Plan. Certainly, all the three drawings were approved by the 1st Respondent on 11th July 2018, and were subject to Form PPA-2. The last drawing is the Structural Drawing which lays out inter alia; the foundation layout details, elevation and lift plan, septic tank layout as well as the payment details; does not bear the stamp of approval from the 1st Respondent.

104. In my own view, I now fully agree the Petitioners claim that the approval drawings and as admitted by the 1st Respondent did not specify the number of floors the apartment would have. At the interlocutory stage, this Court extended the olive branch to the Respondents to have provided empirical both viva voce and documentary evidence to the effect of the exact and specific approved number of stories to be undertaken by the Petitioner but without success. The insistence of the Petitioner being limited to the 7th floor is purely a matter of conjecture and abstract. It is not helpful to this Court at all. Based on the provision of Section 107 of the *Evidence Act*, Cap. 80, on “Burden of Proof” the onus is on the Respondents to demonstrate to court how many floors were allowed when it granted the approval on 11th July 2018. On the contrary, the Petitioners claim their drawings were not limited on the number of floors, those drawings were are no longer a design worth of approval. This Honourable Court is of the opinion that there is a very big difference between a seven storey building and a nine storey building in the sense that even the Court is not conversant with the building dynamics, what would have been easier that for the 1st Respondent than to produce this evidence in Court and hence avoid condoning such an occurrence that may risk the lives of Citizens in the end? Unfortunately, this this was not forth coming and thus this Court has to sustain balancing the competing interests of all parties and without breaching the fundamental rights of person particularly the rights to private property as enshrined under Article 40 of *the Constitution* of Kenya, 2010.

105. The Honourable Court feels that even though the Petitioners claim that they had been given approval by the 1st Respondent as stated under section 92 (2) of the *Physical and Land Use Planning Act*, 2019, a development approval granted under the provisions of any written law in force immediately before the commencement of the Act lapsed if the development had not commenced within twenty-four (24) months of the commencement of the Act. Naturally and effectively, the *Physical and Land Use Planning Act*, 2019 extended the time within which developments approved before its enactment



could be commenced. Since the Act commenced on 5th August 2019, it means that the 1st Petitioner had up to 5th August 2021 (24 months) to commence its development.

106. In conclusion this Honourable Court finds that the Respondents who are the custodians of all records never presented any evidence to substantiate their claim that there was any illegality or irregularity caused by the Petitioners while undertaking the development on its land. For these reasons, I discern that the petitioner is entitled to be granted Conservatory orders sought.

107. On the prayer on the order for certiorari to be issued by this Honourable Court removing and quashing the criminal proceedings against the 2nd Petitioner in Criminal cases No. 1 and 2 this Court will be guided by the decision of Majanja, J (as he was) in Petition No. 461 of 2012 – “Francis Kirima M’ikunyua & Others – Versus - Director of Public Prosecutions”, where he pronounced himself in a situation a court finds itself when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State’s coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

108. In the case of:- “Kuria & 3 Others – Versus - Attorney General [2002] 2 KLR 69”, the High Court held:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court’s) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilization is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute.”

109. Further in the case of:- “Mohammed Gulam Hussein Fazal Karmali & Another – Versus - Chief Magistrate’s Court Nairobi & Another [2006] eKLR”, Nyamu, J examined the policy considerations for halting criminal proceedings, noting that the court has two fundamental policy considerations to



take into account which were enunciated in the case of “M. Devao – Versus - Department of Labour (190) in sur 464” at 481 as:

“The first is that the public interests in the administration of justice require that the court protects its ability to function as a court of law, by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court processes may lend themselves to oppression and injustice...the court grants a permanent stay in order to prevent the criminal process from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes that the court processes are being employed for ulterior purposes or in such a way as to cause improper vexation and oppression.”

110. The circumstances which the Court takes into consideration in deciding whether or not to halt a criminal process were set out by Musinga, J (as he then was) in “Paul Stuart Imison Another – Versus - The Attorney General & 2 Others Petition No. 57 of 2009”, in the following manner:

“The instances in which a court can declare a prosecution to be improper were well considered in Macharia & Another – Versus - Attorney General & Another (2001) KLR 448. A prosecution is improper if:

- a. It is for a purpose other than upholding the criminal law;
- b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute;
- c. It is an abuse of the criminal process of the court;
- d. It amounts to harassment and is contrary to public policy;
- e. It is in contravention of the applicant’s constitutional right to freedom.

111. The 3rd Respondent derives his prosecutorial power both from *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Whereas Article 157(10) of *the Constitution* provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, Article 157(11) provides:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

112. Apart from that, Section 4 of the Office of Public Prosecutions Act, No. 2 of 2013 provides:-

In fulfilling its mandate, the Office shall be guided by *the Constitution* and the following fundamental principles—

- a. the diversity of the people of Kenya;
- b. impartiality and gender equity;
- c. the rules of natural justice;
- d. promotion of public confidence in the integrity of the Office;



- e. the need to discharge the functions of the Office on behalf of the people of Kenya;
- f. the need to serve the cause of justice, prevent abuse of the legal process and public interest;
- g. protection of the sovereignty of the people;
- h. secure the observance of democratic values and principles; and
- i. promotion of constitutionalism.

113. This Court has therefore held that since the promulgation of *the Constitution* of Kenya, 2010, the terrain under the current prosecutorial regime has changed and that the discretion given to the DPP is not absolute but must be exercised within certain laid down standards provided under *the Constitution* and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, *the Constitution* itself. It is on this basis that I understand the holding in the case of:- “Nakusa – Versus - Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565” to the effect tha:-

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003 is that interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

114. Therefore where it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognized under *the Constitution* and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process and would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As was held by Wendoh, J in the case of:- “Koinange – Versus - Attorney General and Others [2007] 2 EA 256”:-

“Under section 26 of *the Constitution* the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with *the*



Constitution or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the Constitution and in considering what constitutes an abuse of the court process the following principles are relevant:

- (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed;
- (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the constitution;
- (iii) Whether the prosecution is against public policy.”

115. It is therefore clear that this Court has the power and indeed the duty to bring to a halt, criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the 3rd Respondent (DPP) and the police.

116. In the case of:- “Meixner & Another – Versus - Attorney General [2005] 2 KLR 189”, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution...Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

117. The rationale for not permitting criminal process to assist the litigants in the settlement of their civil disputes as appreciated in “Republic – Versus - Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703”, where it was held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use



criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings.”

118. That there is a duty cast upon the prosecutor to ensure that he has conviction that the criminal process is appropriate to the circumstances of the case was placed beyond doubt in “R – Versus - Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001” where it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

119. In the said case, the Court expressed itself inter alia as follows:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that



the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles:

- (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it.
- (ii). A prosecution that does not accord with an individual's freedoms and rights under *the constitution* will be halted: and
- (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court:

there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

120. Unless the prosecutor exercises his powers in accordance with the law and *the Constitution*, the Court will intervene in order to bring him back on track. In the case of:- "Joram Mwenda Guantai – Versus - The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170", the Court of Appeal held:

".....the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

121. According to Judicial Review Handbook, 6th Edition by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes



a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

122. Therefore, the people placed in charge of investigation and prosecution must, in deciding whether to prefer criminal charges, ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words, the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by Ojwang, J (as he then was) in Nairobi "HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another – Versus - Lucy Muthoni Stephen & Another":

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”

123. In the instant case, on 27th February 2021 the 2nd Petitioner was served by the 3rd Respondent with summons to appear before the county court on 31st March 2021 to answer development related charges. The 2nd Petitioner was subsequently charged in Mombasa County Court “Criminal Case No. M 079 OF 2021 Republic – Versus - Dancan Odhiambo Omondi” and was released on cash bail of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) on 19th May 2021. That on 13th May 2021 the 1st Respondent's officers served the deponent with a Notice of Prosecution/Enforcement dated 13th May 2021 which ordered demolition for inter alia carrying out works without approvals, which prompted the 2nd Petitioner to report the same to Nyali police station under OB/54/13/05/2021. The deponent further averred that on 3rd July 2021, the Respondents raided his site and arrested three of his workers, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu and charged them on 5th July 2021 with the offence of developing an extension of a building without approvals in Mombasa County Court “Criminal Case No. M 265 of 2021 Republic – Versus - Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu”. The three were later released on a cash bail of Kenya Shillings Five Thousand (Kshs 5,000/=) each.
124. The 2nd Petitioner contended that the Respondents were maliciously prosecuting him in both cases as no enforcement notice had been issued to him as provided by the provision of Section 72 of the *Physical and Land Use Planning Act* 2019. He further maintained that the Demand Notice/Stop Order that was served upon him could not be used in development as it's not a legally recognized document under the *Physical and Land Use Planning Act* 2019. He argued that the Respondents were harassing and intimidating him and his site workers with criminal proceedings, despite having acquired all approvals and permits needed to develop. He maintained that the development was not in breach of the conditions set by County Executive Committee as the approvals given on 11th July 2018 allowed the 1st Petitioner a period of twelve (12) months within which to commence construction and twenty-four (24) months within which to complete the same. That the 1st Petitioner commenced construction



on 7th August 2019 and his arrest happened on 31st March 2021 within the stipulated twenty-four (24) months period.

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

126. It follows that the burden is on the prosecutor to show by way of admissible evidence that he is in possession of material that disclose the existence of a prosecutable case since as was held in “Stanley Munga Githunguri - Versus - R [1986] eKLR” at pages 18 and 19 by a three bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru:

“ A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

127. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in “R – Versus - Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001”:

“Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case.”

128. The Respondents have not provided the Honourable Court with affidavits sworn by the complainants indicating the nature of the complaint which they lodged against the Petitioners. It is however clear that the civil proceedings seeking recovery of the land were instituted before the criminal process was commenced. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case as stated “Republic – Versus - Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another (supra)” it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases otherwise it would amount to abuse of the process of the court. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.



129. It was similarly held by the Court of Appeal in “Commissioner of Police and Director of Criminal Investigations Department – Versus - Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR” that:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

130. The Criminal process were commenced on the 31st March, 2021 in Criminal Case No. M079 of 2021 and Criminal Case No. M265 of 2021 instituted on 5th July, 2021 against the Petitioners. As stated above, the mere fact that the facts of the case constitute both criminal and civil liability does warrant the halting of the criminal case as stated “Republic - Versus - Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & Another (supra)” it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases otherwise it would amount to abuse of the process of the court. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.
131. In this case it is not denied that the facts forming the subject of the civil proceedings are the same facts upon which the criminal proceedings are being based. The standard of proof in criminal cases is beyond reasonable doubt while the standard in civil suits is below that in criminal cases. If the criminal proceedings are determined in favour of the complainant, the Respondents herein, and the civil proceedings are unsuccessful as already been determined in this judgment previous, the judicial process would be made to look like a circus. In the circumstances of this case, it is my view that the Prayers 1, 2 and 3 must succeed.
132. On the prayer seeking a permanent and prohibitory injunction, this Honourable Court opines that when it comes to mandatory injunctions, unlike during interlocutory stage, courts at the main suit may grant the orders as prayed. Such was the reasoning taken by the court in “Lucy Wangui Gachara – Versus - Minudi Okemba Lore [2015] eKLR” when it rendered itself thus:

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage.



In BHARAT PETROLEUM CORP LTD V. HARO CHAND SACHDEVA, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

133. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Respondents in order for the rights of the Petitioners to be protected.
134. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders. In this instant case, the Honourable Court has already discussed in this Judgment that the Petitioners have established their claim against the Respondents therefore the prayer for permanent injunction against the Respondents should be granted to wit - an order of prohibition and permanent injunction restraining the Respondents, whether by themselves agents and servants and/or whosoever is acting on their authority or instruction, from stopping or in any other manner whatsoever interfering with the 1st Respondent's development of apartment blocks known as known as CORAL PEARL EXECUTIVE APARTMENTS on the property known as L.R.No.MN/1/5222 situate in Nyali off Links Road in Mombasa County be and is hereby allowed accordingly.

ISSUE No. d). Who will bear the Costs of the Petition.

135. The Black Law Dictionary defines “Cost” to mean,
- “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.
136. The provisions of Rule from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost. Whilst the provision of Section 27 (1) of the Civil Procedure Rules, 2010 holds that that Costs follow events. The issue of Costs is the discretion of Courts. In the case of “Reids Hewet & Company vs Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180”, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”



137. From the provisions of the law, it means the whole circumstances and the results of the Petition where a party had won the case. The events in the instant Petition are that the Petitioners have succeeded to present their claim against the Respondents. Therefore this Honourable Court awards the costs to the Petitioners to be paid by the 1st, 2nd and 3rd Respondents herein jointly and severally.

VI. Conclusion and disposition

64. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honourable Court arrives at the finding that the Petitioners herein have succeeded in all the prayers sought from their filed Petition. For avoidance of doubt, the Honourable Court proceeds to make the following orders:-

- a. THAT the Petition filed by the Petitioners dated 21st July, 2021 be and is hereby found to be meritorious and hence allowed in its entirety.
 - i. A declaration be and is hereby made the Respondents' actions of stopping the 1st Petitioner's development and prosecuting the 2nd Petitioner and the 1st Petitioner's workers be found to be inconsistent with and in contravention of *the Constitution* of Kenya 2010 and the law.
 - ii. A declaration be and is hereby issued that the criminal charges levelled against the 2nd Petitioner herein, Dancan Odhiambo Omondi, Humphrey Kamandi, Benjamin Ochieng and Gabriel Okumu in Mombasa County Court Criminal Case No. M 079 of 2021: Republic v. Dancan Odhiambo Omondi and Mombasa County Court Criminal Case No. M. 265 of 2021: Republic v. Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu be and are hereby declared illegal, null and void.
 - iii. An order of certiorari be and is hereby issued removing into this Honourable Court and quashing the criminal proceedings against the 2nd Petitioner in Mombasa County Court Criminal Case No. M 079 of 2021: Republic v. Dancan Odhiambo Omondi as well as the criminal proceedings in Mombasa County Court Criminal Case No. M. 265 of 2021: Republic v. Dancan Odhiambo, Humphrey Kamandi, Benjamin Ochieng & Gabriel Okumu.
 - iv. An order of prohibition and permanent injunction be and is hereby issued restraining the Respondents. Whether by themselves agents and servants and/or whosoever is acting on their authority or instruction, from stopping or in any other manner whatsoever interfering with the 1st Respondent's development of apartment blocks known as known as CORAL PEARL EXECUTIVE APARTMENTS on the property known as L.R.No.MN/1/5222 situate in Nyali off Links Road in Mombasa County.
- b. THAT an order is herein made that the injunctive orders made on 24th October, 2022 are hereby vacated.
- c. THAT Costs to be awarded to the 1st and 2nd Petitioners to be borne by the 1st, 2nd and 3rd Respondents jointly and severally.

It is so ordered accordingly.



**JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED
AND DATED AT MOMBASA THIS26THDAY OFFEBRUARY.....
....2024.**

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

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Machogu Advocate holding brie for Mr. Oluga Advocate for the 1st and 2nd Petitioners.
- c. No appearance for the Respondents

