Oakdale Commodities Limited v Sazit Company Limited & 2 others (Environment & Land Case E015 of 2023) [2024] KEELC 1003 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1003 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E015 OF 2023

LL NAIKUNI, J

FEBRUARY 20, 2024

BETWEEN

OAKDALE COMMODITIES LIMITED ..... PLAINTIFF

AND

SAZIT COMPANY LIMITED ..... 1ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND DEFENDANT

DEPARTMENT OF LANDS, HOUSING AND PHYSICAL PLANNING, COUNTY GOVERNMENT OF MOMBASA ..... 3RD DEFENDANT

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application instituted by Oakdale Commodities Limited dated 7th September, 2023 and Preliminary Objection by the Department of Land, Housing and Physical Planning, County Government of Mombasa, the 3rd Defendant herein, dated 25th October, 2023challenging basis of the Plaintiff's suit in its entirety. The Notice of Motion application was under the dint of the provision of Sections 1A,1B & 3A of the *Civil procedure Act*, Cap 21, Article 69 (d) & (g), 70 of *the Constitution* 2010, Sections 4 & 5(1) of Administrative Act.

2. Upon service of the Notice of Motion application dated 7th September, 2023 and the Notice of Preliminary objection, responses by all the affected parties were filed to that effect.

II. The Notice of Motion application dated 7th September, 2023

3. The Plaintiff sought for the following orders:-

a. Spent

b. Spent

c. That a permanent injunction be issued restraining the 1st Defendant by itself, its servants and/or agents from continuing with the developments on all that parcel of land known Plot Number 22992/I/MN, Nyali, along Moyne Drive, Mombasa County in respect of which it has obtained approvals to construct what it refers to as six storey residential building which developments are being undertaken pursuant to the 2nd Defendant's decision granting Licence No. EIA/PSR/23223 to the 1st Defendant.

d. That a declaration do issue that the 2nd Defendant's Environmental Impact Assessment Licence dated 21st December 2022 violates the provisions of Regulation 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and the provisions of Article 47 of *the Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, 2015.

e. That the EIA licence No EIA/PSR/23223 dated the 21st December 2022 issued by the 2nd Defendant be cancelled and revoked.

f. That a declaration do issue that the 3rd Defendant's decision to issue Form PPA 2 - Notification of Approval of Development Permission dated 7th September 2022 to the 1st Defendant for Change of User and construction of multiple dwelling units violates the 3rd Defendant's Zoning Guide for Mombasa County and the provisions of Article 47 of *the Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, 2015.

g. That the Approval NO.P/2022/00592 issued by the 3rd Defendant be cancelled and revoked.

h. That an order of general damages be issued against the 1st - 3rd Defendants jointly and severally for violating the Plaintiff's constitutional right to fair administrative action as guaranteed under Article 47 of *the Constitution* of Kenya 2020.

i. That an order of Costs of the suit together with interest thereon at such rate and for such period of time this Honourable Court may deem fit do issue.

j. Any other such relief as this Honourable court may deem appropriate.

4. The application was premised on the grounds, testimonial facts and the averments made out under the 23 Paragraphed Supporting Affidavit sworn by FAISAL ABDIRAHMAN ABASS together with 7 annextures marked as "OCL 1 to 7" annexed thereto. He averred that:-

a. The 1st Defendant/Respondent is a limited liability Company duly registered under the provisions of the *Companies Act* within the Republic of Kenya and the owner of subject parcel of land being Plot Number 22992/I/MN.

b. The Plaintiff/Applicant is the beneficial and legal owner of all that parcel of land situated in Mombasa County and being CR. NO.14800 where it had constructed a residential apartment occupied by its Director.

c. The Plaintiff/Applicant's parcel of land borders the 1st Defendant/Respondent's subject parcel of land being Plot Number 22992/I/MN.

d. In the year 2023, it noted some construction that was going on the 1st Defendant/Respondent's parcel of land and it noted the erection of a sign board detailing the particulars of approvals and the various parties involved in the ongoing construction.

e. The Plaintiff/Applicant established that the 1st Defendant/Respondent procured a change of user with respect to the subject construction and which Change of User was approved by the 2nd Defendant/Respondent.

f. The Plaintiff/Applicant further established that the 1st Defendant/Respondent's parcel of land measures approximately 0.0869 Ha.

g. The location of its parcel of land and that of the 1st Defendant/Respondent is in Nyali which environment harbors residential one family units as opposed to residential apartments such as the one intended to be constructed by the 1st Defendant/Respondent.

h. The said sign board erected on the parcel of land only disclosed the project was with respect to the construction of a proposed Apartment on the 1st Defendant's parcel of land and failed to disclose the magnitude and/or particulars of the said Apartment.

i. The said sign board erected on the 1st Defendant/Respondent's parcel of land failed to disclose the owner with respect to the subject construction on the 1st Defendant/Respondent's parcel of land.

j. The Plaintiff/Applicant relied on the particulars of unlawfulness with the respect to the Change of User that:-

    i. The 1st Defendant/Respondent never caused a notice to be erected on the suit property with respect to the intended Change of User.

    ii. There was insufficient scoping process that lacked proper Public Participation;

    iii. The Plaintiff/Applicant was never consulted prior to the Change of User being issued despite having its permanent residence adjacent to the 1st Defendant/Respondent's parcel of land;

    iv. The approval was with respect to a parcel of land with an acreage contradicting the 3rd Defendant/Respondent's by-laws;

    v. The Change of User was premised on a flawed Environment Impact Assessment (EIA) Report plagued with misrepresentations inconsistencies and omissions;

    vi. The EIA Report giving rise to the approval of the Change of User failed to disclose the negative effect it would have on the security taking into account that the high rise project borders the Nyali Military Barracks;

    vii. The Defendants/Respondents failed to consider that the development was of a character not in keeping with developments in the area and would set a bad precedent and encourage similar developments thereby altering the appearance of the area.

    viii. That the Defendants/Respondents failed to consider that the development would cause irreparable harm to the environment as it will overwhelm the physical infrastructure of the area which was made of single dwelling houses and not storey buildings.

    ix. The Defendants/Respondents failed to consider that the population increase that would be brought about by the development would have adverse effects on clean water supply and security in the estate.

x. The Defendants/Respondents failed to consider that the ongoing operations with respect to construction and the increased population would create insecurity as the workers were likely to commit petty thefts from neighboring houses.

xi. The Defendants/Respondents failed to consider that there would be pollution arising from waste disposal challenges owing to the increased population occasioned by the project.

k. As a result of the approval of the subject Change of User the Plaintiff/Applicant would stood to suffer loss and prejudice.

l. The Plaintiff/Applicant relied on the particulars of loss and prejudice that:-

i. The residential hoses for purposes of rental facilities would increase traffic in a low density high class residential area.

ii. The adverse effects of the development being undertaken on the subject property would lead to depreciation of values of the Plaintiff/Applicant's property.

iii. The 1st Defendant/Respondent's development would generate noise and constitute nuisance to the Plaintiff/Applicant and other residents due to the increased population, thereby interfering with the quiet enjoyment of the Plaintiff/Applicant's property.

iv. The Plaintiff/Applicant would be permanently deprived of the privacy and quiet enjoyment of its property.

v. The nature of the 1st Defendant/Respondent interference, to wit, construction of the storey building would permanently affect the use, possession and occupation of the Plaintiff/Applicant property thus occasioning permanent loss and damage.

m. Unless the Orders sought was granted at the interim stage, the 1st Defendant/Respondent would proceed with the construction during the pendency of the matter to the prejudice of the Plaintiff/Applicant.

n. The Plaintiff's Application was merited and ought to be granted at the interim stage as it was evident that the 1st Defendant/Respondent's project contravenes the mandatoryprovisions of the 2nd Defendant/Respondent's governing By-Laws with respect to the Acreage required for purposes of the construction.

o. The project emanating from the frown process upon which the change of user was obtained offends the provisions of the Physical Planning Act.

p. The Plaintiff/Respondent had further satisfied that by virtual of not having been consulted during the process of procuring the Change of User, it was denied a right to safe guard its constitutional right with respect to quietly enjoying its property.

q. By dint of not being consulted during the preparation of the Environmental Impact Assessment Report, the Plaintiff/Applicant was not subjected to a fair administrative action hence its constitutional right has been adversely affected.

r. It was in the interests of justice that the application be granted as prayed.

5. The Plaintiff/Applicant also filed a further affidavit dated 27th October, 2023 supporting the Application dated 7th September, 2023.

III. The Replying Affidavit by the 1st Defendant/Respondent to the Notice of Motion Application dated 7th September, 2024

6. On 27th September, 2023, the 1st Defendant/Respondent herein filed 42 Paragraphed Replying Affidavit sworn by ZAHIR MOHAMED YUSUF and 15 annextures marked as "ZMY" annexed thereto. He averred as follows that:-

   a. He was the Director of the 1st Defendant/Respondent's Company and was well conversant with the facts of this case and therefore competent to swear this affidavit.

   b. The 1st Defendant/Respondent's Company was the duly registered proprietor of all the parcel of land known as the suit property.

   c. In the year 2023 the 1st Defendant/Respondent decided to develop the suit property by way of the construction of 11 apartments whose occupation would be purely for residential purposes as and when completed.

   d. As advised by the Project Planner in the early days the then Mombasa Municipal Council first zoned Nyali as a single dwelling residential area pursuant to the Mombasa Municipal Council Draft Plan of 1971.

   e. After the year 2001, the County Government of Mombasa had no guiding spatial plan document until the adoption of the Integrated Strategic Urban Development Plan by the County Government of Mombasa which vouched for the incorporation of the multiple dwelling land use to help house the rising population in Mombasa County.

   f. Pursuant to the provision of Section 56 of the *Physical and Land Use Planning Act* No. 13 of 2019, the County Government of Mombasa has been given the mandate to oversee all kinds of developments within Mombasa County.

   g. It was therefore incumbent upon the 1st Defendant/Respondent to apply to the County Government of Mombasa, being the regulatory authority, for a Change of User in respect of the suit property which would entail the changing of the suit property from a single residential dwelling unit to residential multiple high-rise dwelling units.

   h. As verified by the Project Planner that the Change of User refers to the process of changing the current status and use of land from one state to another. The 1st Defendant/Respondent was going to Change the User from a residential single dwelling to a residential multiple high-rise dwelling units (Apartment use) on the suit property.

   i. Under the guidance and direction of the 1st Defendant/Respondent's planner, the 1st Defendant/Respondent's Company submitted to the County Government of Mombasa the following documents as listed hereunder for the purposes of commencing the process of the change of user as highlighted herein above. These documents were as follows;

      i. A Brief report of the proposed project

      ii. A Scheme plan with the location context

      iii. A Public notice through the Kenyan daily newspapers of countrywide circulation

      iv. An Official Search from the Lands office of the suit property

      v. A True Photostat copy of the title document in respect of the suit property

vi. A True Photostat copy of the rates payment receipts and land rates clearance certificate In respect of the suit for property.

7. As stated herein above the 1st Defendant was going to change the user of the suit property from a residential single dwelling unit to residential multiple high-rise dwelling units (Apartment use). The Change of User for the project was published in the Kenyan daily newspapers for countrywide circulation as recommended by the County Government of Mombasa and as stipulated under the *Physical and Land Use Planning Act* No. 13 of 2019.

8. As informed by the Project Planner the County Government of Mombasa has formulated its own internal electronic system and mechanism that forms the basis of how the relevant authorities ought to go about the approvals of the change of user. Further that since the year 2020, the County Government of Mombasa had put in operation and had approved the use of the Mombasa Electronic Development Application and Management System (e-DAMS) which was an online platform where professionals could easily and conveniently access Mombasa County Government Development Control services. This was the portal wherein all change of user applications to the County Government of Mombasa were lodged and approved or rejected as the case may be.

9. The 1st Defendant'/Respondent's Change of User application was uploaded/ submitted on the 23rd August, 2022 and the proponent herein paid for the same and a circulation was automatically generated to seek views and objections to the said application. As part of Public Participation in the approval process, the general public views were sort pursuant to the publishing of the notice in the newspaper which was published in the Nation Daily and Taifa Newspapers and once objections (if any) had been addressed, the County Government of Mombasa (Department of Lands, Planning and Housing) then proceeds to issue an approval through a Form known as PPA 2. Form PPA 2 (Construction Permit/approval) was issued by the County Government Of Mombasa on the 29th April, 2023 under permit number CP Number P/2022/00592.

10. The 1st Defendant/Respondent was legally entitled to proceed with the construction subject to further compliances with various government agencies such as the National Environment Management Authority (N.E.M.A). The construction permit was only issued after an internal review mechanism was complete which showed that the building was up to the required standards and there were no objections from the relevant authorities. The 1st Defendant/Respondent's building plans (both structural and architectural) were approved by the County Government of Mombasa on the 29th April 2023 under approval number CP Number P/2022/00592. As far as the 1st Defendant/Respondent was concerned there was no objection received by the County Government as stipulated under the law in objection of the 1st Defendant/Respondent's Change of User pursuant to the newspaper advertisement circulated in the entire Republic of Kenya. Further to the above I can confirm that the 1st Defendant's complied with the requirements of the National Construction Authority (NCA) which thereafter issued a Certificate of Compliance dated 25th May 2020.

11. As a seasoned developer in both Mombasa and Nairobi, the 1st Defendant/Respondent was well aware that apart from complying with the Change of User before construction it also needed to comply with all relevant National Environment Management Authority(N.E.M.A) requirements as stipulated under the *Environmental Management and Co-ordination Act* No. 8 of 1999 (EMCA). In view of the foregoing the 1st Defendant/Respondent engaged a duly authorised and licenced environmental expert namely Ezekiel Olukohe to spearhead the compliance and to act as a liaison person between the 1st Defendant and the National Environment Management Authority (NEMA).

12. The 2nd Defendant/Respondent's expert was obliged by *Environmental Management and Co-ordination Act* (EMCA) to come up with an Environmental Impact Assessment (EIA) report and submit the same to the National Environment Management Authority (NEMA). The Environmental Impact Assessment (EIA) refers to a critical examination of the effects of the proposed project on the environment before its implementation. The process began when the s Defendant shared the primary documents with the National Environment Management Authority (NEMA). The required documents shared are as follows:

    i. Change of User

    ii. A Copy of the Title Deed (Plot No. 22992/I/MN Nyali, Mombasa County),

    iii. The 1st Defendant's Company Cerlificate of Incorporation

    iv. Draft Drawings of the 1st Defendant's Company proposed construction and;

    v. The 1st Defendant's Company KRA Pin.

13. After sharing the documents with the National Environment Management Authority (NEMA) as enumerated hereinabove the 1st Defendant was required to take representatives from the 2nd Defendant (NEMA) to the construction site. The representative from the National Environment Management Authority (NEMA) would then give their advice directly from the site. He was well aware that in compliance with the public participation requirement the 2nd Defendant/Respondent required that the 1st Defendant involves the neighbouring property owners by distributing questionnaires to them for feedback. It was noted that there were mixed reactions; some of the residents were co - operative in that they signed the questionnaire and returned with their feedback, however others were un – co - operative in that they neither signed the questionnaires nor returned them. There were a total of 12 questionnaires that were delivered. The 2nd Defendant/Respondent's expert was obligated under *Environmental Management and Co-ordination Act* (EMCA) to collect and collate relevant documentation and material and thereafter compile an EIA Report which was done after the fieldwork process is complete. He seen the Environmental Impact Assessment report (EIA) report prepared by the 2nd Defendant's expert. The main objective of the Environmental Impact Assessment report (EIA) Report was to establish the baseline conditions of the proposed project site, evaluate the existing and the anticipated impacts and propose measures to enhance the positive impacts and measures to attenuate the effects of the significant negative impacts. The report was eventually presented to the National Environment Management Authority (NEMA) contained the following salient features:-

    i. Executive Summary: it contains the entire description of the building, the anticipated environmental impacts, the mitigation measures and the conclusion.

    ii. Background of the Project: it outlined the definition of the project, the location of the project, the project objective and scope, the definition of the Environmental Impact Assessment report (EIA) Study and the preparation of the Environmental Impact Assessment report (EIA) Project Report.

    iii. Environmental Setting of the Project Area and its Environs: it contained the physical environment of the area in which the project would be established (climate, rainfall, temperature and landscape and topography). The Socio-Economic Environment was also captured herein which revolved around the physical infrastructure of the project.

14. Policy and Legal Framework: it outlined the various laws that have formed part of the environmental governance in Kenya. They included:-

> *The Constitution* of Kenya, *Physical and Land Use Planning Act* No. 13 of 2019, the Local Authorities Act and County Government Act, 2013, the *Public Health Act*, *Environmental Management and Co-ordination Act* (EMCA), the *Water Act*, Renewable Energy and Energy Efficiency Regulations, *Employment Act* 2007, Work Injuries Benefits Act 2007, *Labour Institutions Act* 2007, *Occupational Safety and Health Act* 2007, Legal Notice No. 74: The National Construction Authority Regulations 2014.

15. On the Proposed Project Location, Description and Alternatives: it contained the proposed location, ownership and neighbourhood, design, construction work, technology to be used, equipment, materials, utilities and waste, waste management and disposal, project cost and project alternatives. On the Public Consultation: it outlined the method that was used for public participation which in this case was the issuance of questionnaires to immediate neighbours to site. On the Occupational Health and Safety: it contains the occupational health and safety management system, the internal safety matters and the ambient factors in the construction site. On Potential Environmental Impacts: it outlined the positive and negative impacts of the project and the proposed mitigation measures. Some of the positive impacts of the project include: creation of new job opportunities, increased support of local businesses, infrastructure development, contribution to local housing needs and increased revenue to the government. Some of the negative impacts of the project include: negative impacts on the aesthetic characteristics, influence in the micro-environment by casting shadows and blocking views and sunlight, an increase in the turbidity of the run-off and dust disturbance amongst others. On the Environmental Management Plan: it included the Environmental Management Plan (EMP), noise management plan, dust management plan, occupational hazards management plan and waste management plan. On the Environmental Monitoring and Auditing: it contained the monitoring parameters and schedule. On the Decommissioning Plan: it included the disposal/demolition of apartment, the considerations, support infrastructure on site, site rehabilitation and disposal of land. On the Environmental Impact Assessment (EIA) report was submitted by the 2nd Defendants/ Respondent experts and a reference number (NEMA/PR/MSA/5/2/5730) was issued. Further, the 2nd Defendant/Respondent's expert followed up on the licensing process with the National Environment Management Authority (NEMA) which was eventually issued after hearing the views of the lead agencies that the National Environment Management Authority (NEMA) deemed important for this project and after taking all other considerations under the *Environmental Management and Co-ordination Act* (EMCA).

16. In view of this court case and in light of the concerns raised by the Plaintiff/Applicant herein the 1st Defendant decided to engage an independent qualified and licensed planner to audit the change of user granted by the Department of Lands, Planning and Housing and most importantly look into the specific issues raised by the plaintiff in this case.

17. The independent planners report noted that the change of user from single dwelling Unit to Multiple high-rise dwelling units was advertised through two local Daily Newspapers (Taifa Leo and Daily Nation on 31st May, 2022) as required by Law and that circulation was done to relevant departments seeking comments on this application. No objection was raised at the Change of User was consequently approved on 7th September 2022 bearing approval No. CU-00AK7.

18. Further the independent planners report noted that the 1st Defendant/Respondent first lodged a building construction application for approval on 25th September,2022 through the Mombasa Electronic Development Application Management System (EDAMS). The application was invoiced

and the 1st Defendant/Respondent first paid the county fees. The application was assigned reference Number P/2022/00592 and it was circulated via the EDAMS to all technical departments (Planning, Public Health, Architecture, Environment, Water, Fire, Valuation and engineering department). Under circulation stage no objection was raised by the county technical team and the plan was approved on 29 April, 2023. The Plaintiff had falsely claimed in his suit that the character and the characteristics of the location of the suit property (Nyali) was residential single dwelling premises. However, contrary to this unsubstantiated averments, the independent planners report observed that characteristics of the location where the suit property was situated could be termed as a mixed-use development where there are restaurants commercial buildings and notable multiple high-rise residential buildings. Most importantly the planners report pointed out that the most predominant buildings are multiple high-rise dwelling residential buildings including Bungalows and Apartments.

19. The independent Planner had in fact pinpointed specific notable multiple high rise dwelling residential buildings located in the area where the suit property is situated. These buildings were as follows:-

    i. The Manara Park Apartments (Ground plus 7 floors)

    ii. Jupiter Heights (Ground plus two floors in 4 blocks)

    iii. Taneem Residency (Ground plus 11 floors

    iv. Horizon Apartment (Ground plus 6 floors);

    v. Aquavista Residential Apartments (Ground plus 12 floors)

20. The independent planner had rightly and justly concluded that the 1st Defendants development followed the prescribed development approval process as per the *Physical and Land use Planning Act*. No. 13 of 2019 and other relevant laws. It was the planners further conclusion that Nyali area where the situate property was situated is a mixed-use zone and that the proposed 1st Defendants residential building of seven floors is not out of character. From a physical planning point of view, the development of the seven-storey building has complied with county requirements of approval and other statutory regulations.

21. As a result of the injunctions issued herein the 1st Defendant continued to suffer immense prejudice, loss and damage as follows:-

    i. Building materials and especially Steel that has been purchased by the first defendant in large quantities for the subject construction Worth millions of shillings continues to waste away and thereby become derelict / rusty under the harsh coastal weather thereby rendering the said material useless for construction purposes.

    ii. The 1st Defendant/Respondent being a developer has already entered into serious contractual agreements wherein the said developer covenanted to complete the apartments ready for handover and occupation by the various purchasers on or before 30th August 2024. Further the contracts contain a punitive default clause whose full effect and purport Would mean the 1st Defendant paying such purchases Kenya Shillings 100,000/= for each month delayed.

    iii. The 1st Defendant being a developer works with huge capital ordinarily borrowed from banking institutions. Huge penalties and interest shall accrue if the project is not completed in time and payments by the various purchases made accordingly.

22. Given the totality of the case, the evidence adduced, the doctrines of equity and the law and the circumstances of this case it would be a great travesty of Justice if the injunctions given herein is not

discharged forthwith since the balance of convenience tilted heavily towards the refusal of the extension and or further grant of the impugned order.

23. There was now produced herewith and in opposition of the application filed herein and the facts and evidence deposed /annexed hereto the following documents:-

    a. A true photo stat copy of the Certificate of incorporation of Sazit Company Limited dated 18th November, 2011 marked as "ZMY-1".

    b. Proposed change of user for Plot no. 22992/I/MN dated 23rd August, 2022 marked as “ZMY-2",

    c. Letter from the Ministry of Land and Physical Planning to the Director County Planning dated 30th August, 2022 marked as "ZMY-3".

    d. Letter from the Ministry of Lands and Physical Planning to the Director County Physical Planning dated 30th August, 2022 marked as "ZMY-4".

    e. A Letter dated 6th September, 2022 to the Director County Planning Mombasa county marked as "ZMY-5".

    f. Notification of Approval of the Application for Change of User dated 7th September, 2022 marked as "ZMY-6".

    g. A copy of an advertisement for the Change of User published in the newspaper on Daily Nation dated 31st May, 2022 marked as "ZMY-7".

    h. A copy of an advertisement for the Change of User published in the newspaper on Taifa Leo dated 31st May, 2022 marked as "ZMY - 8".

    i. Invoice Number PSR_35651 from NEMA for the payment for project submission report marked as "ZMY-9".

    j. An Invoice Number INV-MSA-AAB439 from County Government of Mombasa for the payment of building plans marked as "ZMY-10"

    k. A KCB deposit slip for the payment of building plans marked as"ZMY-11"

    l. A Notification of Approval of the Application for building plans dated 29th April, 2023 marked as "ZMY-12".

    m. A Certificate of Compliance dated 25th May, 2023 for the Proposed Apartments on PLOT NO.22992/1/MN/NYALI marked as "ZMY-13".

    n. Photographs showing the ongoing construction marked as "ZMY-14".

    o. A Letter of Offer dated 4/11/2022, 22/3/2023 and 22/8/2023 collectively marked as "ZMY-15"

IV. The Notice of Preliminary objection by the 3rd Defendant

24. The 3rd Defendant/Respondent brought an objection on the jurisdiction of the Honourable Court to hear the Plaintiff/Applicant’s suit as per the Plaint dated 7th September, 2023 and prayed for the same to be dismissed with costs.

V. Submissions

25. On 18th January, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 7th September, 2023 and Notice of Preliminary Objection dated 25th October, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged. On 5th February, 2024 upon making a request, all the parties were accorded some brief moment to highlight their written Submissions a task Mr. Gathu, Mr. Kibara and Mr. Tajbhai Advocates executed with great diligence, devotion and dedication. The Honourable Court fully appreciate the efforts put thereof by all parties. Thereafter, a ruling date was reserved on 20th February, 2024 by Honourable Court accordingly.

A. The Written submissions of the Plaintiff for the Notice of Motion application dated 7th September, 2023

26. The Plaintiff/ Applicant through the Law firm of Messrs. Muthee & Partners LLP Advocates filed their written submissions dated 6th January, 2024. Mr. Gathu Advocate commenced their submissions by stating that the before the Honourable Court was the Plaintiff/Applicant's Notice of Motion Application dated 7th September 2023 to which the Honourable Court issued interim Orders on 12th September 2023.The Plaintiff/Applicant reiterated the contents of its Supporting Affidavit sworn on 7th September 2023 and the Further Affidavit sworn on 27th October 2023. The Honourable Court directed that the said Application be canvassed by way of Written Submissions and the Plaintiff/ Applicant submitted as herein follows in support of its Application.

27. On the brief facts of the case the Learned Counsel submitted that it was not disputed that the Plaintiff/ Applicant is the beneficial and legal owner of all that parcel of land situated in Mombasa County and being CR. NO. 14800 where it had constructed a residential apartment occupied by its Director. It was further not in dispute that the Plaintiff/Applicant's parcel of land borders the 1st Defendant/ Respondent's subject parcel of land being Plot Number 22992/I/MN.

28. The Learned Counsel submitted that in the year 2023, it noted some construction that was going on the 1st Defendant/Respondent's parcel of land and it noted the erection of a sign board detailing the particulars to approvals and the various parties involved in the ongoing construction. The Plaintiff/Applicant established that the 1st Defendant/Respondent procured a Change of User with respect to the subject construction and which Change of User was approved by the 2nd Defendant/ Respondent and that the 1st Defendant/Respondent's parcel of land measures approximately 0.0869 Ha. The location of its parcel of land and that of the 1st Defendant/Respondent was in Nyali which environment harbors residential one family units as opposed to residential apartments such as the one intended to be constructed by the 1st Defendant/Respondent.

29. The Learned Counsel submitted that at the time of purchasing its property, it was presented to it that the Parcel of land even at the time of its sub - division was intended to harbor bungalows and one family single dwelling houses and not apartments. The said sign board erected on the parcel of land only disclosed the project was with respect to the construction of a proposed Apartment on the 1st Defendant/Respondent's parcel of land and failed to disclose the magnitude and/or particulars of the said Apartment. The Plaintiff/Applicant had since learnt that the 1st Defendant/Respondent intended to construct a 6 storey building on its parcel of land.

30. The subject Change of User by the 1st Defendant/Respondent not validly obtained as there was material non - disclosure by the 1st Defendant/Respondent and the same should revoked and/or

cancelled. The Plaintiff/Applicant had since established that the persons who were allegedly consulted as a preliminary for the issuance of the Change of User are not immediate neighbors of the 1st Defendant/Respondent or the Plaintiff/Applicant.

31. The Learned Counsel averred that the immediate neighbors who own parcels of land adjacent to the 1st Defendant/Respondent being Summerland Ranches Limited, Adtron Enterprises Limited and Alfred Ndola were never consulted during the alleged process. As a matter of fact, the Plaintiff/Applicant was never consulted and/or issued with any documents requiring him to issue his views in light of the 1st Defendant/Respondent's construction.

32. The Learned Counsel asserted that as a result of the approval of the subject Change of User and the resultant construction of the 6 storey building by the 1st Defendant/Respondent, the Plaintiff/Applicant would stand to suffer loss and prejudice and submits as herein follows.

33. The Learned Counsel on the analysis of the law in respect of the Plaintiff/Applicant's Application and on the issue of whether the Honourable Court has the jurisdiction to issue the Orders sought, submitted that the Honourable Court is clothed with the jurisdiction to hear and determine the instant Application and issue the injunctive Orders sought.The Plaintiff/Applicant makes reference to the provisions of Section 13 (2) (a) and 7 (a) of the *Environment and Land Court Act* 2011 in submitting on the Court's jurisdiction to issue the Orders sought.

34. The Learned Counsel further submitted and relied on the provisions of Article 23 (3) of *the Constitution* of Kenya which provides that:

> "In any proceedings brought Under Article 22"a Court may grant appropriate relief; including (c)a conservatory Order.

35. On whether the Plaintiff/Applicant's application had merit, the Learned Counsel acquiesced that its Application was merited and ought to be granted at the interim stage as it was evident that the 1st Defendant/Respondent's project contravenes the mandatory provisions of the 2nd Defendant/Respondent's governing By-Laws with respect to the Acreage required for purposes of the construction. The by - laws was express and coached in mandatory terms in respect of the acreage required for any storey construction and the Plaintiff/Applicant argued that the 1st Defendant/Respondent's parcel of property does not meet the said acreage.

36. The Learned Counsel further averred that the neighborhood was a residential area and their properties was adjacent to and/or adjoining the suit property, and by virtue of the proximity of the suit property, they was directly affected by any developments or works being undertaken on the suit property. The Learned Counsel invited the Honourable Court to note that the 1st Defendant/Respondent had not availed any evidence that the properties in close proximity to the Plaintiff/Applicant and the 1st Defendant/Respondent's Parcel of land habour story buildings as alleged. As a matter of fact, the building referred to by the 1st Defendant/Respondent did not border the Plaintiff/Applicant's parcel of land and was not even along the main road leading to the Plaintiff/Applicant's or the 1st Defendant/Respondent's parcel of land.

37. The Learned Counsel averred that the Courts had already established and held that where a construction was out of character with respect to the residential use of a particular area, then such construction ought to be stopped by way of granting injunctive orders. That in submitting as aforestated, they were guided by the decision of the Court in the case of "Tiara Villas Management

Limited & 4 others – Versus - Joe Mutambu & 3 others [2022] eKLR" where the Court issued the following Orders:-

> " b) A permanent injunction restraining the 1st and 2nd defendants from continuing with any development, works and /or construction as LR 3734/812 located along Mugumo Road, Lavington Nairobi which is deleterious to the environment and/or out of character with the residential use of the area."

38. On whether the Plaintiff/Applicant had met the threshold for granting of an injunction, the Learned Counsel argued that while determining this issue, he invited the Honourable Court to take into account the principles to be determined in granting an injunction at an interim stage as was settled in the case of:- "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 Others [2003]KLR 125" and thereafter proceed to make a finding that the Plaintiff/Applicant had met the threshold for granting the interim injunction. The Court in this case stated that:-

> " The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.....A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly standard, which is higher than an arguable case

39. The Learned Counsel asserted that the grounds on which the Plaintiff/Applicant sought the injunctions being that the project emanated from a frown process being that the Change of User was obtained. It offended the provisions of the Physical Planning Act as no extension was sort for the increase of the subject parcel of land as per the provisions of the Physical Planning Act entitled the Plaintiff to an order for an injunction.Further, the Learned Counsel argued that there exist special circumstances warranting the granting of the injunction in that once the 1st Defendant's 6 storey building was finalized, the Plaintiff/Applicant's constitutional right to quiet enjoyment of his property which included the privacy he envisaged at the point of constructing his residential family house shall

be permanently infringed on. In submitting on the Court's jurisdiction to grant temporary injunctions so as preserve the subject matter of the suit, the Learned Counsel was guided by the decision in the case of:- "Mwalungu Mwambui Nyiyo & 201 others – Versus - Total Oil Products (East Africa)Limited & another [2021] eKLR" where the Court in enforcing its mandate in respect of the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 stated that:-

> " In the given circumstances, both the Plaintiffs/Applicants and 1st Defendant/Respondent stand to lose if either party asserts rights over the suit property. The provision of Order 40,Rules 1 & 2 of the Civil Procedure Rules,2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting, damaging, alienation, sale, removal or disposition of the suit property. The Plaintiffs/Applicants stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the Court of Appeal in the case of Nguruman Limited-Versus- Jan Bonde Nielsen & 2 others (2014) eKLR" in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."

40. The prejudice to be occasioned by the 1st Defendant which was of a permanent nature ought not to be allowed. This was in the least without granting the Parties an opportunity to ventilate their issues through a full hearing hence the need to grant the interim injunctions at this point so as to preserve the subject matter of the suit. In light of the fact that the Plaintiff/Applicant stood to suffer prejudice of a permanent nature, the Learned Counsel invited the Honourable Court to find that the balance of convenience tilted in favour of the Plaintiff/Applicant. In making reference to the subject matter of the suit, the Plaintiff/Applicant submitted that the same would be lost and the matter rendered a mere academic exercise in the unfortunate event the 1st Defendant/Respondent was allowed to continue with the construction pending the hearing of the instant suit.

41. It was their further submission that that the fact that the 1st Defendant/Respondent contravened mandatory provisions of the 3rd Defendant/Respondent's By-laws with respect to the acreage was sufficient ground to show that the Plaintiff/Applicant's case had high chances of success hence the need to grant an injunction at this interim stage. There was a need to preserve the subject matter of the suit which has so far been preserved vide the interim orders issued on 12th September 2023 which had not been set aside and the status quo orders issued by Lady Justice Matheka on 27th November 2023. Failure to in the lease issue and maintain the status quo orders as at 12th September 2023 shall infringe on the Plaintiff/Applicant's right.

42. In submitting on the need to preserve the subject matter of the suit as aforesaid, the Learned Counsel was guided by the decision of this Honourable Court in the case of:- "Mburu – Versus - Kibara & 2 others (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR)(28 July 2022) (Ruling)" where the Court stated that:-

> " Despite this, it must be appreciated that at this interlocutory stage, the Plaintiff has annexed evidence that he is the registered proprietor of the suit property and that in some way, his right as a proprietor is being infringed. It is implicit that the status of the suit property be preserved, and that there be no further development, construction, or even alienation or charge of the suit property till this suit is heard and determined.

25. The Black's Law Dictionary, Butter Worth's 9th Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been reiterated in a number of decisions. In the case of "Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR, Odunga J. stated:-

> "When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve the existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

26. In the case of "Kenya Airline Pilots Association (KALPA) – Versus - Co-operative Bank of Kenya Limited & another [2020] e KLR, the purpose of a status quo order was explained as follows:

> "... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."

ISSUE No. b). Whether the parties are entitled to relief sought

27. Under this Sub heading, apart from preserving the substratum of the subject matter, It is my view that an order of status quo is a case management strategy, where the court will be keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit. In this instant application, there is a development, (club) that the Plaintiff claim belong to the Defendants and is situated on the suit property. The Plaintiff prays that the 1st, 2nd and 3rd Defendants vacate the suit property. The Plaintiff has also shown that he is the registered proprietor of the suit property. However, as earlier stated it is impossible without a survey report or a scene visit to tell whether the said club is located on the suit property. Both parties as it stands have an interest that needs to be preserved pending the determination of this suit. To meet the end of justice, neither party should be prejudiced.

43. On the need to preserve the subject matter of the suit so that any Judgement in favour of the Plaintiff/ Applicant was not rendered nugatory. The Learned Counsel submitted the Honourable Court to address its mind to the decision in the case of:- "Esso Kenya Limited – Versus - Mark Makwata Okiya Civil Appeal No.69 of 1991" as relied upon in the case of "JM – Versus - SMK & 4 others [2022] eKLR" where the Court stated that:-

> " The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application

before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a Plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."

44. The Learned Counsel further call upon the Court to be guided by the decision of the Court in the case of:- "Giant Holdings Limited – Versus – Kenya Airports Authority [2004] eKLR" where the Court expressed the need to preserve the subject matter of suit and stated that:-

> " Failure to preserve the status quo until the earlier application is heard would in the circumstances described defeat the cause of justice and the intention of the parties. The maximum equity regards that has done which ought to have been done comes in handy in this situation, the situation is not provided for and therefore this court is clearly entitled to invoke its inherent powers and S 63 (c) and (e) of the *Civil Procedure Act* in order to meet the ends of justice. Failure to do so would render the injunction application superfluous. Courts of law and equity should never agree to be moved in vain or its process defeated by a step of one party which conveniently tries to take advantage of a mistake in the court process. The hand of justice is never too short or too long. It adjusts to all situations."

45. In submitting that the Court has the jurisdiction to grant an injunction even at interim stage, the Learned Counsel humbly the Court to be reminded and be guided by its decision in the case of "Bandari Investments & Co. Limited – Versus - Martin Chiponda & 139 others[2022] eKLR" where the Court in granting interim Orders stated that:-

> " The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "Malier Unissa Karim-Versus - Edward Oluoch Odumbe (2015)eKLR as follows:-
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> > "The test for granting a Mandatory Injunction is different from that enunciated in the "Giella – Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of "Kenya Breweries Limited - Versus - Washington Okeyo (2002) EA 109" had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was

correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

> "A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".

40. Further the same Court of appeal in the case of "Jay Super Power Cash and Carry Limited – Versus - Nairobi City Council and 20 others CA 111/2002" held that:-

> "This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".
>
> Additionally, based on a passage from 24 Halsbury Laws of England, Page 248,the case of Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906, the court held thus:-
>
> > 'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedies, or if the Defendant attempted to steal a march on the Plaintiff.....a Mandatory injunction will be granted on an interlocutory application.'
>
> The reason for this rule on granting of Mandatory Injunction is plain. Megarry .J put it succinctly in a

subsequent passage in the case of "Shepard Homes Case (Supra) as follows:-

> ".....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trail whether the injunction should be dissolved or contained"

46. In the instant case, should Mandatory Injunction issue or not? The answer is in the affirmative. In saying so, this Court has based its decision on a number of reasons. Firstly, its agreed that a Mandatory Injunction will issue not as a matter of course. The case should under special circumstances and calling for such an order. Undoubtedly, this is an extremely and extra ordinarily special case. From the facts, the Plaintiff though denying that there were no structures nor people having lived on the suit land. Be that as it may, on 19th November, 2021 this Honorable Court conducted a site visit on the land in the presence of all the parties."

46. The Learned Counsel invited the Honourable Court to be guided by the facts as deponed by the Plaintiff/Applicant in its Supporting Affidavit to the effect that it stood to suffer irreparable loss of a permanent nature in the event the Orders are not issued. While still submitting on this issue, the Learned Counsel invited the Honourable Court to read into the craft nature in which the 1st Defendant/Respondent procured the Change of User by failing to seek the views of its immediate neighbors and alleging that it issued the forms to some of the neighbors but failed to get any responses. As a matter of fact, the Plaintiff/Applicant had not demonstrated what efforts it made if any in collecting the said forms that it dropped with the alleged security guards or left at the said Premises.

47. The above allegations were nothing close to the actual facts as the immediate neighbors of the 1st Defendant/Respondent were yet to construct on their parcels of land in which they intend to construct residential home dwelling houses. Hence it was not possible for the 1st Defendant/Respondent or his agents to leave the alleged forms at any houses as none have been constructed. It was now well settled in law that the Honourable Courts should not allow any party to benefit from an illegality such as the illegality exhibited by the 1st Defendant/Respondent in respect of the failure of its property to meet the threshold for constructing a storey apartment and the failure to seek the views of its immediate neighbors prior to obtaining a change of user.

48. The Plaintiff had further satisfied that by virtual of not having been consulted during the process of procuring the Change of User, it was denied a right to safe guard its constitutional right with respect to quietly enjoying its property. The Learned Counsel posited that the 1st Defendant/Respondent shall not suffer any loss in the event an injunction was granted at this stage pending the expeditious hearing and determination of this suit.

49. In conclusion, the Learned Counsel urged the Honourable Court based on the afore - stated to allow the instant Application with costs to the Plaintiff/Applicant or in the alternative grant status quo orders with the aim of preserving the subject matter of the suit.

B. The written submissions of the Plaintiff on the Notice of Preliminary objection dated 25th October, 2023

50. The Plaintiff/Applicant through the Law firm of Messrs. Muthee Kihiko & Company Advocates LLP filed their written submissions dated 2nd February, 2024. Mr. Gathu Advocate commenced their submissions by stating that before the Honourable Court was the 3rd Defendant/Respondent's preliminary objection dated 25th October 2023 against the Plaintiff/Applicant's suit in its entirety.

51. According to the Learned Counsel, the said Preliminary Objection lacked merit and never met the threshold required of a Preliminary Objection and he submitted further as herein follows. The Preliminary Objection failed to meet the test as set out in the landmark case of:- "Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited (1969) EA 696", where it was held that:-

> " A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

52. On issue of whether the Honourable Court has the jurisdiction to hear and determine the suit, the Learned Counsel submitted the Honourable Court has jurisdiction to hear and determine the suit and issue the Orders sought. That on the onset, they refer the Court to the decision of:- "Peter Karung'o Njoroge – Versus - Hijaz Development Limited & 4 others [2018] eKLR" where the Court held as follows:-

> " 18. However, more often than not, the jurisdiction of such Tribunals or bodies is usually limited in scope. The jurisdiction of the National Environment Tribunal is limited under Section 129 of the *Environmental Management and Co-ordination Act* (EMCA) to hearing appeals in respect to: the grant of a licence or permit, or the transfer of a licence or permit under the Act; the imposition of any condition on a licence issued under the Act; the revocation, suspension or variation of the licence under the Act and the imposition of an environmental restoration order or environmental improvement order by the National Environmental Management Authority (NEMA).
>
> 19. On the other hand, the jurisdiction of the Liaison Committees established under the Physical Planning Act has the jurisdiction of dealing with a complaint by a person who is aggrieved by the decision of the local authority refusing his application for development permission (See Section 34 of the Physical Planning Act).

20. However, unlike the National Environment Tribunal and the Liaison Committees which have limited jurisdiction, the Environment and Land Court has unlimited original and appellate jurisdiction to determine any dispute relating to land and environment (See Section 13 (1) of Environment and *Land Act*). Indeed, this court, unlike the National Environment Tribunal and the Liaison Committees, is the only one mandated to hear and determine applications for redress of a denial, violation or infringement of, or threats to, rights or fundamental freedoms relating to the environment and land.

21. Considering that the Petitioner is seeking to enforce the right to a clean and healthy environment (Article 70) the right of access to information (Article 35) and the right to fair administrative action (Article 47), it is only this court that can determine the Petition and not the NET or the Liaison Committee. The two bodies are not clothed with the jurisdiction to hear and determine matters which are purely constitutional in nature, neither can they issue judicial review orders. Considering that the issues raised in the Petition are a mixture of legal issues, ranging from the legality of the licence that was issued by National Environmental Management Authority (NEMA), to the question of whether there was public participation before the 2nd and 3rd Respondents issued the requisite approvals to the 1st Respondent to develop the suit land and whether the Petitioner's rights have been infringed or are likely to be infringed, it is only this court that can hear those issues, and not NET or the Liaison Committees.

22. For those reasons, I find that the Notices of Preliminary Objections filed in this matter are not meritorious. I therefore dismiss them with costs."

53. From the afore - stated decision of the Court, the Learned Counsel invited the Honourable Court to consider the nature of the Plaintiff/Applicant's suit and the grounds in support of the Order sought which seek to enforce the right to a fair administrative action on account of the fact that it was notified of the subject matter of the suit being the construction by the 1st Defendant/Respondent. The Plaintiff/Applicant further sought to enforce the rights to a healthy environment on the grounds that the subject construction consisting of 6 floors would harm the environment particularly taking into account the small acreage of the subject parcel of land against the population it was intended to accommodate. The Learned Counsel further invited the Honourable Court to take into account the complex nature of the suit and noted that the Plaintiff/Applicant further sought to focus on the permits issued by the 3rd Defendant and which issues could not be determined by the 2nd Defendant/Respondent.

54. The Learned Counsel acquiesced that the provisions of Article 162 (2) (b) of *the Constitution*, 2010 as read together with Section 13 of the *Environment and Land Court Act*, 2011, together with the provisions of Section 3(3) of the Environmental Management & Coordination Act 1999, this Honourable Court ought to assume and exercise its constitutional Mandate. A grant of the Preliminary Objection will be tantamount to abdication of Jurisdiction and by extension a failure to protect *the Constitution*, 2010.

55. Further to their argument, the Learned Counsel relied on the decision in the case of "Ken Kasing'a – Versus - Daniel Kiplagat Kirui & 5 others [2015] eKLR" where the Court in dismissing a similar Preliminary Objection stated that:-

> " 36. It will be seen from the above that the ELC has an extremely expansive jurisdiction. Indeed, in my view, as long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or the rejection of an EIA licence. True, a person aggrieved by the decision has avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a court of first instance. If the ELC feels that the matter can be determined by NET, it can refer the matter to NET for determination, and wait to sit be a statement that the ELC has no jurisdiction over the matter."

56. Submitting on the second limb as raised by the 3rd Defendant/Respondent, the Learned Counsel opined that the Plaintiff/Applicant was not informed of the decision approving the Change of User in the same fashion it was not informed of the process commencing the Change of User. The Plaintiff/Applicant only came to know of the construction when the sign board was elected on the suit property and it made haste to seek orders from the Court.As a matter of fact, the Plaintiff/Applicant wrote a letter dated 14th August 2023 which forms part of the Plaintiff/Applicant's annexures to the 3rd Defendant/Respondent sought for clarification and raising its concerns to the 3rd Defendant/Respondent which letter was yet to elicit any response from the 3rd Defendant/Respondent.

57. The Plaintiff/Applicant not having been informed of the decision approving the Change of User, there was no possible way for the Plaintiff/Applicant to raise any objections or concerns with the Liaison Committee within the statutory timelines.Further, the 3rd Defendant/Respondent having failed to respond to the Plaintiff/Applicant's letter thereby denying the Plaintiff/Applicant the opportunity to engage the 3rd Defendant/Respondent. The 3rd Defendant/Respondent was estopped from raising the said objection in respect of timelines.

58. On this issue, the Learned Counsel was guided by the decision of the Court in the case of:- "John Kabukuru Kibicho & another – Versus - County Government of Nakuru & 2 others [2016]eKLR".

> " 27. The substantive issue in this suit concerns a planning permission that allowed a Change of User of the suit property. I agree with the Respondents on the argument that a person faced with a planning decision, has a right to appeal that decision to the Liaison Committees. However, I do not agree with the contention that the Petitioners herein ought to have channeled their grievance to the Liaison Committees. They had absolutely no opportunity to do so. In as much as the 1st Respondent deposed that the Petitioners were informed of the decision allowing the change of user, I have no proof of such. I have not seen any letter or any form of communication from the 1st Respondent to the Petitioners, informing them that their objection against the Change of User was rejected. If there was such communication, then the issue of the

petitioners not channeling their grievance through the Liaison Committees would probably have had some weight.

28. But how did the Respondents expect the Petitioners to pursue an appeal to the Liaison Committees when they had no notice of the decision approving the Change of User? The Respondents cannot be allowed to use their own failure to communicate their decision, to shut out the Petitioners from accessing this court, yet their failure to communicate, effectively barred the Petitioners from appealing their decision to the Liaison Committees within the stipulated time. Having not been notified of the decision, the Petitioners could clearly not have accessed the Liaison Committees within the statutory period. I therefore do not agree with the Respondents that the petitioners had the avenue of presenting their grievance to the Liaison Committees and I cannot allow the Respondents to use their own omissions to slam shut the door of justice in the face of the Petitioners. I do hold that the Petitioners had a right to access this court.

29. I do not think there is serious argument that this court cannot hear a dispute such as this. This dispute is before the Environment and Land Court which is the court established on the strength of Article 162 (2) (b) of *the Constitution*, with mandate to hear disputes concerning land and the environment. The jurisdiction is elaborated in the *Environment and Land Court Act*, 2011 which at Section 13 sets out the jurisdiction of this court."

59. In conclusion, the Learned Counsel invited the Honourable Court to dismiss the 3rd Defendant/ Respondent's Preliminary Objection and maintain status quo orders with the aim of preserving the subject matter of the suit.

B. The Written Submissions by the 1st Defendant/ Respondent

60. While opposing the application dated 7th September, 2023 by the Plaintiff/Applicant, the 1st Defendant/Respondent through their Learned Counsels the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their rather lengthy written submissions dated 16th November, 2023. Mr. Kibara Advocate commenced his submissions by providing a detailed background of the case. He stated that by the said application dated 07/09/2023, the Plaintiff prayed for the above set out ten (10) orders.

61. In reply to the Plaintiff's application aforesaid, the 1st Defendant/Respondent filed and shall be relying on the following four (4) affidavits all sworn on 27/09/2023:

    a. Replying Affidavit by Zahir Mohamed Yusuf the 1st Defendant/Respondent's director;

    b. Affidavit by Saleh Agil a Registered and Practising Physical Planner;

    c. 1st Defendant's Submissions on Plaintiff's N/M Application dated 07/09/2023);

    d. Affidavit by Ezekiel Olukohe an Environmental Impact Assessment (EIA) expert; and

    e. Affidavit by Fortune Kennedy an EIA/Audit Consultant.

    The Learned Counsel held that virtually all of the Plaintiff's prayers on the face of the application could not be granted as drafted for the following reasons. Firstly, he asserted that this Honourable Court lacked the requisite jurisdiction to entertain the suit and application before it. There were two pieces

of legislation that clearly places this matter outside its jurisdiction. These were the Environmental Management and Coordination Act No. 8 of 1999 and the Physical Planning and Land Use Act. One of the main issues raised by the Plaintiff/Applicant was in relation to the approvals, permits and licences applied and granted by the 2nd Defendant/Respondent. He asserted that for the orders to be granted it was trite legal principle (through the Doctrine of Exhaustion) that one must first exhaust internal mechanisms and all remedies available and further ensure that all other avenues prescribed under any written law are exhausted before approaching the High Court. In this matter by dint of the provision of Section 129 of the EMCA Act. 1999 the Plaintiff/Applicant ought to have first approached the National Environmental Tribunal (NET) set up and the said section before approaching the court, perhaps on appeal. To buttress on that point, he cited several authorities including:- "Benson Ambuti Adega & 2 others – Versus - Kibos Distillers Limited & 5 others [2020]eKLR, where the Supreme Court held as follows.

> " The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted Issues could be determined by the Court "in the Interests of justice." It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but Instead chose to arrogate to itself the jurisdiction to hear and determine all the Issues raised In the Petition.
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> In the case of:- Republic – Versus - Magistrates Court, Mombasa;Absin Synegy Limited (Interested Party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24th January 2022) it was held as follows:
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> > "In common parlance, the term jurisdiction means the power of the courts to decide and try a case or issue. "Jurisdiction may be defined to be the power of the court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. Jurisdiction means the power conferred by law upon the court to try and hear the cases and give appropriate judgements."
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> In the case of:- Republic – Versus - NEMA Ex - Parte Sound Equipment Ltd CACA No. 84 of 2010 [2011] eKLR where it was held that:
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> > "Challenges to Environmental Impact assessment Licences should be made to National Environmental Tribunal established for that purpose under Section 125 of the ENVIRONMENT MANAGEMENT AND COORDINATION ACT (EMCA). Rather than come to this Court, the Tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licenses."

62. Thus, in summary, the Counsel strongly averred that the matter should have been handled by the National Environment Tribunal, a specialized legal body, as the first option on the allegations levelled against the 1st Defendant/Respondent. Secondly, based on the provision of the provision of Section 61 (3) read together with Section 93 of the *Physical and Land Use Planning Act* No. 13 of 2019 stipulates that any party who was aggrieved by the decision of the County Executive Committee which was charged with the grant of Change of User had been challenged by the Plaintiff/Applicant in this case must first approach the County Physical Land Use Planning and Liaison Committee within 14 days of

the decision by the County Executive Committee member. Thereafter, the Committee shall hear and determine the matter within 14 days. The Plaintiff/Applicant never did that and had not demonstrated before this court why it did not take the necessary step before approaching this court.

63. In view of the above legislation, it was clear beyond peradventure that a party such as the Plaintiff in this suit cannot found a suit in the manner and form taken out before an adjudication is heard and determined by the institutions set out therein.

64. The Plaintiff had filed these proceedings in clear breach, violation and contravention of the doctrine of exhaustion as breathed to life and contemplated under the provision of Article 159 of *the Constitution* of the Republic of Kenya. The Learned Counsel then submitted at length and with a myriad of authorities to boot on the historical origin, definitions & interpretation, effect and the rationale of the Doctrine of Exhaustion which the Court find it not so "pari material' to re – produce herein at the moment. In a nutshell, he opined that except for Prayers 1 and 2 (both of which had already been granted), the Plaintiff's prayers as drafted on the face of the application could not be granted by this court.

65. From the depositions in and annexures to the 1st Defendant/Respondent's four (4) affidavits aforesaid, the Learned Counsel rephrased them. In a nutshell, the 1st Defendant/Respondent's intended development had followed the prescribed development approval process as provided under the *Physical and Land Use Planning Act* and all other relevant laws. Because of the ex parte injunction issued herein, the 1st Defendant/Respondent continued to suffer immense prejudice, loss and damage. This was in form of the building materials especially steel already purchased by the 1st Defendant/Respondent in large quantities for the subject construction worth millions of shillings continue to waste away and thereby became derelict/rusty under the harsh coastal weather thereby rendering the said material useless for the intended construction purposes. The 1st Defendant/Respondent being a developer has already entered into serious contractual agreements wherein it covenanted to complete the apartments ready for handover and occupation by the various purchasers on or before 30th August, 2024. Further the contracts contained a punitive default clause whose full effect and purport would mean the 1st Defendant/Respondent paying such purchases a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) for each month delayed. Further, them being a developer works with huge capital borrowed from banking institutions. Huge penalties and interest shall accrue if the project was not completed in time and payments by the various purchasers made accordingly.

66. The Learned Counsel asserted that given the totality of the case, the evidence adduced, the doctrines of equity and the law and the circumstances of this case, it would be a great travesty of justice if the injunction granted ex parte herein is not discharged forthwith since the balance of convenience tilts heavily towards the refusal of the extension and or further grant of the injunction order. In summary, the 1st Defendant/Respondent urged this court to find that the 1st Defendant/Respondent followed due process in obtaining change of user, NEMA licence and all other legal and statutory requirements for putting up the proposed apartments on the suit property.

67. With regard to the Affidavit by SALEH AGIL a Registered and Practising Physical Planner and the depositions thereof. In light of the concerns raised by the Plaintiff/Applicant in this case, the 1st Defendant/Respondent engaged the Planner's services as an independent qualified and licensed planner to audit the Change of User granted by 3rd Defendant/Respondent and specifically to look into the specific issues raised by the Plaintiff in this case. To that end, the 1st Defendant furnished the planner with all relevant documents regarding the approval of the development on the suit property as well as all the relevant documents regarding the Change of User for the planner's perusal and audit. The 1st Defendant/Respondent was going to change the user from a single residential dwelling to multiple

high-rise residential dwelling units (apartment use) on the suit property. The planner confirmed that indeed the 1st Defendant/Respondent submitted to the County Government of Mombasa all the necessary documents to start the process of the proposed change of user.

68. With regard to the Affidavit by EZEKIEL OLUKOHE an Environmental Impact Assessment (EIA)expert and depositions in the Affidavit of Ezekiel Olukohe an EIA expert. The 1st Defendant/ Respondent enlisted the expert to prepare an EIA Report and submit it to NEMA. They also tasked the expert with spearheading compliance and acting as liaison between the 1st Defendant and NEMA. EIA referred to a critical examination of the effects of the proposed project on the environment before its implementation. The process began when the 1st Defendant shared all the relevant primary documents with NEMA. Thereafter, the 1st Defendant/Respondent was required to take NEMA representatives to the construction site who would then give their advice directly from the site. In compliance with the public participation requirement, NEMA required the 1st Defendant to involve the neighbouring property owners by distributing questionnaires to them for feedback. The expert noted that there were mixed reactions; some of the residents signed the questionnaire and returned it with their feedback; others neither signed the questionnaires nor returned them.

69. The expert was obligated under EMCA to collect and collate relevant documentation and material and thereafter compile an EIA Report which is done after the fieldwork process is complete. The main objective of the EIA Report was to establish the baseline conditions of the proposed project site, evaluate the existing and anticipated impacts, and propose measures to enhance the positive impacts and measures to attenuate the effects of the significant negative impacts. The EIA Report was submitted to NEMA and a reference number was issue i.e.NEMA/PR/MSA/5/2/5730). The said EIA Report contained the salient features. On Public Consultation: it outlined the method used for public participation which in this case was the issuance of questionnaires to immediate neighbours to site. On occupational Health and Safety: contained the occupational health and safety management system, the internal safety matters and the ambient factors in the construction site.

70. On Potential Environmental Impacts: it outlined the positive and negative impacts of the project and the proposed mitigation measures. Some of the positive impacts of the project include: creation of new job opportunities, increased support of local businesses, infrastructure development, contribution to local housing needs, and increased revenue to the government. Some of the negative impacts of the project include: negative impacts on the aesthetic characteristics, influence in the micro-environment by casting shadows and blocking views and sunlight, an increase in the turbidity of the run-off and dust disturbance amongst others. On Environmental Management Plan: includes the Environmental Management Plan (EMP), noise management plan, dust management plan, occupational hazards management plan and waste management plan. On Environmental Monitoring and Auditing: contains the monitoring parameters and schedule. On Decommissioning Plan: includes the disposal/ demolition of apartment, the considerations, support infrastructure on site, site rehabilitation and disposal of land. The expert followed up on the licensing process with NEMA which was eventually issued after hearing the views of the lead agencies that NEMA deemed important for the proposed project and after taking all other considerations under EMCA. The expert, at paragraph 14 of his affidavit of had produced and annexed thereto the relevant documents.

71. With regard to the affidavit by FORTUNE KENNEDY an EIA/Audit Consultant and the depositions in the Affidavit of Fortune Kennedy an EIA/Audit Consultant. He stated that in October 2022, the audit consultant delivered questionnaires to the residences in Nyali. The questionnaire was delivered to the security guard who signed the delivery note as John Musyimi (No. 7 on the annexed copy of the delivery note)but they never returned the questionnaire. The Learned Counsel submitted that the Plaintiff/Applicant had not satisfied the Well-Settled Principles on Interlocutory Injunctions and the

conditions required for granting an interlocutory injunction set out in "the locus classicus case" of "Giella – Versus - Cassman Brown & Co. Ltd. [1973] E.A. 358. In that case,Spry VP stated as follows:

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. FIRST an applicant must show a prima facie case with a probability of success. SECONDLY an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. THIRDLY, if the court is in doubt, it will decide an application on the balance of convenience."

He averred that regarding how these indispensable pillars of injunction ought to be handled, the Court of Appeal in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR) held, 'inter alia:

> " These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

72. Accordingly, he submitted that the Plaintiff/Applicant had utterly failed to demonstrate the existence of 'a prima facie case with a probability of success. He opined that the Plaintiff/Applicant had in the end made a desperate last ditch effort predicated on mere semantics in a bid to hoodwink this court. They had only tried to split hairs in advancing a novel argument to the effect that what NEMA authorised and licensed was the construction of 5 storeys with penthouse as opposed to seven floors authorised by the county government of Mombasa. He submitted that both of these 2 Government institutions authorised the same thing and in fact spoke in one voice but in a different language/ expression. This indeed had been a question in the world of Engineering as to how one counted floors in the building. In very simple language, a two - storey building (Ground floor plus 2 floors on top) in fact meant three floors because the expression discounted the ground floor. When NEMA stated that the 1st Defendant/Respondent was authorised to do a 5-storey building with a penthouse if merely meant that the 1st Defendant/Respondent was authorised to do the ground floor + 5 Floors on top and penthouse. These were in fact the seven floors as allowed by the County Government of Mombasa, the latter being in the custom of counting each floor right from the ground.

73. To buttress on this point, the Learned Counsel referred Court to the case of "MRAO Limited – Versus - First American of Kenya limited & 2 others [2003] eKLR, [KLR 125J, the Court of Appeal defined prima facie case as follows:-

> " .....in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

In the Nguruman case (Supra), the Court of Appeal stated, inter alia:-

> " The party on whom the burden of proving a prima facie case lies must show a clear and Unmistakable RIGHT to be protected which is directly threatened by an act sought to be

restrained, the invasion of the right has to be Material and Substantive and there must be an Urgent Necessity to prevent the irreparable damage that may result from the invasion..."

74. He asserted that the Plaintiff/Applicant had not demonstrated any unmistakable right or material and substantive invasion of any or any Urgent Necessity to prevent the alleged irreparable damage that may result from the alleged invasion. To be specific, the crux of the Plaintiff/Applicant's case was that it was never notified of the Change of User and that the Change of User was invalid because there was alleged material non-disclosure by the 1st Defendant/Respondent. The Plaintiff/Applicant also alleged that the 1st Defendant/Respondent's ongoing development was out of character with other developments in the area. Despite making the aforesaid allegations among others, the Plaintiff/Applicant had not placed any, or sufficient, material before this court to corroborate the allegations.

The Learned Counsel submitted that on the other hand, in the aforesaid four (4) affidavits in response to the Plaintiff/Applicant's application for injunction, the 1st Defendant/Respondent had ably demonstrated, inter alia, that the suit property's change of user was duly published on 31st May, 2022 in both the Daily Nation and Taifa Leo being daily newspapers with daily countrywide circulation in Kenya and that the 1st Defendant/Respondent's ongoing development was not out of character with other developments in the area (Nyali). The 1st Defendant/Respondent had demonstrated that the area had high-rise buildings in the vicinity of the suit property running up to 12 floors (see paragraph 25 of the affidavit of Saleh Agil. In a nutshell, the 1st Defendant had not only deflated the Plaintiff/Applicant's cause of action. But the 1st Defendant/Respondent had also proved that it had complied with all the relevant laws and regulations concerning the intended construction of an apartment on the suit property. To support his point, the Counsel cited the case of:- "Lenkishon Kimirei Maika & 2 others – Versus - A.M. Kalio [2018] eKLR which was 'in pari materia' with the instant case and facts, this court sitting in Nakuru had to deal with an equally frivolous Plaintiff whose complaint against the construction by the Defendant was that the Defendant was constructing a huge building in a small parcel of land with the result that the area, scenery and topography would permanently change; that there would be crowding, insecurity, loss of privacy, inadequate parking space, that construction was of a 4 storey building instead of a 2 storey as per approvals and that there was no change of user. In his response, the Defendant in that case-as in the present case - stated that he had obtained all the necessary regulatory approvals and annexed, among others, a copy of the Notice of Application for Change of User published in the Standard newspaper, Notification of Approval for Development Permission and a letter from County Government of Nakuru forwarding copy of approved building plans. In dismissing the application for injunction, this court in the aforesaid case held inter alia:

> " 23. In view of the foregoing discussion, I am not persuaded that the Plaintiffs have shown an infringement of their rights by the Defendant and that their case is likely to succeed at trial. Simply put, they have not established a prima facie case with a probability of success. Notice of Motion dated 20th November 2017 is therefore dismissed with costs to the Defendant."

75. Further, the Counsel cited the case of:- "Janet Flora Muna – Versus - John Karanu Ikinu & 2 others [2015] eKLR the High Court sitting at Nairobi dismissed an application in which the Plaintiff likewise sought to stop an on-going construction on the 1st Defendant's property which was likewise adjacent to the Plaintiff's property, the High Court in dismissing the application for injunction, stated inter alia:

> " However, at this juncture, I see nothing untoward in the construction activities on the suit property being carried out by the 1st Defendant/Respondent and therefore find that the

Plaintiff/Applicant has failed to establish that she has a prima facie case with high chances of success at the main trial."

In the case of "Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR this court sitting at Eldoret held, inter alia:

> "On whether the Plaintiff has established a prima facie case with a likelihood of success, I do find that the Plaintiff has not established any legal right to the property as he is not the registered proprietor of the property and is not claiming beneficial interest. Moreover, the plaintiff has not established by affidavit that he is likely to suffer any irreparable harm."

He beseeched this court to make a similar finding and reiterated that the Plaintiff/Applicant in the present case had not made out "a prima facie case' against the 1st Defendant/ Respondent with a probability of success.

76. This being the first of three hurdles that the Plaintiff/Applicant must sequentially surmount before this Court could grant to the Plaintiff/Applicant the injunctive orders that it sought. Therefore, the Learned Counsel submitted that this court need not even consider the second and third conditions for injunction. To support that position, he referred Court to the "Nguruman case (Supra), the Court of Appeal stated, inter alia:

> " If prima facie case Is not established, then Irreparable Injury and balance of convenience need no consideration."

He urged this court to find and hold as much.

77. Nonetheless, on the second condition, the Counsel held that in the unlikely scenario that this court found that the Plaintiff/Applicant had a prima facie case, the Plaintiff/Applicant had not furnished any cogent evidence that it stood to suffer any loss or injury should the injunctive orders not be granted. From the Plaintiff/Applicant's affidavit in support of the application for injunction, it was evident that the Plaintiff/Applicant's main -if not the only - bone of contention is the approval of Change of User in respect of the suit property. Indeed, under paragraph 14 of the affidavit sworn by the Plaintiff/Applicant's director Faisal Abdirahman Abass in support of the application for injunction, the Plaintiff/Applicant had listed the following as particulars of loss and prejudice that the Plaintiff/ Applicant allegedly stood to suffer if the approval of the subject Change of User is allowed to stand:-

a). That the residential houses for purposes of rental facilities would increase traffic in a low density high class residential area.

b). That the adverse effects of the development being undertaken on the subject property would lead to depreciation of values of the Plaintiff/Applicant's property.

c). That the 1st Defendant/Respondent's development would generate noise and constitute nuisance to the Plaintiff/Applicant and other residents due to the increased population, thereby interfering with the quiet enjoyment of the Plaintiff/Applicant's property.

d). The Plaintiff would be permanently deprived of the privacy and quiet enjoyment of its property.

e). The nature of the 1st Defendant/Respondents interference, to wit, construction of the storey building would permanently affect the use, possession and occupation of the Plaintiff' property.

To the Counsel all these alleged particulars of loss and prejudice are speculative, imaginary, conjectural and hypothetical.

78. With regard to irreparable injury as a precondition for granting interlocutory injunction, the Court of Appeal in the "Nguruman case (Supra) held that there must be more than an Unfounded Fear or Apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; i.e. injury that is Actual, Substantial and Demonstrable; injury that cannot adequately be compensated by an award of damages. Specifically, the Court of Appeal in the said case held, inter alia:

> " If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the Applicant to injunction directly without crossing the other hurdles in between. On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy"

79. He stated that it was manifest from the Plaintiff/Applicant's own affidavit that their application for injunction was built on unfounded fear and apprehension on the Plaintiff/Applicant's part. The Plaintiff/Applicant has not proved actual, substantial and demonstrable Injury that cannot adequately be compensated by an award of damages.

In a nutshell, he reiterated that that the Plaintiff/Applicant had not demonstrated existence of irreparable damage that it was likely to suffer if the injunctive orders sought are not granted. Hence, taking that the Plaintiff/Applicant had failed to surmount the second hurdle necessary to obtain the injunction orders, this court need not consider the balance of convenience. However, as regards the balance of convenience if the Court was in doubt whether or not the Plaintiff would suffer irreparable loss and decides to consider the balance of convenience, he submitted on this ground the injunction sought ought to be rejected. He relied on the decision of the Court of Appeal in "the Nguruman case" (Supra) inter alia:

> "It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the Respondent, if it is granted."

80. He submitted that there was no material placed before the court that any inconvenience would be caused to Plaintiff/Applicant would be greater than that which may be caused. He reiterated that the balance of convenience tilted in favour of refusing the injunction sought by the Plaintiff/Applicant. The Plaintiff/Applicant had approached this Honourable Court in bad faith and with unclean hands. Reliance was placed on the case of: "MacMillan Bloedel Limited – Versus - Gallano Island Trust Committee {1995} B.C.J. 1763" where it was held that:-

> " Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable."

81. Based on the well-settled principles of injunction stated hereinabove set by past decisions of this Court, the Courts of equal status and the Court of Appeal, the Learned Counsel submitted that the Plaintiff/Applicant had failed to laid out a sound legal and/or factual basis for the granting of the injunction order. Thus, the Notice of Motion application dated 7th September, 2023 herein should be dismissed with costs in the cause.

VI. Analysis and Determination

82. I have considered the Notice of Preliminary Objection by the 1st and 3rd Defendants/Respondents herein, the Notice of Motion application dated 7th September, 2023 by the Plaintiff/Applicant herein, the replies and the rival written submissions, the plethora of authorities cited by the parties herein, the relevant provision of *the Constitution* of Kenya, 2010 and the statures.

83. For the Honourable Court to arrive at an informed, fair, reasonable and Equitable decision, it has condensed the subject matter into five (5) salient issues for its determination as follows:-

a. Whether the Preliminary objection dated 25th October, 2024 by the 1st and 3rd Defendants/Respondents herein meet the threshold of objections for raising pure points of law.

b. Whether this Honourable Court has the jurisdiction to hear and determine this suit?

c. Whether the Plaintiff has made out a case for grant temporary injunctive orders?

d. Whether the prayers for permanent injunction can be granted at an interlocutory stage

e. Who bears the Costs of the Notice of Motion application dated 7th September, 2023 and the Notice of Preliminary objection dated 25th October, 2023.

Issue No. a). Whether the Preliminary objection dated 25th October, 2024 by the 1st and 3rd Defendants/Respondents herein meet the threshold of objections for raising pure points of law.

84. First and foremost, prior to deliberating on the issues raised from the Notice of Motion application dated 7th September, 2023 being essentially whether to granting temporary injunction or not, the Honourable Court will deal with the preliminary objection raised by the Defendants/Respondents herein. In determining the instant Notice of Preliminary Objection dated 25th October, 2023, the Court will first consider what amounts to a Preliminary Objection. Juxtapose, it will then come up with a finding on whether what has been raised herein fits the said description.

85. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

86. The above legal preposition has been made graphically clear in the now famous case of "Mukisa Biscuits – Versus - Westend Distributor Limited [1969] EA 696", the court observed that: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ".

87. The same position was held in the case of "Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257" where the Court held that;

> " A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

88. Similarly in the case of "United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396", the Court held that;

> " A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed ."

89. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of:- "In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003" where the Court held that;

> " A Preliminary Objection cannot be raised if any facts has to be ascertained."

90. I have further relied on the decision of "Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR":- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

91. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 1st and 3rd Defendants herein.

In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is on the doctrine of constitutional avoidance.

Issue No. b). Whether this Honourable Court has the jurisdiction to hear and determine this suit.

92. Under this Sub – title, the Honourable Court wishes to deal with the objections raised by the 1st and 3rd Defendants/Respondents on whether this Court bears the jurisdiction to deal and entertain with the subject matter. Indeed "the locus classicus' case on the question of jurisdiction was dealt with in the celebrated case of:- "The Owners of Motor vessel Lillian 'S' -Versus - Caltex Kenya Limited. [1989] KLR 1" where the Court, Nyarangi JA held:-

> "Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given"

93. Accordingly, the objections are that this Honourable Court lacks jurisdiction to hear and determine this suit as per the Plaint dated 7th September, 2023 on two folds:- Firstly, the suit is in relation to the issuance of the approvals, permits and EIA Licences applied and granted by the 2nd Defendant/ Respondent. To the 2nd Respondent/Respondent in a very thin veil, holds that it goes against the Doctrine of Exhaustion which is well spelt out from the provision of Section 129 of the EMCA, 1999. In other words, they have elaborately sought that the Court to address the necessity by parties to exploit alternative statutory dispute resolution mechanisms prior to approaching the court. To buttress on this issue, the Learned Counsel cited the cases of "Benson Ambuti Adega & 2 Others – Versus – Kibos Distillers Limited & 5 Others (2020); Republic – Versus – Magistrates Court, Mombasa: Absin Synegy Limited (Interested party) (Judicial Review E033 of 2021 (2022) KEHC 10 (KLR) and "Republic – Versus – NEMA Ex Parte Sound Equipment Limited CACA No. 84 of 2010 (2011) eKLR" Secondly, as raised by both the 1st and 3rd Defendants/Respondents the application and the suit by the Plaintiff/Applicant offend the provisions of Section 61 (3) read with Section 93 of the *Physical and Land Use Planning Act*, No. 13 of 2019, which stipulate that any party who is aggrieved by the decision of the County Executive Committee which is charged with the grant of Change of User that has been challenged by the Plaintiff/Applicant herein must first approach the County Physical Land Use Planning Liaison Committee within 14 days of the decision by the County Executive Committee member and that Committee shall hear and determine the matter within 14 days. As far as the 2nd and 3rd Defendants/ Respondents are concerned, the Plaintiff/Applicant never did that and indeed failed to demonstrate to this Court that before approaching this Court why it never took the necessary step in lodging its grievances at the appropriate legally established structure. To this end, the Learned Counsel for the 2nd Defendant/Respondent comprehensively took the Court through the Doctrine of Exhaustion backed up with a plethora of Court cases on the issue. They included the cases of:- "Vincent Mwathi Kioko – Versus – Edward Sigei & 4 Others (20121) eKLR; "William Odhiambo Ramogi & 3 Others – Versus – Attorney General & 4 Others (2020) eKLR; Geofrey Muthinja Kabiru & 2 Others – Versus – Samwuel Munga Henry & 1786 Others (2015) eKLR; Albert Chaurembo Mumbo & 7 Others – Versus – Maurice Munyao & 148 Others; SC Petition No. 3 of 2016 (2019) eKLR; Anchor Limited – Versus Sports kenya (2017) eKLR; Secretary, County Public Service Board & Another – Versus – Hulbhai Gedi Abdalle (2017) eKLR and Omondi – national Bank of Kenya Limited & Others (2001) eKLR.

94. I will be addressing these pertinent legal issues indepth later on. In the meantime and right from the very onset, I wish to state that Jurisdiction means a courts power to decide case or issue a decree. In Kenya, Where does the jurisdiction of the Environment and Land Court emanate from? The jurisdiction of the Environment and land Court in as far as these matters are concern has been created by law. It flows from either *the Constitution* or legislation or both. The Supreme Court of Kenya in the case of "Samuel Kamau Macharia – Versus - KCB & 2 Others, Civil Application No. 2 of 2011 it noted:-

> "A Court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"

95. The Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as ".....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes....."

96. As the Learned Counsel for the Plaintiff/Applicant submitted that the broad jurisdiction of the ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Counsel went on to submit that Parliament indeed enacted the *Environment and Land Court Act*, 2011. I dare say that the Courts of law are a creature of *the Constitution* with a sole purpose of provision of the rule of law and protection of the fundamental rights among other rights. In the spirit of the access to Justice as enshrined under Article 48 of *the Constitution* of Kenya, it feels extremely awkward whenever litigants lack or fail to avail to this basic right from the established legally established institutions. I emphasis that the jurisdiction of this Court stems from the provision of Article 162(2)(b) of *the Constitution* 2010, which mandates the Court to hear and determines disputes concerning land and environment. Further the Court's jurisdiction is also set out in section 13(2) of the Environment& Land Court Act, 2011 which states:-

(2) In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?

a. relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land.

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

> " 10- The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-"Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- "Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-
>
> > ".....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost....."

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

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

99. Having determined that the Preliminary Objection by the 3rd Defendant/Respondent is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and determine this suit. It is instructive to note that it has now become a common practice for parties to keep on raising the same issue time and again on almost similar facts. To that end, this Honourable Court has been very consistent on its decision based on "the Doctrine of "Stare Decisis" arrived uniform and same conclusion – in sustaining that the Court has Jurisdiction.

100. Primarily, my understanding is that the Plaintiff/Applicant though has raised a few inconsistencies arising from the EIA Licences but and as even admitted by the Learned Counsel for the 1st Defendant/ Respondent, the main dispute is on the Change of User. Ironically, although the same Learned Counsel seem to be making a meal out the same issue elsewhere, but this Court strongly holds that there is really nothing emanating from the filed pleadings by the Plaintiff/Applicant to warrant this Court to spend so much time and energy on it and even to consider making any reference to the National

Environment Tribunal as advocated by the Court of Appeal in "Kibos Distillers Limited & 4 others - Versus - Benson Ambuti Adega (Supra) where Court stated that inter alia:-

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

As stated herein, in attempting to dwell so much on this limb of the objection which is really a non starter, this Court will have fallen into the hands of crafty pleadings by parties to oust the Jurisdiction of the Court and hence be a deliberate abdication and dereliction of its legal mandate as founded in the above provisions of *the Constitution* of Kenya, 2010 and the statures. Juxtapose, and in the given circumstance, the Court will only heavily concentrate on the second limb of the objection being the specific issue of the Change of User being the main issue raised by the Plaintiff/Applicant herein.

On the Jurisdiction of the Physical Planning & Land Use Liasion Committee.

101. The Plaintiff/Applicant's parcel of land borders the 1st Defendant's subject parcel of land being Plot Number 22992/I/MN. In the year 2023, it noted some construction that was going on the 1st Defendant/Respondent's parcel of land and it noted the erection of a sign board detailing the particulars of approvals and the various parties involved in the ongoing construction. The Plaintiff/Applicant established that the 1st Defendant/Respondent procured a Change of User with respect to the subject construction and which Change of User was approved by the 2nd Defendant/ Respondent. The Plaintiff/Applicant further established that the 1st Defendant's parcel of land measures approximately 0.0869 Ha. Clearly from the facts of the suit amongst the issues is on the Change of User and the EIA License at all. It is no wonder that the 1st Defendant/Respondent never case so strongly on this issue as under the provision of Section 125 of NEMA, the National Environment Tribunal has nothing to deliberate on as no complaint on the EIA License has been lodged as far as I am concerned. It is evident that the dispute herein relates to land use, planning and also environment and land. These are disputes that this Court has jurisdiction to handle as stipulated in Article 162(2)(b) of *the Constitution* and Section 13(2) of the ELC Act (supra). Additionally, under the provision of Sections 4 and 13 (1) of the Environment Land court Act, no. 19 of 2011 grants this court the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the "ELC (Malindi) in the Kharisa Kyango – Versus - Law Society of Kenya".

102. As provided under the *Physical and Land use Planning Act* No 13 of 2019, it demands that any claim in relation to decision making and communication on issuance and/or refusal and/ or revocation of a development permission be lodged with the County Physical and Land Use Planning Liaison Committee. It is well established jurisprudence that jurisdiction is the foundation upon which a court or Tribunal hears and determines a case. It is the heart that gives a Court the lifeline to hear a matter. Before a court makes one more step, it must be fully satisfied that it possesses the requisite jurisdiction. Without jurisdiction any one more step is a nullity and any orders made by a court without jurisdiction is a nullity without any legal force. It is desirable that questions relating to jurisdiction be raised at the earliest opportunity possible before the court makes further step. Parliament enacted the stature known as "The *Physical and Land Use Planning Act*, 2019. Part VI of the Act and particularly Section

76 establishes a County Physical and Land Use Planning Liaison Committee for each county in all the 47 Counties. The provision Section 78 of the Act provides that:-

> " The functions of the County Physical and Land Use Planning Liaison Committee shall be to—
>
> (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
>
> (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
>
> (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
>
> (d) hear appeals with respect to enforcement notices.
>
> Section 61 (3) provides that:-
>
> > "An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed".
>
> As per Section 61(4) -
>
> > "An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court".

103. Based on the above, and in order not to be negatively perceived to be making any conflicting decision with what the same court of equal status has decided over almost the same subject matter I wish to make a direct distinction to the said cases. In the case of Mombasa Judicial Review No. 14 of 2019, Lashad Mohamed Mubarak - Versus - County Government of Mombasa [2020] eKLR Justice Sila Munyao noted:-

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

person feels aggrieved against, whether it is procedural or on merits. (Emphasis is mine)"

104. Our courts have on an umpteen times stated categorically that where Parliament has, through legislation, established primary dispute adjudication mechanisms and organs, the mechanisms must be exhausted. Indeed, in the case of the Court of Appeal decision in "Speaker of the National Assembly – Versus - James Njenga Karume [1992] eKLR." , the Court stated:-

> " .....Where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be strictly followed....."
>
> On the same breath, I fully concur with the robust legal reasoning and ratio in the case of "Geoffrey Muthinja Kabiru (Supra) where the Court of Appeal (P. N. Waki, R.N Nambuye & P.O Kiage J JA) explained the constitutional rationale and basis for the doctrine and held as follows:-
>
> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

105. In a bid to oust the jurisdiction of the Liaison Committee and demonstrate that this Honourable Court has jurisdiction to hear and determine the suit, the Plaintiff/Applicant submitted hold that there exists no Committee nor decision made by the County Executive Member to warrant invoking the jurisdiction of the County Physical and Land use Planning liaison Committee under Section 61(3) of the Physical and Planning Land Use Act 2019 . The Plaintiff argues that clearly what is appealable to the County and Land Use Planning Liaison Committee is the decision of the County executive committee member and nothing else. Therefore, it is my understanding that the jurisdiction of the County Physical and Land use Planning Liaison committee can only be invoked in instances where there is a decision of the County Executive Committee Member. To put it differently the County Physical and Land Use Planning Liaison Committee can only sit and preside over an appeal against the decision of the County Executive Committee member and not a decision by any other person or officer within the county.

106. It is clear that the original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies lies with the County Physical and Land use Planning Liaison Committee and this Court only has appellate jurisdiction. As regards the issue of the Change of User, I reiterate that according to the provision of Section 61 (1), (2) and 3) read with Section 93 of the *Physical and Land Use Planning Act*, No. 13 of 2019, the person aggrieved by the decision on the County Executive Committee is to pursue an appeal to the Liaison Committees and they are to receive a notice of the decision approving the Change of User. In the instant case, the Defendants/Respondents cannot be allowed to use their own failure to communicate their decision, to shut out the Plaintiff/Applicant from accessing this court, yet their failure to communicate, effectively barred the Plaintiff/Applicant from appealing its decision to the Liaison Committees within the stipulated time. Having not been notified of the decision, the Plaintiff/Applicant could clearly not have accessed the Liaison Committees within the statutory period. In saying so, I am compelled to fully rely on the authority cited by the

Learned Counsel for the Plaintiff/Applicant of:- "John Kabukuru Kibicho & another – Versus - County Government of Nakuru & 2 others [2016]eKLR" whereby the Court held thus:-

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

107. Unless otherwise stated, the Liaison Committee for the County of Mombasa has not yet been established pursuant to the provision of the Law. Indeed, both the 1st and 2nd Defendants have not rebutted nor controverted the assertion that Mombasa County Physical and Land use Planning Liaison Committee was non existent. In that circumstances, the provision of Section 93 of the Physical Land Use Planning Act comes to effect. It provides:-

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

108. I take cue from the famous decision to invoke the original and inherent jurisdiction of this Court relating to environmental planning and protection by the decision of in Mombasa Judicial Review

No. 14 of 2019, Lashad Mohamed Mubarak versus County Government of Mombasa [2020] eKLR (supra) by Judge S. Munyao establishing the circumstances of invoking the inherent jurisdiction of the Environment and Land Court under section 93 of the Act when he noted:-

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

109. The court finds that the claim herein is a claim relating to violation of right to clean environment and even though numerous tribunals dealt with the issuance of licenses and approvals, those issues cannot be dealt separately and thus this Court is clothed with jurisdiction to deal with the claim herein as provided in Article 162 (2)(b) of *the Constitution* of Kenya, 2010. In the instant case, I perceive that frustrating atmosphere and feeling depicted from the Plaintiff/Applicant when they find out for themselves and are actually authoritatively informed by the representatives of the 2nd Defendant that the Physical Plaining Liaison Committee is not only non existent but also not functional. That grim scenario reminds the Honourable Court to the story of a famous and key character known as Okwonkwo the village wrestler in the Masterpiece book by the Nigerian reknown author Chinua Achebe, "Things Fall Apart" . Mr. Okwonkwo, by then a very respectable character within the village of Umwofia Kwenu, got entrusted the parental responsibility of taking care of a young man called Ikemefuna, captured while young from a neighbouring village of arch enemies. He brought him up so well upto his teenage stage to a point of regarding him as his parent. One day, the elders being suspicious that the boy once grown would be a menace decided that he be killed on pretense of being returned to his ancestor village. but when a decision was arrived at by the Umuofia Kwenu that the boy had to be killed they picked on Okwonkwo to do the heinous act. He inevitable and reluctantly found himself doing it as boy run towards him for safety from group of enraged and impatient elders so that Okwonkwo was almost betraying them. The act haunted him for ever. He lived on this curse upto his death. Likewise, this Court, on being faced by such similar circumstances, it quickly seeks a soft landing solace from the Scripture in songs by David in the book of Psalms 121 verses 1 which holds:-

> "I lift my eyes to the mountains. From where does my help come? My help come from the Lord, who made heaven and earth. He will not let your foot be moved, he who keeps you will not slumber. He who keeps Israel will neither slumber nor sleep. The Lord is your Keeper; the Lord is your shade on your right hand. The sun shall not smite you by day nor the moon by night....."

110. Thus, based on this glaring legal lacuna and vacuum, created by the County Government of Mombasa arising from the non – existence of the Liaison Committee, the only place left for the Plaintiff/Applicant herein, was to institute this case before this Honorable Court. Until and unless this legal structure is actually created, and it becomes vibrantly operational, the Court of law should never smash them with machete as Okwonkwo in the story from Mr. Chinua Achebe's Master Piece, did by sending them away. Thus, on that front the preliminary objection fails. Having carefully considered the above provisions of law, this Court finds that it has jurisdiction to try the subject matter of this suit. I am further persuaded by the finding of Hon. Justice Sila Munyao, in the case of "John Kaburuku Kibicho

& Another (Supra)" and also the holding and finding of Hon. Justice O. A. Angote, in the case of "Taib Investment Limited – Versus - Fahim Salim Said & 5 Others [2016] eKLR" where the Court held:-

> "..... Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous Tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of Article 162(2)(b) of *the Constitution*, that can deal with all those issues ....."

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

Issue No. c). Whether the Plaintiff has made out a case for grant of temporary injunctive orders?

112. Under this sub title, the issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of "Giella – Versus - Cassman Brown (supra)". This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of "Nguruman Limited – versus - Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR" where the Court of Appeal held that;

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

113. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of "Mrao Ltd – Versus - First American Bank of Kenya Ltd (Supra)" in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

114. The brief facts of the case are that it was not disputed that the Plaintiff is the beneficial and legal owner of all that parcel of land situated in Mombasa County and being CR. NO. 14800 where it has constructed a residential apartment occupied by its Director. It was further not in dispute that the Plaintiff's parcel of land borders the 1st Defendant's subject parcel of land being Plot Number 22992/I/MN. In the year 2023, it noted some construction that was going on the 1st Defendant's parcel of land and it noted the erection of a sign board detailing the particulars to approvals and the various parties involved in the ongoing construction. The Plaintiff established that the 1st Defendant procured a change of user with respect to the subject construction and which Change of User was approved by the 2nd Defendant and that the 1st Defendant's parcel of land measures approximately 0.0869 Ha. The location of its parcel of land and that of the 1st Defendant was in Nyali which environment harbors residential one family units as opposed to residential apartments such as the one intended to

be constructed by the 1st Defendant. There exist special circumstances warranting the granting of the injunction in that once the 1st Defendant's 6 storey building is finalized, the Plaintiff's constitutional right to quiet enjoyment of his property which includes the privacy he envisaged at the point of constructing his residential family house shall be permanently infringed on. Under this ground, I find that the Plaintiff has made out a prima facie case worth the grant of interlocutory orders.

115. Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

116. The Learned Counsel for the Plaintiff invited the Honourable Court to be guided by the facts as deponed by the Plaintiff in its Supporting Affidavit to the effect that it stands to suffer irreparable loss of a permanent nature in the event the Orders are not issued. While still submitting on this issue, the Learned Counsel invited the Honourable Court to read into the craft nature in which the 1st Defendant procured the change of User by failing to seek the views of its immediate neighbors and alleging that it issued the forms to some of the neighbors but failed to get any responses. As a matter of fact, the Plaintiff has not demonstrated what efforts it made if any in collecting the said forms that it dropped with the alleged security guards or left at the said Premises.

117. The above allegations are nothing close to the actual facts as the immediate neighbors of the 1st Defendant are yet to construct on their parcels of land in which they intend to construct residential home dwelling houses hence it was not possible for the 1st Defendant or his agents to leave the alleged forms at any houses as none have been constructed. It is now well settled in law that the Honourable Courts should not allow any party to benefit from an illegality such as the illegality exhibited by the 1st Defendant in respect of the failure of its property to meet the threshold for constructing a storey apartment and the failure to seek the views of its immediate neighbors prior to obtaining a change of user.

118. In my view, therefore, the Plaintiff has sufficiently demonstrated irreparable loss being occasioned to the Plaintiff.

119. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

120. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated:-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

121. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to this application.

In the case of:- "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

122. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/ Applicant have met the criteria for grant of orders of temporary injunction.

Issue No. d). Whether the prayers for permanent injunction can be granted at an interlocutory stage

123. A brief background of the matter is that the Plaintiff/ Applicant instituted a suit against the Defendants/ Respondents by way of the Plaint dated 7th September, 2023 and sought for inter alia, damages and an order for permanent injunction, arising out change of user. It is clear that the Motion is seeking the twin prayers of a temporary injunction and a permanent injunction. Concerning the

permanent injunction sought under order (ii), it is not in dispute that the suit is yet to be heard on merit and it is apparent that this is not clear cut case even without going into its merits.

124. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "Giella – Versus - Cassman Brown, 1973 E.A. Page 358" and a Mandatory Injunction. The first authority on making this distinction was "Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case" in which Megarry .J as he then was stated follows:-

> " Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection".

125. For the foregoing reasons, I find that it would be premature for me to grant a permanent injunction at this stage. I am persuaded the holding of this court in the case of "Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib [2018] eKLR" where it was held inter alia as follows:-

> " ...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 defendant in order for the rights of the plaintiff to be protected. 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..."

126. In respect to order for a temporary injunction, upon my consideration, I note that the same is essentially a prayer for a mandatory order of injunction. When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. 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."

127. It should also be noted that courts have been reluctant to grant mandatory injunctions at the interlocutory stage as was held in the case of "Nation media Group & 2 others – Versus - John Harun Mwau (2014) eKLR" where the court of Appeal stated:-

> "It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.
>
> Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

128. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances. The Plaintiff has not demonstrated their case and has not met the fundamental threshold on being granted Permanent Injunction as laid down in law.

129. Additionally, I fully concur with the submission of the Learned Counsel for the 1st Defendant/ Respondent that there are some prayers sought but cannot be granted at this interlocutory stage but to be considered on merit. Interlocutory stage simply implies matters being handled in the interim awaiting the final and logical conclusion of the matter. Specifically, Prayer 3 being a permanent Injunction be issued restraining the 1st Defendant/Respondent from continuing with the developments on the suit property. This prayer is framed in the style of a final prayer warranting a final order. If it is granted as drafted, there would be nothing left to be determined at the main trial. Likewise, Prayer 4: THAT a declaration do issue that the 2nd Defendant/Respondent's EIA Licence dated...violates...*the Constitution* of Kenya,2010 and the *Fair Administrative Action Act*, 2015. The prayer is framed in the form of declaratory order which cannot be granted at this interlocutory stage. Prayer 5: THAT the EIA licence... issued by the 2nd Defendant/Respondent be cancelled and revoked. The prayer is framed in the form of a final prayer warranting a final order. It is incapable of being granted at this interlocutory stage. Prayer 6: - "That a declaration do issue that the 3rd Defendant's decision to issue...Notification of Approval of Development. Permission to the 1st Defendant for Change of User and construction of multiple dwelling units violates... [The relevant law]. Like Prayer 4, Prayer 6 as framed is in the form of declaratory order which likewise cannot be granted at this interlocutory stage. Prayer 7:- "That the Approval No. P/2022/00592 issued by the 3rd Defendant be cancelled and revoked. Like Prayer 5, Prayer 7 as framed was in the form of a final prayer warranting a final order. Prayer 7 is likewise incapable of being granted at this interlocutory stage. Prayer 8: That an order of general damages be issued against the 1st – 3rd Defendants ...I hold that general damages are not awardable at this interlocutory stage. In that regard allowing this application would amount to granting final orders of specific performance with an award of general and specific damages at an interlocutory stage. For these reasons, therefore, the Court has declined to grant the said orders sought by the Plaintiff/Applicant herein.

Issue No. e). Who bears the Costs of the Notice of Motion application dated 7th September, 2023 and the Notice of Preliminary objection dated 25th October, 2023

130. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri v Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

131. In the present case, the Honourable Court elects to have the costs in the cause.

VII. Conclusion and Disposition.

132. Ultimately, and in view of the foregoing detailed and expansive analysis of the framed issues from the and the Preliminary objections by the 1st and 3rd Defendant/Respondents herein and the omnibus prayers sought from the application by the Plaintiff/Applicant, the Honourable Court arrives at the following decision and specifically make the following orders:-

a. That the Preliminary objection dated 25th October, 2023 is found to lack merit and is hereby sustained.

b. That the Notice of Motion dated 7th September, 2023 is partially found to have merit and is hereby allowed partially.

c. That this Honourable Court do and hereby issues an order of temporary injunction be issued restraining the 1st Defendant by itself, its servants and/or agents from continuing with the developments on all that parcel of land known Plot Number 22992/I/MN, Nyali, along Moyne Drive, Mombasa County in respect of which it has obtained approvals to construct what it refers to as six storey residential building which developments are being undertaken pursuant to the 2nd Defendant's decision granting Licence No. EIA/PSR/23223 to the 1st Defendant pending the hearing and determination of this suit.

d. That for the benefit of any doubt Prayers 3, 4, 5, 6, 7 and 8 are prayers that cannot be granted at an interlocutory stage and this Honourable Court reserves the discretion to deal with them at the finality of the suit.

e. That for expediency sake, the suit to be heard on 4th April, 2024 and mention on 20th March, 2024 for Pre – Trial Conference under the provision of Order 11 of the Civil Procedure, 2010. All facts remaining constant, Judgement to be delivered on 7th May, 2024.

f. That the costs of the Notice of Motion application dated 7th September, 2023 and Notice of Preliminary objection dated 25th October, 2023 shall be in the cause.

It is so ordered accordingly.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2024.

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HON. JUSTICE MR.L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant;

b. Mr. Gathu Advocate for the Plaintiff.

c. M/s. Kinuva holding brief Mr. Kibara Advocate for the Defendants