



Vaitha & 14 others v County Government of Mombasa & 3 others (Constitutional Petition E010 of 2024) [2025] KEELC 824 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEELC 824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E010 OF 2024**

LL NAIKUNI, J

FEBRUARY 21, 2025

**IN THE MATTER OF: VIOLATION AND THREATENED FURTHER
VIOLATION OF ARTICLES 1[1],10,40,42, 47,48,50,69 & 70 OF THE
CONSTITUTION BY THE COUNTY GOVERNMENT OF MOMBASA**

AND

**IN THE MATTER OF: POWER ALLOCATED TO THE COUNTY GOVERNMENT OF
MOMBASA TO FORMULATE BY-LAWS TO REGULATE ZONING IN RESPECT OF USE
AND DENSITY OF DEVELOPMENT IN DIFFERENT PLACES[ZONES] WITHIN MOMBASA**

AND

**IN THE MATTER OF THE FAILURE BY THE COUNTY GOVERNMENT OF MOMBASA
AND THE COUNTY ASSEMBLY TO TAKE LEGISLATIVE AND OTHER MEASURES
TO PROVIDE A FRAMEWROK GUIDING DEVELOPMENT OF LAND BY DEFINING
THE ALLOWED STANDARDS AND REGULATIONS FOR DEVELOPMENT OF
VARIOUS LAND USES IN DIFFERENT PLACES[ZONES] WITHIN MOMBASA**

AND

**IN THE MATTER OF: A STOP OF FURTHER ISSUANCE OF DEVELOPMENT PERMITS BY
THENATIONAL ENVIRONMENT MANAGEMENT AUTHORITY AND THE NATIONAL
CONSTRUCTION AUTHORITY OF KENYA UNTIL THE COUNTY GOVERNMENT OF
MOMBSA AND THE COUNTY ASSEMBLY UNDERTAKE LEGISLATIVE AND OTHER
MEASURES TO PROVIDE A FRAMEWORK GUIDING DEVELOPMENT OF LAND BY
DEFINING THE ALLOWED STANDARDS AND REGULATIONS FOR DEVELOPMENT
OF VARIOUS LAND USES IN DIFFERENT PLACES[ZONES]WITHIN MOMBASA**

BETWEEN

**BHARAT VAITHA 1ST PETITIONER
MANOJ SHAH 2ND PETITIONER
SHABAZ KHAN 3RD PETITIONER**



ABDILLAH SAID	4 TH PETITIONER
ABDULAZIZ ABASS	5 TH PETITIONER
ABDALLA MOHAMMED AHMED	6 TH PETITIONER
KETAN DOSHI	7 TH PETITIONER
DR RISHAD ALI	8 TH PETITIONER
AMIR MERALI	9 TH PETITIONER
MOHAMUED ABDI SANAY	10 TH PETITIONER
F. YASSIN	11 TH PETITIONER
ABDULRAHAMAN MOHAMMED	12 TH PETITIONER
SAEED JUNAID SAID	13 TH PETITIONER
ABDULAZIZ MOHAMED SALEH	14 TH PETITIONER
MOHAMED JENED SAID	15 TH PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA	1 ST RESPONDENT
SPEAKER OF THE COUNTY ASSEMBLY OF MOMBASA	2 ND RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY	3 RD RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY	4 TH RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains to *the Constitution* Petition dated 12th April, 2024 instituted by Bharat Vaitha, Manoj Shah, Shabaz Khan, Abdilllah Said, Abdulaziz Abass, Abdalla Mohammed Ahmed, Ketan Doshi, Dr. Rishad Ali, Amir Merali, Mohamued Abdi Saney, F. Yassin, Abdulrahaman Mohammed, Saeed Junaid Said, Abdulaziz Mohamed Saleh and Mohamed Jened Said the Petitioners herein. It was against the 1st, 2nd, 3rd & 4th Respondents herein. It was brought under the provisions of Articles 1 (1); 10, 27, 40, 69 & 70 of *the Constitution* of Kenya, 2010; Sections 58, 72, 73 and 93 of the Physical & Land Use Planning Act.
2. Upon service, *the Constitution* Petition was opposed by the 1st, 2nd & 4th Respondents herein through filing of Replying Affidavits and grounds of Opposition. The Honourable Court shall be dealing with each of these pleadings indepth in this Judgement herein.

II. The Petitioners Case

3. The property sector in the country is fast growing as evidenced by the numerous high-rise developments in most urban centres. The growth can perhaps be linked to the Kenya vision 2030 a development program aimed to raise the average standard of living to middle income by the year



2030. The vision of the program under its social pillars is inclusive of access to affordable housing. However, in the course of putting up this developments, it should be noted that urban areas have laws and regulations that govern use of property in certain geographical areas. These were what were referred to as zoning regulations. This Petition as commenced by the Petitioners who refer to themselves as residents of Mombasa and owners of various properties within Mombasa, challenges the 1st and 2nd Respondents failure to take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places[zones] within Mombasa county.
4. The Petitioners content that the 2nd Respondents had failed to comply with the Local government [adoptive by laws] [building] order of year 1968 when issuing building approvals as the approvals issued are not in line with the said zoning regulations hence necessitating this suit. The Petitioners allege that the Respondents failure in complying with the zoning regulations has resulted in development activities within Mombasa which are in total disregard to the environmental considerations and interference with natural resources of some areas. The same has further led to the violation of the Petitioners rights as envisaged under Articles 1[1] ,10,42,47,69 and 70 of *the Constitution* of Kenya 2010.
 5. Finally, it the contention by the Petitioners that contrary to the provision of Article 10, 42, 69 & 70 of *the Constitution* of Kenya, 2010; Section 72 & 73 of the PLUPA, the 1st Respondent, the County Government of Mombasa had deliberately refused, neglected and/or refused to establish an important dispute resolution mechanism in the name of the County Physical & Land Use Planning Liaison Committee. This denied parties a right to complaints by the County Executive Members on approvals and further preferring appeals emanating Committee to this Court.
 6. The Petitioners prayed that the following orders be granted:-
 - a. A declaration that the development permits issued by the 1st and 2nd Respondents in contravention of the local government [adoptive by laws] [building] order 1968 are irregular and illegal
 - b. A declaration that the 1st and 2nd Respondents have violated Articles 1[1],10, 42, 69 and 70 of *the constitution* of Kenya 2010 by failing to take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places [zones] within the County Government of Mombasa that would take into account the views of the residents of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the Constitution* 2010 as read with the County Government Act 2012.
 - c. A declaration that the 1st and 2nd Respondents have violated Articles 1[1] ,10, 42, 69 and 70 of *the Constitution* of Kenya 2010 by failing to establish the County Physical and Land Use Planning Liaison Committee as provided under Sections 72 and 73 of PLUPA for the County Government of Mombasa
 - d. An order directing the 1st and 2nd Respondents take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places[zones] within the County Government of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the Constitution* 2010 as read with the County Government Act 2012
 - e. An order be issued directing the 1st and 2nd Respondents to establish the County Physical and Land Planning Liaison Committee as provided under Sections 72 and 73 of the PLUPA for the County Government of Mombasa within 90 days from the date of this order



- f. A conservatory order be issued restraining the Respondents from issuing any further development permits for developments of properties in Mombasa until the 1st and 2nd Respondents undertake legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various uses in different places[zones] within the County Government of Mombasa.
 - g. Costs of the Petition be awarded to the Petitioner herein.
7. The Petition is premised on the grounds, testimonial facts and the averments made out under the a 21 Paragraphed affidavit dated 10th April, 2024 and sworn by MANOJ SHAH the 2nd Petitioner together with six (6) annexures marked as “MS – 1 to 6” annexed thereto. He averred as follows that:-
- a. He was the 2nd Petitioner fully conversant with the matters of fact giving rise to this Petition one and dully authorized to swear this affidavit on behalf of the other Petitioners. The authority was annexed and marked as “MS – 1”.
 - b. The Petitioners through the affidavit state that under the Fourth Schedule of *the Constitution* of Kenya 2010, physical planning functions was among the functions under the devolved County Governments.
 - c. The provision of Section 111 of the County Government Act 2012 provides for city and municipal plans to be included as city or urban areas building and zoning policy.
 - d. Further, the Physical Planning Act of 1996 [repealed] and the *Physical and Land Use Planning Act* [hereinafter referred to as “PLUPA”] gives the County Governments the power to formulate by laws to regulate zoning in respect of use and density of development.
 - e. The word Zoning as used in the County Government Act, 2012 and PLUPA is a method of development management that designates for a particular development or use category or Zone. With each Zone there are provisions and rules setting out the purpose for which property may be used, and the manner in which it may be developed.
 - f. Zoning Policy normally provide for the rights and obligations for property owners and apply to land, buildings and structures. It is therefore the policy that are to normally guide owners or properties on the nature of development they could put up on various areas and similarly guide the Respondents when approving applications for development permits/approvals.
 - g. Currently the existing zoning policy is the Local Government [adoptive by laws] [building] order 1968.
 - h. The 1st and 2nd Respondents had failed to comply with the same by issuing building approvals that were not in line with the said zoning regulations.
 - i. Further, the 1st & 2nd Respondents had failed to take legislative and other measures to provide a framework guiding development of land defining the allowed standards of various land uses in different places (Zones) within the County Government of Mombasa that would take into account the views of the residents of Mombasa as was intended by the provision of Articles 10, 47, 42, 69 and 70 of *the Constitution*, 2010 as read with the County Government Act, 2012.
 - j. The regulation of development in Mombasa had been left to the absolute discretion of the Governor and persons acting under his authority. The 1st and 2nd Respondents did not comply with the Local Government (Adoptive By – laws) (Building) Order 1968 when issuing development permits and had declined to undertake reforms and/or take legislative and



other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places (Zones) within the County Government of Mombasa.

- k. Sometimes in the year 2021, the 1st and 2nd Respondents were in the process of enacting a new Zoning Plan. However, the processes was stopped just to ensure that the absolute discretion of the Governor in matters building approvals was not interfered with.
- l. The failure to make the legislation had in turn resulted in development activities within Mombasa which was in total disregard to the environmental considerations and the same interfered with the natural status of some areas.
- m. The Petitioner gave the following reasons for their discontent while referring to Kizingo area within Mombasa County as a case in point:-
 - a. There were developments of storeys which were [17] storeys higher than those of the Petitioners and therefore greatly interfere with the Petitioners right to privacy
 - b. Apartments had been constructed without proper social amenities including sewer system, water supply, access road and proper drainage
 - c. The 1st Respondent had issued development permits for the construction of structures which interfere with existing road structures.
 - d. No considerations had been put in place to caution the Petitioners and residents of Mombasa in general from noise and air pollution that results from mega development activities
 - e. New development activities did not take into consideration existing developments thereby affecting the already existing activities
 - f. Development permits had been denied for structures which would really assist the residents of Mombasa
 - g. New developments blocking public roads and allowing over 22 storey buildings to be built on them
- n. Considering the nature sand and rocks on which Mombasa was sitting on, and the reports indicating that Mombasa Island would be sinking in 50 years time, the County Government of Mombasa ought to have taken precaution in regulating the kind of development to be undertaken.
- o. The development permits which have been issued in violation of the Local Government (Adoptive By – Laws) (Building) Order 1968 had rendered the said By – Laws otiose and had created a lot of confusion in the Zoning of different area within Mombasa.
- p. By failing to undertake legislative and other measures to provide a framework guiding development of land by defining the allowed standards and regulations for development of various land uses in different placed (zones) within to establish a Liaison Physical Committee as indicated above, the Respondents had fundamentally trampled upon the Petitioners rights.
- q. It was the process of undertaking the legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places (zones) within the County Government of Mombasa that would guarantee the rights of the residents of Mombasa in taking part in the development projects. Otherwise, the



current development projections which were being sanctioned at the absolute discretion of the Governor and persons acting under his authority was in violation of Articles 1(1) and 10 of *the Constitution* of Kenya, 2010.

- r. The 1st and 2nd Respondents had violated the provision of Article 10 of *the Constitution* of Kenya, 2010 by failing to comply with the Local Government (Adoptive By-Laws) (Building) Order 1968 when issuing building approvals that are not in line with the said zoning regulations.
- s. Among the forums set out for purposes of access to justice was the County Physical and Land Use Planning Liaison Committee which determined the disputes relating to the development permits issued by the 1st Respondent.
- t. The 1st and 2nd Respondents had violated the provision of Articles 48 and 50 of *the Constitution* by failing to establish the County Physical and Land Use.
- u. Planning Liaison Committee as provided under Section 72 and 73 of the PLUPA for the County Government of Mombasa.
- v. By failing to effectively undertake the legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places (zones) within the County Government of Mombasa that would guarantee the rights of the residents of Mombasa in taking part in the development projects, the 1st and 2nd Respondents had effectively taken away the right of public participation.
- w. It was therefore in the interests of justice, fairness and in showing fidelity to *the Constitution* that the prayers sought in the Petition filed herewith should be granted.
- x. The 1st and 2nd Respondents had further failed to establish the County Physical and Land Use Planning Liaison Committee as provided for under Sections 72 and 73 of PLUPA for the County Government of Mombasa.
- y. That it was in the interest of justice that the prayers sought in the petition herein are granted.

III. The Foundation of the Petition

- 8. The provision of Article 1(1) of *the Constitution* of Kenya, 2010 provides that all sovereign power belongs to the people of Kenya and shall be exercised only under this Constitution.
- 9. Article 10 of *the Constitution* of Kenya, 2010 establishes rules of law and good governance as some of the principles of governance. Amongst the principles under Article 10 (2) thereof, is the requirement of public Participation. The rule of law requires that any action undertaken by a state organ/officer be based on the law. Even where a public officer exercises authority based on discretion that discretion has to be exercised in compliance with the rule-of-law principles.
- 10. Article 40 (2) on the protection of the property right is instructive that parliament shall not enact a law that permits the state or any person to inter-alia, limit or in any way restrict the enjoyment of any right under this Article based on any of grounds specified or contemplated in Article 27 (4).
- 11. Concerning the environment, Article 42 is clear that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures. Under Article 69 the state shall not only ensure sustainable exploitation management and conservation of the environment but eliminate processes and activities that are likely to endanger the environment. Where a right to a clean and health



environment has been violated or is under threat of violation, Article 70 empowers this court to address the violation, to prevent, stop or discontinue any act or omission that is harmful to the environment.

12. Under the Fourth Schedule of *the Constitution* of Kenya, 2010, physical planning functions are among the functions that have been devolved to the County Governments. The provision of Section 111 of the County Government Act, 2012 provides for City and Municipal plans to be included; in city or urban areas building and zoning policy. Further, the Physical Planning Act of 1996 (repealed) and the *Physical and Land Use Planning Act* (PLUPA) gives the County Governments the power to formulate by-laws to regulate zoning in respect of use and density of development.
13. The word zoning as used in the County Government Act, 2012 and the PLUPA is a method of development management that designates for a particular development or use category or zone. Within each zone provisions and rules set out the purpose for which property may be used, and how it may be developed. The Zoning Policy normally provides for the rights and obligations of property owners and applies to land, buildings and structures. It is therefore the policy that is to normally guides owners or properties on the nature of developments they can put up on various areas and similarly guide the Respondents when approving applications for development permits/approvals.
14. The Petitioners state that currently the, existing zoning policy is The Local Government (Adoptive By-Laws) (Building) Order 1968, and that the 1st and 2nd Respondents have failed to comply with the Local Government (Adoptive By-Laws) (Building) Order 1968 when issuing building approvals that are not in line with the said zoning regulations. Further, the 1st and 2nd Respondents have failed to take legislative and other measures to provide a framework guiding the development of land by defining the allowed standards of various land uses in different places (zones) within the County Government of Mombasa that would consider the views of the residents of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the Constitution*, 2010 as read with the County Government Act, 2012. It was argued that the regulation of developments in Mombasa has been left to the absolute discretion of the Governor and persons acting under his authority.
15. The 1st and 2nd Respondents never complied with the Local Government (Adoptive By-Laws) (Building) Order 1968 when issuing development permits and have declined to undertake reforms and/or take legislative and other measures to provide a framework guiding the development of land by defining the allowed standards of various land uses in different places (zones) within the County Government, of Mombasa. The said failure was said to have in turn resulted in development activities within Mombasa which are in total disregard to the environmental considerations and the same interfere with the natural status of some areas. For instance, in Kizingo area;
 - a. There are developments of storeys which are (17) storeys higher than those of the Petitioners and therefore greatly interfere with the Petitioners right to privacy.
 - b. Apartment have been constructed without proper social amenities including sewer system, water supply, access road and proper drainage.
 - c. The 1st Respondent has issued development permits for the construction of structures, which interfere with existing road structures.
 - d. No considerations have been put in place to caution the Petitioners and residents of Mombasa in general from noise and air pollution that results from mega development activities.
 - e. New development activities do not take into consideration existing developments thereby affecting the already existing developments.



- f. Development permits have been denied for structures which would assist the residents of Mombasa.
 - g. New developments blocking public roads and allowing over 22-story buildings to be built on them.
16. The development permits which have been issued in violation of the Local Government (Adoptive By-Laws) (Building) Order 1968 have rendered the said By-Laws obsolete and have created a lot of confusion in the zoning of different areas within Mombasa.
 17. Further, the 1st and 2nd Respondents have failed to establish the County Physical and Land Use Planning Liaison Committee as provided under Sections 72 and 73 of the PLUPA for the County Government of Mombasa.

IV. The violations of the constitutional provisions

18. The Respondents were said to violate *the constitution* by failing to undertake legislative, and other measures to provide a framework guiding the development of land by defining the allowed standards and regulations for the development of various land uses in different places (zones) within established a Liaison Physical Committee as indicated above, the Respondents have fundamentally trampled upon the Petitioners rights and that of the residents of Mombasa. In particular, it was said that there was a violation of Articles 42, 69 and 70 of *the Constitution* of Kenya, 2010 on the rights to a clean and healthy environment is a constitutional safeguard to Article 42 of *the Constitution*, as read with Articles 69 and 70 of *the Constitution*. This right is so imperative that it has been echoed in Section 3 of the Environmental Management and Co-ordination Act, 1999 which further enjoins every person to safeguard and enhance the environment. Additionally, Section 3 (3) thereof is clear that where a right to a clean and healthy environment has been violated or has been violated, and this court had various powers inter-alia, to prevent, stop or discontinue any act or omission deleterious to the environment and to require that any on-going activity be subject to on environment audit by the provisions of the Act. The development activities being undertaken in Mombasa were said to be done without any existing legal policies. They have in particular failed to ensure orderly physical and land use development, to ensure optimal land use, to protect and conserve the environment, to promote public safety and health, and to promote public Participation in physical and land use development decision-making.
19. The Respondents were said to have violated Articles 1(1) and 10 of *the Constitution* on Public Participation, which provides for national, values and principles of governance which bind all state organs, state officers and public officers including the Respondents and their officers. Further, Article 1(1) of *the Constitution* of Kenya, 2010 provides that all sovereign power belongs to the people of Kenya and shall be exercised only by this Constitution. Among the national values and principles is the principle of public participation which provides that all state organs, state officers and public officers shall allow the participation of the people before making any decision that affects the people. It is the process of undertaking the legislative and other measures to provide a framework guiding the development of land by defining the allowed standards of various land uses in different places (zones) within the County Government of Mombasa that would guarantee the rights of the residents of Mombasa in taking part in the development projects. It was averred that the current development projections which are being sanctioned at the absolute discretion of the Governor and persons acting under his authority violate Articles 1(1) and 10 of *the Constitution* of Kenya, 2010. The 1st and 2nd respondents were said to have violated Article 10 of *the Constitution* of Kenya, 2010 by failing to comply with the Local Government (Adoptive By-Laws) (Building) Order 1968 when issuing



building approvals that are not in line with the said zoning regulations; and for failing to ensure public participation in all environment matters.

20. The Respondents were also said to violate the provision of Articles 50 and 48 of *the Constitution* of Kenya, 2010. Article 48 of *the Constitution* of Kenya, 2010 guarantees the right to access justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Among the forums set out for purposes of access to justice is the County Physical and Land Use Planning, Liaison Committee which determines the disputes relating to the development permits issued by the 1st Respondent. The 1st and 2nd respondents were accused of violating Articles 48 and 50 of *the Constitution* by failing to establish the County Physical and Land Use Planning Liaison Committee as provided under Sections 72 and 73 of the PLUPA for the County Government, of Mombasa.
21. Concerning environmental protection, Article 69 (1)(d) requires the State to encourage public participation in the management, protection and conservation of the environment. By failing to effectively undertake the legislative and other measures to provide a framework guiding the development of land by defining the allowed standards of various land uses in different places (zones) within the County Government of Mombasa that would guarantee the rights of the residents of Mombasa in taking part in the development projects, the 1st and 2nd Respondents were said to have effectively taken away the right of public participation.

V. The responses by the 1st Respondent.

22. The 1st Respondent made their responses to the Petition through filing of a 28 Paragraphed Replying Affidavit sworn and dated on 13th November, 2024 by Paul Manyala the Director in Charge of Planning within the County Government of Mombasa. He averred as follows:-
 - a. *The Constitution* of Kenya 2010 assigns the 1st Respondent the under the Fourth schedule of *the Constitution* at part two, the function and power to undertake County Planning and control development.
 - b. The primary legislation for Planning and Land Use is the *Physical and Land Use Planning Act* 2019, (PLUPA). PLUPA being a national stature takes precedence and is on top of the hierarchy in terms of legislation.
 - c. In Section 2 the interpretation of planning authority is defined as follows: - “Planning Authority” concerning County Government planning functions means the County Executive Committee Member. While Section 3 provides for the objects of the Act which highlights all the issues that the Petitioners had raised in their Application and Petition.
 - d. The County Government of Mombasa does not act in a vacuum, apart from the *Physical and Land Use Planning Act* 2019, there were regulations enacted i.e. the Physical and Land Use Planning (Development Control Enforcement) Regulations [*Legal Notice 25 of 2021*], The Physical and Land Use Planning (General Development Permission and Control) Regulations (*Legal Notice 253 of 2021*), The Physical and Land Use Planning (Building) Regulations (*Legal Notice 239 of 2021*) among others regulations.
 - e. There is also the national Building Code 2024 that provides a framework and standard of construction in the National Spectrum.
 - f. Further, apart from the national legislation, the 1st Respondent had promulgated the Mombasa Integrated Strategic Urban Development Plan 2015-2035 (Hereinafter referred to



as “ISUDP”) a policy framework guiding the development of land, defining of permitted uses, standards, regulations and policy in various areas of jurisdiction of the County.

- g. The Zoning policy chapter and the County Land Use Structure Plans are tools contained in the said plan and used in decision making when considering development applications.
- h. The development control functions of County Government and enforcement of the same was strictly done using the relevant national laws and by considering development applications based on the zoning policy and regulations according to ISUDP 2015 - 2035.
- i. Before any development application was considered it underwent a test on how it would impact on existing social amenities, public utilities, transportation and solid and liquid waste management facilities.
- j. Deliberate efforts had been made on developing and expansion of storm water drainage, expansion of water supply services, enforcement of onsite sewer systems through bio septic tanks technology amongst other measures.
- k. The development applications found to be impacting existing infrastructure significantly must provide management plan to alleviate the negative impacts by providing alternative methods, technology, additional site (especially parking), enhancing the building line or setback standards, complementing or supplementing existing infrastructure by providing for example, a standby generator or solar power as well as boreholes or installing desalination plant for supplementing water supply.
- l. The 1st Respondent had been expanding the existing infrastructure to correspond to the increasing population and housing. As such the expansion of infrastructure had been in collaboration with the National Government where the standard gauge railway was developed, northern and southern bypasses constructed (dongo kundu road), expansion of the Malindi-Mombasa roads, expansion and development of walkways (“red carpet” cabros), development and rehabilitation of public spaces like Mama Ngina waterfront, Jomo Kenyatta Public Beach, Shelly beach, rehabilitation of Kibarani dumpsites among others. Deliberate and concerted effort have also been put on developing and expanding storm water drainages, water supply services, and enforcement of onsite sewer systems through bio septic tank technology, among many other measures.
- m. Pursuant to the provision of Section 56 (c) of the *Physical and Land Use Planning Act*, the 1st Respondent only issues a development permission after strict scrutiny of the Application made for development permission.
- n. Before the County Government of Mombasa issued the final approval for development, the Application for such a development goes through the following process and scrutiny: -
The Applicant developer lodges his/her application to the County by submitting:
 - ii. copy of the title
 - iii. A rates clearance certificate
 - iv. Architectural plans
 - v. Structural plans
 - vi. Environmental impact assessment report; and



- vii. Any other relevant documents.
- m). Once the Applicant lodges the above-mentioned documents they were vetted and an invoice is generated with a reference number, whereupon the Applicant is expected to pay for the development permission.
- o). After the Applicant has paid the required statutory payment, the documents presented by the Applicant then circulates to various relevant departments within the County Government of Mombasa as follows: -
 - i. Valuation — Ensures the land rates are cleared and attach a current certificate of land search to authentic the title as per the documents provided.
 - ii. Physical Planning- Ensures appropriate location and siting of development and that the development application conforms with the zoning standards, policy and permitted users.
 - iii. Architect — Ensures the designs and the design details meet architectural standards.
 - iv. Surveyor- Ensures the building conforms with the plot boundaries and ensures fixing boundaries if need be. Establish existing wayleaves, riparian reserves and encroachment to any public utility within the area.
 - v. Environment, public health and fire safety — Ensure toilets, septic tanks, fire exits, general sanitation is properly catered for.
 - vi. Engineering — Ensure the proposed development is designed to sustain the structural load, integrity of the development through use of appropriate specifications of materials and the structural plans conforms to the development standards and safety.
- q). It was only after the above scrutiny and processes are complete that an Applicant/Developer is presented with a development permission. He claimed that there is a requirement to produce an Environmental Impact Assessment report as a measure of public participation and the impact the project might have.
- r). In addition, the 1st Respondent publishes in the dailies a notice for public views and/or objections over Change of User and such other development permissions.
 - a. For the above reasons the 1st Respondent seeks that the petition be dismissed with costs.

VI. The responses by the 2nd Respondent

23. The 2nd Respondent's response was filed electronically before court on 21st November, 2024.
- a. The 2nd Respondent admitted that the existing policy is the Local Government [Adoptive by Laws] [Building] Order 1968, that however Article 185[2] of *the constitution* provides that county assemblies may make laws that are necessary for or incidental to the effective performance of the functions and exercise of powers of the county government under the fourth schedule.
 - b. In accordance with Article 186, where county legislation is not yet enacted existing national legislation such as the *Physical and Land Use Planning Act* 2019 continues to apply to govern land use and planning within Mombasa county. Reference is made to the holding in "Council of County Governors - Versus - Attorney General and Others [Advisory Opinion No 25



Of 2014 where the supreme court of Kenya held that where there is legislative void at the county level, national legislation assumes that role. The 2nd Respondent's maintains that the national laws are thereby applicable to ensure continuity in governance and there is therefore no absolute discretion that the governor and person's acting under his authority have in granting development permits as alleged.

- c. Further that the county government of Mombasa has enacted several regulations including the Physical and Land Use Planning [Development Control Enforcement] Regulations legal notice 251 of 2021, the Physical Land Use Planning [General Development Permission and Control] Regulations [legal notice no 253 of 2021], the Physical and Land Use Planning[Building] Regulations Legal notice 239 of 2021 and many other regulations.
- d. There was also the Mombasa Integrated Strategic Urban Development Fund 2015-2035, a policy that was inaugurated by the county government which is currently guiding development of land, defining of permitted uses, standards, regulations and policy within the county.
- e. The zoning policy chapter and the county land use structure plans are tools contained in the said plan and used in decision making when considering development applications.
- f. The 2nd Respondent denied that its actions or inactions constitute a breach of its constitutional obligations and asserts that plans to develop comprehensive legislation on land use, physical planning and zoning are actively underway.
- g. Drafting of legislation requires time. The court was urged to dismiss the Petition on the basis that the 2nd Respondent was actively pursuing the development of requisite legislation and national laws duly apply in the interim period.

VII. The responses by the 3rd Respondent

24. The 3rd Respondent did not participate in the Petition despite service being effected upon them. Thus, the Petition proceeded their absence notwithstanding.

VIII. The responses by the 4th Respondent

25. The 4th Respondent filed Grounds of Opposition dated 13th May, 2024 opposing the notice of motion application and Petition. The following grounds were raised that:-
 - a. The suit is bad in law for misjoinder of parties and is an abuse of the court process
 - b. The 4th Respondent is improperly enjoined (Misjoinder of parties) as a Respondent to this suit by the Petitioners
 - c. The 4th Respondent is a government entity established under Section 3[1] of the [National Construction Authority Act](#) no 41 of 2011, mandated to oversee and coordinate the construction, through various functions including the registration of contractors, construction project registration and accreditation of construction skilled workers and site supervisors.
 - d. Further, the 4th Respondent, in furtherance of its mandate, promotes and ensures quality assurance in the construction industry.
 - e. Further, the 4th Respondent in furtherance of its mandate, promotes and ensures quality assurance in the construction industry.



- f. That the issues raised in the application constitute matters of planning which are covered under the *Physical and Land Use Planning Act* 2019 of which govern matters relating to planning, use, regulation and development of land in Kenya and for connected purposes to which the 4th Respondent is not a regulator.
- g. That regulation 17 of the National Construction Authority Regulations 2014 provides for registration of all construction works, contracts or projects either in public or private sector shall be registered with the authority in accordance with the act
- h. That the approval process of any construction process is undertaken by the respective county government with the 4th Respondent registering the construction works, once construction project has been approved by the relevant county government, national environmental management authority among other regulators.
- i. That after the approval process of a construction project, the 4th Respondent undertakes quality assurance activities by ensuring compliance of a construction site with the required standards
- j. That the Petitioners had not demonstrated that the 4th Respondents mandate under the *National Construction Authority Act* no. 41 of 2011 and the National Construction Regulations 2014 correlates to the Petition herein.
- k. That no cause of action had been demonstrated by the Petitioners as against the 4th Respondent
- l. That this Petition against the 4th Respondent be dismissed with costs.

IX. Submissions.

26. On 29th May, 2024 while all the parties were present in Court they were directed to have the Constitutional Petition be canvassed byway of written submissions. Pursuant to that all parties complied and the Honourable Court reserved to deliver its Judgement by issuance of notice. Indeed, the Judgement was delivered on 21st February, 2025 by virtual means.

A. The Written Submissions by the Petitioners.

27. The Petitioners through the Law firm of Messrs. Mutisya Mwanzia & Ondeng Advocates filed their written submissions. Mr. Mwanzia Advocate commenced his submission by stating that the Respondents had failed to regulate developments in Mombasa as per the existing zoning policy, the Local Government (Adoptive By-Laws) (Building) Order 1968, also known as the Building Code. It was submitted that the 1st and 2nd Respondents failed to take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places (zones) within Mombasa, considering the views of the residents of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the Constitution* of Kenya, 2010 as read with the County Government Act, 2012. The failure of upholding developments pursuant to the law or legal framework in place and was said to result in development activities within Mombasa county which are in total disregard of environmental considerations underpinned by *the Constitution* and other laws, for example Environmental Management and Coordination Act (EMCA) and thus interfere with the natural status of some areas thereby infringing on a variety of rights such as right to a clean and healthy environment amongst others.
28. The Learned Counsel argued that there was continued failure by the 1st and 2nd Respondents to establish the County Physical and Land Use Planning Liaison Committee as provided for under



the provision of Sections 72 and 73 of PLUPA to effectuate proper land use and planning thereby effectuating the zoning laws contemplated under Local Government (Adoptive By-Laws) (Building) Order 1968.

29. The Learned Counsel the following issues for determination;
 - a. Whether the 4th Respondent was improperly enjoined in this suit
 - b. Whether the 1st and 2nd Respondents had violated the provision of Articles 1[1],10, 42, 69 and 70 of *the Constitution* of Kenya 2010 by failing to take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places [zones] within the County Government of Mombasa
 - c. Whether the 1st and 2nd Respondents had violated Articles 1[1],10, 42, 48, 50, 69 and 70 of *the Constitution* 2010 by failing to establish the County Physical and Land Use Planning Liaison Committee for the County Government of Mombasa.
 - d. Whether the Petitioners warrant to be granted the prayers in the Petition.
30. On the 1st issue for determination. The Learned Counsel informed the Honourable Court that the 4th Respondent is a construction regulator and was relevant in this Petition in the context of zoning laws or planning and land use matrix in the developments of County governments. The Counsel argued that the 4th Respondent was said to be a necessary party in that, as a regulator in conjunction with other stakeholders like NEMA as it approves development plans and thus instrumental at this issue of zoning. The Counsel submitted that the doctrine of exhaustion contemplated under section 80 of the *Physical and Land Use Planning Act*, 2019 (PLUPA) is where a decision had been made and a person aggrieved is appealing to the County Physical and Land Use Planning Liaison Committee. There was no process undertaken and which can be referred to the Liaison Committee for appeal and more importantly, the Liaison Committee had not been constituted. The Learned Counsel averred that this Petition sought to compel the 1st and 2nd Respondents to undertake progressive steps, since currently there was process undertaken to warrant invocation of the appellate mechanism under the provision of Section 129 (1) of EMCA.
31. The Learned Counsel also submit that there is no process undertaken to warrant invocation of the appellate mechanism under section 129[1] of EMCA and thus this court has the requisite jurisdiction. That moreover the Petitioners decry infringement of their rights to a clean and healthy environment by dint of Section 3[3] of the EMCA Act hence the court has the power to hear and issue the appropriate remedies.
32. On the 2nd issue for determination, it is submitted that the 1st Respondent has not undertaken any steps to constitute the County Physical and Land Use Planning Committee as provided for under the provision of Sections 77 and 78 of the *Physical and Land Use Planning Act* 2019 [PLUPA]. That whereas it is true that planning authority with respect to the county government planning functions means the County Executive Committee Member responsible for matters relating to physical and land use planning in the county, the PLUPA Act is very deliberate on the mechanisms of planning, use, regulation and development of land including appellate mechanisms.
33. The provision of Section 58 of PLUPA prohibits carrying out of developments within a county without the permission of the respective County Executive Committee Member in charge or responsible for matters relating to physical and land use planning. The said Section outlines the procedure for applying for development permission. Invariably, development permission can be granted or denied by the county executive committee member or after being granted, an enforcement



notice given requiring variation and these actions may aggrieve a party and that is why Parliament was deliberate in putting forth section 78 outlining inter-alia the appellate jurisdiction of the County Physical and Land Use Planning Liaison Committee. According to the provision of Section 80 of the PLUPA Act on the doctrine of exhaustion which states that where a decision has been made and a person aggrieved the same should be appealed to the County Physical and Land Use Planning Liaison Committee. Thus, the failure by the 1st and 2nd Respondents to constitute the Liaison Committee amounts to curtailing the Petitioners rights to access to justice as provided for under Articles 48 and 50 of *the constitution*. That in the instant case there exists no Liaison committee constituted and no process undertaken that can be referred to the Liaison committee for appeal.

34. The Learned Counsel asserted that the 1st Respondent had not undertaken any steps to constitute the County Physical and Land Use Planning Liaison Committee as provided under sections 77 and 78 of the *Physical and Land Use Planning Act*, 2019 (PLUPA). It was submitted that the planning authority with respect to county government planning functions means the County Executive Committee member responsible for matters relating to Physical and Land Use Planning in the county, the *Physical and Land Use Planning Act*, 2019 (PLUPA) is deliberate on the mechanisms of planning, use, regulation and development of land, including appellate mechanisms as a way of access to justice as contemplated by Article 48 and fair hearing within the context of Article 50 of *the Constitution* of Kenya, 2010. It was said that Section 57 of *Physical and Land Use Planning Act*, 2019 (PLUPA) prohibits the carrying out of development within a county without a development permission granted by the respective county executive committee member in charge or responsible for matters relating to physical and land use planning.
35. The counsel argued that the appeal mechanism contemplated under section 80 is faster compared to ordinary court mechanism for the because the Liaison committee is enjoined to determine an appeal within 30 days of the appeal being filed. It is worth noting that apart from hearing appeals, the Liaison Committee is tasked under section 78 to advise the county executive committee member on broad physical and land use planning policies, strategies and standards. It was argued that the failure to constitute the County Physical and Land Use Planning Liaison Committee by the 1st and 2nd Respondents is a continued violation of the Petitioners' right to access to justice under Article 48 and the right to fair hearing under Article 50. The Counsel held that the Petition thereby sought for reliefs to have the 1st and 2nd Respondents be compelled to constitute the Liaison committee. The court is urged to hold so.
36. On the 3rd issue for determination it is submitted that under *the Constitution* of Kenya 2010, physical planning functions is among the functions which have been devolved to the county governments. The provision of Section 111 of the County Government Act provides for what cities and municipality plans include. The act is categorical that a city or municipal plans shall be instrumental for development facilitation and control within the respective city or municipality. That the county assembly is obligated to review and approve revisions of city or municipal land use and building plans after every five years without fail. The Petitioners state that the provisions of Section 111 of the County Government Act are amplified by Section 45 of the PLUPA whereby the county executive committee member is tasked with the mandate to prepare a local physical and land use development plan for public participation, the same has not been done in Mombasa county.
37. The Learned Counsel was of the view that that Section 111 of the County Government Act, 2012 is echoed and amplified by section 45 of the *Physical and Land Use Planning Act*, 2019 (PLUPA) whereupon a county government is mandated to prepare a local physical and land use development plan in respect of a city, municipality, town or unclassified urban area as the case may be. The purpose of a local physical and land use development plan is explained under section 46 of PLUPA is to include



inter-alia, zoning, urban renewal or redevelopment and providing a framework and guidelines on building and works development in the city, municipality, urban area or other smaller urban centers including local centers, and market centers. The planning authority of the county government, that is the county executive committee member is at the forefront in being tasked with the mandate to initiate and prepare a local physical and land use development plan whereupon it is to be published for public participation and hopefully eventual endorsement as a development plan for the county.

38. The Learned Counsel argued that the provision of Section 36 of PLUPA is couched in mandatory terms, that a county government, led by the County Executive committee member, prepares a county Physical and Land Use development plan at least once every ten (10) years. Again, section 37 of *Physical and Land Use Planning Act*, 2019 (PLUPA) elaborately outlines the purpose and objects of a county physical and land use development plan. It was submitted that the county executive committee member is a crucial actor in the effectuation of a proper physical and land use planning and that is why *Physical and Land Use Planning Act*, 2019 (PLUPA) did not envisage a situation where he or she acts alone, exercising absolute discretion whimsically to the detriment of the people of the county government. Section 17 of *Physical and Land Use Planning Act*, 2019 (PLUPA) mandates the county executive committee member to formulate a county policy on physical and land use planning. The county executive committee member is helped in his or her functions by several persons or organs, such as the Liaison Committee, the county director of physical and land use planning and even holistic advice of the county physical and land use planning consultative forum in which the county executive committee member is the chairperson.
39. It was argued that the provision of Section 78 of the *Physical and Land Use Planning Act*, 2019 (PLUPA) did not so simplistically fetter the function of the County Physical and Land Use Planning Liaison Committee to hearing of appeals and disputes, rather, it is given also the mandate to advise the county executive committee member on broad physical and land use planning policies, strategies and standards and the 4th Respondent has one of its members forming the composition of the Liaison committee under the provision of Section 77 of the *Physical and Land Use Planning Act*, 2019 (PLUPA).
40. It was submitted that there was no development plan put in place for the County Government of Mombasa, which was said to be the failure of the 1st and 2nd Respondents to take legislative and other measures to provide a development plan for the county government of Mombasa. That was equated to a violation of the law, since in their absence it meant that it was left to the whim of the county executive committee member, or better put, the county executive committee member is the development plan acting as he or she chooses. The court was urged to find that no development plan for Mombasa county has been put in place and it does not suffice for the 1st Respondent to state that it is functioning properly without a vacuum. It was such whimsical acts that are abhorred by members of the county of Mombasa alongside the Petitioners who now wish to compel the 1st and 2nd Respondents to act within the strictures of the law.
41. The court was urged to compel the 1st and 2nd Respondents to partake steps to constitute the Liaison Committee would be in order and we so humbly implore the Court to issue it. Since there are no development plans for the county government of Mombasa, the court was urged to invoke the *Physical and Land Use Planning Act*, 2019 (PLUPA) which categorically mandates the 1st Respondent to come up with a comprehensive development plan for the county to effectuate good physical and land use planning. As such the court ought to compel the 1st and 2nd respondents to take legislative or other measures to come up with a development plan is also meritorious. That flowing from the said order, it goes without saying that a conservatory order is necessary to restrain the Respondents from issuing



any further development permits for development of properties in Mombasa until a development plan is put in place.

42. Further, that the provision of Section 37 of the PLUPA elaborates the purposes and objects of a County Physical and Land Use Development Plan. The Petitioners maintain that the work of the 4th Respondent is not to only register construction works after approval by the relevant county governments but to also ensure the County Physical and Land Use Liaison Committee is in place and undertaking its mandate. The court is implored to find that no development plan for Mombasa has been put in place and it does not suffice for the 1st Respondent to state that it is functioning properly in this vacuum.
43. On the last issue for determination on whether the Petitioners warrant to be granted the prayers in the Petition. The Learned Counsel submitted that it had been established the Physical and Land Use Planning Liaison Committee has not been constituted and thus demonstrated that the Petitioners right to access to justice and fair hearing has been fettered. That there were no development plans for the county government of Mombasa and hence the prayer for the 1st and 2nd Respondents to be compelled to take legislative measures to come up with development plan is meritorious. That the prayer for conservatory orders restraining the Respondents from issuing any further development permits is thus merited. The court is urged to allow the Petition with costs.

B. The Written Submissions by the 1st Respondent.

44. The submissions were filed electronically before court and are dated 11th December, 2024. The following issues for determination are highlighted
 - a. Whether the Petitioners ought to be granted the prayers sought
 - b. Whether orders affecting parties who are not before this honourable court can be granted without hearing the parties
 - c. Whether the Petitioners have no avenue of redress because of failure of the 1st Respondent to establish the Mombasa County Physical and Land Use Planning Liaison Committee?
45. On the 1st issue for determination, the 1st Respondent refers to the Petitioners as vexatious litigants as they have filed several matters before this court regarding development within Kizingo Area in Mombasa County. That the Petitioners are ignorant of the various state laws and regulations set in place including the Mombasa Integrated Strategic Urban Development Plan ISUDP [2015-2035] which was passed by the 2nd Respondent to ensure Mombasa county expansion was organised. That the zoning policy has been captured in the ISUDP [2015-2035] together with a building code that guides the structural integrity and other issues of development.
46. The 1st Respondent states that the Petitioners have failed to prove all the averments raised in the petition. That the Petitioners simply have an issue with developments in kizingo area and not their rights being infringed. That no evidence has been tendered to prove the developments have a strain on the existing social amenities and that the concerns have been raised in a blanket manner altogether. That the Petitioners have failed to indicate to what extend their rights have been allegedly violated.
47. On the 2nd issue for determination it is submitted that conservatory orders are normally issued on an interim basis and not in finality. Secondly that the orders are being sought against parties that are not present in the instant suit as litigants. That the petition has not been made public by substituted service and granting the orders sought will adversely affect parties who have already applied for development



permission, submitted their plans for approval or intend to seek development permission. That the prayer contravenes the provisions of Section 4[3] and 4[4] of the Fair Administrative Actions Act.

48. On whether the Petitioners have no avenue of redress because of the failure of the 1st Respondent to establish the Mombasa County Physical and Land Use Planning Liaison Committee, it is submitted that the county is in the process of establishing one. That there is no vacuum created for resolution of disputes arising from the PLUPA as Section 93 of the said act provides that in the event the Liaison Committee has not been established then the Environment and Land Court shall hear and determine such disputes.

C. The Written Submissions by the 2nd Respondent

49. The 2nd Respondents submissions have listed two issues for determination;
- a. Whether the 2nd Respondent had violated some Articles of *the constitution* by failing to create the Mombasa County *Physical and Land Use Planning Act*
 - b. Whether the Petitioners ought to be granted the prayers sought.
50. On the 1st issue for determination it was submitted that the County Assembly's actions or inactions did not amount to a breach of any constitutional duty. That the Petitioners contention that the County Government had failed in its mandate is incorrect. That several regulations as listed in the 2nd Respondents pleadings have been enacted under the PLUPA and the same provide a policy framework guiding land development, zoning and other matters within the County of Mombasa. Further, the provision of Article 185 [2] of *the constitution* gives the County Assembly the authority to make necessary laws for or incidental to the functions of the county government. That where there is legislative gaps national legislation prevails until county laws are established as was held in case of: "County Council of Governors - Versus - Attorney General and Others Advisory Opinion No 25 Of 2014".
51. On whether the Petitioners ought to be granted the orders sought it is submitted that there has been no unlawful discretion exercised by the Governor as alleged and the allegations made are unwarranted and not supported by any evidence. The 2nd Respondents maintained that in its response it has demonstrated the procedures undergone before a developer gets a permit which included public participation. That the Petitioners had failed to indicate to what extend their rights had been infringed as was in the case of "Bethwell Allan Omondi - Versus - Telkom[K] Ltd & 9 Others [2017]. The court was urged to dismiss the Petition in its entirety.

D. The Written Submissions by the 4th Respondent.

52. The 4th Respondent filed their written submissions dated 20th September, 2024. In their submissions, the 4th Respondent submitted on the following issues:
- a. What was the mandate of the 4th Respondent?
 - b. Whether the Petitioners should be granted conservatory orders as prayed?
 - c. Whether the 4th Respondent was properly enjoined as a Respondent to this Petition by the Petitioners?
53. On the mandate of the 4th Respondent. It was submitted that the 4th Respondent is a government entity established under Section 3(1) of the *National Construction Authority Act* No. 41 of 2011 mandated to oversee the construction industry and coordinate its development through various



functions, including the registration of contractors, construction project registration and accreditation of construction skilled workers. In furtherance of its mandate ensures quality assurance quality in the construction industry where through its board and for the purposes of performance of its functions, appoints investigating officers who have power at all times to enter into any construction site where construction works are being carried out and make such enquiry or inspection as may be necessary.

54. It was further submitted that the 4th Respondent is also empowered to register all construction projects and regulate the performance of contractors in Kenya's construction industry. The 4th Respondent plays an independent but complementary role to the 1st and 3rd Respondents being registration and ensuring compliance of construction sites with the required standards. 4th Respondent is established under section 3[1] of the *National Construction Authority Act* No 41 of 2011 with the mandate to oversee the construction industry and coordinate its development. That to supplement the act, the national construction authority regulations were further gazetted to provide for registration of all construction works, contract or projects either in public or private sector.
55. Under Regulation 17[2] an owner of a construction project has to make an application for registration of the construction work in writing within 30 days from the date on which a tender for construction works, contract or project is awarded to a contractor registered under the act. Under regulation 17[5] an owner shall ensure that the tender for construction work, contract or project is awarded to a person firm or contractor registered under the act. Under regulation 17[6] the 4th Respondent is mandated to register the construction works, contract or project and issue a compliance certificate within 30 days. Section 23[2] of the Act mandates the 4th Respondent to appoint an investigating officer to conduct site inspection and ensure the Act and regulations are being adhered to. The inspection officer can order suspension of the work for non-compliance with the act. Therefore, the 4th Respondent was never concerned with issuing developments permits and the same was the preserve of the County Governments. The 4th Respondents mandate was to ensure the quality of the developments met the standards set.
56. On whether the Petitioners should be granted conservatory orders as prayed. It was averred that the conservatory orders sought pertained to planning issues aimed at restraining the Respondents from issuing any further development permits for properties in Mombasa until the time when the Respondents undertake the necessary legislative and regulatory measures.
57. The 4th Respondent submitted locus classicus of the guiding principles in conservatory applications was in the Supreme Court in "Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 others case (supra) where at Paragraph 86 the court stated as follows:-

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

In Board of Management of Uhuru Secondary School – Versus - City County Director of Education & 2 Others [2015] eKLR, the Court summarized the principles for grant of conservatory orders as: -

“Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of



rights. Thirdly, flowing from the first two principles, is whether if an interim. Conservatory order is not granted, the petition or its substratum will be rendered nugatory.

The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya – Versus -Dickson Mwenda Githinji & 2 Others [2014] eKLR that the court must consider conservatory orders also in the face of the public interest dogma. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters...”

58. Similarly, in the “Wilson Kaberia Nkunjia – Versus - The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR” the Court summarized three main principles for consideration on whether to grant conservatory orders as follows: -
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.
59. It was submitted that the conservatory order sought pertains to a planning issue, specifically aimed at restraining the Respondents from issuing any further development permits of properties in Mombasa until such time as the 1st and 2nd Respondents undertake the necessary legislative and regulatory measures. These measures are intended to establish a comprehensive framework that defines the standards for various land uses across different zones within the County Government of Mombasa, ensuring orderly and sustainable development aligned with proper urban planning principles. This matter was said not to concern or fall within the mandate of the 3rd Respondent.
60. On whether the 4th Respondent was improperly joined in the matter. It asserted that it was wrongly enjoined in this petition, which is issues of physical planning and land use which are provided for under the *Physical and Land Use Planning Act*, 2019, of which govern matters relating to planning, use, regulation and development of land in Kenya to which the 4th Respondent is not a regulator. The 4th Respondent argued to play an independent but complementary role to the 1st and 3rd Respondents being registration and ensuring compliance of construction sites with the required standards. The Petitioners have not demonstrated that the 4th Respondent’s mandate under the *National Construction Authority Act* No. 41 of 2011 and the National Construction Regulations 2014 co-relates to the petition herein. That there is no reasonable cause of action that the Petitioners have demonstrated against the 4th Respondent.
61. This matter never concerned or fell within the mandate of the 4th Respondent. The 4th Respondent maintained that It was wrongly enjoined in the Petition and hence no reasonable cause of action had been demonstrated against it by the Petitioners.
62. The Petitioners had not demonstrated that the 4th Respondent's mandate under the *National Construction Authority Act* No. 14 of 2011 and the National Construction Regulations 2014 co-relates to the Petition. As such, no reasonable cause of action had been demonstrated against the 4^o Respondent and should be dismissed with costs in its favour.



X. The Issues for determination

63. I have considered the filed Petition herein, the responses to the Petition, the Replying affidavits, the Grounds of opposition, the written submissions, the plethora of authorities cited by all Counsels, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
64. In order for the Court to arrive at an informed, reasonable, Equitable and fair decision, it has condensed the subject matter into the following four (4) salient issues for its determination. These were:-
- a. Whether *the Constitution* Petition dated 12th April, 2024 meets the threshold of a Petition.
 - b. Whether the 4th Respondent were been properly sued in this suit?
 - c. Whether the parties herein are entitled to the remedies they seek.
 - d. Who bears the costs of this proceedings?

XI. Analysis & Determination

Issue No. a). Whether *the Constitution* Petition dated 12th April, 2024 meets the threshold of a Petition.

65. Under this Sub heading, for the Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of Constitution of Kenya defines "*the Constitution*" as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.
66. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-
- a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and
 - d. Contributes to good governance.....”
67. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
68. Based on the principles set out in the edit of the Court of appeal case of the “Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013) eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus -



Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

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

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

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

69. As was held in the Supreme Court case of “Mitu – Bell Welfare Society – Versus – Kenya Airports Authority & 2 Others; Initiative Strategic Litigation in Africa (Amicus Curiae) (2021) KESC 34 (KLR)”, the provision of Article 23 (3) of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.
70. The instant Petition as presented by the Petitioners is premised on violation of several rights listed in the Petition. In seeking to determine whether the Petition is competently before court, the court will first address the Petitioners competence to institute proceedings in relation to violation of rights. Article 258 (1) of *the Constitution* grants the Petitioners the right to institute proceedings in relation to violation of their rights. This Article provides thus:-

“Every person has the right to institute court proceedings, claiming that this Constitution has been violated, or is threatened with contravention”.
71. This court was established by Article 162(2)(b) of *the Constitution* of Kenya 2010. One of its mandate therein is to determine the environment and the use and occupation of and title to land. The issues herein deal with the violation of the rights related to the environment use and occupation of land. Where a claim is based on alleged breaches of constitutional rights, this court has original jurisdiction to determine the same see “Nzomo (Suing on his own behalf and on behalf of Kunde Road Residents Welfare Association) – Versus - Ontime Real Estate Ltd & 2 others (Environment & Land Petition E004 of 2023) [2024] KEELC 1572 (KLR) (14 March 2024) (Ruling)
72. The provision of Article 42 of *the Constitution* is based on the right to a clean and healthy environment. Article 183 of *the Constitution* of Kenya and the Fourth Schedule Part 2 Section 8 of *the Constitution* deals on planning of the County.
73. The South African Constitutional Court in the case of: “Fredricks & Other – Versus - MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC), outlined what a constitutional issue entails and the jurisdiction of a Constitutional Court. It stated as follows: -
 - a. *the Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation



of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

74. Having established that the Petition herein is competently before this court, the next issue for determination will be whether the Petitioners have made a case for themselves for grant of the orders sought.
75. The Petitioners herein allege that the Respondents have failed to enact proper legislation to guide and regulate development activities within the County of Mombasa and the same has led to development of buildings with clear disregard to the environmental considerations leading to interference with the natural status of some areas. According to the Petitioners, it is the local government [adoptive by laws] [building order] 1968 that guides development especially in zoning areas but the same have been disregarded by the Respondents. At paragraph 14 of the Petition, the court notes that the Petitioners have listed instances which they opine are a clear disregard to the local government [adoptive by laws] [building order] 1968 and which have resulted in violation of their rights which include Article 10 of *the constitution* on principles of governance, Article 40 on protection of the right to property, Article 42 on the right to a clean and healthy environment, Article 69 on sustainable exploitation, management and conservation of the environment and Article 70 on the power of this court to address violation of any acts that is harmful to the environment.
76. Have the Petitioners sufficiently proved the allegations? The Supreme Court in “Communications Commission of Kenya & 5 Others – Versus - Royal Media Services Limited & 5 Others had the following to say on Constitutional Petitions:
- “-Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement”.
77. Mativo J in the case of “Leonard Otieno – Versus - Airtel Kenya Limited [2018] eKLR expounded that:-
- “It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution*, an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”



Issue No. b). Whether the 4th Respondent been properly sued?

78. Under this Sub heading, the Honourable Court shall deal with the issue on whether the joinder of the 4th Respondent was proper or not in the given circumstances whatsoever. The issue of joinder of parties are governed under the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010. It provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

79. It is trite that misjoinder of parties is not a ground for dismissal of an entire suit or Petition see “William Kiprono Towett & 1597 Others – Versus - Farmland Aviation Limited & 2 Others (2016) eKLR”, but what of instances where clearly there is no cause of action established against a Respondent? The 4th Respondent claims that its mandate under the *National Construction Authority Act* No 41 of 2011 has nothing to do with the violations outlined in the petition as the same are not within its purview. The functions of the 4th Respondent are outlined under the Act as follows;

5. Functions of the Authority

1. The object for which the Authority is established is to oversee the construction industry and coordinate its development.
2. Without prejudice to the generality of subsection (1), the Authority shall—
 - a. promote and stimulate the development, improvement and expansion of the construction industry;
 - b. advise and make recommendations to the Minister on matters affecting or connected with the construction industry;
 - c. undertake or commission research into any matter relating to the construction industry;
 - d. prescribe the qualifications or other attributes required for registration as a contractor under this Act;
 - e. assist in the exportation of construction services connected to the construction industry;
 - f. provide consultancy and advisory services with respect to the construction industry;
 - g. promote and ensure quality assurance in the construction industry;
 - h. encourage the standardisation and improvement of construction techniques and materials; (i) initiate and maintain a construction industry information system;
 - i. provide, promote, review and co-ordinate training programmes organized by public and private accredited training centres for skilled construction workers and construction site supervisors;



- j. accredit and register contractors and regulate their professional undertakings;
 - k. accredit and certify skilled construction workers and construction site supervisors;
 - l. develop and publish a code of conduct for the construction industry; and
 - m. do all other things that may be necessary for the better carrying out of its functions under the Act.
1. Indeed, from the Petition the court has noted that the Petitioners have not been able to state in detail the 4th Respondents failure in discharging their role and which failure would have in turn resulted in violation of their rights. As stated by the 4th Respondent, its mandate is to access the quality of the development in terms of the construction work undertaken and not to grant permission for its inception. Therefore, it will serve no purpose to proceed with the suit against the 4th Respondent as there is clearly no cause of action demonstrated against them. For this reason, I will proceed to strike out the suit against the 4th Respondent. Nonetheless, the matter will proceed as against the rest of the Respondents named herein.

ISSUE No. c). Whether the parties herein are entitled to the remedies they seek.

81. Under this Sub title, the Honourable Court will endeavor to decipher all the reliefs sought with a view to making a deduction whether the parties were entitled to them or not. In so doing, the Court has critically perused the annexures to the Petition herein in proof of violation of the rights alluded to. From the filed pleadings, there are a set of photographs of several high-rise buildings attached thereof. However, in my own opinion, from the said photographs and documentary evidence presented by the Petitioners, there have been no the specific violations outlined nor sufficiently proved in the Petition. It is alleged that the developments greatly interfere with the Petitioners right to privacy but as from the pictures, the Petitioners particular areas of residence are not highlighted, it is not demonstrated what activities are ongoing that clearly infringe on the same right to privacy. The issue of interference of the sewer system and interference with the water system has simply been alluded to but not proved. No report from an expert in such field has been presented before court for analysis of the same in relation to the alleged infringement of rights by the disputed developments. The google map presented before court is without any interpretation, I need not remind the Petitioners that the court cannot jump into the arena and take it upon itself to interpret what is presented before it through the Petitioners lens. Perhaps an affidavit also from an expert in the said field would have demonstrated how the new developments have blocked roads or maybe a map showing these roads before and in their present state with a distinction on the effects of the developments would suffice. I am not satisfied that the Petitioners have provided adequate and empirical evidence to demonstrate the Constitutional violations with precision and the manner in which the said violations were occasioned and the harm suffered.
82. The Petitioners seek for a declaration that the developments permits issued by the 1st and 2nd Respondents are in contravention of the local government [adoptive by-laws] [building] order 1968. One thing that is evident is that the Petitioners have failed to point out which specific sections of this by laws have been violated by the Respondents. The Petitioners have been specific that they are residents of Kizingo area and it is within this area that the county has violated the by-laws by allowing development without the requisite conditions laid being followed/adhered to. The Petitioners would perhaps be detailed in pointing out which zoning regulations have not been complied with. I have further perused the Mombasa county zoning policy attached to the affidavit in support of the petition. Other than making reference to the same, the Petitioners have failed to state with precision which sections of the



said statute have been violated by the Respondents. For that reason, the court does not find sufficient ground having been laid for grant of prayer 1 of the petition.

83. The Petitioners have sought for a declaration that the 1st and 2nd Respondents have violated Articles 1[1],10,42,69 and 70 of *the constitution* of Kenya 2010 by failing to take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places[zones] within the county government of Mombasa that would take into account the views of the residents of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the constitution* 2010 as read with the County Government Act 2012. From the affidavit in response to the Petition sworn by the Director in charge of planning at the County Government of Mombasa, it has been stated that apart from the PLUPA, there are several other regulations that have been enacted by the national government which define the standards of various land uses within different zones. That the County of Mombasa has on its part promulgated the Mombasa Integrated Strategic Urban Development Plan[ISUDP] 2015-2035 a policy framework guiding development of land, permitted uses, standards and regulations and policy within the county. A copy of this piece of legislation was attached to the affidavit as filed vide the court CTS system.
84. The Respondents have further argued that there are several pieces of legislation from the national government that have guided through the development process and it cannot be said that there was a lacuna in legislation. Section 8(2) of the County Government Act states that;
- a. “If a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the county assembly enacts the required legislation.”
85. Article 183 (1)(b) of *the Constitution* further mandates County Governments to implement, within the county, national legislation to the extent that the legislation so requires. With this information in mind, I believe the 1st and 2nd Respondents have demonstrated that there is indeed legislation guiding the development process within the county and a declaration that they have failed to enact legislation cannot suffice.
86. With regard to the Local Development and Zoning of the County of Mombasa. The County Governments in Kenya play a critical role in the development policy making under the *Urban Areas and Cities Act*. The Act provides a framework for the governance and development planning for urban areas and cities. The County Governments are responsible for spearheading development policies that integrate urban areas and cities into broader county development agenda. This includes “County Integrated Development Plans (CIPDs)” and ensuring they align with urban planning frameworks which address specific local needs like housing, infrastructure and services. These integrated plans are essential for coordinated and sustainable urban development. The provision of Section 38 of the Act requires Counties to prepare Integrated City or Urban Development Plans, The Plan should address assessment of the current social, cultural, economic and environmental situation amongst others. This comprehensive approach ensures that development policies are well – planned and effectively implemented. PLUPA provides a legal framework for the preparation, approval and implementation of physical and land use plans by the County Governments. The Act emphasizes sustainable development and orderly land use. Section 45 and 46 of PLUPA holds that “the Local Physical and Land Use Development Plans” must be consistent with an Integrated City or urban Development Plan contemplated under the *Urban Areas and Cities Act*. The purpose for the Plan is for Zoning, Urban renewal or redevelopment, guiding and Coordinating the development of infrastructure and regulating the land use and land development. The contents of this Plan includes population, housing and infrastructure analysis. Others are communication analysis, water and sewage



networks, Environmental impacts – water, noise, air and waste pollutions; clean water supply to include rain water harvesting; road network; education; recreation areas among others.

87. The Court wishes to point out that it fully concurs with the Petitioners to the effect that nothing much has been undertaken in this regard by the 1st Respondent. There is need for a wake up call. There will be need for an enactment into what would be called “The County of Mombasa Development Control Policy/Plan”. This guidelines should be able to define the Zones eg, Kizingo, Tudor, Nyali, Mwembelegeza, Mtwapa, Vipingo and so forth; dictate the specific Zoning Policy on all aspects of development to be undertaken within the County of Mombasa. The provision of Section 111 of the County Government Act, the 1st Respondent is mandated to put in place a land Use Plan, a Zoning Plan, Building Plan (to include the number of floors one can develop within certain Zones) and recreational areas and public facilities plan. The provision of Sections 36, 37, 38, 39 40 and 41 of PLUPA provide for comprehensive procedure of the preparation of a County Physical and Land Use Development Plan.
88. Unfortunately, the 1st Respondent has never taken any further steps in preparing the Local Physical and land Use Development Plan as defined under Section 2 of PLUPA. Section 57 of PLUPA provide that developers would only undertake development projects after the issuance and grant of a development permission; that the approvals for Change of User and subsequent development permissions granted by the 1st Respondent were made in strict compliance with the relevant planning laws, regulations and policies governing urban planning. It was mandatory that developments projects had to undergo intensive public participation and adherence with the EIA reports and requirements by EMCA prior to their commencement.
89. However, the Honourable Court will point out one fact, that the county government did not conduct sufficient sensitization of this piece of legislation to enable the residents of the County of Mombasa get well versed of the same or for what it’s worth to just have knowledge of its existence. I do not wish to delve into the issue of public participation as the same has not been raised in the pleadings as an area of discussion by this court. I will however give my opinion unreservedly over this issue, that the Petitioners being residents of Mombasa county need to be at least consulted when certain legislation or regulations are being formulated by the county. After all, this regulations and laws have been formulated for their use. The importance and necessity of consultation in policy formulation and legislation was discussed by Mrima J in the case of:- “Kaps Parking Ltd and another – Versus - the County Government of Nairobi and another (2021) eKLR”, as follows at paragraph 129 as follows;
- a. “The Black’s Law Dictionary 10th Edition defines ‘consultation’ as follows: -The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.
 - b. 121.Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders’ engagement. Speaking on consultation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)* as follows: -.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....”
90. The Petitioners have sought for a declaration that the 1st and 2nd Respondents have violated Articles 1[1], 10, 42, 69 and 70 of *the constitution* of Kenya 2010 by failing to establish the County Physical and Land Use Planning Liaison Committee as provided under Section 72 and 73 of PLUPA for the County



government of Mombasa. Section 76 of the [Physical and Land Use Planning Act](#), 2019 provides as follows:-

- a. “There is established a County Physical and Land Use Planning Liaison Committee for each county.”
- b. Section 78 outlines the functions of the Liaison Committees as follows:
- c. 78.The functions of the County Physical and Land Use Planning Liaison Committee shall be to —
- d. (a)hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- e. (b)hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
- f. (c)advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- g. (d)hear appeals with respect to enforcement notices.

91. Specifically, the Liaison Committee is an important forum established with the jurisdiction to hear disputes regarding Change of User, non – compliance with Zoning policies as well as disputes regarding the environmental impacts of any developments approved by the County or any County Executive Committee Member. On this particular issue, the Honourable Court is fully in agreement with the Petitioners, indeed a violation of their right to a fair legal process has occurred. The mandate of the liaison committee has been outlined above. The same should be the first point of departure in conflict resolution or management for a party aggrieved under the [Physical and Land Use Planning Act](#) in the event that there is dissatisfied with the findings of the planning authority. The liaison committee is further mandated to advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards. Failure to have the said committee put in place means that the county is indeed operating without the insight of a body created to advise them on land use policies and strategies in planning and to also aid in the legal process in terms of access to justice. Bearing in mind that the court has made a finding on violation of the Petitioners rights by the 1st and 2nd Respondents in failing to set up the liaison committee, it will be proper and in the interest of justice to have the 1st and 2nd Respondents set up the liaison committee so that its mandate is carried out as stated in the act. The [Physical and Land Use Planning Act](#), 2019, came into force on 5th August 2019, I do not find any plausible reason as to why the committee has not been set up.

92. On the other hand, the provision of Section 125 of the EMCA established the National Environment Tribunal with jurisdiction to hear appeals arising from the grant of licence or permits under the Act. See the cases of “Kibos Distillers Limited & 4 Other – Versus – Benson Ambuti & 3 Others (2020) eKLR; Geoffrey Muthinja Kabiru & 2 Others – Versus - Samwuel Munga Henry & 1756 Others (2015) eKLR. The provision of Section 130 (1) of EMCA states that any person aggrieved by a decision or order of the Tribunal may, within thirty (30) days of such decision or order, appeal against such decision or order to the ELC.

93. As I pen off I wish to point out a statement from the 2nd Respondent submission which stated “drafting and enacting comprehensive legislation requires time to ensure all consultations are thorough and inclusive as required under [the constitution](#)” As observed above, the PLUPA came into force in 2019, having proper legislation in order to ensure enforcement of the Act ought to have taken place way before this petition was filed. It cannot be said that 6 years down the line the 1st and 2nd Respondents



are still consulting on formulation of proper legislation. The legislation making process at the county level is a preserve of the county assemblies and they should carry out this duty with a lot of solemnity.

94. There is no doubt that this court must intervene to ensure that the Petitioners rights are protected in setting up certain structures like the liaison committee, the Petitioners have sought for conservatory orders restraining the Respondents from issuing any further development permits for developments of properties in Mombasa until the 1st and 2nd Respondents undertake legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various uses in different places[zones] within the county government of Mombasa. However, the court has observed that the Mombasa integrated strategic urban development fund 2015-2035 is in place in terms of provision of a framework for guiding development of land. The court will not therefore grant conservatory orders as sought as I believe the same will serve no purpose. If anything conservatory orders are to protect a subject matter in the interim and cannot be permanent orders. The court in the case of:- “Makumi & 4 others – Versus - Speaker County Assembly of Kitui & another (Constitutional Petition E001 of 2024) [2024] KEHC 2812 (KLR) (19 March 2024) (Ruling)” aptly put the same as follows:-

“A Conservatory order is a Judicial remedy sought or issued by a court to preserve a subject matter until the Suit/Petition is heard and determined. It is in other words an order of status quo ante so that the substratum of the suit/petition is preserved, or so that the same is not rendered an academic exercise”.

95. This court will however direct that the 1st and 2nd Respondents engage all the relevant stakeholders in holding discussions and public sensitization of the Mombasa Integrated Strategic Urban Development Fund 2015-2035. The 1st and 2nd Respondents have referred to the petitioners as litigious litigants even though I must admit no evidence of this allegation has been tabled, it could be the vigorous litigation is as a result of the lack of knowledge of the legislation that has been put in place by the county with regards to the contents of PLUPA.

96. In issuing my final orders, I am guided by the dictum in “Nancy Makokha Baraza – Versus - Judicial Service Commission & 9 Others [2012] eKLR where the Court expressed itself inter alia as follows:

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

Issue No d). Who will bear the costs of Petition

97. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the end of any legal action and/or proceedings in any litigation. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

“(1) The award of costs is at the discretion of the Court.



- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

98. In the case of “Reids Hewett & Company – Versus - Joseph AIR 1918 cal. 717” and “Myres – Versus - Defries (1880) 5 Ex. D. 180”, the House of the Lords noted:-

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

99. Further, these legal principles were upheld in the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR” the Courts held:-

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

100. Therefore, the events in the instant case is, while the Petitioner herein have succeeded in establishing its case on Preponderance of probabilities, but for very fundamental reason that is a matter of great public and arising from the principles of interest of natural Justice Equity and Conscience I hold that each party bear their own costs of this Petition.

XII. Conclusion & Findings

101. Consequently, the Petition herein partly succeeds and for avoidance of doubt, the Honourable Court proceeds to grant the following orders as stated herein below:

- a. That Judgement entered in favour of the Petitioners in terms of and to the effect that:-
 - i. a declaration be and is hereby made that the 1st and 2nd Respondents have violated Articles 1(1), 10, 42, 48, 50 69 and 70, of *the Constitution* of Kenya, 2010 by failing to establish the County Physical and Land Use Planning Liaison Committee as provided under Sections 72 and 73 of the PLUPA for the County Government of Mombasa.
 - ii. a declaration be and is hereby made that the 1st and 2nd Respondents have violated Articles 1[1],10, 42, 69 and 70 of *the constitution* of Kenya 2010 by failing to take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places[zones] within the county government of Mombasa that would take into account the views of the residents of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the constitution* 2010 as read with the County Government Act 2012.
- b. That an order be and is hereby made directing the 1st and 2nd Respondents take legislative and other measures to provide a framework guiding development of land by defining the allowed standards of various land uses in different places[zones] within the county government of Mombasa as was intended by Articles 10, 47, 42, 69 and 70 of *the constitution* 2010 as read with



the County Government Act 2012 within the one hundred & eighty (180) days from the date of the delivery of this Judgement.

- c. That an order be and is hereby issued directing the 1st and 2nd Respondents to forthwith establish the County Physical and Land Planning Liaison Committee as provided under the provision of Sections 72 and 73 of the PLUPA for the county government of Mombasa within the next ninety (90) days from the date of the delivery of this Judgement.
- d. That the 1st and 2nd Respondents be and are hereby ordered to carry out public sensitization of the Mombasa Integrated Strategic Urban Development Plan 2015-2035 in both print, social, broadcast and digital media within the next 45 days from the date of the delivery of this Judgement.
- e. That an order made that the 4th Respondent was improperly joined in this suit and hence it be and is hereby struck out from the proceedings.
- f. That each party to bear its own costs.

It is so ordered accordingly.

**JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT VIRTUAL TEAMS MEANS,
SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.**

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

Judgement delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Mr. Mwanzia & M/s. Gatimu Advocates for the Petitioners.

No appearance for the 1st, 2nd, 3rd & 4th Respondents.

