



**Mbesa Investments Limited v County Government of Mombasa;  
 Bayusuf & another (Interested Parties) (Constitutional Petition  
 23 of 2022) [2025] KEELC 602 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 602 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
 CONSTITUTIONAL PETITION 23 OF 2022**

**LL NAIKUNI, J**

**FEBRUARY 14, 2025**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION  
 OF RIGHTS & FUNDAMENTAL FREEDOMS UNDER  
 ARTICLE 27, 43 & 47 OF CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012**

**AND**

**IN THE MATTER OF: PHYSICAL & LAND USE PLANNING  
 ACT NO. 13 OF 2019, CHAPTER OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**MBESA INVESTMENTS LIMITED ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... RESPONDENT**

**AND**

**FAHAD IQBAL AHMED BAYUSUF ..... INTERESTED PARTY**

**PHANUEL OTIENDEH ALUOCH KASSIM MOHAMED JUGWE  
 CHRISTOPHER OTHIENO MALOBA KEVIN ONYANGO OKEYO  
 (ON THEIR OWN BEHALF AND ON BEHALF OF OVER 200**

**WORKERS) ..... INTERESTED PARTY**



## JUDGMENT

### I. Preliminaries

1. The Judgment of this Honourable Court pertains to the filed Constitution Petition dated 20<sup>th</sup> June, 2022 by Mbesa Investments Limited, the Petitioner herein against the County Government of Mombasa, the Respondent herein and Fahad Iqbal Ahmed Bayusuf, Phaniel Otiendeh Aluoch, Kassim Mohamed Jugwe, Christopher Otieno Maloba and Kevin Onyango Okeyo (on their own behalf and on behalf of over 200 workers), the Interested Parties herein.
2. Upon service of the Petition, the 1<sup>st</sup> Interested party entered appearance through a Memorandum of Appearance dated 8<sup>th</sup> July, 2022 and filed a response and a Cross - Petition dated 15<sup>th</sup> July, 2022. The Respondent filed a response through a Replying Affidavit sworn on 1<sup>st</sup> August, 2022. The Honourable Court has dealt with indepth in this Judgement.
3. Pursuant to this, direction were taken that the Petition and the Cross Petition be disposed off through the filed Affidavits and by way of written submissions which by the time of penning down the Judgement the Honourable Court was able to only access the Submissions by the Petitioner and the 1<sup>st</sup> Interested Party.

### II. Description of parties

4. The Petitioner was described as a limited liability company incorporated under the [Companies Act, 2015](#) and had its registered office in Mombasa.
5. The Respondent was described as the County Government of Mombasa established under the provision of Articles 6 and 176 of [the Constitution](#) of Kenya 2010 as read together with Schedule Six to the said Constitution.
6. The 1<sup>st</sup> Interested Party was described as a male adult of sound mind, residing and working for gain within Mombasa County and a neighbor to the Petitioner and a party in the case of:- “Mombasa High Court Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - County Government of Mombasa & 2 Others”.
7. The 2<sup>nd</sup> Interested Parties were described as all male adults of sound mind, residing and working for gain within Mombasa County representing over 200 workers of mixed gender at the construction site and were also parties in the case of:- “Mombasa High Court Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - County Government of Mombasa & 2 Others”.

### III. The Court’s direction before the hearing

8. Nonetheless, on 4<sup>th</sup> May, 2022, the Honourable Court fixed the hearing on 5<sup>th</sup> October, 2022 with the Petitioners having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, the Respondents did not present any witness neither did they interrogate the evidence.



## IV. The Petitioner's Case

### A. Facts of the case:-

9. The Petitioner was established for the purposes of development of a two 10 storey building together with ground floor on the beach front in Nyali. In pursuit of the Project, the Petitioner identified and acquired all that parcels of land known as Land Reference Numbers MN/I/3412, MN/I/5503 and MN/I/5504 which were situate at Nyali area. This acquisition was driven by the strategic location of the land and its close proximity to the beach.
10. After the acquisition of the Project Land, the Petitioner, either directly or through its agents and/or consultants begun the process of obtaining the requisite statutory approvals and/or licenses from the relevant agencies. On or about April 2015, the Petitioner applied for a change of user with respect to the Project land by filing the requisite Form PPA 1 and submitted it together with the planning brief prepared by the physical planner it had engaged.
11. The Respondent thereafter sought comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for the Change of User. The Petitioner also placed advertisements in The Standard Newspaper and the Daily Nation both appearing on the 27<sup>th</sup> April 2015 (page 36) and 28<sup>th</sup> April 2015 (page 55) with a view to informing the public about the intended change of user. The said application was approved on 25<sup>th</sup> September 2015 after all the all relevant agencies which had been consulted had endorsed it.
12. The Petitioner was aware of the correspondence and notification from the relevant agencies with respect to that application were submitted to the Director-County Planning and Architecture of the Respondent. On the 25<sup>th</sup> September, 2015 the Respondent granted approval for the change of user subject to certain conditions being met. The Ministry of Land also forwarded the revised rent valuation which the Petitioner paid. The Petitioner also applied to the National Environment Management Authority (NEMA) for an Environment Impact Assessment Licence for the Project in accordance with the Environment Management and Coordination Act, *Act No.8 of 1999*. On the 14<sup>th</sup> April 2020, NEMA granted a license for the Construction of the storey building comprising ten storey and swimming pool among other developments.
13. The Petitioner also submitted the Project building plans to the Respondent for approval by the Project architects. Having obtained the licenses and/or approvals, the Petitioner pushed ahead with project arranging for financing, mobilizing resources, promoting the project arranging for financing and securing clients/customers. In the meantime, the Petitioner consultants finalized the building plans as well as other arrangements to ensure the timely completion of the project.
14. The Petitioner made arrangements to commence construction. As part of these arrangements, its aforesaid architects submitted to the Respondent the detailed plans for issue of a Certificate of Approval as well as stamping in line with the prior notification of approval which had already been given.
15. The Petitioner supported the Petition through a 32 paragraphed Affidavit sworn on the same day as the Petition by Hussein Sharriff Alwy, a Managing Director of the Petitioner with fourteen (14) annexures marked as "HS - 1 to HS - 14" who averred that:-
  - a. The Petitioner was established in 16<sup>th</sup> February 1994, so as to acquire beach front land and develop apartments for sale to the general public. To this end they acquired Plot Numbers MN/I/5503, MN/I/5504 and MN/I/3412. Annexed in the affidavit and produced as exhibits



were true copies of Petitioner's Certificate of Incorporation, Transfers and Title Deeds of the abovementioned plots all marked as "HSA - 2a, 2b and 2c".

- b. After the acquisition of the Land, the Petitioner, directly or through our agents and/or consultants began the process of obtaining the requisite statutory approvals and/or licenses from the relevant agencies.
- c. On or about 29<sup>th</sup> April 2015, the Petitioner applied for a change of user with respect to the Land after which the Respondent sought comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for change of user.
- d. The Petitioner complied with all the necessary procedures and requirements with respect to its application for change of user and placed advertisements, one in Saturday Nation and The Standard both appearing on 28<sup>th</sup> April 2020 and 27<sup>th</sup> April 2020. Annexed in the affidavit and produced as exhibits were copies of the said advertisements and marked as "HS - 3".
- e. The said application was approved on 25<sup>th</sup> September 2015 after all the all relevant agencies which had been consulted had endorsed it. Annexed in the affidavit and produced as exhibits a copy of the Form PPA2 and marked as "HS - 4".
- f. The Petitioner was aware that the following correspondence and notification from the relevant agencies with respect to that application were submitted to the Director County Planning and Architecture.
- g. On 25<sup>th</sup> September, 2015, the Respondent granted approval for the change of user subject to certain conditions being met. The Ministry of Lands also forwarded the revised rent valuation which the Petitioner paid.
- h. The Petitioner also applied to the National Environment Management Authority ("NEMA") for license for the Project in accordance with the Environmental Management and Coordination Act, *Act No 8 of 1999*. On 14<sup>th</sup> April 2020, NEMA granted a license for the "Construction of the building comprising two ten storey complex and swimming pool among others things. Annexed in the affidavit and produced as exhibit a copy of the said EIA license and marked as "HS 5".
- i. The Petitioner also submitted the Project building plans to the Respondent for approval by the Project architects.
- j. On 25<sup>th</sup> September, 2015, the Respondent notified that said architects that the building plans had been approved. Having obtained these licenses and/or approvals, the Petitioner pushed ahead with project arranging for financing, mobilizing resources, promoting the project and securing clients/customers. In the meantime, the Petitioner's consultants finalized the building plans as well as other arrangements to ensure the timely completion of the project.
- k. The Petitioner made arrangements to commence construction. As part of these arrangements, its aforesaid architects submitted to the Respondent the detailed plans for issue of a Certificate of Approval as well as stamping in line with the prior notification of approval which has already been given. The construction works begun immediately.
- l. However, on the 24<sup>th</sup> June 2020, the Respondent served them with a notice entitled 'Enforcement Notice' from the Respondent suspending the Petitioner's approval Reference Number CP/AAA/2628 until further notice and to take note and:-



- i. Immediately stop and desist from carrying out any works and remove laborers on site;
- ii. Immediately restore the land to its original shape and level
- m. No valid reasons were given nor were we given an opportunity before making the decision to suspend the construction. Annexed in the affidavit and produced as exhibit a true copy of the letters aforesaid and marked as “HS - 6”.
- n. Vide a letter dated 25<sup>th</sup> June 2020, the Petitioners advocates notified the Respondent that unless it revokes the suspension of the construction works, appropriate proceedings will be instituted. The said letter had not elicited any response from the Respondent. Annexed in the affidavit and produced as exhibit a true copy of the letters aforesaid and marked as “HS - 7”.
- o. The Petitioner having not been consulted by the Respondent prior to the abrupt issuance of the “Enforcement Notice” and being aggrieved by the suspension and due to the non - existence of the County Physical and Land Use Planning Liaison Committee provided under Sections 72 and 76 of the *Physical and Land Use Planning Act* Number 13 of 2019, the Petitioner approached the High Court in “Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - The County Government of Mombasa. Annexed in the affidavit and produced as exhibit is a true copy of the Petition and marked as “HS - 8”.
- p. The High Court in Petition Number 43 of 2020 issued a Conservatory Order in the interim on 7<sup>th</sup> July 2020 in favour of the Petitioner whose effect was to “stay the enforcement and implementation of the Enforcement Notice issued by the Respondent dated 24<sup>th</sup> June 2020 to stop developments on Plots Number MN/I/3412, MN/I/5503 and MN/I/5504 located in Nyali area within Mombasa County”. Annexed in the affidavit and produced as exhibit a true copy of the Order and marked as “HS - 9”.
- q. Two other parties sought to be enjoined in the proceedings in the High Court Petition Number 43/2020 being the 1<sup>st</sup> Interested Party herein and Muslims For Human Rights on behalf of the 2<sup>nd</sup> Interested Parties herein.
- r. The Respondent herein objected to the jurisdiction of the High Court in entertaining the Petition and filed a Notice of Preliminary Objection seeking that the Petition be struck out, a position supported by the 1<sup>st</sup> Interested Party. The High Court vide a ruling delivered on 10<sup>th</sup> December 2020 dismissed the Preliminary Objection and held that it had the necessary jurisdiction to entertain the Petition.
- s. The 1<sup>st</sup> Interested Party being aggrieved by the said ruling, proffered an appeal in the Court of Appeal being “Mombasa Civil Appeal No. 64 of 2020: Fahad Iqbal Ahmed Bayusuf - Versus - MBESA Investments Limited & 2 Others” whose main issue was on jurisdiction.
- t. The High Court later confirmed the conservatory orders on 14<sup>th</sup> April 2021, subject of another appeal being “Civil Appeal No. 26 of 2021: Fahad Iqbal Ahmed Bayusuf – Versus - MBESA Investments Limited & 2 Others”. Annexed in the affidavit and produced as exhibit a true copy of the Order and marked as “HS 10”.
- u. Vide a judgment dated and delivered on 10<sup>th</sup> June 2022 in “the Mombasa Civil Appeal No. 64 of 2020: Fahad Iqbal Ahmed Bayusuf – Versus - MBESA Investments Limited & 2 Others”, the Court of Appeal was persuaded that the preliminary objection on jurisdiction by the County Government (the Respondent herein) was merited and proceeded to allow the appeal and



strike out Petition 43 of 2020. Annexed in the affidavit and produced as exhibit a true copy of the Court of Appeal judgment and marked as “HS - 11”.

- v. The Court of Appeal noted that whereas it was minded to order the matter to be transferred to the Environment & Land Court in lieu of an order to strike out the Petition, it was unable to do so.
- w. The effect of the Court of Appeal striking out the Petition Number 43 of 2020 in the High Court rendered the conservatory orders issued to stay the implementation of “the Enforcement Notice” obsolete.
- x. During the existence of the conservatory orders, the Petitioner had proceeded and continued to construct the building on the suit properties and was currently on completion with two blocks of 12 storeys each erected on the suit properties. Annexed in the affidavit and produced as exhibit are photographs showing the current status of the building and marked as “HS - 12”.
- y. Further, the building being commercial in nature, they were engaging with prospective purchasers and some have even paid deposits as a sign of commitment. Annexed in the affidavit and produced as exhibit a photostat copy of a Sales Sheet showing the current purchasers and marked as “HS - 13”.
- z. From the foregoing, the Respondent may at any time act on implementing the ‘Enforcement Notice’ thereby occasioning a real risk that the Project will collapse with various strategic investors pulling out with even greater losses despite the main challenge of the Respondent’s actions remaining undetermined by court and which we feel were unlawful and unjustified.
  - aa. Throughout the construction, the Petitioner had continually been engaging the neighbors surrounding the suit properties but the 1<sup>st</sup> Interested Party had neglected and/or refused to participate in the Grievance Remedy Mechanism (GRM). Annexed in the affidavit and produced as exhibit a true copy of the GRM Reports a Sales Sheet showing the current purchasers and marked as “HS - 14”.

SUBPab. The Affidavit was made in support of the petition and the Application filed herewith and urged the Honourable Court to grant the orders herein.

#### **B. The issues in dispute:-**

- 16. The issues in dispute was that the Petitioner after having obtained all the requisite approvals commenced construction works on the project until on the 24<sup>th</sup> June 2020 when the Petitioner was slapped with a notice entitled ‘Enforcement Notice’ from the Respondent suspending the Petitioner’s approval Reference Number CP/AAA/2628 until further notice and to take note and:-
  - i. Immediately stop and desist from carrying out any works and remove laborers on site;
  - ii. Immediately restore the land to its original shape and level
- 17. The said ‘Enforcement Notice’ was based on a purported Petition received from “neighbors” and the suspension was to last pending resolution of “outstanding matters”. The Petitioner was not consulted by the Respondent prior to the abrupt issuance of the “Enforcement Notice” and being aggrieved by the suspension and due to the nonexistence of the County Physical and Land Use Planning Liaison Committee provided under Sections 72 and 76 of the *Physical and Land Use Planning Act* Number 13 of 2019, the Petitioner approached the High Court in “the Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - The County Government of Mombasa”.



18. The High Court in Petition Number 43/2020 issued a Conservatory Order in the interim on 7<sup>th</sup> July 2020 in favour of the Petitioner whose effect was to ‘stay the enforcement and implementation of the Enforcement Notice issued by the Respondent dated 24<sup>th</sup> June 2020 to stop developments on Plots Number MN/I/3412, MN/I/5503 and MN/I/5504 located in Nyali area within Mombasa County’.
19. The two other parties sought to be enjoined in the proceedings in the High Court Petition Number 43/2020 being the 1<sup>st</sup> Interested Party herein and Muslims For Human Rights on behalf of the 2<sup>nd</sup> Interested Parties herein. The Respondent herein objected to the jurisdiction of the High Court in entertaining the Petition and filed a Notice of Preliminary Objection seeking that the Petition be struck out, a position supported by Fahad Iqbal Ahmed Bayusuf.
20. The High Court vide a ruling delivered on 10<sup>th</sup> December 2020 dismissed the Preliminary Objection and held that it had the necessary jurisdiction to entertain the Petition. The 1<sup>st</sup> Interested Party being aggrieved by the said ruling, proffered an appeal in the Court of Appeal being “Mombasa Civil Appeal No. 64 of 2020: Fahad Iqbal Ahmed Bayusuf – Versus - MBESA Investments Limited & 2 Others” whose main issue was on jurisdiction. The High Court later confirmed the conservatory orders on 14<sup>th</sup> April 2021, subject of another appeal being “Civil Appeal No. 26 of 2021: Fahad Iqbal Ahmed Bayusuf – Versus - MBESA Investments Ltd & 2 Others”.
21. According to the Petitioner vide a Judgment dated and delivered on 10<sup>th</sup> June 2022 in “Mombasa Civil Appeal No. 64 of 2020: Fahad Iqbal Ahmed Bayusuf – Versus - MBESA Investments Limited & 2 Others”, the Court of Appeal was persuaded that the preliminary objection on jurisdiction by the County Government (the Respondent herein) was merited and proceeded to allow the appeal and strike out Petition 43 of 2020. The Court of Appeal noted that whereas it was minded to order the matter to be transferred to the Environment & Land Court in lieu of an order to strike out the petition, it was unable to do so.
22. Violation and Infringement of the Petitioner’s Constitutional Rights and Statutory Provisions:-
  - a. Violation and infringement of Article 47 of *the Constitution* and the *Fair Administrative Action Act*. Article 47 of *the Constitution* provides inter alia as follows:
    1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
    2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Having already approved the building plans and notified the Petitioner of such approval, the Respondent had no lawful authority to suspend the approval after the fact. The Respondent failed and or neglected to give valid reasons or any explanations on the suspension. The lack of transparency with respect to the Respondent’s statutory duty insofar as the approval of the plans runs afoul of the Petitioner’s right to reasonable, lawful and procedurally fair action. Despite engaging the Respondent severally, to date the Petitioner is unable to establish the real reasons why the Respondent has declined to act, the legal basis for such inaction and when if at all, the Respondent will communicate its decision.
  - b. Violation & Infringement of Article 27 of *the Constitution*. Article 27 of *the Constitution* provides so far as material to these proceedings that “every person is equal before the law and has the right to equal protection and benefit of the law”.



By purporting to suspend the approvals of the building the Respondent had betrayed these principles and values as well as denied the Petitioner the protection and benefit of the law:

- a. The Petitioner relied and acted upon the approvals and licences which the Respondent had issued and or given under the Physical Planning Act in discharge of its obligations under the [County Governments Act](#), 2012;
  - b. The Petitioner had a legitimate expectation that having already granted approval of the building plans as well as the change of user, the Respondent would not illegally suspend and or interfere with the project;
  - c. The Respondents inaction violates sections 2(c), (e), (h), (i) and (m) of the [Fair Administrative Action Act](#), 2015.
- c. Violation of Article 43 of [the Constitution](#). Article 43 provides for economic and social rights so far as material to these proceedings that every person has the right to be free from hunger and to social security. The 2<sup>nd</sup> Interested Parties being employed or contracted by the Petitioner earn their livelihood through the construction of the suit properties. By purporting to suspend the approvals of the building, and to an extent suspending construction works, the Respondent has infringed on the 2<sup>nd</sup> Interested Parties right to earn a livelihood and right to access social amenities.
- d. Violation of Section 72 of the [Physical and Land Use Planning Act](#) No. 13 of 2019. Under the above section, the Petitioner was also entitled to be given an opportunity to be heard before any adverse action is taken to suspend the project.

### C. Jurisdiction

23. This Honourable Court had the necessary jurisdiction by virtue of Section 13 of the Environment & [Land Act](#), Section 93 of the Physical Land Use & Planning Act and pursuant to the directions of the Court of Appeal in Mombasa Civil Appeal Number 64 of 2020: Fahad Iqbal Ahmed Bayusuf – Versus - MBESA Investments Ltd & 2 Others. The County Physical and Land Use Planning Liaison Committee provided under Sections 72 and 76 of the [Physical and Land Use Planning Act](#) Number 13 of 2019 in Mombasa County has not yet been constituted and this Honourable Court was seized with the original jurisdiction to entertain this dispute.

### D. The Prayers Sought:-

24. The Petitioner sought for the following orders:-
- a. A Conservatory Order to stay the enforcement and implementation of the Enforcement Notice dated 24<sup>th</sup> June 2020 issued by the Respondent to suspend the Petitioner's Approval Ref Number CP/AAA/2628 whose effect is to stop carrying out any works on Plot Number MN/I/3412, MN/I/5503 & MN/I/5504 located in Nyali area within Mombasa County.
  - b. A Declaration that the Respondent has violated the Petitioner's rights under Articles 27,43 and 47 of [the Constitution](#).
  - c. A Declaration that the 'Enforcement Notice' dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioner's Approval Ref. Number CP/AAA/2628 indefinitely is null and void.



- d. An Order of Certiorari to quash and suspend the 'Enforcement Notice' dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioner's Approval Ref. Number CP/AAA/2628.
- e. An Order of Prohibition and Permanent Injunction be issued to restrain the Respondent, whether by itself, its agents, assigns, employees and servants and/or whomsoever is acting under its authority or instruction from suspending the Petitioner's Approval Ref Number CP/AAA/2628 and/or interfering with the Petitioner from carrying out any works on Plot Number MN/I/3412, MN/I/5503 & MN/I/5504 located in Nyali area within Mombasa County.
- f. Such other and or further relief as this Honourable Court may deem fit and just to grant; and
- g. The costs of and occasioned by this Petition be provided for.

## V. The Response by the Respondent

25. The Respondent through DR. JUNE MWAJUMA, the Chief Officer in charge of the Department of Physical Planning, Lands and Housing of the Respondent,, responded to the Petition dated 20<sup>th</sup> June, 2022 through a 28 paragraphed replying affidavit where she averred that:-
  - a. The instant Application and Petition was time barred.
  - b. The *Physical and Land Use Planning Act* 2019 at Section 72 provides for time frames that an aggrieved party had to seek redress. The first step was to appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days.
  - c. The *Physical and Land Use Planning Act* 2019 at section 93 further provides that all disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court.
  - d. Therefore, as per paragraph 5 and 6 above, this instant 'Appeal' was time barred and that the Petitioners were guilty of laches.
  - e. For argument sake, state as follows:-
    - a. Section 72 (3) of the *Physical and Land Use Planning Act* No. 13 of 2019, that provides for an avenue for an aggrieved party upon being served with an enforcement notice on the steps he or she is required to do and that is by lodging an appeal to the relevant County Physical and Land Use Planning Committee within fourteen (14) days.
    - b. Further to the above, the appeal at the County Physical and Land Use Planning Committee ought to be heard and determined within thirty (30) days.
    - c. That Section 72 (4) of the *Physical and Land Use Planning Act* No. 13 of 2019, also provides that where a party is aggrieved by the decision of the County Physical and Land Use Planning committee, "May appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty (30) days.
    - d. That from the provisions of the law, it is clear that the wisdom of the legislature had envisaged that such disputes should not last more than 74 days, however for this instant dispute, it has been brought after more than 730 days (2 years).



- f. The Petitioner had sought for approvals from the Respondent for the construction of three blocks. The three blocks were categorized as follows:
- i. Two blocks comprising of 10-storeys; and
  - ii. One block of 18 floors.
- g. The approval issued to the Petitioner was a conditional approval and a part approval attaching some conditions to it and the approval was granted on the following terms:-

The Approval granted was a part approval allowing the Applicant/Petitioner to construct only the two blocks comprising of 10-storeys on Plot No.MN/I/5503 and Plot No. MN/I/5504.

That before the process of acquiring an approval, the Applicant ought to have undertaken public participation during the Environmental Impact Assessment.

- h. The Respondent vide a letter dated 30<sup>th</sup> April, 2020 addressed to the Petitioner the Respondent informed the Petitioner of the partial approval bearing in mind the complexity of the project. (Attached and marked JM-1 a copy of the letter to Mbesa Investments Limited dated 30<sup>th</sup> April 2020).
- i. The partial approval issued to the Petitioner only allowed construction two blocks comprising of 10 - storeys each, however the Petitioner commenced development on a piece of land that was yet to be approved.
- j. The Petitioner commenced development on Plot No. MN/I/3412 that did not have any approval whatsoever, thus totally disregarding the condition on which the Approval was issued, thus breaching the condition of the Approval.
- k. Apart from the breach as stated in paragraph 8, some residents made a complaint to the Respondent that Public Participation was not undertaken and as such it came to the attention of the Respondent that the residents around the development commenced by the Petitioner had not gone through the mandatory public participation and the Environment Impact Assessment had failed to incorporate their concerns.
- l. Unfortunately, the Petitioner breached the laid down condition of the approval and as such the Respondent issued an enforcement notice stopping the project from further works.
- m. Further to above averments, the Approval issued to the Petitioner attracted some conditions that the Petitioner has clearly breached as follows:-
- i. No construction should commence on site unless EIA project report is prepared, submitted and approved by NEMA as per EMCA (amended) Cap 387 and register the project with the National Construction Authority (NCA).
  - ii. To start construction within 12 months and completing such in 24 months otherwise the approval lapses.
  - iii. Undertake adequate consultations with neighbors and neighborhood.
- (Attached and marked JM- 2 a copy of the Approval to Mbesa Investments Limited dated 8<sup>th</sup> April 2020).



- n. From the conditions set out in paragraph 16 above, more specifically the condition over completion, the Petitioner herein does not have a valid approval to continue any construction and as such the orders sought both in the Application and Petition are a nullity.
- o. Whereas this Honourable Court has issued conservatory orders to the Petitioners, the Petitioner was enjoying ‘illegal fruits’ and developing through the ‘back door’ as they did not have a valid approval and Section 57 of the *Physical and Land Use Planning Act* 2019 provided for a compulsory requirement that no one shall development without a development permission.
- p. There was another matter before the Environment and Land Court, “MSA ELC Petition No. 16 of 2020 - Lydia Kaguna Japeth & 2 others – Versus - Mbesa Investments Ltd & 2 others” that touches on the aspect of Public Participation and the legitimacy of the development.
- q. The Petitioner herein was issued a change of user approval sometime in 25<sup>th</sup> September 2015 and the approval stipulated some conditions that the Petitioner yet again has flaunted. Some of these conditions are as follows:
  - i. Endorsing the new user on title with the National Land Commission
  - ii. Subject to the comments provided by the Office of Director of Surveys, Physical Planning and National Land Commissioner at the Sub-County Level
- r. The Respondent had a mandate as per the fourth schedule of *the Constitution* to ensure proper control of planning and development within the jurisdiction of the County Government of Mombasa.
- s. The *Physical and Land use Planning Act* 2019 gives powers to the Respondent to control development within the jurisdiction of the County Government of Mombasa.
- t. Where a developer does not have the required permission to undertake development, that developer/individual/entity committed an offense as stipulated under the provision of Section 57 of the *Physical and Land Use Planning Act*.
- u. The Petitioner was using a back door means to legitimize an illegitimate development by misleading this Honourable court.
- v. Respectively this Honourable Court lacked the requisite jurisdiction to hear and determine this instant Petition due to limitation of time and laches.
- w. The Affidavit was sworn in opposition the Application and Petition dated 22<sup>nd</sup> June, 2022.
- x. Whereas the cross-petition was concerned the Respondent fully supported it especially noting the provisions of Section 72 (2) (c) and 72 (5) of the *Physical and Land Use Planning Act* 2019.

## **VI. Response by the 1<sup>st</sup> Interested Party**

- 26. The 1<sup>st</sup> Interested party filed his 42 paragraphed response on 5<sup>th</sup> July, 2022 where the 1<sup>st</sup> Interested Party averred that:-
  - a. The 1<sup>st</sup> Interested Party referred to paragraphs 5 to 16 of the Petition and states that save for the matters of non-disclosure referred to hereafter, the said paragraphs were a replica of Petition No 43 of 2020 which has since been struck out.
  - b. The 1<sup>st</sup> Interested Party referred to paragraph 13 of the Petition and states as follows:



- i. On the 14<sup>th</sup> April 2020, NEMA granted the Petitioner a Licence to construct the ten storey building as averred at paragraph 13 of the Petition.
- ii. By a letter dated 24<sup>th</sup> July 2020, NEMA wrote to the Petitioner and authoritatively directed it that:-

“Based on the foregoing and pursuant to Section 108 of EMCA, 1999, the Authority hereby Orders that you stop all construction works at the project site until the above issues are resolved.”

- iii. As a follow-up to the said letter, on the 28<sup>th</sup> July 2020 NEMA again wrote to the Petitioner and among others directed as follows:-

Consequently, and premised on the precautionary principle, we hereby invoke Section 64 of EMCA and direct you as follows.

- (a) THAT the order of 24<sup>th</sup> July 2020 directing project works to stop immediately is hereby underscored and reiterated;
- (b) that you immediately commence the process of submitting a fresh Environment Impact Assessment Study Report noting to engage and obtain the views of all stakeholders including the immediate neighbors. This should be submitted within the next 45 days.
- (c) That keeping with Section 64 (3) of EMCA, show cause within the next 14 days, why EIA licence NEMA/EIA/PSL/9181 dated 14<sup>th</sup> April 2020 should not be cancelled or revoked by the Authority. We look forward to your co-operation in the matter.

Mamo B. Mamo

AG. Director General

These two letters are exhibits 1A, B & C in the exhibits annexed to the Supporting/Replying Affidavit

- c. Faced with these two Stop Orders, the Petitioner filed proceedings in the National Environment Tribunal (NET) in Nairobi, and challenged the decision of NEMA contained in the two letters whose excerpts have been reproduced above. This was in Net 30 of 2020. The 1<sup>st</sup> Interested Party herein was a party in those proceedings in the Tribunal.
- d. The Tribunal rendered its decision on the 21<sup>st</sup> April 2021, when it decreed as follows:
  67. For the following reasons, the Tribunal makes the following orders:
    - a) The Appellant's Appeal dated 30<sup>th</sup> July 2020 is hereby allowed.
    - b) The decisions of the 1<sup>st</sup> Respondent dated 24<sup>th</sup> July 2020 and 28<sup>th</sup> July 2020 are hereby set aside; and
    - c) There was no prayer for costs hence each party shall bear own costs.



- e. It was noteworthy that in conclusion, the Tribunal stated as follows:-
- “Parties attention is drawn to Section 130 of the Environment Management & Coordination Act.”
- f. All Parties were therefore to observe the provisions of Section 130, and in particular, sub-section (2) which provides as follows:-
- (2) No decision or Order of the Tribunal shall be enforced until the time for lodging an appeal has expired, or, where the appeal has been commenced, until the appeal has been determined.
- g. The 1<sup>st</sup> Interested Party lodged an appeal in the High Court, on the 6<sup>th</sup> May 2022, being Civil Appeal Number 17 of 2022. In that appeal, which is challenging the decision of the Tribunal contained in the Judgment delivered on 21<sup>st</sup> April 2022, the 1<sup>st</sup> Interested Party is the Appellant, while the Petitioner herein, Mbesa Investments Limited is the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Interested Party now avers that by operation of law, the Licence granted to the Petitioner remains unenforceable and moribund to date, until his appeal, filed on 6<sup>th</sup> May 2022, being Civil Appeal Number 17 of 2022, was heard and determined.
- h. For the avoidance of doubt, there were exhibited in the Supporting/Replying Affidavit, at the respective pages shown, the following documents:-
- i. Certificate of Motion in NET 30 of 2020 pages 1D-2
  - ii. Notice of Motion in Net 30 of 2020 pages 3-4
  - iii. Notice of Appeal in Net 30 of 2020 pages 5-7
  - iv. Supporting Affidavit thereto pages 8-12
  - v. Judgment in Net 30 of 2020 pages 13-32
  - vi. Memorandum of Appeal in Civil Appeal No 17 of 2022 pages 33-38
- i. The Petitioner however failed to observe the law as provided for in the provision of Section 130 (2) of EMCA. Consequently, on the 12<sup>th</sup> July 2022, the 1<sup>st</sup> Interested Party filed in the High Court, in Civil Appeal No 17 of 2022, a Notice of Motion, wherein he sought to have the Petitioner compelled to obey the law. A copy of this Notice of Motion filed under Certificate of Urgency is at pages 39 to 45 of the exhibits filed herewith.
- j. The sum total of the foregoing true and correct observations is that there exists no NEMA License in place that allows the Petitioner to continue with any development on the suit property. It was also wrong and unfair for the Petitioner to have failed to disclose to this Court the above factors which outrightly militate against its continued construction works for lack of a NEMA License authorizing it to do so. For these reasons alone, the Orders sought should be refused, and those already given should be vacated.



- k. The 1<sup>st</sup> Interested Party refers to the averments at paragraphs 17 of the Petition, onwards, and responds thereto as follows:
- a. The matters in dispute, as correctly observed by the Court of Appeal (see paragraph 30) are those relating to planning, regulation, use and development of land under the Physical & Land Use Planning Act.
  - b. For this reason, the 1<sup>st</sup> Interested Party contends that the same should have been referred to the Court that has jurisdiction to determine the same within the strict timelines provided for in the Act. This the Petitioner failed to do Elaboration on these matters comes hereafter.
- l. The provision of Section 72 of the Physical & Land Use Planning Act which the Petitioner relied on in bringing this Petition allowed a County Executive Committee Member to serve an Enforcement Notice on a developer, who, if aggrieved, was entitled to make use of the provisions of Section 72(3) which provides as follows:-
- (3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
- m. It was apparent and obvious that the appeal to the relevant County Physical & Land Use Planning Committee should be made within fourteen (14) days from the date of the Notice complained of and not after the expiry of those fourteen(14) days. However, where, as here, there existed no County Physical & Land Use Planning Committee, an aggrieved party was allowed by the provision of Section 93 of the Act to refer such a dispute to the Environment & Land Court. To complete this summation, one of the objects of the Act was given and explained in Section 3 (e) that the Act provides that:-
- (e) a mechanism for dispute resolution with respect to Physical and Land Use Planning.
- n. With these principles of the Act in mind, and with specific reference to Section 72 of the Act, the 1<sup>st</sup> Interested Party stated that:-
- (a) The letter complained of by the Petitioner was written to it on the 24<sup>th</sup> June 2020 (see paragraph 17 of the Petition.)
  - (b) In the absence of the County Physical & Land Use Planning Committee, the Petitioner should have referred its dispute to this Court within 14 days as provided for in Section 72 of the Act.
- In these circumstances, the Petitioner failed to raise its dispute before this Court within the time provided for in the law.
- o. This Petition was filed in this Court on the 20<sup>th</sup> June 2022. This is a period of exactly Two (2) years since the letter complained of was written on 24<sup>th</sup> June 2020. Had the Petitioner complied with the provisions of Section 72(3) of the Act, its dispute would have been filed in this Court at the very latest, by 8<sup>th</sup> July 2020. For the reasons pleaded at paragraph 20 above, the 1<sup>st</sup> Interested Party avers that this Petition, and all proceedings thereof were a nullity, and this Court therefore lacks the requisite jurisdiction to belatedly hear and determine the same.



- p. In furtherance of the above, the 1<sup>st</sup> Interested Party states that any developments done, pursuant to Orders of a Court which has no jurisdiction to issue them, was developed or constructed without the requisite permission and or authority and such developments ought to be demolished. This averment covers Orders issued both in Petition No 43 of 2020 as well as those issued herein.
- q. The 1<sup>st</sup> Interested Party repeats the averments contained in paragraph 22 above and in response to paragraph 25 of the Petition states that once High Court Petition No 43 of 2020 was struck out by the Court of Appeal, it went down together with each and every other interim order that the Petitioner was enjoying resulting from that Petition. Accordingly, and for that reason, the conservatory orders of the High Court which were confirmed on 14<sup>th</sup> April 2021 were no longer in existence, operational, or of any legal effect. The same can therefore not be relied upon by either the Petitioner or any other person in any manner.
- r. In response to paragraph 27 of the Petition, the 1<sup>st</sup> Interested Party states that the Court of Appeal, or any other Court, does not exercise an advisory role to any of the litigants who appear before it. The 1<sup>st</sup> Interested Party now turns to respond to paragraph 6 of the Petition, and paragraph 3 of the Supporting Affidavit concerning the Title Documents to plot number MN/1/3412, MN/1/5503 and MN/1/5504. He did so in this manner.
- i. On Plot No. MN/1/5503:-
- a. For plot number MN/1/5503, the Petitioner has exhibited a Transfer, at pages 3 to 5, and a Grant number CR 19237, at pages 9 to 12.
- b. At pages 11 and 12, there were clearly shown ENTRIES in the Land Registry of Transactions affecting this plot, from number 1 to 5.
- c. Finally on this plot, at page 13, there was a certificate of SEARCH confirming ownership of this property
- ii. On Plot No. MN/1/5504:-
- a. For this plot, MN/1/5504, the Petitioner had exhibited a Transfer at pages 6 to 8, and a Grant number 19238 at pages 14 to 17.
- b. At pages 16 and 17 there are clearly shown entries in Lands Registry of all Transactions affecting this plot at number 1 to 7.
- c. Finally on this plot, at page 18, there was a Certificate of SEARCH confirming ownership of this property
- iii. On Plot No. MN/1/3412:-
- a. There was no Transfer to the Petitioner exhibited concerning this plot. This is utterly strange, and totally unlike the other plots explained above
- b. There was a Grant number CR 16957 exhibited at pages 19 to 23.
- c. The writings on this Grant at pages 19,20,21 and parts of page 23 are completely illegible.
- d.



- (i) The entries on Transactions on this plot commence at page 22. Entry number 1,2,3 and 4 were illegible.
  - (ii) Entry number 5 has been omitted.
  - (iii) Entry number 6 and 7 can be partially read.
  - (iv) the rest of the entries from number 8 onwards have been deleted or erased.
- e. Finally unlike the other two properties, the Petitioner has provided no search from the Lands Registry concerning this plot.
- iv. The 1<sup>st</sup> Interested Party averred that it was on this plot number MN/1/3412 that the Petitioner started building, with all the shortcomings shown above. It was contended that the issue of ownership of this property arose in Nairobi National Environmental Tribunal case No 30 of 2020, and in a letter written to the 1<sup>st</sup> Interested Party's previous Advocates in that case, from the Lands Registry, which was dated 2<sup>nd</sup> July 2020, the District Land Registrar wrote as follows:-

Search on Plot Number 3412/SEC 1/MN:CR 16957

Refer to your letter dated 26<sup>th</sup> June 2020.

Kindly be advised that we are unable to confirm the ownership of the above parcel of land as the same has two contradicting files. Also be advised that as per the records in both files the parcel of land is a residential

Signed.

Josephine M. Rana

District Land Registrar

Mombasa

The two letters referred to herein are at pages 65 and 66 respectively of the 1<sup>st</sup> Interested Party's Exhibits

- s. It was contended that this was yet another aspect of blatant and willful non-disclosure on the part of the Petitioner. The 1<sup>st</sup> Interested Party shall, at the hearing of this Petition, require complete compliance with the provisions of the Evidence Act, Cap. 80, on production and reliance on documents by a party in litigation. Without prejudice to the plea at paragraph 28 above, the 1<sup>st</sup> Interested Party shall, among others, require that the Petitioner fully complied with Section 67 of the Evidence Act on proof of documents by primary evidence. For the foregoing reasons, it was contended that the Petitioner was carrying out developments on plot number MN/1/3412 when it has no right, whether in law or otherwise, to do so.
- t. On part 4, the 1<sup>st</sup> Interested Party referred to paragraphs 28 to 34 of the Petition, and responded to the issues therein raised as follows:-
- a. Article 10 of the Constitution provides for National Values and principles of governance, and, among others, 'binds all persons whenever any of them applies or inter prates this Constitution.'
  - b. Pursuant to Sub-clause (2) National Values include:



- a. The Rule of law
- b. Sustainable development

These tenets were non-negotiable.

- u. The 1<sup>st</sup> Interested Party repeated the matters stated at Paragraphs 3 to 13 in this Response and stated that the Petitioner has outrightly and expressly disobeyed the very clear provisions of Section 130 (2) of EMCA as therein demonstrated, and is therefore an entity that has no respect for the Rule of Law as required by Article 10 (a) of *the Constitution*. In similitude, the continued development and construction works being undertaken by the Petitioner, in total disregard of the provisions of Section 130 (2) of EMCA, are in complete contravention and disregard of both Article 10 (a) and 10 (e) of *the Constitution*.
  - v. In the circumstances, the 1<sup>st</sup> Interested Party invoked the provisions of Article 27 (1) of *the Constitution* that:- “Every person is equal before the law and has the right to equal benefit of the law” and averred that the Petitioner was at fault to zealously seek a benefit of the law that it is on the other hand unscrupulously transgressing. The Petitioner should first obey the laws of the land, and then seek a benefit from those laws. Therefore, before the Petitioner raised any complaint, let it first obey and observe the law.
  - w. To plead the same cause in other words, it was contended that had the Petitioner been law abiding and obedient to the specific directives of Section 130 (2) of EMCA, then the present complaints raised by it would not have arisen at all. The 1<sup>st</sup> Interested Party invoked the provisions of Article 259 of *the Constitution*, which among others provided that:-
    - (i) This Constitution shall be interpreted in a manner that:
      - (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights.
      - (d) Contributes to good governance.
  - x. When the Petitioner failed to obey the provisions of Section 130 (2) of EMCA, its conduct, which still continues and permeates into the filing of this Petition, amounted to subverting the Rule of law and good governance, which are attributes safeguarded by this Constitution, as shown in Article 259 reproduced above.
27. In the Cross Petition, the 1<sup>st</sup> Interested Party contended that:-
- a. In Nairobi National Environment Tribunal No. 30 of 2020, the 1<sup>st</sup> Interested Party raised the issue of infringement of his Rights to Privacy, enshrined in Article 31 of *the Constitution*. The Interested Party similarly raised the same in this Petition as a reason why the subject development should not be allowed to stand, but ought to be demolished.
  - b. The 1<sup>st</sup> Interested Party states that in an affidavit sworn by Hassan Sharriff Alwy on behalf of the Petitioner in NET 30 of 2020, at Paragraph 17 thereof, he, in admission, of infringing the 1<sup>st</sup> Interested Party's right to privacy stated as follows:-
    - 17. Am aware that Mr. Bayusuf had raised with the Appellant two issues regarding the Project infringement of his privacy and dust. I am also aware that the Project proponent offered him several ways to mitigate his concerns. These include watering the ground during the construction period to minimize dust. He was also offered construction, at the cost of the Appellant, of a sail over his swimming pool and that



the developer's architect will provide a design that will address all his concern as to infringement of his privacy. Bayusuf did not take up these offers because he is hellbent to veto the project. Annexed herewith and marked 'HAS - 13' are photos of Mr. Bayusufs house in relation to the project site and of him in the project site.

(see page 51 of my exhibits herein.)

- c. The effect of the subject development is that the same is an infringement of the 1<sup>st</sup> Interested Party's Rights to privacy, and therefore a direct contravention of the provisions of his Fundamental Rights under Article 31 of *the Constitution*. In the circumstances, the 1<sup>st</sup> Interested Party prays that on the basis of the Supreme Court decision in "Pati Limited – Versus - Funzi Island Development Limited (Supreme Court No 4 of 2015)" the impugned developments on MN/1/3412, MN/1/5503 and MN/1/5504 all be demolished.
  - d. For these reasons adduced herein, it is contended that the Petitioner has not made out any sustainable case that merits the grant of any of the prayers sought.
28. The 1<sup>st</sup> Interested Party prayed that the Petitioners Petition dated and filed on 20<sup>th</sup> June 2022 and all declarations and Orders therein sought be dismissed, with costs. The 1<sup>st</sup> Interested Party prayed for judgment be entered in favour of the 1<sup>st</sup> Interested Party on the Cross-Petition for:-
- a. A declaration that the continued construction works or any other related works of whatever nature, being undertaken by the Petitioner herein on plot numbers MN/1/3412, MN/1/5503 and MN/1/5504 do cease, discontinued, and be stopped forthwith.
  - b. The buildings, structures and or any other developments that have been constructed and or erected by the Petitioner on plot number MN/1/3412, MN/1/5503 MN/1/5504 all be pulled down and the same be demolished by the Petitioner, failing which, the demolition be done by any other of the parties herein at the cost of the Petitioner.
  - c. Costs of this Cross-Petition be paid by the Petitioner.

## VII. Submissions

29. The parties while all in court on the 29<sup>th</sup> April, 2024 consented to canvassing the Petition dated 20<sup>th</sup> June, 2022 by way of written submissions. All parties complied accordingly. Pursuant to which on 24<sup>th</sup> September, 2024 after the Honourable Court confirmed the same a Judgment date was reserved on 31<sup>st</sup> January, 2025. However, due to unavoidable circumstances the date was vacated to 14<sup>th</sup> February, 2025.

### A. The Written Submissions by the Petitioner

30. The Petitioner through the Law firm of Messrs. Balala & Abed Advocates filed their written submissions dated 18<sup>th</sup> March, 2024. M/s. Julu Advocate commenced the submissions by stating that it was in support of the filed Petition dated 20<sup>th</sup> June, 2022 and in opposition of the Cross Petition by the 1<sup>st</sup> Interested Party dated 15<sup>th</sup> July, 2022.
31. The Learned Counsel stating that the Petitioner was the owner of all those parcels of land known as Land Reference Numbers MN/I/3412, MN/I/5503 and MN/I/550 which due to their strategic location of the land and its close proximity to the beach, the Petitioner intended to develop a two 10 storey building together with ground floor on the beach front in Nyali. To this end, in April 2015, the Petitioner applied for a Change of User with respect to the Project land by filing the requisite Form PPA 1 and placed advertisements in "The Standard" and "The Daily Nation" newspapers both appearing on the 27<sup>th</sup> April, 2015 and 28<sup>th</sup> April, 2015 respectively with a view to informing the public about the



intended change of user. The said application was approved on 25<sup>th</sup> September, 2015. The Petitioner then also applied to the National Environment Management Authority (NEMA) for an Environment Impact Assessment License for the Project in accordance with the Environment Management and Coordination Act, [Act No.8 of 1999](#) which was granted on 14<sup>th</sup> April, 2020.

32. Thereafter, The Petitioner also submitted the Project building plans to the Respondent for approval and the same were approved vide Form PPA2 which is the Notification of Approval of the Application for Development permissions dated 8<sup>th</sup> April, 2020. Having obtained the licenses and/or approvals, the Petitioner was later Served with an Enforcement Notice dated 27<sup>th</sup> June, 2020 by the Respondent and ordered to stop the ongoing construction and to immediately restore the and to its original shape. The Respondent alleged that the approval was carried out without following the condition of approval and due to the same members of the neighborhood have petitioned the Respondent to stop the development pending resolution of the matter. It is this notice that violated Articles 27,40,43 and 47 of [the Constitution](#) and Sections 72 and 76 of the [Physical and Land Use Planning Act](#) Number 13 of 2019.
33. The Learned Counsel further argued that the Respondent's response to this Petition was plagued with the jurisdictional questions and would seem to be purely a question of Law. To mean that they don't deny the facts of the petition as pleaded. The Factual chronology of events leading to this Petition, which were not denied by the Respondent herein, is that upon receipt of the Enforcement Notice on 24<sup>th</sup> June, 2020, the Petitioner herein filed "High Court Constitutional Petition Number 43 of 2020: MBESA Investment Limited – Versus - The County Government of Mombasa" whereupon a Conservatory Order was issued on 7<sup>th</sup> July, 2020 in the interim which stayed the enforcement and implementation of the Enforcement Notice issued by the Respondent. The 1<sup>st</sup> Interested Party herein and Muslims For Human Rights (MUHURI) on behalf of the 2<sup>nd</sup> Interested Parties were later enjoined in the suit. The Respondent herein also objected to the jurisdiction of the High Court in entertaining the Petition and filed a Notice of Preliminary Objection that was dismissed vide a ruling delivered on 10<sup>th</sup> December, 2020. The 1<sup>st</sup> Interested Party being aggrieved by the said ruling, preferred an appeal in the "Court of Appeal being Mombasa Civil Appeal No.64 of 2020: Fahad Iqbal Awed Bayaaf – Versus - Mbesa Investments Ltd and 2 Others" whose main issue was on jurisdiction. Meanwhile, the High Court later confirmed the conservatory orders on 14<sup>th</sup> April, 2021, subject of another appeal being "Civil Appeal No. 26 of 2021:Fahad Iqbal Ahmed Bajwsuf – Versus - Mbesa Investment Ltd and 2 Others".
34. The Court of Appeal then delivered its judgment on 10<sup>th</sup> June, 2022 upheld the preliminary objection and struck out. "Constitutional Petition Number 43 of 2020: Mbesa Investment Limited – Versus - The County Government of Mombasa". Ten days later on 20<sup>th</sup> June, 2022, the Petitioner filed this Petition before this Court. The application, implementation, enforcement and of [the Constitution](#) does not place a time limit within which redress under its provision may be sought. Whereas there was no time limitation in respect of Constitutional Petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The Court of Appeal in "Chief Land Registrar & 4 Others – Versus - Nathan Tirop Koeh & 4 Others [2018]eKLR" stated:-

“ Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in [the Constitution](#), the period of limitation in the [Limitation of Actions Act](#) do not apply to violation of rights and freedoms guaranteed in [the Constitution](#). The law concerning limitation of actions cannot be used to shield the State or any person from claims of



enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo – Versus - Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) [2010] eKLR; Otieno Mak’Onyango – Versus - Attorney General & another Nairobi HCCC No. 845 of 2003).

In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi – Versus - The National Police Service [2017] eKLR, where the learned judge expressed:

“While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20 (4) of *the Constitution*; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20 (4) of *the Constitution*.”

35. According to the Learned Counsel submitted that guided as above, determining whether the petition has been instituted within a reasonable time is a question based on the unique circumstances of this case and whether justice would be done. Section 9(2) of the *Law Reform Act* does not apply to this matter as pleaded by the Respondent and cannot therefore be defeated by the doctrine of laches. The Petitioners had not buttressed his case upon the Fair Administrative Act purely but filed a Constitutional Petition and his rights cannot be subtracted or diminished by other processes provided for by statutory law. *The Constitution* is supreme and statutory laws cannot be allowed to debunk that supremacy.
36. Further, there was no inordinate delay in the of this Petition, if at all if there was any inordinacy, then the same had been well explained by the Petitioner as the time between the years 2020 to 2022 was spent in prosecuting the initial Petition in the High Court and all the ensuing appeals therefrom. Promptitude was well evident as this Petition was filed only 10 days after the decision of the Court of Appeal. Suffice to say, neither the High Court or the Court have ever canvassed the merits of the Petitioners gravamen before either courts and this would be the first time the Petitioner will truly had a fair trial on the unfair, unlawful, unconstitutional and economically devastating actions of the Respondent towards the Petitioner. The Petitioner prayed that this Court defends this right jealously and dismiss the preliminary objections again for the paper objection that it was as it did on its Ruling delivered on 31<sup>st</sup> May, 2023 and assert its jurisdiction to hear and determine this matter.
37. The Learned Counsel averred that on the constitutional violations, Article 27 provides for Equality and freedom from discrimination. Any matter relating to discrimination had to be addressed within the confines of Article 27 of *the Constitution* read together with Section 3 and 13 of the Environment and *Land Act*. The Petitioner followed the legal procedure for obtaining the approval of did. This fact was not contested nor denied by the Respondent or by the Interested parties. In fact the Respondent in its Response to the Petition, did not specify any legally viable or valid reason for invalidating the License that they had issued. There was no factual or legal basis for issuing the Enforcement Notice to the Petitioner apart from the whims and blatant differential treatment of the Petitioner by the Respondent. Discrimination here then meant affording different treatment to Petitioner attributable



wholly or mainly to their description whereby the Petitioner was subjected to restrictions to which persons of another description were not accorded. The Respondent accorded the Petitioner unfair treatment and denied it normal privileges attributed to the very legitimate expectation that once they adhere to the law and got the requisite approvals, then the license acquired from any such approval must be legally self-sustaining and achieve the ends of its intentions.

38. The manner in which Article 27, and indeed the entire Constitution, must be interpreted is a liberal, broad and purposeful to promote its values and principles. It should be interpreted in a manner that sustains rights, its word, spirit and taking into account the history behind it and sustaining co-structures of *the Constitution*. This was set out by the Court of Appeal in “Karisa Chengo & 2 Others – Versus - Republic (2015) eKLR” where it held;-

“First, under Article 259 of *the Constitution*, *the Constitution* is to be interpreted in a manner that promoter its purposes, values and principles, advances the rule of law, human rights and fundamental freedom in the Bill of rights, permits the development of the law and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of *the Constitution* to protect and promote the purpose and principles of *the Constitution*. Secondly, in *Ndyanabo – Versus - Attorney General* [2001] 2 EA 485 the Tanzanian Court of Appeal held that in interpreting *the Constitution*, the Court should be guided by the general principles that; *the Constitution* was a living instrument with a soul and consciousness of its own. Thirdly, the principle established in *Kigula and Others – Versus - Attorney General* [2005] 1 EA 132 by the Ugandan Court of Appeal is that the entire Constitution has to be read as an integral whole and no one particular provision destroying the other but each sustaining the other and that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument. See also *Tinyefuza Attorney General of Uganda, Constitutional Petition No. 1 of 1997* (1997 UGCC 3). Fourthly, the Constitution should be given a purposive and liberal interpretation as gathered from its spirit and the intention of the drafters. The Supreme Court in *Re the Matter of the Interim Independent Electoral Commission Constitutional Application No.2 of 2011* at para.51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991 (2) SA 805, 813(NM) at page 8132 B-C where he stated that:-

“*The Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between government and the governed. It is a mirror reflecting the “national soul” the identification of ideals and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of *the Constitution* must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”

The foregoing notwithstanding we also accept that while interpreting *the Constitution*, we must bear in mind that a Constitution is drafted with an eye into the future, its major function being to provide a continuing framework for the legitimate exercise of governmental power including the exercise of judicial authority and function. Most fundamentally we are aware that once enacted, the provisions of *the Constitution* cannot be easily amended or repealed. A constitution therefore must be capable of growth and development over the time so as to meet new social, political and historical realities often unimagined by its framers. We must therefore not forget that a Constitution is not an empty vessel, on the contrary it is a living instrument and it is always speaking. It is a



house with many rooms and doors, conservative enough to protect the past but flexible enough to advocate new issues and the future. Finally, it is also necessary to consider the historical, textual, structural, doctrinal and ethical models while giving meaning to the provisions of *the Constitution*.

39. Further the Learned Counsel submitted that was the broad approach and they submitted that this Honourable Court should take in determining the Petition herein and especially in mirroring and interpreting the facts and the law within it to the provisions of Article 27. Article 40 provides as hereunder:-

- “40. Subject to Article 65, every person has the right, either individually or in
- (1) association with others, to acquire and own property-
    - (a) of any description; and
    - (b) in any part of Kenya.
  - (2) ....
  - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
    - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
    - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
      - (i) requires prompt payment in full, of just compensation to the person; and
      - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
  - (5) .....
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

40. The Petitioner’s ownership of the parcels of land known as Land Reference Numbers MN/I/3412, MN/I/5503 and MN/I/550 was not denied nor contested. Neither parties had denied this not provided proof otherwise. The petitioners then remain the owner of the properties and it is on this basis that the approvals were done by the Respondent. A reading of Article 40 reveals that the purpose of the Article is to protect existing private property right, including the right to acquire, use and even dispose of property. A strict textual reading would reveal that it was not only the acquisition but the use and enjoyment of the same right or property is what is constitutionally protected as it would be impractical to own property than one cannot use and enjoy. The Petitioners enjoyment and use of MN/I/3412, MN/I/5503 and MN/I/550 involved development of the same into a two 10 storey building together with ground floor on the beach front in Nyali. If there was to be any curtailment of this right then the same must be done in accordance with the law and, in particular, the requirements of Article 40 as to due process.



41. The provision of Article 260 of *the Constitution* reveals that land is property for purposes of the constitutional provisions and since there is no dispute that the property had been lawfully acquired, the then same consequently qualifies for protection under Article 40. The question that arises is if the Respondent's actions unlawfully and illegally curtailed the Petitioners enjoyment and use of their property. They answered in the affirmative.
42. Simply put, all approvals needed for change of users, construction and planning were all lawfully acquired by the Petitioner. This the Respondent did not deny. The circumstances leading to Petitioner being stopped from constructing on his own property are unclear and remain unexplained by the Respondent. Any deprivation of property rights must be consistent with the provisions of Article 40 (3). The only reason the Respondent cited was that the same has been carried out without following the conditions of approval and as such they neighborhood has positioned the Respondent to stop the development. These reasons are vague, not anchored in any law or reasonably explained via documentation attached to the Notice. Perhaps to persuasively quote Odunga J in "Gideon Omare – Versus - Machakos University [2020] eKLR" where he stated:-

“.....reasons are essential to the efficient functioning of the machinery of good government. Such efficiency requires that decisions be well thought out and not arbitrary, both of which point to the giving of reasons as a fundamental part of the decision-making process. The giving of reasons affords the decision-making process a measure of impartiality and gives the appearance that decisions are free from impartiality and bias, thus encouraging public confidence in the system of administration. Reasons also tend to give legitimacy to administrative decisions, encouraging acceptance of a decision, even where adverse to the person affected, since reasons appear rational, unbiased, and logical. Reasons are essential to the adequate functioning of the appeal process, as they enable the person affected to know whether it is possible to challenge a decision, and if so, upon what grounds. Reasons also enable a reviewing authority to better understand the basis of the decision, thus allowing that authority to better carry out the appellate function effectively. Reasons form part of the general ideals of due process, that is, that the principles of natural justice and fairness be carried out in any decision making process.”

43. The consequences for failing to give reasons were emphasized in "Priscillah Wanjiku Kibara – Versus - Kenya National Examination Council(KNEC)[2016] eKLR" in which this court held that where an administrator fails to give reasons, the court can infer that there were no good reasons; also that if the reasons given are not the ones the administrator is lawfully and justifiably entitled to rely upon, the Court was entitled to intervene since the conclusion would be that the administrative action is based on an irrelevant matter. Therefore, devoid of any valid reason contained thereon, the decision to issue the Enforcement Notice was thus arbitrary, irregular and thus unconstitutional.
44. Assuming for a minute that the Enforcement Notice was backed by the law, the provision of Section 72 of *Physical and Land Use Planning Act*, 2019, hereinafter referred to as PLUPA, provided that:-

72. Enforcement notice

- (1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
- (a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained;
- or



- (b) any condition of a development permission granted under this Act has not been complied with.
  - (2) An enforcement notice shall—
    - (a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
    - (b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and
    - (c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.
  - (3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
  - (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.
  - (5) A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.
45. According to the Learned Counsel, a cursory look at the Enforcement Notice dated 24<sup>th</sup> June, 2020 would reveal the glaring lack of compliance to the aforesaid Sections. Any procedure, therefore, that deprives the petitioner of the right to own, use, dispose or enjoy his own private property is unfair, irrational, and contrary to the limitation imposed by Article 40 of *the Constitution*. Effectively, absence of any lawful explanation as to why the Petitioner cannot freely use and enjoy his property is sufficient to prove deprivation or dispossession in so far as the proprietor is concerned and must be deemed as being capricious, whimsical and arbitrary contrary to Article 40. The Petitioner's rights under Article 40 were therefore violated and asked the court to hold the same.
46. Further, according to the Learned Counsel the provision of Article 47 provides that:-
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
  - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
    - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and



(b) promote efficient administration.

47. The provision of Article 47 imports and implies a duty to act fairly by a decision maker in any administrative action. The statutory manifestation of Article 47 is the *Fair Administrative Action Act*, hereinafter referred to as FAA, which defines an administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunal; or any act, omission or decision of any person, body or authority that affected the legal rights or interests of any person to whom such action relate. Therefore, the Respondent had a duty to act fairly in relation to the Petitioner, Section 4 (3) and(4)of the FAA lays down the procedure to be adopted by decision makers as follows:-

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings where necessary to ensure a fair hearing.

48. The core of the duty to act fairly therefore was the need to ensure that a person affected by a decision is given notice and has an effective opportunity to make representations before the subject action is taken or decision is made, and not thereafter. Not only was the Petitioner not accorded an opportunity to be heard, but also that the Respondent investigations or information that led to the Enforcement Notice were also procedurally unfair and unclear. The Petitioner was not even told which neighbor was accusing him or at what point in the approval process was not done appropriately to warrant the Notice being issued. The Petitioner could not also appeal the same before the County Physical and Land Use Planning Liaison Committee since it had not been established as yet then. Fair administrative action broadly refers to administrative justice in public administration concerning control of the exercise of administrative powers in the execution of constitutional and statutory duties guided by constitutional principles and policy considerations making the right to a fair administrative action, though a fundamental right, contextual and flexible in its application.



49. The Enforcement Notice did not meet the prerequisite provided by Article 47 as read with the provisions of FAA and this Honourable Court can be reviewed as it was tainted with unreasonableness, irrationality, illegality and procedural impropriety. It is apparent then, absent of the adherence to *the Constitution*, the decision to issue an enforcement Notice was arrived at arbitrarily, capriciously, mala fide, as a result of an unwarranted ulterior or improper purpose and that the Respondent clearly misconceived the nature of the discretion conferred upon it under section 72 of PLUPA. The Petitioner's right under Article 47 were thus violated and would then make the ensuing Enforcement Notice Unconstitutional.
50. Regarding the Cross Petition, the same is filed by the 1<sup>st</sup> Interested Party herein, the same is principally alleging that the development the Petitioner was undertaking infringes on his rights to privacy enshrined under Article 31 of *the Constitution*. The Interested party also admits that he raised this issue in Nairobi National Environment Tribunal No. 30 of 2020 to mean that the contents of the Cross Petition is being litigated both before this Court and before the Tribunal which is defiant forum shopping and puts this Court at a precarious position where it can pronounce itself on an issue that could possibly come before it on appeal. The matter on the 1<sup>st</sup> Interested Party's right to privacy is also subject of an appeal in this Court being "Environment Land Court Civil, Appeal Number 17 of 2022: Fahad Igbal Ahmed Bayusuf – Versus - Mbesa Investment Ltd & Another, see pages 33-38 of the 1<sup>st</sup> Interested Party's bundle of documents, hence sub judice.
51. The provision of Article 31 of the does not extend to stopping development and construction of works in someone's own property vis a vis the neighbors privacy. There is no personal interest or stake that the 1<sup>st</sup> Interested party has in this matter herein to justify the acts of the Respondent vide their input and submissions before this Court. In fact, at page of the Petition, the 1<sup>st</sup> Interested party participated in the collection of public views regarding the petitioners' project and he did not mention then that his right to privacy would have been infringed in any way. The 1<sup>st</sup> Interested Party's interest herein was not clearly identifiable or proximate enough to sustain a cross petition in any way. This court rightly pointed out in its Ruling delivered on 5<sup>th</sup> October, 2020 that joinder of the 1<sup>st</sup> Interest Party did not mean that they had a case. The Cross Petition was thus an afterthought, an abuse of the court process and ought to be struck out with costs. The Learned Counsel asked the Court for the costs to follow the events. The Learned Counsel informed Court that the Petitioner was the absolute and legally registered owner to all that parcel of land known as MN/I/3412, MN/I/5503 and MN/I/5504. The Counsel stated that due to their strategic position and location having a close proximity to the beach, the Petitioner intended to develop a two – 10 storey building together with a ground floor on the beach front in Nyalia estate within the County of Mombasa.

#### **A. The Written Submissions of the Respondent**

52. The Respondent through the Office of the County Attorney filed their written submissions dated 4<sup>th</sup> September, 2024. Mr. Tajbhai Advocate the Learned County Attorney submitted that the Petitioner filed a Notice of Motion Application and Petition dated 20<sup>th</sup> June 2022 and sought for several orders which we will not replicate herein. In opposing the Notice of Motion Application and Petition dated 20<sup>th</sup> June 2022 the Respondent filed a Response to the Petition dated 8<sup>th</sup> August 2022 and a response on 8<sup>th</sup> November 2022 sworn by Dr. June Mwajuma and a further replying affidavit sworn by Jimmy Waliaula dated 8<sup>th</sup> November 2022 and filed on 8<sup>th</sup> November 2022.
53. The Learned County Attorney relied on the following issues for determination:-
- a. Whether the Respondent is the authority and has powers and functions with regards planning?



- b. Whether the Respondent has powers to issue an enforcement notice and whether the enforcement notice was properly issued?
  - c. Whether the Petitioner moved the court within the time frames stipulated in law?
  - d. Whether this Honourable Court can interfere with the administrative action of the Respondent and to what extent?
  - e. Whether this Honourable Court should issue conservatory orders or not?
  - f. Whether the Petitioners ought to be granted the prayers sought?
54. On whether the Respondent is the relevant authority with regards planning and development permissions. The Learned County Attorney submitted that under *the Constitution* of Kenya 2010, at the Fourth Schedule at Part Two, Section 8 stated that the functions and powers of county planning and development control are vested upon the County Government of Mombasa and further buttressed by the *Physical and Land Use Planning Act* No.13 of 2019 as the authority that can issue development permissions and is the planning authority.
55. The provision of Section 56 of the *Physical and Land Use Planning Act* No. 13 of 2019 gives the Respondent powers to undertake development control. The provision of Section 57 (1) of the *Physical and Land Use Planning Act* No. 13 of 2019 further stated as follows:-
- “A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.”
56. Section 57 (2) further creates an offence for when a person commences a development without a development permission. In these brief submissions as above and as an introductory chapter to the submissions it was crystal clear that the Respondent is the relevant authority and she has been vested powers by the supreme law of the land as the relevant authority with regards to planning and issuing of development permissions.
57. On whether the Respondent has powers to issue an enforcement notice and whether the enforcement notice was properly issued, the Learned County Attorney told the court that to further buttress and add favour to the above submissions, the Respondent had vested powers pursuant to the fourth schedule at part two of *the Constitution* of Kenya 2010, at Section 8 which stated as follows:-
- “County planning and development, including-
- (a) statistic;
  - (b) land survey and mapping;
  - (c) boundaries and fencing;
  - (d) browsing; and
  - (e) electricity and gas reticulation and energy regulation
58. Subsequently, the *Physical and Land use Planning Act* No.13 of 2019 at Section 56 stated as follows:-
56. Power to undertake development control



Subject to the provisions of this Act, the Urban Areas and Cities Act, No.13 of 2011, and the County Governments' Act, No.17 of 2012, the county governments shall have the power within their areas of jurisdiction to-

- (a) prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
- (b) control or prohibit the subdivision of land;
- (c) consider and approve all development applications and grant all development permissions;
- (d) ensure the proper execution and implementation of approved physical and land use development plans;
- (e) formulate by-laws to regulate zoning in respect of use and density of development;
- (f) reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans; and
- (g) consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas.”

59. The Learned Counsel submitted that from the provisions above, the Respondent has all the powers to undertake development control within Mombasa County. The Physical and Land Use Planning Act at Section 57 further stated as follows:-

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

60. The Learned Counsel made reference to the Replying Affidavit sworn by Dr. June Mwajuma at Paragraph 11 where the Respondent specifically made it clear to the Petitioner herein that the approval granted to them was a partial approval for two (2) blocks, yet the Petitioner has admitted in their pleadings for the construction and/or development of three (3) blocks. Section 57 (2) states as below:-

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

61. Section 67 of the Act further states:-

“Offences relating to development permission

1. A person commits an offence if that person –
  - a. Uses or permits to be used any land or building in contravention of any conditions imposed by a county executive committee member when granting development permission; or
  - b. commences, undertakes or carries out-
    - i. a development where development permission has been revoked;



- ii. a development where development permission has been modified and the development does not comply with the modifications in the development permission, or
- iii. a development where the building works are inconsistent with the plans approved by the county executive committee member

- a. ....

- 2. ....

- 3. A person who commits an offence under this section is liable, on conviction to a fine of not less than one million shillings or to imprisonment for a term of not less than five years or to both

62. The Learned Counsel submitted that the Petitioner herein had come before this Honourable court with unclean hands. This was because the Petitioner had admitted the construction of three blocks instead of two blocks as provided for in both the partial approval and the letter written to the Petitioner. Therefore, this Honourable court should not allow or aid the Petitioner to continue with this illegality and/or to acquire a development permission through the back door. Apart from the partial approval, the Petitioner was required to submit an EIA report to the Respondent being a condition before an approval is issued. It was established that the conditions before an EIA was issued were not met as the neighbors were never consulted and/or informed about the development (i.e. public participation was not carried out).

63. The Respondent received a complaint of the lack of public participation and upon further scrutiny by the Respondent it was established that the Petitioner had contravened the conditions of the partial approval and to the most extreme commenced development on a portion that did not have development permission. The Learned Counsel referred the court to page 97 of the Petitioner's list of documents which was a report on the 2<sup>nd</sup> grievance redress mechanism for the ongoing development of apartments and associated facilities by Mbasa Investments Ltd on Plots L.R. Nos MN/I/5503, 5504 AND 3412 in Nyali, Mombasa County at page 2 of the report it clearly states that construction was being carried out on MN/I/5503, 5504 and 3412 in the introductory paragraph yet the Petitioner did not have any development permission on MN/I/3412. Secondly, referring to the same report at item no. 3 headed as "Results of the GRM" at the second paragraph it clearly states that there was a grievance by 13 neighbors including the fact that no ESIA was carried out. Thus, as a result the Respondent issued an enforcement notice.

64. The Learned Counsel submitted that the enforcement notice was issued pursuant to Section 72 of the [Physical and Land Use Planning Act](#) No. 13 of 2019 which states as follows:-

72. Enforcement notice

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

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



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

65. In conclusion, the Respondent had powers to issue the enforcement notice and the issues prevailing that led to the issuance of the enforcement notice were also within the confined of the law.
66. On whether the Petitioner moved the Court within the time frames stipulated in law. The Learned Counsel submitted that the Petitioner had not adhered to the time limitations set out by the various statutes from the *Physical and Land Use Planning Act* No. 13 of 2019 to the *Fair Administrative Action Act*. Therefore, their suit is time barred. First and foremost the Learned Counsel referred the court to the provision of Section 72 (3) of the *Physical and Land Use Planning Act* No. 13 of 2019 wherein it stipulates time frames under which an aggrieved party ought to seek redress once served with an enforcement notice. Section 72 (3) states as follows:-
- “Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall bear and determine the appeal within thirty days of the appeal being filed.”
67. The Learned County Counsel further went on to state that the court will take judicial notice that the County Physical and Land Use Planning Liaison Committee for the County Government of Mombasa does not exist although this fact does not interfere with the time limitation as Section 93 of the *Physical and Land Use Planning Act* No. 13 of 2019 states as follows:-
- “All disputes relating to physical and land use planning before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court.”
68. Therefore, the Petitioner ought to have challenged the enforcement notice within fourteen (14) days before the Environment and Land Court. However, in this instant suit the Petitioner came before this Court after close to two years as the enforcement notice was issued on 24<sup>th</sup> June 2020 and the instant suit was filed on 20<sup>th</sup> June 2022. The Petitioner had claimed in their submissions that the delay was occasioned by another suit that was filed prior to this, however the issue of jurisdiction was raised in that suit at the earliest yet the Petitioner insisted that the High Court had the requisite jurisdiction, thus the delay was as a result of their ignorance. Therefore, the Petitioner should not be allowed to have a second bite of the cherry.
69. In addition, to the above submissions, the Petitioner had moved this Honourable Court for orders of Certiorari and bearing in mind they have done so through a Constitutional Petition, the law that governs such orders is the *Fair Administrative Action Act*, 2015. The provision of Section 12 of the *Fair Administrative Action Act* 2015 states as follows:-
- “This Act is in addition to and not in derogation from the general principles of common law and rules of natural justice.”
70. The provision of Order 53 of the Civil Procedure Rules, 2010 and Section 9 (2) of the *Law Reform Act* prescribes a time frame of six (6) months or a shorter period for one to challenge a decision made by an administrative body after the act or omission has occurred. In this instant suit, the Petitioner had once again defaulted on the time frames and brought this suit outside the time as stipulated above. It was their submission that the suit was time barred.



71. On whether this Honourable court can interfere with the administrative action of the Respondent and to what extent. The Learned Counsel submitted that the Petitioner herein was challenging the Respondent's decision to stop the development and/or construction being carried out by themselves. In other words they were challenging the administrative decision made by the Respondent i.e. a judicial review clothed as a Constitutional Petition. The Learned Counsel referred the Court to the case of "Pastoli – Versus - Kabale District Local Government Council & Others (2008) 2 EA 300" where the court held:-

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before is, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.

72. Further in case of "Municipal Council of Mombasa – Versus - Republic & Umoja Consultants Ltd [2002] eKLR", the Court of Appeal stated:-

"Judicial review is concerned with the decision making process, not with the merit itself the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision".

73. Justice Mativo in "Republic – Versus - Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR" held as follows:-

An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

It is not disputed that the Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved that the Respondent acted outside its powers or the decision was arrived at after taking into



account irrelevant or extraneous matters. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety had been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair”.

74. As was held in the case of “Republic – Versus - National Water Conservation & Pipeline Corporation & 11 Others”, Is once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. Judicial intervention is posited on “the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature. Hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision to determine whether that decision or action was unauthorized or invalid. It is referred to as supervision jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned the manner in which a decision is made than the merits or otherwise of the ultimate decision. Along as the process followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere..
75. Considering the Respondent has all the powers and authority vested upon it both by the Constitution and legislation, this Honourable should not allow the Petitioner to go scoot free with an illegality and furthermore protect the Petitioner with the illegal constructions and back door access to a development permission. Furthermore, the Respondent acted within its mandate when it issued an enforcement notice and the Petitioner has failed to prove to this Honourable Court that indeed the decision to issue an enforcement notice was illegal, irrational and procedural impropriety.
76. The Respondent thus with due respect to this Honourable Court concluded their submissions by asking the Honourable Court to appreciate the powers and functions vested upon the Respondent by the supreme law of the land i.e. the Constitution of Kenya 2010 and the Physical and Land Use Planning Act No. 13 of 2019 and not interfere directly with the powers vested and functions assigned to the Respondent. To the contrary the Learned Counsel with the Honourable Court to protect the Respondent’s powers and functions with regards to development control, development permissions and planning.
77. The Learned Counsel on the issue of whether this Honourable court should issue conservatory orders or not, submitted that a conservatory order could not be issued in its finality as the preserve of a conservatory order is to preserve a subject matter pending the hearing and determination of a main suit thus the prayer (i) in the Petition could not be granted in that style as sought and they shall not submit more on that prayer.
78. On whether the Petitioners sought to be granted the prayers sought, the Learned Counsel submitted that the Petitioner had failed to justify and/or to fulfill the legal doctrine “he who claims must prove”. It is trite law that he who alleges must prove. In addition, the Petitioner had failed to prove the manner in which the Respondent has violated their rights or infringed on the same.



79. The Learned Counsel made reference to the Court of Appeal decision in “Bethwell Allan Omondi Okal – Versus – Telcom (K) Ltd (Founder) & 9 Others [2017] eKLR”, the Court stated as follows:-

“The appellant also failed to not only cite the articles of the Constitution be fell the respondents offended, but also failed to show the manner in which the respondents violated them. It is not enough to mention perceived violations of the Constitution in generalities as the appellant has done in his petition. Even the provisions of Section 1A and 1B of the Civil Procedure Act and Section 3A and 3B of the Appellate Jurisdiction Act cannot be invoked in his aid.”

80. Further in the case of “Susan Mumbi – Versus - Kefala Grebedhin (Nairobi HCCC No.332 of 1993)”, Justice Juma stated:

“The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

81. According to the Learned Counsel in this instant Petition the Petitioners had failed to fulfill the legal doctrine of he who alleges must prove.

82. In conclusion, the Learned Counsel submitted that the Petitioner herein was hiding under the pretext of public interest litigation to cater and protect their private individual interest especially with regards to their own economic gain. They were covering their illegal construction especially with regards to the construction of the third block without an approval and acquiring an invalid EIA report to circumvent the law and cushion themselves with the protection of this Honourable court.

83. Unfortunately, the Petitioner had also taken advantage of continuing with the development without a development permission as the one that was also granted for the two blocks had since expired as it was issued on 8<sup>th</sup> April 2020 and the Petitioner was only granted 24 months to complete the project i.e. 8<sup>th</sup> April 2022 however due to the order granted to the Petitioner they are still constructing and/or constructed outside the 24 months as per the development permission.

84. The Learned Counsel pleaded with the Honourable Court to stop the illegalities being undertaken by the Petitioners and compel the Petitioner to adhere to the law of the land. The Learned Counsel closed their submissions by stating that the Respondent prayed that the Application and Petition be dismissed with costs to the Respondent.

### **C. The Written Submissions by the 1<sup>st</sup> Interested Party**

85. The 1<sup>st</sup> Interested Party through the Law firm of Messrs. Paul O. Buti Advocate filed their written submissions dated 16<sup>th</sup> April, 2024. Mr. Buti Advocate commenced by stating that the submissions related to the Petition and Notice of Motion by the Petitioner, all dated and filed on the 20<sup>th</sup> June 2022. This aspect has been fully captured in the Petitioner’s Submissions dated 18<sup>th</sup> March 2024. A brief background of this matter, had been given by the Petitioner at Paragraphs 1 and 2 of its submissions. Thus, it did not need repetition here.

86. On what the Petitioner was claiming, the Learned Counsel submitted that it was absolutely crucial, and an imperative necessity, that the claims of the Petitioner be clearly understood from the outset, in order to set a basis as to whether the same are grantable in these proceedings. To begin with, prayer (b) of the Petitioner’s Notice of Motion is word for word similar to prayer (i) in its Petition, with the only



difference being that prayer (b) is to be granted, awaiting a determination of the Petition. The main prayer therefore is that at paragraph (i) of the prayers in the Petition, which is as follows:-

- (i) A conservatory order to stay the enforcement and implementation of the Enforcement Notice dated 24<sup>th</sup> June 2020 issued by the Respondent to suspend the Petitioner's Approval Ref Number CP/AAA/2628 whose effect is to stop carrying out any works on plot Number MN/1/3412, MN/1/5503 & MN/1/5504 located in Nyali area within Mombasa County.

87. Then there was prayer (iii), which in similitude, was as follows:

- (iii) A Declaration that the 'Enforcement Notice' dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioners Approval Ref. Number CP/AAA/2628 indefinitely is null and void.

88. Finally, prayer (iv) is for Orders of certiorari in these terms:

- (iv) An Order of Certiorari to quash and suspend the "Enforcement Notice" dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioner's Approval Ref. Number CP/AAA/2628.

Any other orders sought in that Petition are auxiliary to these that he had reproduced above.

89. The Learned Counsel submitted that he had to point out the following cardinal factors which were crucial and at the center of the Petitioner's prayers which have been reproduced above. They were as follows:-

- a. The main and core document in these proceedings is the Approval of development permission given to the Petitioner designated as Ref number CP/AAA/2628.
- b. Crucial and central as this document may be to the Petitioner's case, the Petitioner, whether intentionally or otherwise, failed to include it in its bundle of exhibits.
- c. It was the 1<sup>st</sup> Interested Party, Fahad who had introduced this document as an exhibit to his Supplementary Affidavit of 5<sup>th</sup> September 2023.
- d. Again, Fahad had, through a Notice to Produce dated 5<sup>th</sup> September 2023, issued under Section 69 of the *Evidence Act*, sought that the Petitioner produces the Original of the document Ref Number CP/AAA/2628.

90. Further the Learned Counsel submitted that in opposing grant of these prayers, the 1<sup>st</sup> Interested Party (hereinafter, "Fahad") had filed the following documents:-

- a. Response to Petition, dated 15<sup>th</sup> July 2022, filed on 18<sup>th</sup> July 2022, a Cross Petition and Replying/Supporting Affidavit.
- b. Supplementary Affidavit, with a 2-page annexure, dated and filed on 5<sup>th</sup> September 2023.
- c. Notice to produce, dated and filed on 5<sup>th</sup> September 2023

91. These documents were filed in opposing the Petitioner's claims specified earlier. The Learned Counsel proceeded to render submissions on behalf of Fahad, closely following the grounds set out in his Response/Reply.

92. On the response, the Learned Counsel submitted that the response was dated 15<sup>th</sup> July, 2022. At paragraphs 1 to 13, Fahad had clinically set out matters of non-disclosure, which were materially relevant in this Petition, but had not been disclosed by the Petitioner.



- a. At paragraph 4 of the Response, it has been pleaded that when stop orders were served on the Petitioner on the 24<sup>th</sup> and 28<sup>th</sup> July 2020, it filed in the Nema Tribunal, NET No 30 of 2020, in which a Judgment was delivered on the 21<sup>st</sup> April 2022 in favour of the Petitioner. The Tribunal rendered itself as follows:
- (b) The decisions of the 1<sup>st</sup> Respondent dated 24<sup>th</sup> July 2020 and 28<sup>th</sup> July 2020 are hereby set aside. In conclusion, it ordered as follows:
- “Parties attention is drawn to Section 130 of the Environmental Management & Coordination Act.”
- b. Noticeably, Section 130 referred to above deals with appeal by a party from the Tribunal to this Court.
- c. Fahad then preferred in this Court Civil Appeal No 17 of 2022 which was filed and served on 6<sup>th</sup> May 2022.
- d. At the time of filing this Petition on 20<sup>th</sup> June 2022, the Petitioner was fully aware of all these facts, which it did not disclose to this Court./see memorandum of Appeal at page 33 of the Replying Affidavit of ‘Fahad.’)
93. At paragraph 6 of the Response, “Fahad” made specific reference to Section 130(2) of Environment Management Coordination Act, which he also referred to here, which was as follows:
- (2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired, or, where the appeal has been commenced, until the appeal has been determined.
- Civil appeal number 17 of 2022 was pending in this Court. By operation of law, and as pleaded at paragraph 8 of the Response of ‘Fahad,’ the Licence granted to the Petitioner remains wholly moribund until the subject appeal was determined.
94. The Petitioner however continued with construction works without regard to the position of law as set out in Section 130 (2) of the Act. This prompted Fahad to file an application in Civil Appeal No 17 of 2022, primarily seeking the following orders:-
- (b) An Interim Order be given to stay or cause to remain unenforceable the Orders of the National Environment Tribunal (NET) issued in NET 30 of 2020 on 21<sup>st</sup> April, 2022 in accordance with the provisions of Section 130 (2) of the Environment Management Coordination Act pending the hearing and determination of this application.
- (c) The Orders of the National Environment Tribunal (NET) in NET 30 of 2020 made on the 21<sup>st</sup> day of April 2022 be stayed and remain unenforced until the Appeal lodged herein being civil appeal number 17 of 2022 is heard and determined, as required by Section 130 (2) of the Environment Management & Co - ordination Act, cap 387 Laws of Kenya.
- (For this application, see page 41 of the annexures to the Affidavit of Fahad)
95. The Petitioner raised objection to this application and in a Ruling delivered by this Court on the 6<sup>th</sup> November 2023 held as follows:-
- “I strongly discern that the only legal and appropriate opportunity available for the Appellant (Fahad) under the provisions of Section 130 (1) & (2) of EMCA and as correctly stated by the NET itself was to submit itself before this Court.



Indeed the Appellant (Fahad) has timeously preferred an appeal before this Court and hence granting this Court jurisdiction to hear and determine any related interlocutory application or proceeding including the instant one by the Appellant.”

(This Ruling is his first in the list of authorities see page 39 paragraph 40 of the attached decision.

96. With such glaring determination of the matter, he concluded by reiterating the plea at paragraph 12 of the Response of “Fahad” that:

12. It is wrong and unfair for the Petitioner to have failed to disclose to this Court the above factors which outrightly militate against its continued construction works for lack of a NEMA License authorizing it to do so.

97. In light of this, he submitted as follows:-

- a. The Petitioner has blatantly breached and failed to obey the peremptory requirements of the provisions of Section 130(2) of EMCA.
- b. This Petitioner has never ever stated anywhere that it has complied with the provisions of this Section and its peremptory imperatives.
- c. Such a litigant, who brazenly fails to obey what the law requires it to do should not be heard to approach this Court for any type of Orders, for other citizens to obey. (What is good for the goose, should also be good for the gander.)

98. The Learned Counsel drew attention of the Court to the fact that in its submissions, the Petitioner has made no reference at all to these parts of “Fahads”, Response. Therefore, the necessary imperative for this failure is that the Petitioner was totally unable to resist these facts and the derivative applicable law based on those facts.

99. On the breach of Article 10 by the Petitioner, the Learned Counsel submitted that in response to Paragraphs 28 to 34 of the Petition, ‘Fahad’ pleads at his Paragraphs 31 to 37 of his Response that the Petitioner was in breach of Article 10 of *the Constitution*. It was therefore now submitted as follows:-

- a. Article 10 of *the Constitution* provides for National Values and principles of governance, and, among others, “binds all persons whenever any of them applies or inter prates this Constitution.”
- b. Pursuant to Sub-clause (2) National Values include:
  - a. The Rule of law
  - b. Sustainable development.

These tenets are non-negotiable.

In these submissions, it has been shown at paragraph 6 above that the Petitioner was guilty of non - disclosure of the matters pleaded at paragraphs 1 to 13 of the Response. The Petitioner has outrightly and expressly disobeyed the very clear provisions of Section 130 (2) of EMCA as therein demonstrated, and is therefore an entity that has no respect for the Rule of Law as required by Article 10(a) of *the Constitution*.(see paragraph 32).



100. The Learned Counsel submitted that in furtherance of the above, he referred this Court to its Ruling given on 23<sup>rd</sup> November 2023, which has been referred to above. This was as a result of the Petitioners continued resistance to obey the mandatory edict of the provisions of Section 130 (2) of EMCA. This Court rightly stopped the Petitioner in its tracks. The Petitioner may well argue that ‘Fahad’ should take out contempt proceedings if there is any form of disobedience by the Petitioner. In his view and submission, Article 10 did not portend that any good, law abiding, and conscientious citizen should wait to be forced by any Court before obeying an Order of any Court or Tribunal. Obedience to such orders should be as a matter of course, and not coercion. This was what the Rule of Law espoused in Article 10 stands for.
101. In the circumstances, it was submitted that Article 27 (1) of *the Constitution* mandates that “Every person is equal before the law and has the right to equal benefit of the law” and submitted that the Petitioner is at fault to zealously seek a benefit of the law that it is on the other hand unscrupulously transgressing. The Petitioner should first obey the laws of the land, and then seek a benefit from those laws. To submit on the same issue in different words: Had the Petitioner been law abiding and obedient to the specific directives of Section 130(2) of EMCA, then the present complaints raised by it would not have arisen at all.
102. It was further submitted that the 1<sup>st</sup> Interested Party invoked the provisions of Article 259 of *the Constitution*, which among others provides that:-
- (i) This Constitution shall be interpreted in a manner that:
    - (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights.
    - (d) Contributes to good governance.
103. When the Petitioner failed to obey the provisions of Section 130 (2) of EMCA, its conduct, which still continues and permeates into the filing of this Petition, amounted to subverting the Rule of law and good governance, which were attributed safeguards by this Constitution, as shown in Article 259 reproduced above.
104. On the allegations on Article 40 of *the Constitution*, the Learned Counsel submitted that allegations concerning violation of Article 40 of *the Constitution* have been raised for the first time at paragraph. 10 of the Petitioner’s submissions. There was no pleading in the entire Petition was filed that raises any violation of this Article, with the attendant specific particulars as required by law. In the submission, arguments on this Article had been raised “in vacuo” and without being pleaded. They were not therefore matters for determination by this Court.
105. A perusal of the Petition will show that at paragraph 27 the Petitioner has pleaded thus:
- Violation&infringement of the Petitioner's Constitutional Rights & Statutory Provisions
- They are then particularized as follows:
- (a) Violation of Article 47 of *the Constitution*.
  - (b) Violation and Infringement of Article 27 of *the Constitution*.
  - (c) Violation of Article 43 of *the Constitution*
  - (d) Violation of Section 72 of the Physical & Land use Planning Act.
- These are the only Constitutional and Statutory Complaints raised.



It is obvious and clear that the Petitioner has not pleaded, nor alleged any violation concerning Article 40 of *the Constitution*.

Such allegations can therefore not be raised for the first time in its submissions. They can therefore not form the basis or issue for consideration by this Court.

106. On the title documents of the Petitioner, the Learned Counsel submitted that acquisition by the Petitioner of its Titles had been raised at Paragraph 6 of the Petition. It is challenged in vigorous terms by “Fahad” at his Paragraphs 25 to 30 of his Response. The Learned Counsel proceeded to submit as follows:-

- a. For plot number MN/1/5503, the Petitioner has exhibited a Transfer, Grant, Entries in the Land Register and a Certificate of Search. These are at pages 3 to 13 of the Petitioners exhibits.
- b. For plot MN/1/5504 all the documents referred to in (a) above are exhibited, in relation to this plot MN/1/5504, and are at pages 14 to 18 of the exhibits.

107. According to the learned Counsel, when it comes to property number MN/1/3412, the documentation and manner of acquisition of this property by the Petitioner was blurred and wanting in rational explanation. This aspect has been pleaded by “Fahad” in his Response thus:-

3. PLOT NUMBER MN/1/3412

- (a) There is no Transfer to the Petitioner exhibited concerning this plot. This is utterly strange, and totally unlike the other plots explained above.
- (b) There is a Grant number CR 16957 exhibited at pages 19 to 23.
- (c) The writings on this Grant at pages 19,20,21 and parts of page 23 are completely illegible.
- (d)
  - (i) The entries on Transactions on this plot commence at page 22. Entry number 1,2,3 and 4 are illegible.
  - (ii) Entry number 5 has been omitted.
  - (iii) Entry number 6 and 7 can be partially read.
  - (iv) The rest of the entries from number 8 onwards have been deleted or erased
- (e) Finally unlike the other two properties, the Petitioner has provided no SEARCH from the Lands Registry concerning this plot.

108. According to the Learned Counsel it was instructive that this was the plot where the Petitioner commenced its constructions, yet its manner of acquisition and ownership of this plot is unclear. In this respect, he also referred the Court to page 66 of the exhibits of Fahad, in which there was a letter written in these terms:-

Search on Plot Number 3412/SEC 1/MN:CR 16957

Refer to your letter dated 26<sup>th</sup> June 2020.

Kindly be advised that we are unable to confirm the ownership of the above parcel of land as the same has two contradicting files. Also be advised that as per the records in both files the parcel of land is a residential



Signed.

Josephine M.Rana

District Land Registrar

Mombasa

109. The two letters referred to herein are at pages 65 and 66 respectively of the 1<sup>st</sup> Interested Party's Exhibits. The circumstances under which this letter was written have been fully explained at paragraph 27 of the Response, where the contents of this letter are again recited.
110. The question as to ownership this property, the epicenter of construction, was one which the Petitioner must demonstrate to the satisfaction of this Court, before it can venture to seek for any orders from it. At paragraphs 28 and 29 of the Response, 'Fahad' had challenged the Petitioner to fully comply with Section 67 of the *Evidence Act*, on the Best Evidence Rule before it could litigate one more inch further on anything to do with this property. In the absence of such evidence, this Court should not proceed to grant any Orders sought by the Petitioner.
111. For ease of reference, Section 67 provides as follows:  
Proof of Documents by primary evidence  
67. Documents must be proved by primary evidence except in the cases hereinafter mentioned  
The Petitioner's documents do not fall under any of those exceptions.
112. On the prayers sought and whether they could be granted, the Learned Counsel submitted that on 31<sup>st</sup> May 2023, this Court delivered a Ruling on preliminary objections raised by both Fahad and the Respondent which were dismissed. Parties were allowed to file further Affidavits thereafter. On the 5<sup>th</sup> September, 2023, Fahad filed a Supplementary Affidavit with one annexures, being approval of Development permission given to the Petitioner dated 8<sup>th</sup> April 2020. A Notice to produce a document was also served on the Petitioner.
113. A perusal of the document of 8<sup>th</sup> April 2020 will show that it was entitled:  
Notification of approval of the application  
for development permission  
It relates to properties MN/1/5503, MN/1/5504 and MN/1/3412.  
Condition 9 made provision as follows:  
"To start construction within 12 months and completing such in 24 months otherwise the approval lapses."  
Date: 8<sup>th</sup> April 2020.
114. It was obvious from the foregoing that this approval lapsed on the 8<sup>th</sup> April 2022, unless there was any extension, whose evidence they did not have. It was not in dispute that the Petitioner had all along been carrying on construction works on the basis of orders given to it in High Court Constitutional Petition No 43 of 2020, which stopped the operation of the Enforcement orders of 24<sup>th</sup> June 2020. This had been elaborately pleaded by the Petitioner.
115. It was also not in dispute that Constitutional Petition No 23 of 2020 was struck out by the Court of Appeal on 10<sup>th</sup> June 2022. Therefore, the Petitioner filed this Petition on the 20<sup>th</sup> June 2022, 10 days



after Petition 43 of 2020 was struck out by the Court of Appeal. In the Learned Counsel's submission, he argued that the Approval for development given on 8<sup>th</sup> April 2020, lapsed, became spent, and was of no effect, whether legal or otherwise, on the 8<sup>th</sup> April 2022. Therefore, when this Petition was filed, on the 20<sup>th</sup> June 2022, it was a period of 2 months and 12 days since the lapse of Approval permission.

116. On the first prayer (Prayer – i), the Learned Counsel submitted that in the Petition seeks stay of the Enforcement order of 24<sup>th</sup> June 2020, which suspended the Petitioner's Approval Ref Number CP/AAA/2628. This is the approval which lapsed on 8<sup>th</sup> April 2022. By the time this Petition was filed, this approval permission had been spent, and there remained nothing about it to be either stopped or dealt with. The Petitioner chose not to include such an important document, which was Ref number CP/AAA/2628, in its exhibits because it was all along well aware that it had lapsed by the time this Petition was filed. The Petitioner did not want the Court to interrogate this fact. This submission was reiterated, and holds true, for prayer (iii) in the Petition, also relating to Approval permission designated as Number CP/AAA/2628. It could not be granted.
117. On prayer (iv) for an Order of Certiorari to quash the Enforcement Notice suspending Petitioner's Approval Ref Number CP/AAA/2628 the Learned Counsel submitted that in a similar manner, the prohibitory injunction sought at prayer (v) relates to the same Approval Ref Number CP/AAA/2628. All these prayers can also not be issued. Certiorari could not be issued to quash a decision that is no longer operational or in force. The Approval lapsed on 8<sup>th</sup> April 2020. By the time this Petition was filed, that Approval permission was no longer in force, as it had become spent, obsolete and otiose for all legal purposes.
118. Since courts do not issue orders in vain, the totality of the present circumstances dictate that none of the prayers sought by the Petitioner is capable of being granted, particularly when such orders are sought regarding a document that the Petitioner itself had not produced and exhibited before Court.
119. On consideration for the Petitioner's submission, the Learned Counsel argued that the Petitioner addressed the issue of jurisdiction of this Court to determine this Petition at paragraphs 3 to 6 (see pages 2,3, and 4.) In his submission, this was not an issue for consideration now because:-
  - (a) On the 28<sup>th</sup> July 2022, Fahad raised these jurisdictional issues as a Preliminary Objection, in his Notice of Preliminary Objection dated and filed in Court on even date.
  - c. This Court rendered its decision in a Ruling delivered on the 31<sup>st</sup> May 2023, dismissing that objection.

Therefore, the question of jurisdiction of this Court could not be raised again for determination a second time.
120. Paragraphs 7 and 8 of the Petitioner's Submissions were on Article 27. The Petitioner had usefully cited the decision in "Kariba Chengo others – Versus - Republic". The Learned Counsel particularly underscored the following rendition from that decision which was as follows:-

“First, under Article 259 of *the Constitution, the Constitution* is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights, permits the development of the law and that contributes to good governance.



121. The Learned Counsel submitted that though the Petitioner is fully aware that Article 27 promotes the Rule of law and good governance, it has fully made a total mockery of that requirement in that the Petitioner's conduct was always to subvert the Rule of law and good governance.

On this submission, I fully reiterate the matters submitted on at paragraphs 13 to 19 above, where it has been shown that the Petitioner has failed to obey the law as written in Section 130(2) of EMCA, thereby contravening Article 10 of *the Constitution* on both the Rule of law and good governance

122. The Petitioner then submitted on Article 40 of *the Constitution*. This is from paragraph 10 of its submissions. The Learned Counsel submitted that as earlier, that the Petitioner never pleaded that there was any infringement of its Rights under this Article. His submissions above on this point provide a complete and perfect answer to the Petitioner's allegations thereon. Further the Petitioner then submitted on Section 72 of the PLUPA. As before, these were matters that formed the basis of this Court's Ruling delivered on 31<sup>st</sup> May 2023. They could not be relitigated upon in this forum.

123. According to the Learned Counsel, although the Petitioner pleads in its Petition that Article 43 of *the Constitution* is one of the Articles that has been breached, no submissions of whatever nature have been tendered by it on this Article. With reference to the submissions on Article 47 and he submitted as follows:-

- a. The Petitioner never exhibited or produced the very central and important document, being the approval of Development Permission contained in a letter Ref Number CP/AAA/2628 dated 8<sup>th</sup> April 2020.
- b. All its prayers in the Petition are predicated on, and are all dependent on this document being Ref number CP/AAA/2628, which the Petitioner claims was suspended/stayed by the letter of 24<sup>th</sup> June 2020.
- c. In the circumstances, and in his submission, this Court cannot make or grant any orders in favour of the Petitioner, based on a document which the Petitioner has not produced before this Court.
- d. By reason of this failure by the Petitioner to produce this centrally important document before this Court, any submissions on Article 47, seeking to reinstate the operations and legal force of this omitted document, fall by the wayside and are not for consideration.

124. When the 1<sup>st</sup> Interested Party, Fahad, produced this Development permission, Ref Number CP/AAA/2628, it demonstrates that it was given on 8<sup>th</sup> April 2020, and that by the time this Petition was filed on 20<sup>th</sup> June 2022, that Development permission had lapsed two months previously, on 8<sup>th</sup> April 2022. Again, no administrative action could be called into aid, to rationalize a decision whose effect and operational date has lapsed. For these further reasons, it was submitted that Article 47 of *the Constitution* has been belatedly sought in addressing the Petitioner's complaints. These complaints could not in the circumstances be solved by the use of Article 47.

125. It was therefore the Learned Counsel's prayer that the Petition herein, and the resultant Notice of Motion, both dated 20<sup>th</sup> June 2022, be dismissed with costs to Fahad. It was humbly so prayed. Resulting from such a dismissal of the Petition of 20<sup>th</sup> June 2022, it is the 1<sup>st</sup> Interested Party's prayer that this Court proceeds to grant the declaratory order sought in prayer (a) of its Response dated 15<sup>th</sup> July 2022, and prayer (b) thereof, that the subject buildings on plot numbers MN/1/5503, MN/1/5504 and MN/1/3412, be demolished in the manner therein prayed.



126. On the cross petition, the Learned Counsel submitted that the issues raised in the Cross Petition were of a constitutional nature, centered on the Fundamental Right to privacy enshrined in Article 31 of *the Constitution*. As a starting point, this aspect is not denied by the Petitioner, Mbesa Investments. At paragraph 39 of the Cross Petition, this issue was pleaded as follows:-

39. The 1<sup>st</sup> Interested Party states that in an affidavit sworn by Hassan Sharriff Alwy on behalf of the Petitioner in NET 30 of 2020, at paragraph 17 thereof, he, in admission, of infringing the 1<sup>st</sup> Interested Party's right to privacy stated as follows:

17. Am aware that Mr. Bayusuf had raised with the Appellant two issues regarding the Project infringement of his privacy and dust. I am also aware that the Project proponent offered him several ways to mitigate his concerns. These include watering the ground during the construction period to minimize dust. He was also offered construction, at the cost of the Appellant, of a sail over his swimming pool and that the developer's architect will provide a design that will address all his concern as to infringement of his privacy. Bayusuf did not take up these offers because he is hellbent to veto the project. Annexed herewith and marked "HSA13" are photos of Mr. Bayusuf's house in relation to the project site and of him in the project site. (see page 51 of his exhibits herein.)

127. In the Replying Affidavit to the Cross-Petition, sworn by Hassan Alwy, on 3<sup>rd</sup> August 2022, and filed in Court on 5<sup>th</sup> August 2022, he did not deny the averments pleaded at paragraph 39 of the Cross-Petition. These matters were therefore accepted by the Petitioner in their entirety. As evidence and proof of such admission, at paragraph 5 of the said Replying Affidavit of Mr. Alwy, he deponed, on oath again as follows:

SUBPARA 5.

That to mitigate this concern, we approached the 1<sup>st</sup> Interested Party and offered to construct a shade over his swimming pool at our own cost to which the 1<sup>st</sup> Interested Party refused this offer, a fact acknowledged by the 1<sup>st</sup> Interested Party at paragraph 39 of the Cross Petition.

128. It was evident here that the Petitioner wholly admits the infringement of the Cross-Petitioner's Fundamental Right to privacy, as enshrined in Article 31 of *the Constitution*. With such admission, no further or additional evidence is required on that infringement. The Learned Counsel further submitted that point in this manner, Article 50(1) of *the Constitution* provides that:-

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial Tribunal or body."

129. In tandem, Article 159(1) recognizes the establishment of Tribunals and clause (2) provides as follows:

(2) In exercising judicial authority, the Courts and tribunals shall be guided by....

130. Tribunals, such as the National Environment Tribunal exercises judicial authority recognized by *the Constitution*. Therefore, admissible evidence tendered before it could be referred to by another judicial body, as containing the truth of the averments that it contains. In these circumstances, the evidence of Hassan Alwy as tendered in that Tribunal, cannot now be contradicted in these proceedings. The admission made by Mr. Hassan Alwy therefore fully complies with the law. In view of such evidence and admission, what remedy is available to Fahad, the Cross-Petitioner?



131. Article 31 of *the Constitution* provides as follows:-  
Privacy  
31. Every person has the right to privacy....
132. The learned Counsel submitted that such a Fundamental Right could not in any manner be limited except in circumstances provided for in Article 24 of *the Constitution* which provides as follows:  
(1) A right or fundamental freedom in the Bill of Rights shall not be limited, except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
133. There is the use of the peremptory phrase “shall not be limited” in the opening words of that Article. Where any such limitation is to be applied, then it must be “reasonable and justifiable” in an open and democratic society which reveres and protects “human dignity, equality and freedom.”
134. It was now appropriate to consider the breach of the Fundamental Rights of Fahad, the Cross-Petitioner, which the Petitioner admits it has breached. By Article 24 cited above, it has been made abundantly obvious beyond reasonable doubt that a provision in the Bill of Rights can only be limited “by law”. Any legislation that will amount to a limitation of a fundamental Right must satisfy the requirements of Article 24(2) (a) and (c). Finally on the matter clause (3) provides as follows:-  
(3) The state or a person seeking to justify a particular limitation, shall demonstrate to the Court, tribunal or other authority that the Requirements of this Article have been fully satisfied.”
135. In this litigation, Mr. Hassan Alwy, in his Replying Affidavit to the Cross-Petition states that he “has offered to construct a shade over the swimming pool at our own cost to which the 1<sup>st</sup> Interested Party refused.”(see his paragraph 5 of that affidavit). In his submissions, the Learned Counsel argued that this “offer” to construct a shade over the Cross-Petitioner’s swimming pool” did not amount to legislation capable of limiting a Fundamental Right which can only be limited “by law” enacted by parliament.
136. In consequence of the foregoing, the Cross-Petitioner is entitled to the full protection offered by the Courts, in protecting his Fundamental Rights, which have been breached by the Petitioner. In his respect, he fully relied on the provisions of Article 20, which provided that:-  
“(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the right or fundamental freedom”
137. Finally reliance was placed on clause (3) (b) which provides that:  
“(3) In applying a provision of the Bill of Rights, a Court shall: (b) adopt the interpretation that most favours the enforcement of a Right or fundamental freedom.”
138. Guided by these pristine constitutional principles, it was submitted that the Cross-Petitioner was entitled to the remedies that he now requests this Court to grant to him. In its submissions on invasion of the Right to privacy of the Cross-Petitioner, the Petitioner argues that this issue is raised in Civil Appeal No 17 of 2022, which was before this Court arising from the decision of the Tribunal in NET 30 of 2020. The Petitioner contended that it should not be subject of deliberations here.



139. In his submission, the Learned Counsel drew the attention of the Court to the decision of NET 30 of 2020, in which the Tribunal held that its decision was based on only one issue. That one issue is applicability of Article 47 of *the Constitution*. This was also the subject of appeal in Civil Appeal No 17 of 2022. If the Petitioner's arguments that this Court should not consider Article 31 of *the Constitution* was correct, then by the same token, this Court should refuse to consider any arguments of the same Petitioner based on Article 47 in its Petition, with the immediate resulting effect that Petition be dismissed forthwith.
140. However it has to be borne in mind that Article 31 of *the Constitution* was raised when dealing with issues relating to issuance of NEMA LICENCE, which was the only matter the Tribunal was seized of. They were in Court dealing with development permission issued by the County Government of Mombasa in what was referred to by the Petitioner as development permission in a document designated as Ref number CP/AAA/2628, an issue which was not before the Tribunal, and was not subject to any appeal.
141. In the circumstances, the 1<sup>st</sup> Interested Party was perfectly right, and within his rights, to raise the issue of violation of his Fundamental Rights in Article 31 by the Petitioner. He was not forbidden, whether in law or otherwise, from raising that complaint in the existing new circumstances. Fahad, the 1<sup>st</sup> Interested Party, has sought for prayers of demolition of the developments on MN/1/5503, MN/1/5504 and MN/1/3412 as a necessary consequence of the dismissal of the Petition filed by the Petitioner. In the same manner, the same remedies were sought against the Petitioner for breaching his constitutional Rights in Article 31.
142. For the submissions at paragraph 59 above, guidance is taken from the Supreme Court decision in "Pati Limited – Versus - Funzi Island & others (KESC 29(KLR))". This case was considering the legality of allocation of Trust land to a party who consequently constructed and developed a Five Star Hotel, worth Kshs. 240 million, on that allocated parcel of land. After full arguments, that Court at paragraph 63 of the decision concluded and held as follows:-
- i. Firstly, the gazette notice No 3831 of 1994 specified the size of the land set apart as comprising approximately 0.7 of a hectares. However, the land ultimately set apart and allocated to the appellant was 3.126 hectares. There is no further notice on record in respect of the change of size of the suit land.
  - ii. By the same token, the Msambweni Land Control Board, gave Consent to set apart 0.7 of a hectare of land, yet there is no further Consent from that Board, for the change of the acreage to 3.126 hectares.
  - iii. The suit land was set apart for use as a boat landing base, (a purpose that would have benefitted the local communities ordinarily resident in the area) yet the appellant has constructed a five-star hotel on it. There is no further notice on record for change of purpose of setting aside.
143. In conclusion, at paragraph 64, that Court held as follows:
- The entire process and notice for setting apart, fell far short of the requirements of *the Constitution* and the law. In view of these shortcomings and our conclusion regarding the legal status of the suit land, we find no reason to upset the judgment of the Court of Appeal.
144. The Judgment of the Court of Appeal was therefore fully upheld. That Judgment is in the decision in "Funzi Island Development Limited & others – Versus - Pati Limited (2014 eKLR)". At paragraph 46 of the Judgment of Maraga JA (as he then was) having found that the suit land was wrongly alienated, contrary to law, he held as follows:-



46. In reaching the above conclusion I have not ignored the fact that the 3rd respondent has considerably developed the suit land. We saw the developments on it when we visited the locus in quo and in the absence of any evidence to the contrary, the value of the developments may very well be about Kshs. 240 million. I am therefore alive to the fact that my above decision has grave ramifications. But I have a job to do; to apply the law to the facts of this case.
145. Then at paragraph 47, where relevant in these proceedings, it was held as follows:
- “What is crucial is that right from the word go, the 3rd respondent knew that its acquisition of the suit land was seriously opposed. That notwithstanding, it went ahead and acquired it. The 3<sup>rd</sup> respondent is therefore complicit in the irregular allocation of the suit land to it. It cannot therefore seek shelter under the indefeasibility of title under Section 23 of the now repealed Registration of Titles Act which was in operation then and under which the land was registered or the developments it has carried out on the land.
146. These decisions were on all fours with what has happened in these proceedings. The Petitioner is well aware that there has always been opposition to the subject developments. This issue is also pleaded in specific terms, at paragraph 41 of Fahad’s Response. It could therefore not take refuge or hide behind any claims that its constructions are either at an advanced stage or completed. If the law has been flouted, the natural consequences for not following the law ought to follow in full force.
147. For all these reasons, the 1<sup>st</sup> Interested Party prayed that the Petition filed on 20<sup>th</sup> June 2022 be dismissed. The prayers sought in the Response, be granted as prayed. The costs herein be awarded to the 1<sup>st</sup> Interested Party against the Petitioner.

#### **IV. Analysis and Determination**

148. I have carefully considered all the filed pleadings pertaining to the Petition dated 20<sup>th</sup> June, 2022, the Replying Affidavit dated 1<sup>st</sup> August, 2022, the Cross – Petition dated 15<sup>th</sup> July, 2022 by the 1<sup>st</sup> Interested Party, all the Affidavits by the Petitioner, the Respondents and the 1<sup>st</sup> Interested Party, the articulate written submissions by both the Petitioner and the 1<sup>st</sup> Interested Party, the myriad of cited authorities, the appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
149. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following four (4) salient issues for its determination. These are:-
- a. Whether the Petition dated 20<sup>th</sup> June, 2022 by the Petitioner and the Cross Petitioner dated 15<sup>th</sup> July, 2022 by the 1<sup>st</sup> Interested Party respectively meet the threshold for Constitution Petitions.
  - b. Whether *the Constitution* Petition has any merit and, if affirmative, if the Petitioner is entitled to the reliefs sought?
  - c. Whether the Cross Petition has any merit and, if affirmative, if the Cross - Petitioner is entitled to the reliefs sought?
  - d. Who will bear the Cost of the Petitioner?



**Issue No. a). Whether the Petition dated 20<sup>th</sup> June, 2022 by the Petitioner and the Cross Petitioner dated 15<sup>th</sup> July, 2022 by the 1<sup>st</sup> Interested Party respectively meet the threshold for Constitution Petitions.**

150. 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.
151. 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.....”
152. 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.
153. 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.”
154. 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.



155. In this Petition, the Petitioner seeks for a Conservatory orders to stay the enforcement and implementation of the Enforcement Notice dated 24<sup>th</sup> June 2020 issued by the Respondent to suspend the Petitioner's Approval Ref Number CP/AAA/2628 whose effect is to stop carrying out any works on Plot Number MN/I/3412, MN/I/5503 & MN/I/5504 located in Nyali area within Mombasa County. The Petitioner sought declarations on the violations of the Respondents and the nullity of the enforcement notice dated 24<sup>th</sup> June, 2020.
156. The Petitioner was apprehensive that the construction which had already attained Change of User, approvals from the various authorities, conducted public participation and had already been undertaken to high extension and the remaining portion of the suit property may be sold to other private individuals at the expense of the pupils in the nursery school and the locals who benefit from the school. The manner in which the suit land was sub - divided and allocated to private individuals is a contravention of *the Constitution* of Kenya 2010 in particular Articles 27, 43 and 47 of the said Constitution.
157. The Petitioner contended that the Respondent failed to consult it prior to the abrupt issuance of the "Enforcement Notice" and being aggrieved by the suspension and due to the non - existence of the County Physical and Land Use Planning Liaison Committee provided under Sections 72 and 76 of the *Physical And Land Use Planning Act* Number 13 of 2019, the Petitioner approached the High Court in "Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - The County Government of Mombasa".
158. The Respondent opposed the Petition on grounds that the Petitioners were only granted partial approvals to construct buildings on two blocks onto two parcel of the suit land. But instead they breached the law by undertaking development onto the third parcel of land which had not attained any approvals from the County Government of Mombasa. Resultantly, the Respondent issued "the Enforcement Notice" against the Petitioner to stop the development from proceeding on. The Respondent further argued that the Petitioner instituted a Petition disguised as a Judicial Review which was erroneous. Besides, they were caught up by the doctrine of laches having instituted the suit close to two years after the Enforcement Notices had been issued. They held that there was no proof that the Petitioner had undertaken any public participation as required by Law.
159. On the other hand, the 1<sup>st</sup> Interested Party who filed a Cross – Petition, prayed that the Petitioners Petition dated and filed on 20<sup>th</sup> June 2022 and all declarations and Orders therein sought be dismissed, with costs. The 1<sup>st</sup> Interested Party prayed for Judgment be entered in favour of the 1<sup>st</sup> Interested Party on the Cross - Petition for:-
- a. A declaration that the continued construction works or any other related works of whatever nature, being undertaken by the Petitioner herein on plot numbers MN/1/3412, MN/1/5503 and MN/1/5504 do cease, discontinued, and be stopped forthwith.
  - b. The buildings, structures and or any other developments that have been constructed and or erected by the Petitioner on plot number MN/1/3412, MN/1/5503 MN/1/5504 all be pulled down and the same be demolished by the Petitioner, failing which, the demolition be done by any other of the parties herein at the cost of the Petitioner.
  - c. Costs of this Cross-Petition be paid by the Petitioner.
160. The 1<sup>st</sup> Interested Party contended that the effect of the subject development is an infringement of the 1<sup>st</sup> Interested Party's Rights to privacy. As a result, it was a direct contravention of the provisions of his Fundamental Rights under the provision of Article 31 of *the Constitution*. In the circumstances,



and to buttress its point, the 1<sup>st</sup> Interested Party prays that on the basis of the Supreme Court decision in “Pati Limited – Versus - Funzi Island Development Limited (Supreme Court No 4 of 2015)” the impugned developments elaborately undertaken on MN/1/3412, MN/1/5503 and MN/1/5504 all be demolished.

161. Thus, in application of the set out legal principles and stated in the above plethora of authorities, for filing a Constitutional Petition and the Cross Petition, the Honorable Court is fully satisfied that the Petitioner and the Cross Petitioner herein have dutifully complied. Indeed, they have fully met the threshold of reasonable precision in pleadings for instituting this Petition and Cross Petition against the Respondents herein and pleading for the prayers sought.

**Issue No. b). Whether the Constitutional Petition has any merit and, if affirmative, if the Petitioner is entitled to the reliefs sought?**

162. The Honorable Court has noted that the Petitioner was established for the purposes of development of a Two 10 storey building together with ground floor on the beach front in Nyali. In pursuit of the Project, the Petitioner identified and acquired all that parcels of land known as Land Reference Numbers MN/I/3412, MN/I/5503 and MN/I/5504 which were situate at Nyali area. This acquisition was driven by the strategic location of the land and its close proximity to the beach.
163. After the acquisition of the Project Land, the Petitioner, either directly or through its agents and/or consultants begun the process of obtaining the requisite statutory approvals and/or licenses from the relevant agencies. On or about April 2015, the Petitioner applied for a Change of User with respect to the Project land by filing the requisite Form PPA 1 and submitted it together with the planning brief prepared by the physical planner it had engaged. On 25<sup>th</sup> September, 2015 the application was approved and the Change of User was issued.
164. The Respondent thereafter sought comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for change of user. It is evident that the Petitioner also placed advertisements in two local edition being “The Standard” and “the Daily Nation” newspapers both appearing on the 27<sup>th</sup> April 2015 (page 36) and 28<sup>th</sup> April 2015 (page 55) with a view to informing the public about the intended Change of User. The said application was approved on 25<sup>th</sup> September 2015 after all the all relevant agencies which had been consulted had endorsed it.
165. The Petitioner was aware of the correspondence and notification from the relevant agencies with respect to that application were submitted to the Director-County Planning and Architecture of the Respondent. On the 25<sup>th</sup> September, 2015 the Respondent granted approval for the Change of User subject to certain conditions being met. The Ministry of Land also forwarded the revised rent valuation which the Petitioner paid. The Petitioner also applied to the National Environment Management Authority (NEMA) for an Environment Impact Assessment Licence for the Project in accordance with the Environment Management and Co - ordination Act, Act No.8 of 1999. On the 14<sup>th</sup> April 2020, NEMA granted a license for the Construction of the storey building comprising ten storey and swimming pool among other developments.
166. The Petitioner also submitted the Project building plans to the Respondent for approval by the Project architects. Indeed, they were granted an Approval of development being Ref. Numbers CP/AAA/2628. The only vehement contention raised here by the 1<sup>st</sup> Interested Party was the production of through a Notice to Produce for the original copy by the Petitioner. Having obtained the licenses and/or approvals, the Petitioner pushed ahead with project arranging for financing, mobilizing resources, promoting the project arranging for financing and securing clients/customers. In the



meantime, the Petitioner consultants finalized the building plans as well as other arrangements to ensure the timely completion of the project.

167. The Petitioner made arrangements to commence construction. As part of these arrangements, its aforesaid architects submitted to the Respondent the detailed plans for issue of a Certificate of Approval as well as stamping in line with the prior notification of approval which had already been given. As part of these arrangements, its aforesaid architects submitted to the Respondent the detailed plans for issue of a Certificate of Approval as well as stamping in line with the prior notification of approval which has already been given. The construction works begun immediately.

168. However, in a sudden change of heart, on the 24<sup>th</sup> June 2020, the Respondent served them with a notice entitled 'Enforcement Notice' from the Respondent suspending the Petitioner's approval Reference Number CP/AAA/2628 until further notice and to take note and:-

- i. Immediately stop and desist from carrying out any works and remove laborers on site;
- ii. Immediately restore the land to its original shape and level.

169. The Petitioner asserted that there was no valid reasons were given nor were they given an opportunity before making the decision to suspend the construction. This Honourable Court concurs that these were contrary to the principle of natural justice, without any factual basis and the principles enshrined under the Provision of Article 27 of *the Constitution*. The provision of Article 40 (1), (2), (3), and (4) of *the Constitution* provides that:

“1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-(a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

- i. requires prompt payment in full, of just compensation to the person: and
- ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”

a. Further Article 47 of *the Constitution* states as follows:

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



- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
  - (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) Promote efficient administration.'

170. From all the evidence placed before the Court, there is no doubt the parcels of land known as MN/1/5503 and 5504 belongs to the Petitioner this is evidenced by copies of Petitioner’s Certificate of Incorporation, Transfers and Title Deeds of the abovementioned plots all marked as “HSA - 2a, 2b and 2c”. The only parcel whose ownership has been vigorously challenged is Land Reference Number MN/1/3412 and which the Honourable Court will be dealing with at a later stage. Legally speaking, the absolute proprietorship is guarded by the provision of Sections 24, 25 and 26 of the Land Registration Act. No. 3 of 2012 whereby the indefeasible rights, interested and title is vested onto the proprietor by law. Further, private property is well safeguarded under the provisions of Article 40 (1) and (2) of the Constitution of Kenya, 2010. The Petitioner obtained the required statutory approvals, on 29<sup>th</sup> April 2015, the Petitioner applied for a change of user with respect to the Land after which the Respondent sought comments from the District Physical Planner, District Surveyor and District Land Officer all of whom expressed no objections to the application for change of user. The Petitioner complied with all the necessary procedures and requirements with respect to its application for change of user and placed advertisements, one in Saturday Nation and The Standard both appearing on 28<sup>th</sup> April 2020 and 27<sup>th</sup> April 2020.
171. The Petitioner alleged that the said ‘Enforcement Notice’ was based on a purported petition received from “neighbors” and the suspension was to last pending resolution of “outstanding matters”. The Petitioner further averred that it was not consulted by the Respondent prior to the abrupt issuance of the “Enforcement Notice” and being aggrieved by the suspension and due to the non - existence of the County Physical and Land Use Planning Liaison Committee provided under the provision of Sections 72 and 76 of the Physical and Land Use Planning Act Number 13 of 2019, the Petitioner approached the High Court in “Constitutional Petition Number 43 of 2020: MBESA Investments Limited – Versus - The County Government of Mombasa.
172. The Petitioner contended that he was not in breach of any of the terms of the approvals and licences which allowed it to undertake its construction project. The Petitioner further contended that the only reason given in the enforcement notice was that the notice was issued on account of a “public petition” whose details or particulars of complaint were not given. The Petitioner further pleaded that the said enforcement notice was issued without according it an opportunity of being heard. The Petitioner



considered the Respondent's actions to constitute a violation of Articles 40 and 47 of *the Constitution* of Kenya and the *Fair Administrative Action Act*, 2015.

173. The issuance of an enforcement notice is a matter which is reserved for the Committee under the provision of Section 78 of the *Physical and Land Use Planning Act*, 2019. The section stipulates as follows:

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to-

- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
- (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- (d) hear appeals with respect to enforcement notices”.

According to the Respondent, the *Physical and Land Use Planning Act* 2019 at Section 72 provides for time frames that an aggrieved party had to seek redress. The first step was to appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days. However, this could not happen and as all admit that no such Committee existed. Nonetheless, the provision of Section 93 of the *Physical and Land Use Planning Act* 2019 further provides that all disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court. It stipulates as follows:-

“All disputes relating to physical and land use planning, before establishment of the national and county physical and land use liaison committees shall be heard and determined by the Environment and Land Court.”

174. For arguments sake, the Respondent contended that a) Section 72 (3) of the *Physical and Land Use Planning Act* No. 13 of 2019, that provides for an avenue for an aggrieved party upon being served with an enforcement notice on the steps he or she is required to do and that is by lodging an appeal to the relevant County Physical and Land Use Planning Committee within fourteen (14) days. Further to the above, the appeal at the County Physical and Land Use Planning Committee ought to be heard and determined within thirty (30) days.
175. The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.
176. The court is of the opinion that the Petitioner has demonstrated a violation of its legal and constitutional rights. It is evident from the material on record that the Petitioner's main grievance relates to the issuance of an enforcement notice without due process and the Respondent's failure to



include the Petitioner in the process of the issuance of the enforcement notice. Thus, in a nutshell, it is entitled to the reliefs and declarations sought.

177. The Respondent claims that the approval issued to the Petitioner was a conditional approval and a part approval attaching some conditions to it and the approval was granted on the following terms:-

“The Approval granted was a part approval allowing the Applicant/Petitioner to construct only the two blocks comprising of 10-storeys on Plot No.MN/I/5503 and Plot No. MN/I/5504.

That before the process of acquiring an approval, the Applicant ought to have undertaken public participation during the Environmental Impact Assessment.”

178. The Respondent vide a letter dated 30<sup>th</sup> April, 2020 addressed to the Petitioner the Respondent informed the Petitioner of the partial approval bearing in mind the complexity of the project. The partial approval issued to the Petitioner only allowed construction two blocks comprising of 10 - storeys each. However, it is alleged that the Petitioner commenced development on a piece of land – MN/I/3412 that was yet to be approved and hence totally disregarding the condition on which the Approval was issued. Despite of all these assertion, the Respondents and the 1<sup>st</sup> Interested Party failed to demonstrate with empirical evidence to the Honourable Court how this was done. I strongly feel this would have been better executed in an ordinary suit or better still through adducing of oral and documentary evidence in a full trial which this Court never got that opportunity to have fully interrogated and scrutinize it. The evidence in form of letters obtained from the Land Registry was extremely casual, simplistic and vague. To challenge the ownership of this parcel of land, the 1<sup>st</sup> Interested party overly relied on a letter dated 2<sup>nd</sup> July 2020 by the District Land Registrar on pages 64 and 65 of its exhibits which stated as follows:-

SEARCH ON PLOT NUMBER 3412/SEC 1/MN:CR 16957

Refer to your letter dated 26<sup>th</sup> June 2020.

Kindly be advised that we are unable to confirm the ownership of the above parcel of land as the same has two contradicting files. Also be advised that as per the records in both files the parcel of land is a residential

Signed.

Josephine M. Rana

District Land Registrar

Mombasa

179. The Honourable Court never found the correspondences from the Land Registrar precisely valuable at all. Firstly, the District Land Registrar who are the legal custodians of the land records was never summoned as witness to testify on the averments and contents of this letter. The officer would have at least explained the nature, meaning, scope and effect of the existence of two contradicting files (the Court assumes its both Correspondence and Parcel files). Additionally, the officer would have provided proof of ownership in form of an official search or copy of the Green Card of the current owners of the parcel in question being MN/I/3412. For these reasons, the allegations and based on the doctrine of “the burden of proof” as enshrined under the provision of Section 107 of the *Evidence Act*, cap. 180 remained unexploited by the those who were alleging – the Respondent and the 1<sup>st</sup> Interested Party herein.



180. Apart from the breach as stated in paragraph 8, some residents made a complaint to the Respondent that Public Participation was not undertaken and as such it came to the attention of the Respondent that the residents around the development commenced by the Petitioner had not gone through the mandatory public participation and the Environment Impact Assessment had failed to incorporate their concerns.
181. Although the powers to approve development rests on the County Government, this court has the mandate under articles 22, 47 and 70 of *the Constitution* to consider whether due process was followed in issuing the change of user approval and the EIA license to the Petitioner.
182. Public participation is enshrined as a right in the bill of rights and is also important in achieving sustainable development by creating avenue for a that minimizes conflicts as well as receiving good ideas on how to plan an area. In the case of “Kaps Parking Limited and another – Versus - the County Government of Nairobi and another (2021) eKLR”, Mrima J stated as follows at paragraph 129;
- “ 120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. 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.
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....”
183. In the case of “Communications Commission of Kenya & 5 others – Versus - Royal Media Services Limited & 5 others, [2014] eKLR”. The Supreme Court of Kenya stated inter alia that: “Public participation is the cornerstone of sustainable development and it is so provided in *the Constitution*...
- (381) Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private “sweet heart” deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of *the Constitution* would both be subverted.”



184. Any other written law in my opinion excludes the PLUPA and includes all that governs land use and environmental protection. No wonder the requirement to share the planning brief with other lead agencies.
185. In the case of “British Tobacco PLC – Versus - Cabinet Secretary of Health (2019) eKLR”, the Supreme Court of Kenya at paragraph 96 of the judgement while setting out guiding principles of public participation had this to say;

“It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.

- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
  - ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
  - iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.”
1. Section 58 of PLUPA does express the manner in which the public participation is to be undertaken and going by the decision herein above, the Petitioner had a duty to ensure public participation took place. Indeed, the Respondent issued an enforcement notice stopping the project from further works. Further to above averments, the Approval issued to the Petitioner attracted some conditions that the Petitioner has clearly breached as follows:-
    - i. No construction should commence on site unless EIA project report is prepared, submitted and approved by NEMA as per EMCA (amended) Cap 387 and register the project with the National Construction Authority (NCA).
    - ii. To start construction within 12 months and completing such in 24 months otherwise the approval lapses.
    - iii. Undertake adequate consultations with neighbors and neighborhood.
  2. The impugned development was to be done in an identified neighborhood and thus the target group likely to be affected was easily reachable. The Petitioner strongly asserted that it had always conducted public participation of its project. The Petitioner stated that they had always engaged the neighbours and the potential purchasers of the complete units through the Grievance Remedy Mechanism (GRM) but the 1<sup>st</sup> Interested Party would always refuse to participate. The Petitioner annexed the GRM report and a Sale sheet of the current purchasers



marked as “HS – 14” for ease of reference. Section 58(5) requires the County Executive Member to grant development permission subject to compliance with the provisions of any other written law.

3. According to the 1<sup>st</sup> Interested Parties, on 14<sup>th</sup> April 2020, NEMA granted the Petitioner a Licence to construct the ten storey building as averred at paragraph 13 of the Petition. By a letter dated 24<sup>th</sup> July 2020, NEMA wrote to the Petitioner and authoritatively directed it that:-

“Based on the foregoing and pursuant to Section 108 of EMCA, 1999, the Authority hereby Orders that you stop all construction works at the project site until the above issues are resolved.”

189. As a follow-up to the said letter, on the 28<sup>th</sup> July 2020 NEMA again wrote to the Petitioner and among others directed as follows:-

Consequently, and premised on the precautionary principle, we hereby invoke Section 64 of EMCA and direct you as follows.

- (a) That the order of 24<sup>th</sup> July 2020 directing project works to stop immediately is hereby underscored and reiterated;
- (b) That you immediately commence the process of submitting a fresh Environment Impact Assessment Study Report NOTING to engage and obtain the views of all stakeholders including the immediate neighbors. This should be submitted within the next 45 days.
- (c) THAT keeping with Section 64(3) of EMCA, show cause within the next 14 days, why EIA licence NEMA/EIA/PSL/9181 dated 14<sup>th</sup> April 2020 should not be cancelled or revoked by the Authority. We look forward to your co-operation in the matter.

Mamo B. Mamo

AG. Director General

190. To this point I am satisfied that the Respondent was not within its rights and mandate to issue the enforcement notice against the Petitioner on allegations that it failed to follow the conditions issued in the letter by NEMA dated 24<sup>th</sup> July 2020. Indeed, find that Petitioner has established the violation of its rights by the Respondent.

191. Finally, the Court wishes to address the contention by the Respondent to the effect that it breached “the doctrine of laches” and that it came to court without clean hands for coming to Court close to two years after the Enforcement Notices” were issued. In so doing, I fully concur with the submissions made out by the Learned Counsel for the Petitioner to the effect that the Petitioner never brought a suit under the provision of Order 53 of the Civil Procedure Rules, 2010, Section 8 and 9 of the Law Reform Act nor the Fair Administration of Action Act, 2012. Undoubtedly, the Petition brought this suit as pure a Constitution Petition. In the circumstance I am guided by the legal ration founded in the Supreme Court case of “Mitu - Bell Welfare Society – Versus Kenya Airports Authority & 2 Others” (2021) KECS 34 (KLR) which held that the provision of Article 23 ( 3 ) of the Constitution



empowers this Court to fashion appropriate reliefs, so as to redress the violation of a fundamental right as it is in this case. For all these reason, therefore, the Petition succeeds.

**Issue No. c). Whether the Cross Petition has any merit and, if affirmative if the Cross – Petitioner is entitled to the reliefs sought?**

192. Under this sub title, essentially the Honourable Court finds that the 1<sup>st</sup> Interested Party has raised two fundamental Constitutional issues in his Cross Petition – the infringement and violation of his Privacy and dust spread out from the construction undertaken by the Petitioner onto his land. The 1<sup>st</sup> Interested Party contended that in Nairobi National Environment Tribunal No 30 of 2020, the 1<sup>st</sup> Interested Party raised the issue of infringement of his Rights to Privacy, enshrined in Article 31 of *the Constitution*. The Interested Party similarly raised the same in this Petition as a reason why the subject development should not be allowed to stand, but ought to be demolished. The 1<sup>st</sup> Interested Party states that in an affidavit sworn by Hassan Sharriff Alwy on behalf of the Petitioner in NET 30 of 2020, at paragraph 17 thereof, he, in admission, of infringing the 1<sup>st</sup> Interested Party's right to privacy stated as follows:-

17. Am aware that Mr. Bayusuf had raised with the Appellant two issues regarding the Project infringement of his privacy and dust. I am also aware that the Project proponent offered him several ways to mitigate his concerns. These include watering the ground during the construction period to minimize dust. He was also offered construction, at the cost of the Appellant, of a sail over his swimming pool and that the developer's architect will provide a design that will address all his concern as to infringement of his privacy. Bayusuf did not take up these offers because he is hellbent to veto the project. Annexed herewith and marked 'HSA13' are photos of Mr. Bayusufs house in relation to the project site and of him in the project site.

193. In the circumstances, the 1<sup>st</sup> Interested Party prays that on the basis of the Supreme Court decision in “Pati Limited – Versus - Funzi Island Development Limited (Supreme Court No 4 of 2015)” the impugned developments on MN/1/3412, MN/1/5503 and MN/1/5504 all be demolished. The specific process being considered is whether the Cross Petitioner and other members of the public that were affected or likely to be affected by the proposed developments were adequately consulted as provided for under article 10(2) and 47 of *the Constitution* (public participation).

194. On the cross petition, the issues raised in the Cross Petition were of a constitutional nature, centered on the Fundamental Right to privacy enshrined in Article 31 of *the Constitution*. As a starting point, this aspect is not denied by the Petitioner, Mbesa Investments. At paragraph 39 of the Cross Petition, this issue was pleaded as follows:-

39. The 1<sup>st</sup> Interested Party states that in an affidavit sworn by Hassan Sharriff Alwy on behalf of the Petitioner in NET 30 of 2020, at paragraph 17 thereof, he, in admission, of infringing the 1st Interested Party's right to privacy stated as follows:

17. Am aware that Mr. Bayusuf had raised with the Appellant two issues regarding the Project infringement of his privacy and dust. I am also aware that the Project proponent offered him several ways to mitigate his concerns. These include watering the ground during the construction period to minimize dust. He was also offered construction, at the cost of the Appellant, of a sail over his swimming pool and that the developer's architect will provide a design that will address all his concern as to infringement of his privacy. Bayusuf did not take up these offers because he is hellbent to veto the project. Annexed herewith and marked “HSA13” are photos of



Mr. Bayusuf's house in relation to the project site and of him in the project site.(see page 51 of his exhibits herein.)

195. In the Replying Affidavit to the Cross-Petition, sworn by Hassan Alwy, on 3<sup>rd</sup> August 2022, and filed in Court on 5<sup>th</sup> August 2022, he did not deny the averments pleaded at paragraph 39 of the Cross-Petition. However, the Honourable Court finds it had to fathom how it would grant such drastic and harsh orders for the demolition of already completed structure simply because it would deny an individual right to privacy. The Honourable Court would have expected that there was a mass protest by the whole neighborhood which was not the case here. The vicinity of the development – Nyali estate is a sub – urban and up market area occupied by upper middle class and where such developmental growth is taking place at a rampant speed. As admitted by all parties herein, it should not be lost from sight that the PLUPA, 2019 provides a legal framework for the preparation, approval and implementation of physical and land use plans by County Governments – the Respondent herein. The Act emphasizes sustainable development and orderly land use. “The Local Physical and Land Use Development Plans (Section 45)” must be consistent with an “Integrated City or Urban Development Plan” contemplated under “the *Urban Areas and Cities Act*”. I am further guided by the Sustainable Development Goals Number 11, entitled - “Make Cities and Human Settlements inclusive, Safe, resilient and Sustainable” It includes safe and affordable housing, transport systems, inclusive and sustainable urbanization, protection of the world’s cultural and natural heritage, reduction of the adverse effects of natural disasters, reduction of the environmental impacts of cities and to provide access to safe and inclusive green and public spaces...”. Furthermore, as mitigated by the Petitioner at Paragraph 5 of the said Replying Affidavit to the Cross – Petition of Mr. Alwy, he deponed, on oath again as follows:-

5. That to mitigate this concern, we approached the 1<sup>st</sup> Interested Party and offered to construct a shade over his swimming pool at out own cost to which the 1<sup>st</sup> Interested Party refused this offer, a fact acknowledged by the 1<sup>st</sup> Interested Party at paragraph 39 of the Cross Petition.

196. That being the case, it follows that there is no discernible violation to the right to privacy, at least not as envisaged under Article 31 of *the Constitution* of Kenya which provides that:-

“ 31. Privacy

Every person has the right to privacy, which includes the right not to have—

- a. Their person, home or property searched;
- b. Their possessions seized;
- c. Information relating to their family or private affairs unnecessarily required or revealed; or
- d. The privacy of their communications infringed.”

197. In any event it is clear from the pleadings and evidence given to this Court that the Cross-Petitioner’s complaint is not that the Petitioner’s impugned building materially interfered with the enjoyment and peaceful occupation of his property, but that it compromised the aesthetic value of his property.

198. In the previous title I extensively examined if the Petitioner conducted a public participation as conditioned by NEMA and the Respondent and I found out that it was well undertaken. The Cross – Petitioner seeks for extremely draconian orders – the demolition of the development by the Petitioner. I am afraid there has been no threshold warranting the Court to grant the said orders. Suffice it to say, they have contended that his right of privacy being violated by the Petitioner. On the right to privacy, each of the developments are on their own plots and the right to privacy envisaged must



balance the rights of a land owner to use and enjoy their land within the law. The type of development being undertaken is a town house except they are more than one town house on the plot unlike the neighboring plots which have one house each.

199. The construction by the Petitioner is an 18 storey building which I find will not breach the rights of privacy for which the Cross Petitioner is entitled to. In the event it did, indeed the 1<sup>st</sup> Interested Party is entitled to his privacy. The Honourable Court will direct that the Petitioner using a well designed plan by his Architect and at his costs provide a proper mechanism to prevent the infringement of the privacy for the 1<sup>st</sup> Interested Party and the spread of dust caused by any ongoing construction. Therefore, I find that the Cross – Petitioner/1<sup>st</sup> Interested Party has partially succeeded in his claim that the impugned building may interfere with his right to privacy. For that reason, the Cross Petition be and is hereby partially succeeds. It is instructive to note from record that this subject matter has been extensively litigated for such a long period at different legal fora. Clearly, a lot of resources has been expended on it. In all fairness, and in the fullness of time, I would humbly urge the parties to embrace the legal maxim – “litigation must come to an end”.

#### **Issue No. d). Who will bear the Costs of the Petition and the Cross Petition**

200. It is now well established that the issue of Costs is the discretion of Courts. 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.”

201. 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.....”

202. 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”.



203. Therefore, the events in the instant case is, while the Petitioner herein have succeeded in establishing its case on Preponderance of probabilities, the 1<sup>st</sup> Interested Party also partially has made his case. For that very fundamental reason, therefore, in the interest of natural Justice Equity and Conscience I hold that each party bear their own costs of this Petition and the Cross – Petition.

## V. Conclusion and Disposition

204. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that although the Petitioner herein has succeeded in all the prayers sought from its filed Petition, the 1<sup>st</sup> Interest Party has also managed to partially establish his case in the Cross – Petition. For avoidance of doubt, I allow the Petition dated 22<sup>nd</sup> February, 2022 specifically under the following terms:-

- a. That Judgement be and is hereby entered in favour of the Petitioner in its entirety in accordance with the prayers sought in the Petition dated 20<sup>th</sup> June, 2022.
- b. That a Conservatory Order to stay the enforcement and implementation of the Enforcement Notice dated 24<sup>th</sup> June 2020 issued by the Respondent to suspend the Petitioner’s Approval Ref Number CP/AAA/2628 whose effect is to stop carrying out any works on Plot Number MN/I/3412, MN/I/5503 & MN/I/5504 located in Nyali area within Mombasa County.
- c. That a declaration that the Respondent has violated the Petitioner’s rights under Articles 27,43 and 47 of *the Constitution*.
- d. That a declaration that the ‘Enforcement Notice’ dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioner’s Approval Ref. Number CP/AAA/2628 indefinitely be and is null and void.
- e. That a declaration that the Respondent violated the Petitioner’s rights under Articles 27, 43 and 47 of *the Constitution* of Kenya, 2010.
- f. That a declaration that the ‘Enforcement Notice’ dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioner’s Approval Ref. Number CP/AAA/2628 indefinitely be and is null and void.
- g. That an Order of Certiorari to quash and suspend the ‘Enforcement Notice’ dated 24<sup>th</sup> June 2020 by the Chief Officer suspending the Petitioner’s Approval Ref. Number CP/AAA/2628.
- h. That an Order of Prohibition and Permanent Injunction be issued to restrain the Respondent, whether by itself, its agents, assigns, employees and servants and/or whomsoever is acting under its authority or instruction from suspending the Petitioner’s Approval Ref Number CP/AAA/2628 and/or interfering with the Petitioner from carrying out any works on Plot Number MN/I/3412, MN/I/5503 & MN/I/5504 located in Nyali area within Mombasa County.
- i. That the Cross – Petition dated 15<sup>th</sup> July, 2022 filed by the 1<sup>st</sup> Interested Party/Cross be and is partially allowed whereby the Petitioner be directed within the next Ninety (90) days at its own costs from the date of this Judgement to undertake and complete:-
  - i. the construction of a properly designed shade and/or Sail around the swimming pool belonging to the 1<sup>st</sup> Interested Party by a qualified Architect; and



ii. the construction of a pre – cautionary Safety measures hood and Perimeter - wall to ensure that there will be no infringement of the privacy of the 1<sup>st</sup> Interested Party and others as stipulated under the provision of Article 31 of *the Constitution* of Kenya, 2010 and the spread of dust or any form of pollution caused by any construction by the Petitioner.

j. That each party to bear their own costs.

It is so ordered accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THROUGH THE  
MISCROFT TEAMS VIRTUALLY THIS 14<sup>TH</sup> DAY OF FEBRUARY 2025.**

.....

**HON. JUSTICE L. L. NAIKUNI**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Kalekye – the Court Assistant.
- b. M/s. Julu Advocate for the Petitioner.
- c. Mr. Tajbhai Advocate for the Respondent
- d. Mr. Paul Buti Advocate for the 1<sup>st</sup> Interested Party.

