Abdalla & 6 others v Khansa Developers Limited & 3 others (Constitutional Petition 16 of 2022) [2024] KEELC 3667 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3667 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 16 OF 2022

LL NAIKUNI, J

APRIL 30, 2024

BETWEEN

MOHAMED AHMED ABDALLA .... 1ST PETITIONER

SALIM SAID .... 2ND PETITIONER

AMIN S. SALIM .... 3RD PETITIONER

ABULLAZIZ ABBAS .... 4TH PETITIONER

RISHAD A.S. .... 5TH PETITIONER

BHARAT DEVIDAS VAITHA .... 6TH PETITIONER

KETAN DOSHI .... 7TH PETITIONER

AND

KHANSA DEVELOPERS LIMITED .... 1ST RESPONDENT

RAMESH CHANDRA HARIA .... 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA .... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

RULING

. Introduction

1. This Honourable Court rendered itself in a Judgment delivered on 22nd February, 2023. The said Judgment was in favour of the Petitioners in its entirety. Being aggrieved by the said Judgement, the 1st Respondent, Khansa Developers Limited brought the Notice of Motion application dated 26th July, 2023 brought under the provision of Sections 1A, 1B, 3A, 63(e) & 80 of the *Civil Procedure Act*, Cap

21 Laws of Kenya and Orders 45 Rules 1 & 2 Order 51 Rule I of the Civil Procedure Rules, 2010, Articles 27 (1), (2), 48, 50(i), 159 (2) (d) of *the Constitution* of Kenya, 2010.

2. Upon service of the Notice of Motion application, the 1st Petitioner responded to the application through a replying affidavit dated 28th August, 2023.

II. The 1st Respondent/ Applicant's case

3. The 1st Respondent sought out the following orders:

    a. Spent

    b. Spent

    c. That the Honourable Court be pleased to review and or vary and/or set aside the Judgement delivered on the 22nd February, 2023;

    d. That costs of the application to be in the cause.

4. The application by the 1st Respondent /Applicant herein was premised on the grounds, testimonial facts and averments made out under the 12th Paragraphed Supporting Affidavit of Sammy Kamuio Mukuri sworn and dated 26th July, 2023 with seven (7) annexture marked as 'SKM - 1 – 7". The 1ST Respondent/Applicant averred that:

    a. This Honourable Court delivered its Judgment herein on the 22nd February, 2023. Annexed in the affidavit and marked "SKM - 2" is a copy of the Judgement.

    b. There were also some new material evidence, which could persuade the Honourable court to review its Judgment.

    c. On the 14th November, 2022 the Honourable Court conducted a site visit ("Locus in Quo").

    d. After preparing a draft site visit report the court directed all the parties to read the said draft report and make additions, deletions and corrections and sent the report back to court together with skeletal submission.

    e. The court failed to incorporate the refined Draft Site Visit Report but solely relied on its raw report thus failing to correct apparent mistakes on the face of the record. Annexed in the affidavit and marked as "SKM - 3" was the corrected Draft Site Visit Report submitted to the court.

    f. The Honourable Court pointed out that the Petitioners, though fully aware of the Change of User, failed to challenge it as required by the law but apparently the Honourable court used this finding against the 1st Respondent.

    g. He was aware of the change of Change of User, which was advertised in "the Daily Nation" and "the Taifa Leo", newspaper, the edition of 28th January, 2022, provided the only avenue in so far as public participation at the County Government level was concerned. Annexed in the affidavit and marked "SKM - 4" were copies of the advertisements in the Daily Nation and Taifa Leo.

    h. The 1st Respondent had obtained fresh validations of the Mombasa County Government approvals and the National Environment Management Authority (NEMA) Licence in adherence to the court Judgement of the 22nd February, 2023 and therefore the need for review. Annexed in the affidavit and marked "SKM - 5", "SKM - 6" and "SKM - 7" were copies of the

validation reports from the Mombasa County Government dated the 18th July, 2023 and the National Environment Management Authority dated the 24th July, 2023 respectively.

i. The Court was now seized with the current information, the Honourable court ought to review, vary or set aside its Judgement herein.

j. It was in the interest of justice that the Honourable Court grant the orders sought.

III. The Response to the Application by the 1st Respondent

5. The Petitioner/Applicant opposed the said application through a 38 Paragraphed Replying Affidavit sworn by the 1st Petitioner, Mohamed Ahmed Abdalla on 28th August, 2023 where he averred that:-

   a. Prior to delving into the merits of the motion, he highlighted the salient features of the Judgment sought to be reviewed as below.

   b. Vide a Petition dated 5th May, 2023 alongside his other Petitioners, urged the Court for the various reliefs as contained on the face thereof.

   c. The basis of the said Petition was that the intended development on property title number Mombasa/blocXXVI/595 (Hereinafter the "Suit property") was offensive to the neighborhood for not only infringing our constitutional rights to privacy and clean and healthy environment, but the same was also commenced without the requisite consents and/or approvals from the relevant bodies charged with environmental protection.

   d. Even where the requisite approvals were obtained (and arguably correctly so), there was no public participation, a very fundamental requirement especially noting that the Applicants herein had not put in place, proper mechanisms to protect residents in the neighborhood from the massive noise and air pollution arising from the construction. He invited the Court to see the averments in his Affidavit in support of the Petition, together with the annexures the rein.

   e. The Court took affidavit evidence and heard submissions (oral and written) from all parties and on 22nd February, 2023 penned down a comprehensive 84 - page Judgment wherein the Court while allowing the Petition, most importantly held that;

      i. There was undisputed evidence that the alleged public hearing and consultation did not take place as required for the quantitative and meaningful consultation to be applicable (see paragraph 95 of the Judgment);

      ii. There was no effective and adequate public participation as dictated by *the Constitution* and other laws (See Paragraph 96 of the Judgment);

      iii. The Project was out of character in the area and bore no board by the National Construction Authority bearing any details of the project being undertaken. The residents in the area depended mainly on boreholes and tankers for water supply (See paragraph 105 of the Judgment);

      iv. The potential negative impacts of the intended development, as per the Environmental Impact Assessment Report on record included (See paragraph 106 of the Judgment);

   dust and noise disturbance,increased vehicular traffic,increased demand for water and electricity supply,impacts on solid waste from the buildings upon occupancy,occupational injuries; andReduced privacy to immediate neighbors.

v. development must be judged by its impacts on the people, not only in changes in their income but more generally in terms of their choices, capabilities and freedoms (See paragraph 108 of the Judgment);

vi. The area which the development project was being undertaken was a development control area, and the development threatens the Petitioners right to a clean and healthy environment. Having visited the site, the Court noted that the Petitioners houses would not have any natural light and their right to privacy is highly jeopardized (See paragraph 110 of the Judgment);and

vii. Vide Environmental Impact Assessment License, the 4th Respondent issued the 1st Respondent with License No. NEMA/EIA/PSL/ 21084 on 23rd August 2022. Consciously, the 1st Respondent began development of the suit property even before the 4th Respondent gave an approval which led to his finding that the process was flawed, wrongful and unprocedural (See Paragraph 112 of the Judgment).

f. Based on the foregoing findings, the Court made declarations that;

  i. the proposed development of 18 floors storey building on Plot Number Mombasa/ Block/ XXVI 595 was irregular, illegal and wrongful for failure to fully comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution* of Kenya, 2010; and

  ii. the development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building situated on all that parcel of land known as Land Reference Number Mombasa/ Block XXVI/595 without complying with the provisions Articles 10, 40, 42,47 and 69 of *the Constitution* of Kenya, 2010 were all illegal, irregular, wrongful and therefore null and void ab initio.

g. A generous look at the Judgment, as highlighted above, and the Application before the Court, it was evident that;-

  i. The 1st Respondent/Applicant had failed to appreciate the implications of the findings and the declarations made by the Court which rendered every approval (EIA and development approvals) earlier granted a nullity and void ab initio;

  ii. The implications of the aforesaid declarations rendered the purported fresh validation by the 2nd and 3rd Respondents an exercise in futility and in any case, a nullity;

  iii. Any of the issues highlighted by the Court specifically on proper and/or qualitative public participation had to start afresh as if it had never been done; and

  iv. The 1st Respondent/Applicant had not addressed whether there had been in place, proper mechanisms to cushion the area residents from the negative environmental impacts highlighted in the EIA Report and noted by the Court at paragraph 106 of the Judgment.

h. An Application for review of Judgment was governed by the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010.

  i. In summary, an Applicant was required by law to demonstrate either that:-

  i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or:

ii. on account of some mistake or error apparent on the face of the record, or

iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay;-

j. The Application as framed and taken fell short of the requirements he had highlighted above.

k. That he had perused through the motion in its entirety and he could confirm that the application was framed and taken fell short of the requirements he had confirmed to this Court that the Application as framed and taken fell short of the requirements he had highlighted above.

l. On the issue of an error apparent on the face of the records, according to the 1st Respondent/ Applicant, at Paragraphs 5, 6, 7 and 8 of Mr. Mukuri's Affidavit that there existed apparent errors on record warranting a review.

m. The alleged errors apparent on record, according to the Applicant were that the Court;

i. relied on "its raw report" from the site visit and failed to take notice of deletions and skeletal submissions by the 1st Respondent/Applicant; and

ii. having found that the Petitioners failed to challenge the change of user though fully aware from the advertisement, the Court erroneously used this findings against the 1st Respondent/Applicant herein.

n. From the above, it was clear that the 1st Respondent/Applicant had not carefully read the Court Judgment and had misunderstood the law, and specifically;

i. The 1st Respondent/Applicant failed to read Paragraph 105 of the Judgment where the Court expressly indicated that before it retired to write its Judgment, it visited the site of the suit property. The visit, according to the Court, did give it a good visual and understanding of the development project and the surrounding environment. Parties also made submissions;

ii. The Court was under no obligation to admit the deletions, additions or submissions of the Parties, and any case, such deletions or additions (if any) could not form part of the Report;

iii. The 1st Respondent/Applicant misunderstood what was under challenge, and rightly so, were the development approvals and the EIA license for lack of public participations. The Court never made any finding on change of user and could not be subject for review;

iv. If there was any finding by the Court on the change of user, such findings were made on the basis that the project area was a controlled area, and not because there was public participation or lack of it; and

v. The purported errors were, in the first place, not errors apparent on the face of record but an attempt by the Applicant to challenge the Court's analysis of evidence and conclusion reached thereon, which could only be done by a way of Appeal.

o. For the present Application to succeed on grounds of errors apparent on the face of the records, such error must be;

a. very evident error and never require any extraneous matter to show its incorrectness;

b. so manifest and clear that no court would permit such an error to remain on the record; and

c. Self-evident and should not require an elaborate argument to be established.

p. Guided by the above guidelines, the error alluded to, if at all, was not an error apparent on the face of the record. The 1st Respondent/Applicant had further annexed as annexures "SKM - 5, 6 and 7" all of which were approvals and/or licenses subsequent to the Judgment. This was the evidence which the Court had been informed that was new and could not be produced in Court prior to the Judgment. Superior in this jurisdiction had had an opportunity to interrogate this ground and had held that:-

i. mere discovery of new or important matter or evidence was not sufficient ground for review; and

ii. a party seeking review had also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

q. Further guided by the aforesaid principles established by this Court, the 1st Respondent/ Applicant had failed to discharge the duty placed upon him by law for this ground to succeed, and for the following reasons;

i. the evidence sought herein were all subsequent to Judgment of the Court, hence not new material. By way of demonstration, Annexures marked "SKM - 5 & 6" were all letters from the County Government of Mombasa dated 18th July, 2023 while annexure "SKM – 7" was a letter from NEMA dated 24th July, 2023. All subsequent to the Judgment by this Court; and

ii. the alleged new material fell outside the purview of the provision of Order 45 of the Civil Procedure Rules, 2010 in so far as the material sought to be relied upon was never in existence prior to the delivery of the Judgment and allowing the same would be miscarriage of justice. To rely on them, the Court would be a conduit pipe for an illegality, which dispenses justice with one hand and takes away with the other.

r. Even where this Court would overlook the fact that this was not a new and important matter or evidence which was not within the 1st Respondent/Applicant's knowledge, the Applicant had not demonstrated any due diligence in obtaining the alleged "new and important matter or evidence" and he said so for the following reasons:-

i. The 1st Respondent/Applicant had not furnished the Court with any correspondences prior to issuance of the letters subject to this Application;

ii. Annexures marked as "SKM – 5, 6 and 7" were all dated July 2023 subsequent to the Judgment. Hence no due diligence in their acquisition/obtaining;

iii. The information contained in the said letters were the very fundamental issues upon which the Petition was premised. Hence not new and/or important.

s. Lacking evidence of due diligence as he had demonstrated above, this grounds failed in its entirety. In any event, the grounds mounted on the Applicant's Application (faulting the Honourable Court's analysis of evidence, findings and conclusions thereto) was a ground for Appeal, not review as sought by the 1st Respondent/Applicant.

t. On the alleged fresh validation, the deponent averred that once Court had pronounced itself on a matter by way of a Judgment, the principal of finality to litigation applies and this Court became functus officio and was divested of jurisdiction to re - open this suit except for review and on grounds provided under the provision of Order 45 of the Civil Procedure Rules, 2010.

u. Secondly and most importantly, fresh validation or the production of fresh evidence that was not available during trial was not a ground for review but a procedure on appeals under Rule 79 of the Court of Appeal Rules, 2022. He reiterated that the Court in its Judgment made a declaration declaring that the approvals and EIA license a nullity and void ab initio.

v. The implications of the aforesaid declarations was that even with fresh validations, no life could be breathed into the approvals and licenses because they were void from inception. Therefore the aforesaid validation, if at all, was a nullity and in contempt of the orders of this Honourable Court.

w. On the issue of unreasonable delay, the deponent averred that it was not in dispute that Judgment in this Suit was delivered on 22nd February, 2023. It has taken the 1st Respondent/ Applicant a whooping over five (5) months prior to moving this Court for review. The provision of Order 45 of the Civil Procedure Rules, 2010 was clear that where grounds for review existed, which he had stated did not, then an Application for review must be brought without unreasonable delay. What amounted to "unreasonable delay" was factual, and depended on each particular case. Looking at circumstances before the Court, the 1st Respondent/Applicant had not informed the Court why it took them five (5) good months prior to moving the Court for review orders. From the foregoing, he implored the Court to find and hold that the 1st Respondent/Applicant was guilty of laches. No explanation had been placed before the Court to explain a delay of five (5) months which by all measures, was inordinate and unreasonable.

x. The application had failed to meet the required standard for review of the Judgment, and was for dismissal. Further legal arguments would be made at the hearing of the Application.

IV. The Supplementary Affidavit by the 1st Respondent/ Applicant

6. With the leave of Court, the 1st Respondent/Applicant in support of the Notice of Motion application, filed a 15th Paragraphed supplementary affidavit dated 18th September, 2023 sworn by Sammy Kamuio Mukuri. He averred as follows:

a. The Petitioners had completely misapprehended the Judgement delivered by this Honourable Court on the 22nd February, 2023, which misapprehension emanates from a selective understanding of the Petitioners prayers, to wit prayer (b) and (c) of the Petition dated the 5th May, 2022. For ease of reference, he stated out the prayers as follows:-

> ai. Permanent injunction restraining the 1st and 2nd Respondents, their agents, employees or such other persons acting under their directions from carrying out, further carrying out or in any way proceeding with the proposed development of 18 floors storey building on plot number Mombasa/Block XXVI/595 until:-

a. A proper public participation is carried out and views of the Members of the public taken into account;

b. Appropriate social amenities in particular, sewer system, water supply, access road and proper drainage is properly established.

c. The Respondents provide proper mechanism to caution the Petitioners and members of the public from the noise and air pollution as a result of mega development.

d. A fresh environmental impact assessment is carried out within the law and a report submitted to the 4th Respondent, the Petitioners herein and the surrounding members of the public; and

e. The project was subjected to a proper environmental audit and a report prepared, detailing the short and long term significant effects of the project on not only the environment, but also to the Petitioners and members of the public.

iii. A permanent injunction restraining the 3rd and 4th Respondents from issuing any further development approvals to the 1st and 2nd Respondents and/or any other person acting under their directions, in respect to the proposed development of 18 floors storey building on plot number Mombasa/Block XXVI/595 prior to compliance with prayer (b) above.

a. Once the conditions and/or the above stated prayers were met, the 1st Respondent was at liberty to re-commence construction without further reference to any party or the court. That was to say the 1st Respondent was not forever barred from doing the construction.

b. The foregoing notwithstanding, and having fulfilled the conditions set by the court, and on account of new material evidence and errors apparent, the 1st Respondent had dutifully sought a review of the decree of the court.

c. Mohamed Ahmed Abdalla, the 1st Petitioner, had failed to exhibit the alleged authority granted to him to swear the Replying Affidavit on behalf of the other 6 Petitioners.

d. At Paragraph 8 of the Replying Affidavit, it was alleged that prior to starting the construction, the necessary consents had not been granted by the 4th Respondent, the National Environment Management Authority (NEMA). Now the 4th Respondent had validated the consents.

e. With regard to the contents of Paragraph 9 of the Petitioners Replying Affidavit, the 1st Respondent/ Applicant had laid in place the necessary mechanism in place to protect the residents from noise and air pollution, and if dissatisfied, the Petitioners could still move the court or appropriate bodies.

f. The issues complained of by the Petitioners at Paragraph 10 of the Replying Affidavit were continuously addressed by both the County Government and the National Government who had the mandate and not the 1st Respondent.

g. With regard to paragraph 19 of the Replying Affidavit, it was stated that the Honourable Court had no obligation to admit the deletions and additions by the parties; this statement was contrary to the directions given by the court.

h. His response to Paragraph *19* (c) was that the Change of User as far as the 3rd Respondent, that was the County Government was concerned, was so fundamental as far as public participation was concerned that if indeed the Honourable court made no finding about it, then there was a sufficient reason for review as provided in Order 45 (b) of the Civil Procedure Rules, 2010.

i. It was important to reiterate that all the necessary licenses having been validated through a repeat process, both the County Government of Mombasa and NEMA never demand fresh payment for it since all the necessary fees had already been paid. Neither do the two institutions issue new licenses as a matter of practice but rather validate the hitherto issued licenses.

j. The parameters for gauging delay depends on the circumstance of a particular case and in this case fresh validations had to be obtained from the 3rd and 4th Respondents which had to take some time.

k. He urged the court to grant the orders sought.

V. Submissions

7. On 27th July, 2023 in the presence of both parties in Court, the Honourable Court directed that the Notice of Motion application dated 26th July, 2023 be canvassed by way of written submission. Pursuant to that, all parties fully complied accordingly as per the stipulated timeframe.

8. On 12th October, 2023 all the parties were granted an opportunity to high light their submissions. Indeed, the Honourable Court is highly grateful to Mr. Bwire Advocate and Mr. Makau Advocate in the manner in which they diligently, devotedly and dedicatedly they executed their tasks with high professional standards. Thereafter, the Honourable Court proceeded to reserved the date of the ruling on notice.

9. From the highlighting of the Submissions, the Learned Counsel for the Petitioners vehemently held that the right to cause a review of the Judgement was not available to the 1st Respondent in that they had already preferred an Appeal against the Judgement of this Court which offended the provision of Order 45 of the Civil procedure Rules, 2010. On the other hand, the 1st Respondent was of the view that they had only filed a Notice of Appeal in accordance with the provision of Rule 82 of the Appellate Court Rules and hence there was no appeal in the strict sense of the word. The Court will deliberate on this issue.

A. The Written Submissions by the 1st Respondent

10. The 1st Respondent through the Law firm of Messrs. J. M. Makau & Company Advocates filed their written submissions filed and dated 21st September, 2023. Mr. Makau Advocate commenced their submissions by stating that the 1st Respondent/Applicant's Notice of Motion Application dated the 26th July, 2023 was brought under the provision of Sections 1A, 1B, 3A, 63(c) and 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya and Orders 45 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Articles 27(1), (48), 50(1), 159(2) (d) of *the Constitution* of Kenya, 2010 and all other enabling provisions of the law. He stated that the 1st Respondent/Applicant relied on the supporting affidavit dated the 26th July, 2023 and the annextures thereto together with the supplementary supporting affidavit dated the 18th September, 2023. Prayers 1 and 2 were spent. Thus the only two pending prayers sought were review of the Court's Judgement delivered on the 22nd March, 2023 and costs of this application.

11. He relied on the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010, on which this application is premised on. The Learned Counsel submitted that the case law, had on numerous times reiterated and emphasized on the wide unfettered discretion given to this court on the power to review. In the case of "Sadar Mohamed – Versus - Charan Singh (1959)

EA U 1793", quoted with approval in the case of "Shanzu Investments Ltd – Versus - Commissioner of Lands, Civil Appeal No.100 of 1993", Farrel J, as he then was, held as follows:

> " That there is unfettered discretion in court to make such orders as it thinks fit on an application for review and that the omission of any qualifying words was deliberate......"

12. He cited the case of : "Wangechi Kimita & Another – Versus – Mutahi Wakabiru, CA No. 80 of 1985 (Unreported)" cited in the "Sadar Mohamed case (Supra)", it was held that:

> " ....any other sufficient reason need to not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 of the *Civil Procedure Act*. The court went further on to hold that the other grounds set out in the rule did not in themselves form a genus or class or things with which the third general head could be said to be analogous. The correct position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason".

13. The Learned Counsel submitted that it had been important, to restate the unfettered discretion of this court because the Petitioners, in their Replying Affidavit, had tried to clog the powers of this court by over emphasizing on the first two grounds and overlooking the third ground which was wide and liberal as stated in the case law above. Without repeating what was contained in the two supporting affidavits, it may be important to state that prayers (b) and (c) of the Petition was conditional in that upon fulfilling those conditions, the 1st Respondent would be at liberty to commence construction. This was captured in Paragraphs 3, 4,and 5 of the 1st Respondent's supplementary supporting affidavit.

14. The 1st Respondent had secured a validation of its licences both by the County Government of Mombasa, the County and the National Environment Management Authority, NEMA. In repeating the annulled processes, the two bodies, were required, by practice to validate the hitherto issued licences and not issue fresh ones as doing so would require payment of large sums of money to the County and NEMA totaling to about a sum Kenya Shillings Thirteen Million (Kshs.13,000,000.00/=). This was to say, once the process was repeated, the two did not require fresh payment for the licences by the 1st Respondent/Applicant. The 1st Respondent/Applicant had annexed the validations as annextures "SKM - 5", "SKM - 6"and "SKM - 7".

15. On the 14th November, 2022, the Honourable Court conducted a Site Visit ("Locus In Quo"), upon which the court prepared a raw draft site visit report which was shared upon the parties with directions that the parties were to make corrections, deletions and additions if need be and submit the same to the court. The 1st Respondent/Applicant prepared and submitted the report marked as "SKM - 3" on Paragraph 6 of the supporting affidavit but the court inadvertently failed to incorporate it in its Judgement or record and thus the court needs to correct this apparent mistake on record.

16. According to the Learned Counsel, the change of user was the only document which triggered public participation at the county level. Once a Change of User was issued and brought to the attention of the members of public concerned, the Petitioners in this case, the Petitioners had a fourteen (14) days widow to put forward their objections. In this case, the Petitioners failed to do so and although the court reprimanded them for the indolence, the court apparently used it against the 1st Respondent/ Applicant. The Court was urged by the Learned Counsel to find that the Replying Affidavit filed by the 1st Petitioner was defective for failure to exhibit and/or annex the authority granted to him by the

rest of the Petitioners as claimed the provision of Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules, 2010 provides:

> " Where there are more Plaintiffs than one any one or more of them may be authorized by any other of them to appear and plead or act for such other in any proceeding and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
>
> The authority shall be in writing signed by the party giving it and shall be filed in the case".

17. The Learned Counsel submitted that the Petitioners had failed to comply with a mandatory provision of the law. The provision was couched in mandatory terms and thus it was not a mere technical issue curable by Article 159 (2) (d) of *the Constitution* of Kenya,2010 but a substantive provision in an Act of Parliament. He cited the case of "James Ndugi & 4 Others - Versus - Jamleck Waithaka Kinyua & 8 Others, ELCC/E 126 OF 2020", the Defendants preliminary objection was upheld for failure to adhere to this mandatory requirement and the suit struck out with costs. After citing several decided cases Hon. Justice Oguttu Mboya had this to say:

> " In my humble view, the failure to generate, execute and/or sign any such authority either as required under the law or at all renders the suit filed by and/or on behalf of the 2nd to 5th Plaintiffs herein, fatally incompetent".

18. The Learned Counsel averred that the Court ought to be persuaded by the above sentiments and hold the Replying Affidavit defective for failure to annex the alleged authority. He concluded by urging the Court to grant the prayers sought.

B. The Written Submissions by the Petitioner.

19. The Petitioner through the Law firm of Messrs. John Bwire & Associates Advocates filed its written submissions dated 9th October, 2023. Mr. Bwire Advocate averred that the 1st Respondent had by way of the Notice of Motion application dated 26th July, 2023, moved this Court to review its Judgment under Order 45 of the Civil Procedure Rules for what it termed as:-

    (a) sufficient reasons in the best interests of justice; and

    (b) an apparent mistake on record.

20. The Review application was opposed by the Petitioners' Replying Affidavit sworn on 28th August 2023 (Hereinafter "the Replying Affidavit") on grounds inter alia that the Review Application has not met the threshold for reviewing a Judgment under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules, 2010. On 21st September, 2023, the 1st Respondent filed its written submissions. In the submissions, the 1st Respondent abandoned the other grounds for review under Order 45, and premised its submissions on one ground that there are "sufficient reasons in the interests of justice to review the judgment."

21. The Learned Counsel averred that their position was guided by the jurisprudence established by this Court, the reasons cited by the 1st Respondent did not qualify to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules, 2010.

22. On the law, he held that it was settled that a court or a judicial officer powers of review, but such power must be exercised within the framework of Section 80 *Civil Procedure Act* and Order 45 Rule 1 of

the Civil Procedure Rules, 2010. From the law, the starting point was that a review may be granted whenever the court considers that:-

(a) There is new and important matter or evidence which, after exercise of due produced at the time when the decree was passed;

(b) It is necessary to correct an apparent error or omission on the part of the court; and

(c) For any other sufficient reasons.

23. In order to determine whether or not the Review application was merited, the 1st Respondent must prove either of the three (3) grounds.

24. The Learned Counsel relied on the following two (2) issues for determination. These were firstly, whether there was an error apparent on the record. The Learned Counsel submitted that in determining whether or not there was an error apparent on record, Courts have established several principles to guide judicial officers on whether or not to allow review on this ground. The Courts have observed:-

(a) The Indian Supreme Court in the case of Aribam Tuleshwar Sharma – Versus - Aribam Pishak Sharmal made a pertinent observation that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

(b) In the case of Nyamogo & Nyamogo – Versus - Kogo [2001]1 EA 173, the Court of Appeal observed that "an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record";

(c) An erroneous decision does constitute an error on the face of the record sufficient to permit review-see Nyamogo and Nyamogo Advocates – Versus - Kogo [2001] 1 EA 173 (CAK). This court cannot quash its own decision

(d) In Attorney General & Others – Versus - Boniface Byanyima the Court held that evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

25. According to the Learned Counsel, from the jurisprudence above, an error apparent on record by its very connotation signifies what he would call an error that was "self-evident", "striking", "obvious", "glaring" and "ominous". In other words, it must be so manifestly clear that it would be unjust to allow the error to remain on record. The 1st Respondent argued that there was an error apparent on record because its deletions, corrections and additions contained in its report marked as "SKM – 3" were inadvertently failed to be incorporated in the Judgment of the Court.

26. The Learned Counsel contended that what he understood from the aforesaid submissions by the 1st Respondent was that the Court failed to look into its evidence of the alleged deletions, corrections and additions. The question that this Court must ask itself was whether failure by the Court to consider a party's evidence was a ground for review or appeal?. The aforesaid question was aptly answered by

Bennet J in "Abasi Balinda – Versus - Fredrick Kangwamu and another [1963] 1 EA 557 (HCU)" when he held that:-

> " a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal."

27. Guided by the aforesaid decision of the Court of Appeal, the Learned Counsel asserted and rightly so, that the alleged failure to incorporate the 1st Respondent's report was no error or errors apparent on the face of the record to entitle the Court to grant the applicant an order for review. In any event, allowing such report or what the 1st Respondent terms as additions, corrections and deletions was discretionary, and invites the questions whether or not such additions and deletions should be allowed and whether they would change the outcome of the case.

28. With respect to their Learned Colleagues for the 1st Respondent, it was their submissions that the properly advanced at the hearing of an appeal which they had expressed intentions for review fails.

29. Secondly, whether the 1st Respondent had provided sufficient reasons to justify review of the Judgment by the Honourable Court. The Learned Counsel submitted that as they had indicated above, the 1st Respondent seemed to have abandoned other Courts Judgment. The alleged "sufficient reasons", according to the 1st Respondent/Applicant, was that the 1st, 2nd and 3rd Respondents. It was further alleged that repeating the annulled process, it would cost the 1st Respondent/Applicant about a sum of Kenya Shillings Thirteen Million (Kshs. 13,000,000.00/=). In determining whether the alleged validation was sufficient reasons, the Court must ask itself whether it pronounced itself and whether such pronouncement could be reviewed on the alleged grounds it would be expensive to initiate the process afresh.

30. According to the Learned Counsel, what was not in dispute was that the Court declared the licenses "null and void". If a Court of law declared a certain action as null and void, it meant such act or decision should be treated as if it never existed. A license that was declared null and void, cannot be validated or reinstated merely because it would be expensive to start afresh or by just going and sweet - talking the authorities to issues validation licenses. In any event, the purported validation process was a process not-known in law.

31. The Learned Counsel opined that their argument aforesaid was guided by the provision of Section 67 (2) of the Environment Management and Coordination Act which provided that:-

> " whenever an environmental impact assessment licence is revoked. suspended or cancelled, the holder thereof shall not proceed with the project which is the subject of the licence until a new licence is issued by the Authority."

32. There was another reason advanced by the 1st Respondent/Applicant that the change of user was the only document that triggers public participation at the county level, and to the extent that the Petitioners never challenged the Change of User, the Court was wrong to hold that there was no public participation. The arguments by the 1st Respondent was far from the truth. This Court went into details as to why it believed public participation was not meaningful at the averments of Paragraphs 95 to 106 of the Judgment.

33. The other reason why this argument must fail was what the Court of Appeal held in the case of "Nyamogo & Nyamogo – Versus – Kogo (Supra)" that:-

> an erroneous decision does constitute an error on the face of the record sufficient to permit review. But it can be a ground for appeal.

34. According to the Learned Counsel, it was not surprising that the 1st Respondent/Applicant had also expressed intentions to appeal out of time as demonstrated in the Petitioners further affidavit. Under this head, reasons cited by the 1st Respondent/Applicant never quality to be sufficient reasons to warrant a review under Order 45 Rule 1 of the Civil Procedure Rules, 2010.

35. The Learned Counsel concluded that correctly being guided by the jurisprudence, they had proved that there was no error apparent on record and there were no sufficient reasons warranting a review. If anything, this was a clear-cut case of an appeal disguised as a review. The 1st Respondent/Applicant wanted to avoid the mandatory public participation process on the pretest of alleged expenses. The long and short was that the application was for dismissal, and should be dismissed with the contempt it deserved with costs.

VI. Analysis and Determination

36. I have carefully read and considered the pleadings herein being the application dated 26th July, 2023 by the 1st Respondent/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

37. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-:

    a. Whether the Notice of Motion application date 26th July, 2023 by the 1st Respondent / Applicant has made out a case of the review of the Judgment of this Honourable Court delivered on 22nd March, 2023?

    b. Whether the parties are entitled to the reliefs sought.

    c. Who meets the costs of the Notice of Motion application dated 26th July, 2023?

    ISSUE No. a) Whether the Notice of Motion application date 26th July, 2023 by the 1st Respondent /Applicant has made out a case of the review of the Judgment of this Honourable Court delivered on 22nd March, 2023.

38. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging its Judgment. But as preliminary issue which was strongly brought out by the Petitioner during the oral submissions whether this Court has Jurisdiction to hear and entertain the application herein on grounds that the 1st Respondent had already preferred an appeal before the court of Appeal. Mr, Bwire Advocate for the Petitioner was of the strong view that so long as the appeal had been preferred and had not been withdrawn under the under the provision of Rule 68 of the Appellate Rules, Cap. 9, the granting of the orders sought by the 1st Respondent was not available to them under the provision of Order 45 of the Civil Procedure Rules, 2010. In a quick rejoinder to this legal assertion, Mr. Makau, the Learned Counsel for the 1st Respondent was candid enough and admitted that on being aggrieved by the Judgement of this Court they filed a Notice of Appeal at the Court of appeal but nothing else to wit an appeal had been filed. According to Mr. Makau Advocate they had not filed an appeal as demanded under the provision of Rule 82 of the *Appellate Jurisdiction Act*, Cap. 9. To me that is a very weighty issue which would not just be washed away. From

the provisions of Articles 25 (c), 47 and 50 (1) and (2) of *the Constitution* of Kenya, 2010 based on the fundamental rights and in adversarial system every person is entitled on lodging an appeal at any Court in a hierarchical order should he/she feel aggrieved. The appeal has to be as it stated. The provision of Rule 82 (1) of the *Appellate Jurisdiction Act* holds that:

> " Subject to the Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within 60 days of the date when the notice of appeal was lodged:

a. A memorandum of appeal, in quadruplicate;

b. The record of appeal, in quadruplicate;

c. The prescribed fee; and;

d. Security for the Costs of the appeal"

39. This provision of the law which is couched in mandatory terms defines not only what constitutes an appeal but spells out in clear terms the time frame upon which these should be complied with to properly constitute an appeal. These records are in public domain and from the doctrine of "Burden of proof" under the provision of Section 107 of the *Evidence Act*, cap, 80, it is on he who alleges to proof. What would have been easier than for the Petitioner to have placed these empirical documentary evidence before this Honourable Court. Taking that that never took place, the Court has no option but assume and proceed as submitted by the 1st Respondent that theirs was only a mere intention to lodge an appeal but never actually complied with the requirements of the law. Thus, for this reason, I hold that this Court is clothed with the jurisdiction to hear and entertain this application whatsoever.

40. Hence, I now move to consider the other issues from the application. For clarity sake, I reiterate that the application by the 1st Respondent/Applicant was brought under the provision of Sections 1A, 1B, 3A, 63(e) & 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Orders 45 Rules 1 & 2 Order 51 Rule I of the Civil Procedure Rules, 2010, Articles 27(1), (2), 48,50(i), 159(2) (d) of *the Constitution* of Kenya, 2010. The principles governing review of Judgment are found in Section 80 *Civil Procedure Act* Cap 21 and Order 45 (1) and (2) of the Civil Procedure Rules, 2010 and an appeal has been preferred. Therefore, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying Court orders. These are found mainly under the provisions of law already stated herein. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

41. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

42. While the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

(1) Any person considering himself aggrieved—

   a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

43. It was trite law the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the provision of Order 45, Rule 1 of the Civil Procedure Rules, 2010. Any other attempt, except on grounds falling within the ambit of the above rule, would amount to an abuse of the judicial discretion given to this Court under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 (b) of the Civil Procedure Rules to review its judgement or order.

44. To begin with, its instructive to note that there are myriad of Court decisions over this subject matter and hence there will be no need to re – invent the wheel herein. For instance, in the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

45. Further, in the case of "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

46. Broadly speaking, in the case of "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

47. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

a. There should be a person who considers himself aggrieved by a Decree or order;

b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;

c. A decree or order from which no appeal is allowed by this Act;

d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or

e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.

f. The review is by the Court which passed the decree or made the order without unreasonable delay.

48. I have previously stated in this Honourable Court in the case of "Sese (Suing as the *Administrator of the Estate of the Late Shali Sese) – Versus - Karezi & 8 others (Environment and Land Constitutional Petition 32 of 2020*) [2023] KEELC 17427 (KLR)" held that:-

> "The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible."

49. In the instant case, the 1st Respondent/Applicant has urged the Court to review its judgment dated 22nd March, 2023 by Hon. Justice L. L. Naikuni (Mr.) because there was new material evidence which can persuade the Honourable court to review its judgment. On the 14th November, 2022 the Honourable Court conducted a site visit of the locus in quo. After preparing a draft site visit report the court directed all the parties to read the report and make additions, deletions and corrections and sent the report back to court together with skeletal submission.

50. The court failed to incorporate the refined Draft Site Visit Report but solely relied on its raw report thus failing to correct apparent mistakes on the face of the record. Annexed in the affidavit and marked as "SKM - 3" was the corrected Draft Site Visit Report submitted to the court. The Honourable Court pointed out that the petitioners, though fully aware of the change of user, failed to challenge it as required by the law but apparently the Honourable court used this finding against the 1st Respondent. He was aware of the change of change of user, which was advertised in "the Daily Nation and the Taifa Leo" newspapers of 28th January, 2022, provides the only avenue in so far as public participation at the County Government level was concerned. Annexed in the affidavit and marked "SKM - 4" were copies of the advertisements in the Daily Nation and Taifa Leo.

51. According to the 1st Respondent, they obtained fresh validations of the Mombasa County Government approvals and the National Environment Management Authority licence in adherence to the court judgement of the 22nd February, 2023 and therefore the need for review. Annexed in the affidavit and marked "SKM - 5", "SKM - 6" and "SKM - 7" are copies of the validation reports from the Mombasa County Government dated the 18th July, 2023 and the National Environment Management Authority dated the 24th July, 2023 respectively.

52. The Petitioners opposed the said application and argued that prior to delving into the merits of the motion, he highlighted the salient features of the Judgment sought to be reviewed as below. Vide a Petition dated 5th May, 2023 alongside his other Petitioners, urged the Court for the various

reliefs as contained on the face thereof. The basis of the said Petition was that the intended development on property title number Mombasa/bloc XXVI/595 - the Suit Property was offensive to the neighborhood for not only infringing our constitutional rights to privacy and clean and healthy environment, but the same was also commenced without the requisite consents and/or approvals from the relevant bodies charged with environmental protection.

53. According to the Petitioners/Respondents even where the requisite approvals were obtained (and arguably correctly so), there was no public participation, a very fundamental requirement especially noting that the Applicants herein had not put in place, proper mechanisms to protect residents in the neighborhood from the massive noise and air pollution arising from the construction. He invited the Court to see the averments in his Affidavit in support of the Petition, together with the annexures the rein. The Court took affidavit evidence and heard submissions (oral and written) from all parties and on 22nd February, 2023 penned down a comprehensive 84-page judgment wherein the Court while allowing the Petition, most importantly held that;

    i. There was undisputed evidence that the alleged public hearing and consultation did not take place as required for the quantitative and meaningful consultation to be applicable (see paragraph 95 of the Judgment);

    ii. There was no effective and adequate public participation as dictated by *the Constitution* and other laws (See paragraph 96 of the Judgment);

    iii. The Project was out of character in the area and bore no board by the National Construction Authority bearing any details of the project being undertaken. The residents in the area depended mainly on boreholes and tankers for water supply (See paragraph 105 of the Judgment);

    iv. The potential negative impacts of the intended development, as per the Environmental Impact Assessment Report on record included (See paragraph 106 of the Judgment);dust and noise disturbance,increased vehicular traffic,increased demand for water and electricity supply,impacts on solid waste from the buildings upon occupancy,occupational injuries; andReduced privacy to immediate neighbors.

    v. development must be judged by its impacts on the people, not only in changes in their income but more generally in terms of their choices, capabilities and freedoms (See paragraph 108 of the Judgment);

    vi. The area which the development project is being undertaken is a development control area, and the development threatens the Petitioners right to a clean and healthy environment. Having visited the site, the Court noted that the Petitioners houses will not have any natural light and their right to privacy is highly jeopardized (See paragraph 110 of the Judgment);and

    vii. Vide Environmental Impact Assessment License, the 4th Respondent issued the 1st Respondent with License No. NEMA/EIA/PSL/ 21084 on 23rd August 2022. Consciously, the 1st Respondent began development of the suit property even before the 4th Respondent gave an approval which leads to my finding that the process is flawed, wrongful and unprocedural (See paragraph 112 of the Judgment).

54. This Court made declarations that;

    a. the proposed development of 18 floors storey building on Plot Number Mombasa/Block/ XXVI 595 is irregular, illegal and wrongful for failure to fully comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution* of Kenya, 2010; and

b. the development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building situated on all that parcel of land known as Land Reference Number Mombasa/ Block XXVI/595 without complying with the provisions Articles 10, 40, 42, 47 and 69 of *the Constitution* of Kenya, 2010 are all illegal, irregular, wrongful and therefore null and void ab initio.

55. The starting point is that the background of the case at hand. On the 5th May, 2022, Mohammed Ahmed Abdalla, Salim Said, Amin S. Salim Abdullaziz Abbas, Bharat Devidas Vaitha and Ketan Doshi, the 1st, 2nd , 3rd, 4th, 5th , 6th and 7th Petitioners herein instituted a petition against the 1st, 2nd, 3rd and 4th Respondents herein where they prayed for a Judgement against the Respondents for:-

a. A declaration that the proposed that

i. The proposed development of 18 floors storey building Plot number Mombasa/ Block/XXVI595 is illegal for failure to comply with the provisions of Articles 10, 40,42 and 69 of *the Constitution*.

ii. All development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building Plot number Mombasa/ Block XXVI/595 without complying with Articles 10, 40, 42, 47 and 69 of *the Constitution* of Kenya are all illegal, therefore null and void;

b. Permanent injunction restraining the 1st and 2nd Respondents, their agents, employees or such other persons acting under their directions from carrying out, further carrying out or in any way proceeding with the proposed development of 18 floors storey building on Plot number Mombasa/ Block XXVI/595 until: -

i. A proper public participation is carried out and views of the members of the public taken into account;

ii. Appropriate social amenities in particular, sewer system, water supply, access road and proper drainage is properly established.

iii. The Respondents provide proper mechanisms to caution the Petitioners and members of the public from the noise and air pollution as a result of mega development;

iv. A fresh environmental impact assessment is carried out within the law and a report submitted to the 4th Respondent, the Petitioners herein and the surrounding members of the public; and

v. The project is subjected to a proper environmental audit and a report prepared, detailing the short and long term significant effects of the project on not only the environment, but also to the Petitioners and members of the public

c. A permanent injunction restraining the 3rd and 4th Respondents from issuing any further development approvals to the 1st and 2nd Respondents and / or any other person acting under their directions, in respect to the proposed development of 18 floors storey building on Plot number Mombasa/Block XXVI/595 prior to compliance with prayer (b) above.

d. Costs of the Petition be provided to the Petitioners.

e. Such other reliefs the Court shall deem fit to grant in the Circumstances.

56. In its Judgment, this Honorable Court rendered itself as follows:

> "Ultimately, having conducted such an elaborate and indepth analysis of the framed issues emanating from the filed Petition and the Cross Petition, the Honourable Court is fully satisfied that the Petitioners have proved their case as presented accordingly. On the same breath, the Court finds the Cross Petition without any merit and hence fails. Specifically, and for avoidance of any doubt, I proceed to enter judgment on the following terms: -
>
> a. ThatJudgement be and is hereby entered in favour of the 1st, 2nd, 3rd, 4th, 5th 6th and 7th Petitioners herein with costs.
>
> b. That the "Counter Claim"/Cross – Petition by the 1st Respondent dated 4th October, 2022 be and is hereby dismissed with Costs.
>
> c. That a declaration be is and hereby issued that the proposed development of 18 floors storey building on Plot Number Mombasa/ Block/ XXVI 595 is irregular, illegal and wrongful for failure to fully comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution* of Kenya, 2010.
>
> d. That a declaration be and is hereby issued that the development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building situated on all that parcel of land known as Land Reference Number Mombasa/ Block XXVI/595 without complying with the provisions Articles 10, 40, 42, 47 and 69 of *the Constitution* of Kenya, 2010 are all illegal, irregular, wrongful and therefore null and void ab initio
>
> e. That costs of the Petition and for the dismissal of the Cross – Petition herein be and is hereby awarded to the 1st, 2nd, 3rd, 4th, 5th , 6th and 7th Petitioners herein.
>
> It is so ordered accordingly.

57. In the current present application, the 1st Respondent/ Applicant has demonstrated that there had been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record as the Court had used the recommendations in site visit report to come to their conclusion.

58. When this matter came up for highlighting on 12th October 2023, Learned Counsel Mr. Makau submitted that this Court is clothed with wide jurisdiction on review while relying of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010. The Counsel relied on the application and submissions and submitted that the 1st Respondent is entitled to the orders sought. Mr. Bwire Advocate for the Petitioners fully relied on the replying affidavit and submissions which he made emphasis. Review in its nature is limited as circumscribed by the foregoing, the rules lay down the jurisdiction, power and scope of review. Order 45 Rule 1 of the Civil Procedure Rules, 2010 limit it to the following grounds;

    a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

    b. on account of some mistake or error apparent on the face of the record, or

    c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

I will proceed to determine the instant application by weighing against the three grounds provided under Order 45 Rule 1 (b) of the Civil Procedure Rules as hereunder.

> Issue. No. a. Whether there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the 1st Respondent or could not be produced by it at the time when the decree was passed.

59. The 1st Respondent at paragraph 5 of the supplementary affidavit raises an interesting issue that it has fulfilled the conditions set by the court, and on account of new material evidence. In the case of "Turbo Highway Eldoret Limited - Versus - Synergy Industrial Credit Limited [2016] eKLR Sewe J. cited the case of "Rose Kaiza - Versus - Angelo Mpanjuiza [2009]eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

> " Applications on this ground must be treated with great caution and as required by R 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

In the case of "D. J. Lowe & Company Limited – Versus - Bonquo Indosuez, Nairobi Civil Application No.217 of 1998, the Court of Appeal sounded a caution in such applications and stated that:-

> "Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

60. Taking into account the above authorities I must now proceed and exercise great caution. I have keenly perused the Judgement delivered on 22nd February 2022 and I have not found any conditions which the court set to be fulfilled by the 1st Respondent. Be as it may be, the 1st Respondent states that the 4th Respondent, National Environment Management Authority has "validated" consents as such there is new and important evidence. As I understand, there must be discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed. Further, to qualify to be new evidence so as to fall within the ambit of Order 45 Rule 1 of the Civil Procedure Rules, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence.

61. In the instant case notification of approval of the application for development permission dated 18th July 2023, letter dated 18th July 2023 from the county government of Mombasa to the 1st Respondent and letter dated 24th July 2023 from the 4th Respondent to the 1st Respondent marked as annextures "SKM - 5, 6 and 7" does not meet this threshold. This is because the said documents were not even available to be produced at the time when this court rendered its Judgement. This is a situation which a

party is circumventing the orders of the court by procuring new evidence so as to strengthen or change the complexion and dimension of the case. A party cannot purport to "validate" that which the Court has declared illegal, null and void unless the orders of the court are set aside by the Court which issued the orders or the appellate court depending with individual facts of the case. Without belabouring on this point, the 1st Respondent has failed to sufficiently demonstrate this ground.

Issue No. b. Whether there is apparent mistakes on the face of record

62. The Supreme Court of India while discussing the scope of review in the case of "Ajit Kumar Rath - Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608. had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" .... means a reason sufficiently analogous to those specified in the rule"

63. Although the 1st Respondent has relied on this issue. The 1st Respondent has strongly proffered a position that there is an apparent mistake on record in that the court solely relied on its draft Site visit report of 14th November 2022 and failed to take notice of deletions and the skeleton submissions filed by the 1st Respondent as it had directed to do and thus failed to correct apparent mistakes on the face of record as the Court had originally intended.

In the case of "National Bank of Kenya Limited versus Ndungu Njau (1997) eKLR the Court of Appeal held that:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter".
>
> "In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other Judges of coordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added)

64. I wish to refer to the case of:- "Aribam Tuleshwar Sharma – Versus - Aribam Pishak Sharmal, (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047, the Supreme Court of India observed that:-

> " It has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions"

As I understand, it is the 1st Respondent's case to be that the Court failed to consider its deletions and the skeleton submissions and solely relied on its draft site report of 14th November 2022 and thus arrived at an erroneous decision. This Court does not have a chance to explain whether it relied solely on its draft site report and failed to take into account the deletions and skeleton submissions by the 1st Respondent. The question is whether the 1st Respondents case that that the court solely relied on its draft site visit report of 14th November 2022 and failed to take notice of deletions and the skeleton submissions filed by the 1st Respondent as it had directed to do and thus failed to correct apparent mistakes on the face of record as the Court had originally intended is an apparent error on the face of record.

65. In the case of:- "Nyamogo & Nyamogo - Versus - Kogo (Supra) the Court of Appeal described an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

66. Additionally, in the case of:- "Chandrakhant Joshibhai Patel – Versus - R [2004] TLR, 218 it had been held that an error stated to be apparent on the face of the record:

> " ...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

Further, in the case of:- "Attorney General & Others – Versus - Boniface Byanyima (HCMA No. 1789 of 2000) the court citing "Levi Outa - Versus - Uganda Transport Company, (1995 HCB 340) held that:-

> " the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

67. Also, in the case of:- "Republic - Versus - Cabinet Secretary for Interior and Co-ordination of National Government Ex - Parte Abulahi Said Salad [2019] eKLR, Judicial Review Application 350 of 2018 John M. Mativo J (as then he was) stated:-

17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

18. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its Judgment/decision."

Flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant case, is there apparent error that is self-evident on the face of the record itself that this Court solely relied on its draft site report and failed to consider parties deletions, additions and submissions? Perhaps, that would be the case. This argument falls on two grounds. First, the court determined the Petition and delivered its Judgement on the basis of the entirety of the material presented before it by all the Parties. Secondly, the alleged failure by the Court to take into account the 1st Respondents deletions, additions and skeleton submissions I doubt would amount to "an error on the face of the record." The power of review is available only when there is an error apparent on the face of the record. I am not fully convinced that the Judgement by this Court which is the subject of this application suffers any such error apparent on the face of the record. In saying so, I reiterate the decision of the Court in the case of:- "Meera Bhanja - Versus - Nirmala Kumari Choudhury, (1995) 1 SCC 170 where the Court held that review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible in an application for review. I agree with the Petitioners submissions that the 1st Respondents case that the court failed to consider its deletions, corrections, additions and submissions is a ground of appeal and not review. An application for review is not an appeal and neither must it be allowed to be an appeal in disguise where a party is inviting the Court do re - examine its Judgement in merits. This Court made a conscious Decision on the matters in controversy in the Petition and rendered itself in the Judgement of 22nd February 2023. Whereas the 1st Respondent has not come out clearly, it is apparent that the 1st Respondent in its case is saying that this Court failed to consider its additions to the draft Site Visit report and submissions and thus arrived at an erroneous decision. With due respect to the 1st Respondent, this issue perhaps was better dealt with in an appeal taking that it does not fall within the limited armpit of review.

68. Without going into the merits, this Court on 22nd February rendered itself:-

c) That a declaration is and hereby issued that the proposed development of 18 floors storey building Plot Number Mombasa/ Block/ XXVI595 is illegal for failure to comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution* of Kenya 2010.

d) That a declaration be and is hereby issued that the development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building Plot Number Mombasa/ Block XXVI/595 without complying with articles 10, 40,42,47 and 69 of *the Constitution* are all illegal, therefore null and void ab initio.

69. The orders arising from the foregoing in the Judgement was without doubt very clear, the that the development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building Plot Number Mombasa/ Block XXVI/595 without complying with the provision of Articles 10, 40, 42, 47 and 69 of *the Constitution* were all illegal, therefore null and void ab initio.

70. According to the 1st Respondent the Court it has secured a validation if its licences both by the County Government of Mombasa, the County and the National Environment Management Authority, NEMA. In repeating the annulled processes, the two bodies, are required, by practice to validate the hitherto issued licences and not issue fresh ones as doing so would require payment of large sums of money to the County and NEMA totaling to about a sum of Kenya Shillings Thirteen Million (Kshs.13,000,000.00/=). This is to say, once the process is repeated, the two do not require fresh payment for the licences by the 1st Respondent.

71. As it is already on record, on the 14th November, 2022, the Honourable Court conducted a site visit ("The Locus in Quo"), upon which the court prepared a raw draft site visit report which was shared upon the parties with directions that the parties were to make corrections, deletions and additions if need be and submit the same to the court. The court inadvertently failed to incorporate it in its Judgement or record and thus the court needs to correct this apparent mistake on record.

72. According to the Learned Counsel for the 1st Respondent, the change of user is the only document which triggers public participation at the county level. Once a change of user is issued and brought to the attention of the members of public concerned, the Petitioners in this case, the Petitioners had a fourteen (14) days widow to put forward their objections. In this case, the Petitioners failed to do so and although the court reprimanded them for the indolence, the court apparently used it against the 1st Respondent.

73. Under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 2111 of 1996, "National Bank of Kenya – Versus - Ndungu Njau", the Court of Appeal held that;

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court The error or omission must be self evidence and should not require an elaborate argument to be established It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".

74. The grounds laid by the Applicant discloses an error apparent on the face of the record. In my view, these are not grounds for an Appeal. In the case of "Abasi Belinda – Versus - Fredrick Kangwanu and Another (1963) EA 557" Bennet J aptly held as follows;

> " A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."

a. Whether there is Sufficient reason for review.

75. As stated here in umpteenth times, review can also be allowed for any other sufficient reason. The expression sufficient reason means a reason sufficiently analogous to those specified in the rule. On what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of the "Official Receiver and Liquidator – Versus - Freight Forwarders Kenya Ltd (2000) eKLR" stated that;

> " These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record."

76. Furthermore, in the case of:- "Shanzu Investments Limited – Versus - Commissioner for Lands (Civil Appeal No 100 of 1993)" the Court of Appeal held that:-

> " Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

77. Where the application is based on sufficient reason it is for the Court to exercise its discretion. In the case of:- "Tokesi Mambili and Others - Versus - Simion Litsanga the Court held as follows: -

> " In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

In the case of: "Republic - Versus - Cabinet Secretary for Interior and Co - ordination of National Government Ex Parte Abulahi Said Salad [2019] eKLR, Judicial Review Application 350 of 2018 John M. Mativo J (as then he was) culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ Judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1. It was the 1st Respondent's case that both the County Government of Mombasa approvals and the National Environment Management Authority, the 3rd and 4th Respondents herein licenses issued to the 1st Respondent had now been freshly validated in adherence to the Judgment of 22nd February 2023 and thus need to review.

78. In the case of "the Registered Trustees of the Archdiocese of Dar es salaam - Versus - Chairman of Bunju Village Government & Others, Civil Appeal No. 47 of 2006, C.A observed that:-

> " It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant."
>
> In the case of "Sadar Mohamed – Versus - Charan Singh and Another {1963}EA 557 the Court held that:-
>
> "Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."
>
> In the case of:- "Tokesi Mambili and Others - Versus - Simion Litsanga {2004} eKLR, the Court of Appeal held:-
>
> 'In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made.

An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

79. Vide Judgement delivered on 22nd February 2023, this Court rendered itself:

a. That Judgement be and entered in favour of the 1st , 2nd , 3rd , 4th , 5th and 6th Petitioners herein with costs

b. That the Counter - Claim/Cross Petition by the 1st Respondent dated 4th October 2022 be and is hereby dismissed with costs.

c. That a declaration is and hereby issued that the proposed development of 18 floors storey building Plot Number Mombasa/ Block/ XXVI595 is illegal for failure to comply with the provisions of Articles 10, 40,42 and 69 of *the Constitution* of Kenya 2010.

d. That a declaration be and is hereby issued that the development approvals issued by the 3rd and 4th Respondents for the proposed development of 18 floors storey building Plot Number Mombasa/ Block XXVI/595 without complying with Articles 10, 40,42,47 and 69 of *the Constitution* are all illegal, therefore null and void ab initio

e. That the costs of the Petition and for dismissal of the cross Petition herein be and is hereby awarded to the 1st , 2nd , 3rd , 4th , 5th and 6th Petitioners herein with costs

80. Clearly, the 1st Respondent has not been successful on the other grounds seeking for the review of the Judgement by this Court apart from the one on sufficient cause on a very thin membrane. On the ground of sufficient cause, I hold that the 1st Respondent/Applicant has demonstrated any sufficient reason to warrant a review of the Judgment of this Court. Suffice it to say, in all fairness, and taking into consideration that the development to be undertaken by the 1st Respondent/Applicant prospers smoothly, its instructive that the following pre – conditions have to be fulfilled. These were:-

a. The project to be undertaken to be reduced to 16 floor from 18 floor story building.

b. The 1st Respondent/Applicant to re – submit the application for approvals from the 3rd and 4th Respondents herein.

c. All the public and the residents habiting within this vicinity to be fully involved through public participation on the project being undertaken by the 1st Respondent/Applicant.

d. The potential negative impacts of the intended development and safety measures be clearly placed and set out, as per the Environmental Impact Assessment Report be undertaken to ensure that there is:Prevention of dust and noise disturbance caused;There will be no increase of vehicular traffic,There will be no increased demand for water and electricity supply,There be effective impacts on solid waste from the buildings upon occupancy,There be no occupational injuries; andThere should be no increase in privacy to immediate neighbors.

e. The 1st Respondent/Applicant to ensure that the area which the development project is being undertaken is a development control area. It should not be a threat, violation or denial of the Petitioners right to a clean and healthy environment.

f. The 1st Respondent/Applicant should ensure that the Petitioners houses natural light and their right to privacy is not highly jeopardized.

g. An elaborate and conspicuous Bill board by the National Construction Authority (NCA) to be mounted outside the premises.

h. There be adequate source of water supply away from the bore – hole and the water supply by water boosters.

81. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay. The 1st Respondent/Applicant averred that there was no delay in presenting the application, the Judgment they seek a review from was delivered on 22nd March, 2023 and the instant application to review the same is dated 26th July, 2023. I discern that the duration is reasonable and there was no undue delay.

82. For all these reasons, I find that the application dated 26th July, 2023 by the 1st Respondent/Applicant is meritorious and thus the same is allowed.

ISSUE No. c). Who meets the costs of the Notice of Motion application dated 26th July, 2023

83. Although the issue of costs of an action or proceeding are at the discretion of the court in accordance with Rule 2.........of *the Constitution* (Protection and Freedom of Rights), 2023, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21).

84. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See "Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Ltd [1967] EA 28". The court finds no good reason why the successful party should not be awarded costs of the action. However, in the instant case, it is just reasonable, fair and Equitable in the given circumstances of this case that each party bear their own costs of the application whatsoever.

VII. Conclusion and Disposal

85. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the 1st Respondent in the Notice of Motion application dated 26th July, 2023 has on balance and preponderance of probability established its claim for review of the Judgment delivered on 22nd March, 2023. Therefore, for avoidance of any doubts, I proceed to specifically order:-

a. That the Notice of Motion application dated 26th July 2023 by the 1st Respondent be and is hereby found to be meritorious and hence its allowed upon fulfilment of the following conditions.

b. That in effect therefore, the Judgement delivered by this Court on 22nd, March, 2023 be and is hereby set aside upon the Respondents fulfilling the subject Pre – Conditions laid out from this Ruling without failure.

c. That a declaration be and is hereby issued that the proposed development of 18 floors storey building Plot Number Mombasa/ Block/XXVI595 be reduced to 16 Floors and to be in compliance with the provisions of Articles 10, 40, 42 and 69 of *the Constitution* of Kenya 2010.

d. That there be a fresh Environment Impact Assessment Report in accordance with the provision of Section 58 (1) of EMCA, 1999 to be prepared and issued by NEMA within the next 30 days from this date and that there shall be a new development Plans prepared by the County Government of Mombasa Physical Planner to ensure there that there are stringent Environmental and construction safety precautionary measures stipulated out clearly ensuring that the following are undertaken: -**Prevention of dust and noise disturbance**

caused;There will be no increase of vehicular traffic,There will be no increased demand for water and electricity supply,There will be effective impacts on solid waste from the buildings upon occupancy,There will be no occupational injuries; andThere should be no increase in privacy to immediate neighbors.

e. That a declaration be and is hereby issued that the 1st Respondent to apply afresh for development approvals by the 3rd and 4th Respondents for the proposed development of 16 floors storey building Plot Number Mombasa/ Block XXVI/595 upon compliance with the provision of Articles 10, 40, 42, 47 and 69 of *the Constitution* of Kenya, 2010.

f. That each party to bear their own costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICRO – SOFT TEAMS MEANS, SIGNED AND DATED AT MOMBASA THIS 30TH DAY OF APRIL............2024.

....

HON. JUSTICE 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. Timbe Advocate holding brief for Mr. Bwire Advocates for the Petitioners.

c. Mr. J. Makau Advocates for the 1st Respondent.

d. M/s. Baraza Advocate for the 2nd Respondent.

RULING: CONSTITUTION PETITION NO.16 OF 2022 Page **19** of **19** **HON. JUSTICE L.L. NAIKUNI (JUDGE)**