Abdalla & 6 others v Khansa Developers Limited & 3 others (Constitutional Petition 16 of 2022) [2024] KEELC 13226 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13226 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 16 OF 2022

LL NAIKUNI, J

NOVEMBER 18, 2024

IN THE MATTER OF: THE PROPOSED DEVELOPMENT OF 18 STOREY BUILDING ON PLOT NUMBER MOMBASA/BLOCK XXVI/595

AND

IN THE MATTER OF: VIOLATION OF ARTICLES 10,40,42,47 AND 69 OF THE CONSTITUTION OF KENYA

BETWEEN

MOHAMED AHMED ABDALLA .... 1ST PETITIONER

SALIM SAID .... 2ND PETITIONER

AMIN S SALIM .... 3RD PETITIONER

ADBULLAZIZ ABBAS .... 4TH PETITIONER

RISHAD AS .... 5TH PETITIONER

BHARAT DEVIDAS VAITHA .... 6TH PETITIONER

KETAN DOSHI .... 7TH PETITIONER

AND

KHANSA DEVELOPERS LIMITED .... 1ST RESPONDENT

RAMESH CHANDRA HARIA .... 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA .... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination of the Notice of Motion application dated 31st May, 2024 filed by Mohamed Ahmed Abdalla, Salim Said, Amin S. Salim, Abdullaziz Abbas, Rishad A.S., Bharat Devidas Vaitha and Ketan Doshi, the Petitioners/Applicants herein under the dint of the provision of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules 2010.

2. Upon service of the Notice of Motion application, the Respondents responded through a Replying Affidavit sworn on 11th June, 2024. Pursuant to leave granted by the Honourable Court on 26th September, 2024, the Petitioners filed a supplementary affidavit sworn 7th October, 2024 and in response to the supplementary affidavit filed a supplementary Replying Affidavit sworn 9th October, 2024.

3. From the very onset, I wish to state that this proceedings are almost a replica of the famous British author and Politician Jeffrey Archer in his famous Master - Piece "A Twist in the Tail" being a 1988 collection of 12 short stories from real life situations with a twist in the end for each story. I say so in that it all commenced from a comprehensive Judgement delivered by this Court on 22nd February, 2023 in favour of the Petitioner/Applicant. Being dissatisfied, instead of preferring an appeal, the 1st Respondent moves Court for a review of its decision. The application is spiritedly opposed but on 30th April, 2024 the Honourable Court agrees with the Applicant. It was that decision that the Petitioner/Applicant rather than filing an - Appeal decides to approach Court through the instant application dated 31st May, 2024 seeking for orders of review of the Courts decision on both the Ruling and Judgement. I cannot stop imagining what the next move will be as it certainly its unlikely that it will end here despite of the legal Maxim – "Litigation must come to a conclusion". However, all said and done, I discern and rightfully admit that all the parties are within their legal rights.

II. The Petitioners/Applicants' case

4. The Petitioners/Applicants sought for the following orders: -

    a. Spent.

    b. Spent.

    c. That this Honourable Court be pleased to review its ruling delivered on 30th April, 2024 by inter alia;

        a. review the order allowing the 1st Respondent to build 16 floors;

        b. review the order allowing each party bear their own costs; and

        c. review the ruling and direct the deputy registrar to convene and supervise the public participation as ordered by the Court on 30th April, 2024

        d. That costs of the Application be provided for.

5. The Application was supported on the grounds, testimonial facts and the averments made out under the 27th paragraphed affidavit in support sworn by Mohamed Ahmed Abdalla, the 1st Petitioner/ Applicant herein sworn on 31st May, 2024 where he averred that:

   a. On 22nd February, 2023, this Honourable Court delivered a Judgment allowing the Petition dated 5th May 2022 (hereinafter referred to as "The Judgment"). Annexed in the affidavit was the Judgment and marked as Exhibit - 2.

   b. The Judgment decreed among other things:-

      i. The proposed development of 18 floor storey building on Plot Number Mombasa/ Block XXVI/ 595 is illegal for failure to comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution*; and

      ii. Permanent injunction restraining the 1st Respondent from proceeding with the proposed development of 18 floor storey building on the Suit Property until a proper public participation is carried and view of the members of the public are taken

      c. Aggrieved by the Judgment, on 26th July, 2023 the 1st Respondent filed a Notice of Motion under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules, 2010 seeking review or set aside of the Judgment (hereinafter referred to as "the Review Application"). Annexed in the affidavit and mark it Exhibit - 3 was a copy of the Review Application for the kind perusal and consideration of this Honourable Court.

      d. The Review of the Application was premised on two (2) principle grounds that;

         i. There was some new material evidence which were not within the knowledge of the 1st Respondent at the time of trial; and

         ii. There was an error apparent on the face of the record

      e. On 30th April, 2024, the Learned Judge delivered a ruling allowing the Review Application setting aside the Judgment with conditions inter alia that the 1st Respondent builds 16 and not 18 floors, and further ordered that each party to bear their own costs. Annexed in the affidavit and mark it Exhibit-4 copy of the Ruling for the kind perusal and consideration of this Honourable Court.

      f. The Ruling of the Court aforesaid also directed that there be a fresh Environmental Impact Assessment Report and there shall be a new development plan prepared by the County Government of Mombasa to ensure the fulfilment of:-

         a. Prevention of dust and noise disturbance;

         b. There will be no increase of vehicular traffic;

         c. There will be sufficient water and electricity supply;

         d. There will be sufficient sewer system; and

         e. Privacy of the Petitioners is protected.

      g. The Petitioners have moved this Court to review its ruling as outlined herein-below;

         a. Error Apparent on the Face of the Record

h. Parties were bound by their pleadings and a party could not be award an order they never sought or prayed for.

i. The Review Application and their response, there was no request to review the size of the building from 18 to 16 floors either by the Petitioners or Respondents.

j. Consequently, an order allowing construction of 16 floors without a specific prayer to that effect is an error apparent on the face of the record.

k. In addition to the foregoing, allowing development of 16 floors at the same time directing a fresh physical planning, fresh environmental impact assessment and fresh building approvals is contradictory and therefore, a direct interference with the discretion of other agencies.

l. In furtherance to the above, the order allowing 16 floors contradicted the conditions given in the Ruling for a fresh physical planning especially on privacy and vehicular traffic.

m. In conclusion under this head, it is settled principle of the law that costs follow event. Therefore, the finding of the Learned Judge that each party to bear their own costs is an error on the face of the record.

n. As indicated above, the Learned Judge in his ruling directed parties to bear their own costs.

o. Recently, the National Evironment Tribunal had delivered a ruling between the parties and directed the Petitioners to pay the 1st Respondent costs.Annexed in the affidavit and mark it as Exhibit - 5 copy of the ruling of the Tribunal for the kind perusal and consideration of this Honourable Court.

p. The decision by the Tribunal to condemn the Petitioners to pay costs is sufficient for this Court to review its orders on costs.

q. On 28th May 2024, the 1st Respondent mobilized persons who are not residents of SM Rashid and Kizingo areas in what they termed as stakeholder engagement and public participation.

r. The actions of the 1st Respondent aforesaid were wrongful and in any case, informed the decision of the Learned Judge directing a fresh public participation.

s. In view of the foregoing, there was sufficient reasons for the Court to review its decision to allow a court-supervised public participation to ensure strict compliance with the provision of Articles 10 and 42 of *the Constitution* of Kenya, 2010.

t. There was a very strong public interest in ensuring that the environment was protected.

u. It was therefore clear that the public interest factors also weigh decidedly in favour of allowing the prayers sought.

v. It was the interest of justice that the prayers sought in this Application be allowed as prayed.

w. Further legal submissions in support of the Application would be advanced at the hearing of the Application.

III. The response by the Respondents

6. The Respondents responded and opposed the Application through an 18 paragraphed Replying Affidavit sworn by Sammy Kamuio Mukuri, the 1st Respondent on 11th June, 2024 who averred that: -

    a. A party cannot pursue both appeal and review for the same cause simultaneously.

    b. The history of this matter and the number of multi-storey buildings which had been put up in the locality, the Petitioners appeared consumed with personal vendetta and are engaged in an economic sabotage and not a pursuit of civil rights. Annexed in this affidavit and marked as "SKM -3" were a set of photographs of high rise buildings next to the subject parcel number Mombasa/Block XXVI/595.

    c. Indeed this review application was unmeritorious, a novice and amounted to an abuse of the court process as it does not meet the parameters of a review, namely; an error apparent on the face of the record, a new and important matter of evidence or any other sufficient reason.

    d. The Petitioner's main prayers were:-

        i. Review the order allowing 1st respondent to build 16th floors.

        ii. Review the order allowing each party to bear their own costs.

        iii. Review the ruling and direct the Deputy Registrar to convene and supervise the public participation as directed by the court on 30th April, 2024.

        iv. Costs of this application.

    e. Although the Petitioners purport that the current zonal by-laws disallow construction of a multi-storey buildings in the area, they had not annexed the said by-laws to prove this assertion and thus warrant a review.

    f. Indeed the subject area is now open to construction of high rise buildings. Annexed in the affidavit and marked as "SKM - 4 (a) & (b)" were copies of a policy document prepared by the County Government of Mombasa and passed by the County Assembly of Mombasa and an affidavit sworn by the County Director of Physical Planning as proof thereof.

    g. The Court's Judgment of 23rd February,2023 did not permanently stop construction of the high-rise building by the 1st Respondent but required the 1st Respondent to first and foremost ensure that a proper public participation is carried out and views of the members of public taken. This was captured at paragraph 5(b) of the Petitioners/Applicants supporting affidavit filed herein.

    h. An award of costs is at the discretion of this court and in any case the successful party in the review application was the 1st Respondent and therefore the petitioners' complaint is unfounded.

    i. In this court's ruling of 30th April, 2024, the court ordered for a fresh Environment Impact Assessment Report in accordance with the provisions of Section 58 (1) of EMCA within thirty (30) days. The report was duly prepared and submitted to the National Environment Management Authority (NEMA) on the 29th May, 2024. Annexed in the affidavit and marked as"SKM - 5 (a) (b) & (c) were copies of a duly stamped copy of the NEMA Report, an invoice and a payment receipt thereof.

j. A participation was carried out on the 28th May, 2024and some of the petitioners and their advocate were present after having been duly notified invitation through writing. Annexed in the affidavit and marked as "SKM - 6 (a) and (b)" were copies of the letters to the petitioners through their advocates notifying of the public meeting and the minutes of the meeting. He also had a video of the public participation meeting.

k. This court did not order that the repeat public participation exercise be supervised by the deputy registrar. In any case, it was supervised by the Deputy County Commissioner, Mombasa County as shown in the minutes.

l. The Petitioners/Applicants application is premature because the other processes ordered by this court are on course and the 1st Respondent is yet to move to the ground to enable the petitioners observe if the safety measures enumerated by this court are adhered to or not.

m. The Petitioners ought to have appealed against the award of costs by the National Environment Tribunal (NET) but not to drag that issue before this court since it is not seized of it.

n. He urged the court not to entertain the application for review and should dismiss it with costs.

V. The Supplementary Affidavit by the Petitioners'/Applicants.

7. Pursuant to leave granted by the Honourable Court on 26th September, 2024, the Petitioners/ Applicants filed a 22 paragraphed supplementary affidavit sworn by Mohamed Ahmed Abdalla, the Petitioner/Applicant on 7th October, 2024 where he averred: -

i. He was well seized of the matters deposed to herein and being duly authorized by the 2nd to 7th Applicants, he was competent to swear this affidavit.

ii. For the avoidance of doubt, he emphasized at the outset that he stood by all of the grounds in his Supporting Affidavit. What was set out below was intended to supplement the contents of his Supporting Affidavit. In response to the depositions contained in Paragraphs numbers 6, 8, 9, 10, 11 and 19 of the Affidavit; where he responded as follows, respectively;

iii. The order reducing the number of floors from 18 to 16 was an error apparent on the face of the record, as it was manifestly clear that no such order was ever sought in the Application dated 26th July, 2023, the Response to the Petition, or the Cross-Petition, both dated 24th August, 2022.

iv. The 1st Respondent was introducing new issues and materials beyond the scope of their Application dated 31st May, 2024. This included discussions on zonal laws, the construction of high-rise buildings in the area, and even producing a policy document prepared by the County Government of Mombasa and passed by the County Assembly of Mombasa. To clarify, their Application concerned reviewing the order for the construction of 16 floors, an order that was never sought, and the issue that each party should bear their own costs.

v. The proceedings leading to this application arose from a Petition dated 5th May, 2022.The Petition was opposed by a Preliminary Objection dated 24th May, 2022, which sought to dismiss both the Notice of Motion Application and the Petition in limine, on grounds including the Honourable Court's lack of jurisdiction to hear and determine the matter, as the Petition allegedly contravened sections 72(3) and (4) of the *Physical and Land Use Planning Act*, 2019 and the provision of Section 129 (1) of the Environment Management and Co-

ordination Act. He annexed a copy of the Preliminary Objection and marked it as“MAA - 2" for the kind perusal and consideration of this Honourable Court.

vi. On 26th July, 2022, Honourable Court declined to dismiss the Petition, holding that it had the requisite jurisdiction to hear and determine both the Notice of Motion Application and the Petition dated 5th May, 2022.The Court further directed that all matters relating to the issuance of a fresh Environmental Impact Assessment, Environmental Audit, and the corresponding report raised in the pleadings be referred to the National Environment Tribunal for urgent consideration. For expediency, the Court directed that the Notice of Motion Application and the Petition be heard and concluded within 90 days from the date of the ruling. He annexed in the affidavit a copy of the Order dated 26th July, 2022 and marked it as“MAA - 3” for the kind perusal and consideration of this Honourable Court.

vii. Acting on the instructions of the Court, the Petitioners filed an appeal on the aforementioned subject, registered as Tribunal Appeal No. 39 of 2022, before the National Environment Tribunal.

viii. Before the Appeal was determined by the tribunal, this Honourable Court, on 23rd March, 2023, delivered a judgment in which it declared the permits issued to the 1st Respondent to be null and void, awarding costs to the Petitioners. He annexed in the affidavit a copy of the judgment dated 22nd February,2023 and marked it as “MAA - 4” for the kind perusal and consideration of this Honourable Court.

ix. Subsequently, on 1st September, 2023, the Tribunal delivered a ruling striking out the notice of appeal, with costs awarded to the Respondents. The ruling was based on the grounds that the matter had already been adjudicated before this Court and all permits, including the Environmental Impact Assessment (EIA), had been revoked. He annexed in the affidavit a copy of the ruling dated 1st September, 2023 and marked it as “MAA - 5” for the kind perusal and consideration of this Honourable Court.

x. Pursuant to the ruling, the 1st Respondent filed a bill of costs, and on 8th April, 2024, while the Application leading to these proceedings was pending ruling scheduled for 30th April, 2024, the 1st Respondent was awarded costs amounting to a sum of Kenya Shillings Eight Thirty Thousand Seventy Three Hundred (Kshs 830,073.00/=). He annexed in the affidavit a copy of the Taxation ruling dated 8th April, 2024 and marked it as “MAA - 6” for the kind perusal and consideration of the Honourable Court.

xi. From the background above, it was important to note the following:

  a. Tribunal Appeal No. 39 of 2022 was filed pursuant to the orders of the Court on 26th July 2022;

  b. Tribunal Appeal No. 39 of 2022 was struck out with costs as a result of the Judgment delivered on 23rd March 2023, which allowed the Petition with costs; and

  c. In awarding costs in Tribunal Appeal No. 39 of 2022, the Tribunal expressly noted that, since the Petitioners were awarded costs in the Judgment before this Court, it would be unfair not to award the 1st Respondent costs before the Tribunal.

xii. Therefore, given that the Petitioners/Applicants were ordered to pay costs by the Tribunal as a result of this Court’s judgment, it was unjust for this Honourable Court to set aside the award of costs it had made to the Petitioners/Applicants.

xiii. Additionally, in the ruling dated 30th April, 2024, and specifically in paragraph *para_80 80*, this Court acknowledged that the 1st Respondent was not successful on most grounds seeking a review of the Judgment, except on one ground related to sufficient cause, which was on a very narrow basis.

xiv. The Court then proceeded to order that the conditions set out in the Judgment be fulfilled as prerequisites for any further developments. These conditions included orders related to privacy, sanitation, a fresh application for permits, and mandatory public participation. He annexed in the affidavit a copy of the ruling dated 30th April, 2024 and marked it as "MAA - 7" for the kind perusal and consideration of this Honourable Court.

xv. Considering that the court sustained the prayers in the Petition, it was sufficient reasons why the Respondents should be condemned to pay costs.

xvi. Furthermore, although costs were awarded against the Respondents in the Judgment, only the 1st Respondent sought a review of the judgment. Thus, reviewing the judgment, including the costs against the other Respondents who did not participate in the review was unjust.

xvii. Therefore, even if the costs awarded against the 1st Respondent were set aside, the Court, having determined that the 3rd and 4th Respondents violated *the Constitution*, should have still condemned them to pay costs.

xviii. In response to Paragraphs 13 and 14 of the Affidavit, it could not be claimed that there was adequate public participation for the following reasons:

a. They were notified of the intended meeting scheduled for 28th May, 2024 only on 22nd May, 2024, giving the, just 5 days' notice, which was insufficient to fit the meeting into their busy schedules as professionals engaged in office work and personal businesses; he annexed in the affidavit a copy of the notification of the meeting and marked it as "MAA - 8" for the kind perusal and consideration of this Honourable Court.

b. None of them attended the public participation and stakeholder engagement meeting, despite being the individuals most affected by the proposed development;

c. not a single neighbour of the subject property attended the meeting;

d. the attendees were not residents of Kizingo; rather, individuals from other areas were paid to attend the meeting; and

e. the meeting was abruptly terminated when our counsel raised objections to these irregularities, preventing attendees from presenting their views

xix. For the reasons set out in his Affidavit in support of the Application as supplemented by this Affidavit, he respectfully submitted that the orders sought in the motion were warranted.

xx. The legal grounds in support of the award of the prayers sought in the motion will be addressed fully through written submissions.

IV. The Supplementary Replying Affidavit by the 1st Respondent

7. Pursuant to an Order of the Court on 8th October, 2024 responded to the Supplementary affidavit with a 12th paragraphed supplementary Replying Affidavit sworn by Sammy Kamuio Mukuri, on 9th October, 2024 who averred that:

a. He reiterated the contents of his Replying Affidavit dated the 11th June, 2024 and said the following: -

b. The court's order reducing the number of floors from 18 to 16 could not possibly be an error apparent on record but a finding of the court based on the materials presented to the court and the court's independent conclusion on that particular issue.

c. The 1st Respondent was the successful party in the impugned ruling of this court and thus the 1st Respondent ought to be the party complaining about costs not awarded but not the petitioners

d. He reiterated that the issue of costs in the Tribunal Appeal No. 39 of 2022 was conclusively determined by a competent tribunal and the Petitioners/Applicants had rightfully exercised their right of appeal by filing a reference in the High Court. Annexed in the affidavit and marked as "SKM - 1" was a copy of the application for reference.

e. The Petitioners filed their Appeal before the National Environment Tribunal (NET) so late in the day and should therefore not blame this court for their own mistakes. The court had granted the Petitioners/Applicants fourteen (14) days within which to file their Appeal before the NET, that was from the 26th July, 2022, but filed on 21st October 2022, about three (3) months later. Annexed in the affidavit and marked as "SKM - 2" and "SKM - 3" were orders of the court and the Petitioners/Applicants Notice of Appeal to the NET.

f. With regard to paragraphs numbers 15, 16 and 17 of the Petitioners/Applicants' Supplementary Supporting Affidavit, it was instructive to note that it was the 1st Respondent and not the Petitioners/Applicants, who was the successful party and therefore ought to be the one complaining about costs not following the event.

g. The complaint at Paragraph 19 of the Petitioner's Supplementary Affidavit ought to have been ventilated in an appeal but not in a review application as it challenges a determination of this Honourable Court.

h. The matters captured in Paragraph 20(a)-(e) of the Petitioners/Applicants Supplementary Affidavit were complaints of events after this court had rendered it's ruling on the 30th April, 2024 which the petitioners seek to review and thus one wonders if such matters not captured in the ruling itself can be subject of review.

i. In view of the foregoing, he urged this court to dismiss the petitioner's application for review with costs.

VI. Submissions

9. On 9th July, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 31st May, 2024 be disposed of by way of written submissions. Pursuant to that all the parties fully complied accordingly.

10. Indeed, on 23rd October, 2024, upon their request, the Honourable Court granted Mr. Bwire and Mr. Makau Advocates for both the Petitioners/Applicants and the 1st Respondent an opportunity to orally highlight the submissions an exercise they duly executed with much zeal, resilience and dedication befitting high caliber of professionalism. The Honourable Court will forever express its gratitude for that profound gesture. All the issues raised were well captured and have been re – produced herein for ease of reference and in making this determination whatsoever.

11. Subsequently, the Honourable Court reserved a ruling date for 4th November, 2024 accordingly. However, due to unavoidable circumstances it was deferred to 18th November, 2024.

A. The Written Submissions by the Petitioners/Applicants

12. The Petitioners/Applicants through the Law firm of Messrs. John Bwire & Associates Advocates filed their written submissions dated 26th July, 2024. Mr. Bwire Advocate commenced by stating that what was before the Court was their application dated 31st May, 2024 seeking the reliefs as already stated out herein mainly for the review of the ruling of this Court delivered on 30th April, 2024. He stated that he would be relying on the filed pleadings. The Learned Counsel stated that the Applicants filed the Petition dated 5th May, 2022 against the Respondents. On 23rd February 2023, this Honourable Court delivered a detailed 84 Pages Judgment allowing the Petition and dismissing the Respondent's Cross - Petition with costs to the Petitioners. On 28th August, 2023, the 1st Respondent filed a Notice of Motion application seeking orders inter alia the setting aside of the judgment on grounds that there was new evidence and/or an error apparent on the face of the record and/or for other sufficient reasons.

13. The Learned Counsel averred that the Honourable Court delivered its ruling on 30th April 2024 setting aside its Judgment and allowing the Respondents to carry on with the construction on conditions including that the construction should be up to 16 floors instead of what they had applied for being 18 floors. The ruling prompted the Applicants herein to file an Application dated 31st May 2024 seeking inter alia that the Honourable Court be pleased to review its ruling on particularly the order allowing the 1st Respondent to build 16 floors, the order allowing each party to bear their own costs and direct the deputy registrar to convene and supervise the public participation as ordered. These were therefore the Applicant's written submissions in support of the Application dated 31st May 2024.

14. On the issues for determination, the Learned Counsel relied on the following: -

    a. Whether there is an error apparent on the face of the record; and

    b. Whether there exists sufficient reason for this Honourable Court to review its ruling delivered on 30th April 2024 as prayed for in the Applicant's Application dated 31st May, 2024

15. On analysis and under the issue of whether there was an error apparent on the face of the record. The Learned Counsel urged the Honourable Court to ask and answer only one question: whether the order allowing construction of up to 16 floors was an error apparent on the face of the record. It was important that the Court consider perusing the following documents:-

    a. The Petition dated 5th May 2022;

    b. Response to Petition and Cross-Petition;

    c. The Notice of Motion dated 26th July 2023; and

    d. The 1st Respondent's submissions dated 21st September, 2023

16. None of these pleadings were there a mention of 16 but 18 floors. Thus, the Learned Counsel submitted that before substantively answering the aforesaid question, it was important for them to revisit what is an "error apparent on the face of the record." An error apparent on the face of the record was extensively defined in the Court's Ruling of 30th April 2024 on this matter at paragraph *para_64 64* where the Honourable Court while referring to the decision of the Supreme Court of India in the

case of “Aribam Tuleshwar Sharma - Versus - Aribam Pishak Sharmal.(SCC p.390.para 3)1(1979)4 SCC 389:AIR 1979 SC 1047” in held that

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

17. The Learned Counsel submitted that having defined what is an error apparent on the face of the record, the question to ask and answer is whether the decision allowing construction of 16 floors introduced by Court “suo moto” which was an error apparent on the face of the record. It was settled law that relief not found on pleadings should not be granted. Put it differently, the general rule is that courts should determine a case on the issues that flow from the pleadings and therefore a court may only pronounce Judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination and therefore it is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.

18. The foregoing was observed in the cases of “Galaxy Paints Company Limited – Versus - Falcon Guards Limited [2000] 2 EA 385” and “Standard Chartered Bank Kenya Limited – Versus - Intercom Services Limited & 4 Others Civil Appeal no 37 of 2003 [2004] 2 KLR 183”. They placed further reliance on the case of “China Wu Yi Limited & another -Versus - Irene Leah Musau (2022) eKLR” where the court in considering the relevance of pleadings stated inter alia that: -

> “ The point of pleadings was to secure that both parties were aware of the points in issue between them so that they can each prepare their evidence in support of their case and that a relief not founded on the pleadings will not be given.”

19. In the case of “Geoffrey Kamau Ndishus & Ano – Versus – Peter Muchiri Murungi eKLR”, it was held that:-

> “ a court has no power to make an order. unless by consent, which is outside the pleadings.”

20. In the case of “Aquarius Limited & 9 others – Versus - Chief Magistrate's Court-Nairobi & 2 others [2006] eKLR” in the absence of a specific prayer in pleadings or applications, courts cannot invoke provisions of Section 3A of the *Civil Procedure Act*, Cap. 21 on inherent jurisdiction to issue an order that was not sought. They had carefully reviewed the Petition dated 5th May 2022, the Response to the Petition and Cross - Petition dated 24th August 2022, the Notice of Motion for Review dated 26th July 2023 and the submissions by both parties and none of them seeks or even mentioned 16 floors. In fact, in the ruling of 30th April, 2024, there was no mention in the entire ruling until at paragraph *para_80 80* in its determination where the Court ruled as follows:-

> “Clearly, the 1st Respondent has not been successful on the other grounds seeking for the review of the Judgement by this Court apart from the one on sufficient cause on a very thin membrane. On the ground of sufficient cause. I hold that the 1st Respondent/Applicant has demonstrated any sufficient reason to warrant a review of the Judgment of this Court. Suffice it to say.in all fairness, and taking into consideration that the development to be undertaken by the 1st Respondent/Applicant prospers smoothly, its instructive that the following pre -conditions have to be fulfilled. These were:- The project to be undertaken to be reduced to 16 floor from 18 floor story building.”

21. The finding aforesaid, there was no prayer that the Court review its decision revoking the entire development and substitute it to 16 floors, and there was also no issue framed by the parties or in the ruling reducing the floors from 18 floors to 16 floors. Indeed the Court in its Judgement described the area as being of high density and the County Government had failed to provide adequate water supply. They submitted and hereby urged the Honourable Court to review its order allowing the Respondents to construct 16 floors since that particular order was never prayed for. In fact, there was not a single prayer requiring the court to intervene on the number of floors.

22. On whether there exists sufficient reason for this Honourable Court to review its ruling delivered on 30th April 2024 as prayed for in the Applicant's Application dated 31st May, 2024, the Learned Counsel submitted that the question to ask and answer is whether there are sufficient reasons to allow this Court to allow the following prayers sought in the Petitioners Application for Review:

    a. Whether there are sufficient reasons for the Court should review its orders allowing the 1st Respondent to construct up to 16 floors;

    b. Whether there are sufficient reasons for the Court should review its orders allowing each party bear their own costs; and

    c. Whether there are sufficient reasons for the Deputy Registrar to supervise the public participation

23. The Learned Counsel responded to the aforesaid questions sequentially as hereunder; on whether there are sufficient reasons for the Court should review its orders allowing the 1st Respondent to construct up to 16 floors, the Learned Counsel submitted that under sub-heading, the main substratum was the issue of reviewing the order allowing the 1st Respondent to contrast up to 16 floors. But as a preliminary issue which had been raised by the 1st Respondent in their Replying Affidavit dated 11th June,2024 was whether this Court had jurisdiction to hear the current Application on ground that the Applicants had already preferred an appeal before the Court of Appeal.

24. Their submission was that lodging a Notice of Appeal was a mere expression of an interest to appeal and does not amount to filing of an appeal. He placed reliance on this Honourable Court's ruling in "Mohamed Ahmed Abdalla & Others – Versus - Kha*nsa Developers Limited & Others Constitutional Petition Number 16 of 2022*" where the Honourable Court observed at paragraphs *para_38 38* and *para_39 39* that an appeal is only lodged pursuant to provisions of Rule 82 (1) of the *Appellate Jurisdiction Act* by filing the requisite documents within 60 days of lodging the Notice of Appeal.

25. According to the Learned Counsel theirs was therefore a mere intention to lodge an appeal which they never proceeded to do. On to the substratum of the issue, they had demonstrated above that the order reducing the construction from 18 floors to 16 floors was an error apparent on the face of the record. The foregoing notwithstanding, they submitted that there were sufficient reasons why the order for 16 floors should be reviewed. First, the prayer was not sought in the Cross-Petition, the Review Application and the submissions by the parties. In addition to the foregoing, no issue was framed by the parties or the court in the pleadings, submissions or even the ruling. The 16 floors just appeared on the pre-conditions given at paragraph 80 of the Ruing.

26. It was their submission that the court lacked legal mandate to formulate a relief where the prayers sought were ambiguous. We place reliance on the cases of "China *Wu Yi Limited & Another – Versus – Irene Leah Musau – Civil Appeal No. 67 2018* (Machakos High Court) (2022) eKLR"; "Kenya

Airports Authority – Versus - Mitu Bell Welfare Society & 2 others [2016] eKLR" while citing "Malawi Railways Limited -S-Nyasulu [1998] MWSC 3":

> As the parties are adversaries is let to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved: for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice".

27. Secondly, the ruling of 30th April 2024, the Honourable Court made the following findings;

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

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

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

28. The aforesaid findings contradicted the findings for construction of 16 floors and they said so for the following reasons;

    a. The Court having found that the entire process for issuance of permits to be done afresh, it was erroneous for the Court to determine the number of floors. Such decision was a preserve of the agency;

    b. The Court having ruled that the area is a development-controlled area and it is a low-density area, the order of 16 floors defeats the purpose of the area being a development-controlled area;

    c. The Court having ruled that the area is a low-density area, the decision to allow 16 floors defeats the pre-condition to the 1st Respondent to ensure privacy of the Petitioners

29. From the foregoing, it was their submissions that there were sufficient reason to set aside the order of 16 floors because to allow it will be to revoke all other pre-conditions given by the Honourable Court as outlined above.

30. On whether there were sufficient reasons for the Court should review its orders allowing each party bear their own costs, the Learned Counsel submitted that the proceedings herein emanated by way of Petition dated 5th May, 2022.The Petition was opposed by a preliminary objection dated 24th May,

2022 seeking to dismiss the Petition in limine. On 26th July,2022, the Honourable Court declined to dismiss the Petition but directed all matters pertaining to the issuance of the Environmental Impact Assessment raised in the pleadings be referred to the National Environment Tribunal.

31. Acting on the instructions of the Court aforesaid, the Petitioners filed Appeal No.39 of 2022. Before the Appeal was determined by the Tribunal, this Court on 23rd March, 2023, delivered a judgment declaring the permits issued to the 1st Respondent were a nullity. On 1st September, 2023, the Tribunal delivered a ruling striking out the notice of appeal with costs on grounds that the matter had been dealt with before the Honourable Court and all permits had been revoked including the EIA.

32. The 1st Respondent filed a bill of costs and on 8th April 2024, while this matter was pending ruling scheduled on 30th April, 2024, the 1st Respondent was awarded costs amounting to a sum of Kenya Shillings Eight Thirty Thousand and Seventy Three Hundred (Kshs 830,073.00/=). From the background above, it was important to note the following;

    a. The Appeal No. 39 of 2022 was filed pursuant to the orders of the Court on 26th July 2022;

    b. The Appeal No. 39 of 2022 was strike out with costs as a result of the judgment delivered 23rd March 2023 which allowed the Petition with costs; and

    c. In awarding costs in Appeal No. 39 of 2022, the Tribunal was express that since the Petitioner were awarded costs in the judgment before this court, it will be unfair not to award the 1st Respondent costs before the Tribunal.

33. The Learned Counsel submitted that considering that the Petitioners were ordered to pay costs by the Tribunal because of the orders of this Court, it was unjust to set aside the order of costs. Another reason why the Court should review its orders on costs is that this court in the entire ruling and specifically in paragraph *para_80 80* therein, acknowledged that clearly the 1st Respondent was not successful. The Court went ahead and ordered the prayers it awarded in the judgment as a pre-condition for any further developments including the order on privacy, sanitation, fresh application of permits and a mandatory public participation.

34. Considering that the court sustained the prayers in the Petition, it was sufficient reasons why the Respondents should be condemned to pay costs. Third, although costs in the judgment were awarded against both Respondents, it was only the 1st Respondent who sought review against the judgment. To review the judgment including costs against Respondents who did not participate in the review was unjust. Therefore, even if costs were set aside as against the 1st Respondent, the Court having ruled that the 3rd and 4th Respondents violated *the constitution*, it should have awarded costs against them. To this regard, they submitted that the Respondent's application dated 26th July, 2023 was not sufficient to warrant setting aside the courts orders as to costs much less the order pertaining to the Respondent's Cross-Petition.

35. They urged this Honourable court to order that costs abide by the Petition/judgment issued and if the court cannot find so, that at the very least the Respondent herein pay costs of their Cross-petition.

36. On whether there were sufficient reasons for the deputy Registrar to supervise the public participation, the Learned Counsel submitted that it was held in the case of "Law Society of Kenya - Versus - Attorney General & 2 Others [2019] eKLR" that the burden to prove that the necessary public participation was conducted lied upon the respondents. The parameters governing public participation were restated by the court in the recent decision of "Mugo & 14 others – Versus - Matiang'i & another: Independent

Electoral and Boundary Commission of Kenya & 19 others (Interested Party) (Constitutional Petition 4 of 2019)[2022]KEHC 158(KLR)(12 January 2022) (Judgment)" where it was held:

> To attain the principle of public participation in a decision-making process, the following parameters are required:
>
> a. there had to be evidence of inclusivity that was to say that all stakeholders or those affected…had to be given an opportunity to express or ventilate their views well aware of what was at stake:
>
> b. the affected people had to be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information had to be disseminated through public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reached the targeted audience:
>
> c. the government agency or a public officer in charge of the programme of public participation had to of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement had to be meaningful and done in good faith rather than a mere formality:
>
> d. [,]
>
> e. public participation did not mean that everyone had to give their views on the issue at hand as to attain such a standard at times could be impractical. A public participation exercise had to however show intentional inclusivity and diversity. A programme of public participation could not disregard bona fide major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy were expected to have a bigger say in that policy, legislation or action and their views had to be sought, taken into account. The view of the major stakeholders had to be captured through minutes or any other proof that showed that their views were captured and had a bearing in the final decision: and
>
> f. Public participation was not a public relations exercise. It had to be meaningful and done in good faith."

37. The Learned Counsel submitted that the public participation allegedly conducted by the Respondents on 28th June 2024 in satisfaction of this Honourable Court's conditions, as observed by counsel for the Applicants present during the meeting fell acutely short of the foregoing requirements for public participation for the following reasons: -

    i. notification of the meeting to the Applicants herein, who are the ones likely to be affected most by the development was done very close to the day of the intended meeting, thus late in the day for the Applicants to schedule the same amidst their busy schedules;

    ii. none of the Applicants attended the said public participation and stakeholder engagement meeting;

    iii. not a single neighbour to the subject property attended the said meeting; and

    iv. those who attended were not residents of Kizingo, instead, people from elsewhere were paid to attend the meeting. This is partly evidenced by the fact that after the meeting was

abruptly stopped on the intervention of the Applicant's counsel, some youthful attendees, while boarding a tuk-tuk outside the meeting venue told counsel, 'wewe umetuharibia bana' loosely translated to mean 'you have spoilt for us.' Because the meeting had been abruptly brought to an end, they were not going to be paid.

38. The Learned Counsel submitted that consultations or stakeholder engagement ought to give more latitude to key stakeholders in a given field to take part in the process. This was because such key stakeholders are usually the most affected by an action. Therefore, the exercise should have been conducted in the presence of the Applicants and other residents of Kizingo and not outsiders. Due to the foregoing, it was their submission that the same was done in bad faith. Additionally, the Honourable Court, while there may bean attendance list, the same cannot in itself be proof of effective public participation.

39. They placed reliance in the case of "Mugo & 14 others – Versus - Matiang'i & another:Independent Electoral and Boundary Commission of Kenva & 19 others (Supra)" where it was observed that a list of attendees of a meeting by itself would not meet the required threshold for public participation. They buttressed their position with the case of "Ali & 2 others – Versus - Stay City Apartments Limited & 3 others(Constitutional Petition E017 of 2023)[20241 KEELC 3881(KLR)(2 May 2024)(Ruling)" where the court observed that:-

> " On the basis of the foregoing, the Court is persuaded that there is prima facie evidence that the Petitioner's constitutional rights to clean and healthy environment are likely to be infringed. The Honourable Court has carefully considered the record. There is no record that the development commenced after sufficient public participation. Public participation is an innovation, knowledge sharing and intensive consultation with the public on the project. It is has to be real and not illusionary nor a mere formality nor cosmetic exercise to scratched from the surface and the periphery to fulfil an abstract prescribed form. From this definition, the Court takes cognizance that public participation never took place and hence favors the issuance of the orders sought. There was a larger public interest in ensuring that the effective public participation, approvals are obtained before commencement of the projects, and the rights to the large to health and clean environment are guaranteed."

40. It was therefore their submission that the court reconvenes the public participation and orders that the same be supervised by the Deputy Registrar to ensure it was effective and meaningful.

41. In conclusion, they humbly submitted that the instant Application was meritorious and ought to be allowed in the interest of fairness and justice.

B. The Written Submission by the 1st Respondent

42. The 1st Respondent through the Law firm of Messrs. J. M. Makau & Company Advocates filed their written submissions dated 20th August, 2024. Mr. Makau Advocate submitted that the seven Petitioners/Applicants had filed their Notice of Motion dated the 31st May, 2024 seeking the following orders, namely:

    i. Review the order allowing the 1st respondent to build 16 floors;

    ii. Review the order allowing each party to bear their own costs and

    iii. Review the ruling and direct the deputy registrar to convene and supervise the public participation as directed by the court on 30th April, 2024

43. The 1st Respondent reiterated and relied on the contents of its Replying Affidavit dated the 11th June, 2024 sworn by Sammy Kamuio Mukuri. The Learned Counsel stated that it was instructive to note that the Petitioners/Applicants had concentrated more on the Judgement delivered by this Court rather than supporting their application and the ruling of this Court delivered on 30th April, 2024. Further, he drew Courts' attention to the fact that the Petitioners/Applicants even after filing of the application for review, they had filed a Notice of Appeal dated the 14th May, 2024 to prefer an appeal before the Court of Appeal, which appeal route they have since abandoned. However, as it will emerge in their submissions, this review application was basically an appeal in disguise. To the Counsel, the application was an appeal in disguise. An application for review was grounded on the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya and Order 45 Rule I of the Civil Procedure Rules, 2010.

44. The Learned Counsel averred that it therefore followed that an application for review must strictly fall within the ambits of the two provisions and the third which was at the discretion of the court, though judicially guided. In the case of:- "Mohamed Shally (Suing as the Administrator of the Estate of the late Shali Sese) – Versus – Karei & 8 Others, ELCP No. 32 of 2020/2023", the court stated:

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

45. Further the court stated:-

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

46. The Learned Counsel proceeded to submit on the three issues which fall within the ambit of a review. On whether there was a discovery of new and important matter of evidence which after the exercise of due diligence, was not within the knowledge of the applicants or they could not produce at the time this court made the orders, the Learned Counsel submitted that the applicants have not placed any new material evidence whatsoever before you. There is not an iota of evidence to support this limb. The requirement for new material evidence which a party discovers later was emphasized in court of Appeal case of "Rose Kaiza – Versus - Angelo Mpanjuiza (2009) eKLR" where the court said;

> "... it is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

47. On the issue of whether on account of some mistake or error apparent on the face of the record, the Learned Counsel submitted that on this limb, the applicants have equally failed to pinpoint the mistakes(s) or error(s) on the face of the record. They could not do so because there was none in the

first place. They merely concentrated on what the Court stated at the conclusion of its Ruling vis – a vis the allowance of 16 and not 18 floors. Yet, the Ruling based its finding on all the relevant issues in depth. In the case of "National Bank of Kenya Limited – Versus – Ndingu Ndungu Njau (1997) eKLR", the Court of Appeal held that:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.
>
> In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that this decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other Judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decision on the same issue. <u>In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires on elaborate argument to expose.</u>" Emphasis

48. And in "Aribam Tuleshwar Sharma – Versus - Aribam Pishak Sharmal, (SCC.P 390 para 3) I (1979) 4 SCC 389: AIR 1979 SC.1047", the Supreme Court of India observed as follows:

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

49. Further in the case of "R – Versus – Carbinet Secretary for Interior and Co – Ordination of National Government Ex – Parte Abulahi Said Salad (2019) eKLR", Judicial Review Application No.350 of 2018, Mativo J, as he then was stated the following:

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
>
> The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

50. On the issue of where there is any other sufficient reason presented by the Applicant, the Learned Counsel submitted that the Applicants complained of the court's order changing the number of storeys from eighteen (18) floors to sixteen (16) floors, the order that each party bears its own costs and a rather strange fresh request that the Deputy Registrar of this court convened and supervised any public participation exercise. This request was strange because the Honourable Court never issued such orders or directives.

51. According to the Learned Counsel, a sufficient reason ought to be a reason sufficiently analogous or in tandem to the reasons stated in Order 45 of the Civil Procedure Rules. In the case of "Official Receiver and Liquidator – Versus - Freight Forwarders Kenya Ltd (2000) eKLR", the court of Appeal stated as follows as to what constituted sufficient reasons, that is:

> " These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record."

52. The Learned Counsel averred that looking at the three prayers by the applicants, it is apparent that the applicants are indirectly challenging the findings of this court. It was a finding of the court that have number if floors should be reduced from eighteen (18) to sixteen (16). It was also at the discretion of the court to award costs to the first respondent who was successful in the impugned review ruling, though the court in its wisdom decided that each party should bear its own costs. The issue of who ought to convene the public participation exercise was not addressed in the ruling. Needless to state, because of the timelines issued by this court, that exercise has been undertaken through the supervision of the Deputy County Commissioner, Mombasa County. All these were issues to be raised in an appeal and not in application for review.

53. It was on account of the aforegoing submitted that, however liberal this court attempts to be in order to serve justice, the applicants have not presented any sufficient reason to warrant the discretion of this court. It would appear, the Petitioners/Applicants were trying to prosecute an appeal in the guise of a review. In the case of "Abasi Balinda – Versus - Fredrick Kangwamu & Another (1963) I EA 557 (HCU)" it was held that:

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

54. In conclusion, the Learned Counsel submitted that, it may be worthwhile to outline the principles set out by Mativo J, as he then was in the case of "Republic – Versus - Cabinet Secretary for Interior & Co-Ordination of National Government, (Supra)", in matters of review applications, namely:

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

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

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

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

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

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

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

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

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

x. The power of a civil court to review its judgment/decision is traceable in Section 80 *Civil Procedure Act*. The grounds on which review can be sought are enumerated in Order 45 Rule 1

55. The Learned Counsel submitted that the Applicants had totally failed to confirm to these principles and theirs was an appeal in disguise. It was unfortunate that they already closed their door on the appeal. They had even, mischievously tried to import issues before the National Evironment Tribunal and lament about costs to which they had filed a reference before the high court. This should not be allowed by this court as it amounts to an abuse of the Court process. Owing to the frivolity of this application, the costs the 1st Respondent had incurred and continued to incur on account of the baseless actions of the Applicants and to bring this issue to an ultimate end, this application ought to be dismissed with costs. This will act as a deterrent noting that the Applicants were spared costs in the impugned ruling. He wondered how a loser in a case would be seeking for costs. He urged Court to dismiss the application with costs to the 1st Respondent.

C. The Skeletal submissions of the 1st Respondent

56. With the leave of Court, the 1st Respondent through the Law firm of Messrs. J. M. Makau & Company Advocates filed the skeletal written submissions dated 9th October, 2024 pursuant to an order of the court on 8th October, 2024. Mr. Makau Advocate submitted that the 1st Respondent filed its substantive submissions dated the 20th August, 2024. In their Supplementary Affidavit dated the 7th October, 2024, the petitioners have implored this court to review its order on the issue of costs and possibly be awarded costs in the impugned ruling.

57. Interestingly, the successful party in the impugned ruling was the 1st Respondent. They were the ones who ought to have been awarded costs. However, the court decreed that each party ought to bear its

costs. It was trite law that costs follow the event and costs are usually awarded to the successful party which was the 1st respondent and one wonders on what basis the Petitioners were demanding costs.

58. The provision of Section 27 of the *Civil Procedure Act*, Cap.21 granted the court discretion to award or not to award costs. It therefore follows that this discretion does not fall within the ambits of the three limbs for granting of orders of review as envisaged in Order 45 rule 1 of the Civil Procedure Rules, 2010. In any case the Honourable Court, the petitioners/applicants were not the successful party.

59. Further, the Learned Counsel submitted that petitioners had challenged the costs awarded at the National Environment Tribunal (NET), in the High Court by filing a reference and therefore they ought not ventilate that issue in this court but before the court seized of the matter. This court, after due consideration of the material placed before it reduced the number of floors from eighteen to sixteen floors. It cannot be possibly claimed that this was a mistake on the face of the record since the court has given reasons for doing so. This court has powers to act suo motto to meet the ends of justice.

60. The Learned Counsel observed that the history of this matter was sorrowful. He averred that from the scandalous applications filed by the Petitioners/Applicants, continued to cause the 1st Respondent to suffer immensely. They had already incurred such huge resources being colossal amount of finances, man hours and time due to the actions by the Petitioners/Applicants.

61. In conclusion, the Learned Counsel submitted that the Petitioners' application for review fell short of the principles set out in the law and precedents for granting review orders and ought to be dismissed with costs.

V. Analysis and Determination

62. The Honourable Court has considered the application by the Petitioners and Respondents, their comprehensive written and oral submissions, myriad of authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

63. For the Court to reach an informed, just, reasonable and equitable decision, it has condensed the subject matter into the following salient three (3) issues that fall for determination: -

a. Whether the Notice of Motion application date 21st June, 2024 by the Applicant has made out a case of the review of the order allowing the 1st Respondent to build 16 floors, the order allowing each party bear their own costs and review the ruling and direct the Deputy Registrar to convene and supervise the public participation as ordered by the Court on 30th April, 2024?

b. Whether the parties were entitled to the reliefs sought?

c. Who bears the Costs of the Notice of Motion application dated 31st May, 2024?

ISSUE No. a). Whether the Notice of Motion application date 21st June, 2024 by the Applicant has made out a case of the review of the order allowing the 1st Respondent to build 16 floors, the order allowing each party bear their own costs and review the ruling and direct the deputy registrar to convene and supervise the public participation as ordered by the Court on 30th April, 2024

64. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging orders of review of the order allowing the 1st Respondent to build 16 floors, the order allowing each party bear their own costs and review the ruling and direct the deputy registrar to convene and supervise the public participation as ordered by the Court on 30th April, 2024. The application by the Applicant was brought under the provisions of

Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules 2010. A clear reading of these provisions indicate that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

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

> " Any person who considers himself aggrieved—'
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

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

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay."

67. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few case law on this subject matter. In the case of: - "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

73. In the case of: - "Tokesi Mambili and others – Versus - Simion Litsanga" the Court held as follows: -

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

    ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

74. I still wish to cite the case of: - "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018" John M. Mativo Judge culled out the following principles from a number of authorities: -

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

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

    iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.iv.An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

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

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

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

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

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

ix. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

75. Being aggrieved by the Ruling of this Court, the Petitioners/Applicants on 31st May, 2024 moved this Court to have it make yet another review of its orders from a Ruling of 30th April, 2024 in favour of the Respondents. From records, being aggrieved by the Judgment, on 26th July, 2023 the 1st Respondent filed a Notice of Motion under provision Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010 seeking review or set aside of the Judgment. The Review of the Application was premised on two (2) principle grounds that;

i. There was some new material evidence which were not within the knowledge of the 1st Respondent at the time of trial; and

ii. There was an error apparent on the face of the record

76. On 30th April, 2024, the Learned Judge delivered a ruling allowing the review application setting aside the Judgment with conditions inter alia that the 1st Respondent builds 16 instead of 18 floors in order to fit within the stipulated pre - conditions in the Judgement and due to the place being a low density. The Court further ordered that each party to bear their own costs. Annexed in the affidavit and mark it as Exhibit - 4 copy of the Ruling for the kind perusal and consideration of this Honourable Court. Specifically, and for safety sake, the Ruling of the Court aforesaid clearly spelt out these conditions as herein below and also directed that there be a fresh Environmental Impact Assessment Report and there shall be a new development plan prepared by the County Government of Mombasa to ensure that:-

a. There would be prevention of dust and noise disturbance;

b. There would be no increase of vehicular traffic;

c. There would be sufficient water and electricity supply;

d. There would be sufficient sewer system; and

e. There would be privacy of the Petitioners is protected.

77. Despite of all these, being dissatisfied by this decision of the Court, the Petitioners/Applicants moved this Court to review its ruling as outlined herein. Primarily, they contended that parties were bound by their pleadings and a party could not be award an order they never sought or prayed for. On the umpteenth times, the Petitioners/Applicant over stressed the point that there was no request to review the size of the building from 18 to 16 floors neither by the Petitioners nor the Respondents. Consequently, an order allowing construction of 16 floors without a specific prayer to that effect was an error apparent on the face of the record.

78. The Petitioners/Applicant argues that on 22nd February, 2023, this Honourable Court delivered a judgment allowing the Petition dated 5th May 2022. The Judgment decreed among other things;

i. The proposed development of 18 floor storey building on Plot Number Mombasa/ Block XXVI/ 595 is illegal for failure to comply with the provisions of Articles 10, 40, 42 and 69 of *the Constitution*; and

ii. Permanent injunction restraining the 1st Respondent from proceeding with the proposed development of 18 floor storey building on the Suit Property until a proper public participation is carried and view of the members of the public are taken.

79. In addition to the foregoing, the Learned Counsel for the Petitioners argued that allowing development of 16 floors at the same time directing a fresh physical planning, fresh environmental impact assessment and fresh building approvals was not only confusing, contradictory but a direct interference with the discretion of other agencies. In furtherance to the above, the order allowing 16 floors contradicted the conditions given in the Ruling for a fresh physical planning especially on privacy and vehicular traffic.

80. Additionally, according to the Petitioners/Applicants, the finding of the Learned Judge that each party to bear their own costs is an error on the face of the record. Painfully, the Petitioners asserted that as indicated above, the Learned Judge in his ruling directed parties to bear their own costs. Juxtapose, yet recently, the National Environment Tribunal where this Court referred the parties to for adjudication on matters of the EIA Licenses approvals from its Judgement had delivered a its ruling between the parties and directed the Petitioners to pay the 1st Respondent costs for a sum of Kenya Shillings Eight Thirty Thousand and Seventy Three Hundred (Kshs. 830, 073, 00/=) which the Petitioners perceived to be double standards to say the least. Annexed in the affidavit and mark it Exhibit-5 copy of the ruling of the Tribunal for the kind perusal and consideration of this Honourable Court. In view of the foregoing, it was incumbent for this Court to re – visit its decision from the already pronounced Judgement and award costs to the Petitioners/Applicants. In a nutshell, they held that there was sufficient reasons for the Court to review its decision to allow a court-supervised public participation to ensure strict compliance with the provision of Articles 10 and 42 of *the Constitution*.

81. Critically speaking, out of the several reasons advanced by the Petitioners/Applicants for seeking orders for review, the Honourable Court finds most applicable one was on error apparent on the face of the record of the court. Indeed, it has fleshed out the argument a "Suo Moto" order by this Court allowing construction of 16 floors without a specific prayer to that effect is an error apparent on the face of the record. In addition to the foregoing, allowing development of 16 floors at the same time directing a fresh physical planning, fresh environmental impact assessment and fresh building approvals is contradictory and therefore, a direct interference with the discretion of other agencies. In furtherance to the above, the order allowing 16 floors contradicted the conditions given in the Ruling for a fresh physical planning especially on privacy and vehicular traffic. I find this argument rather defeatist on two fold. Firstly, this Court being a specialized one on matters of Land and Environment seeks a wide inherent powers, discretion and latitude from the provision of Sections 3 & 13 of the Environment & *Land Act*, No. 19 of 2011; Sections 101 of the Land Registration of 2012; Section 150 of the *Land Act*, No. 6 of 2012; Sections 1A, 1, 3 & 3A of the *Civil Procedure Act*, Cap. 21. Indeed, in so doing the Court has critically considered all the Pre – Conditions to be fulfilled by the developer while undertaking the construction project. The Petitioners/Applicants seem to have deliberately placed a blind eye on them. Secondly, I fully concur with the Learned Counsel for the 1st Respondent that these are matters more suitable to be dealt with under an appeal than a review.

82. Furthermore, according to the Respondents, a party could not pursue both appeal and review for the same cause simultaneously. The history of this matter and the number of multi-storey buildings which have been put up in the locality, the Petitioners/Applicant appears consumed with personal vendetta and are engaged in an economic sabotage and not a pursuit of civil rights. Indeed, they argued that this review application is unmeritorious, a novice and amounts to an abuse of the court process as it does not meet the parameters of a review, namely; an error apparent on the face of the record, a new and important matter of evidence or any other sufficient reason. The Petitioner's main prayers were:-

a. Review the order allowing 1st respondent to build 16th floors.

b. Review the order allowing each party to bear their own costs.

c. Review the ruling and direct the deputy registrar to convene and supervise the public participation as directed by the court on 30th April, 2024.

d. Costs of this application

83. Without wanting to descent into the arena of the appeal, I have noted that although the Petitioners purport that the current zonal by-laws disallow construction of a multi-storey buildings in the area, they have not annexed the said by - laws to prove this assertion and thus to warrant a review. Indeed the subject area is now open to construction of high rise buildings. By all means, it is instructive to note that the Court's Judgment of 23rd February, 2023 did not permanently stop construction of the high-rise building by the 1st Respondent but required the 1st Respondent to first and foremost full compliance on the fundamental requirements. In particular to ensure that a proper public participation is carried out and views of the members of public taken. This is captured at Paragraph 5(b) of the Petitioners/ Applicants supporting affidavit filed herein.

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

85. It is significant to be noted that this Court made declarations that:

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

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

86. For avoidance of any doubts, in its Judgment, this Honorable Court rendered itself as follows:

> " Ultimately, having conducted such an elaborate and in depth analysis of the framed issues emanating from the filed Petition and the Cross Petition, the Honourable Court is fully satisfied that the Petitioners have proved their case as presented accordingly. On the same breath, the Court finds the Cross Petition without any merit and hence fails. Specifically, and for avoidance of any doubt, I proceed to enter judgment on the following terms: -

a. That Judgement be and is hereby entered in favour of the 1st, 2nd, 3rd, 4th, 5th 6th and 7th Petitioners herein with costs.

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

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

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

e. That costs of the Petition and for the dismissal of the Cross – Petition herein be and is hereby awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners herein.

It is so ordered accordingly.

87. In the current present application, the Petitioner/ Applicant has demonstrated that there had been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record. To do the review I have to take a keen perusal of the Ruling issued on 30th April, 2024. The ruling was in respect to the application dated 26th July, 2023 seeking to review and or vary and/or set aside the Judgement delivered on the 22nd February, 2023.

88. Flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant case, is there apparent error that is self-evident on the face of the record itself that this Court solely relied on its draft site report and failed to consider parties deletions, additions and submissions? Perhaps, that would be the case. This argument falls on two grounds. First, the court determined the Petition and delivered its Judgement on the basis of the entirety of the material presented before it by all the Parties. Secondly, the Petitoners/Applicant seem to be making a huge meal from the conclusion of the Ruling whereby in its own wisdom and inferences based on the stated pre – conditions thereof in reducing the floors from 18 to 16 which by all standards makes such major impact to the development to be undertaken by the 1st Respondent herein. Paradoxically, I could have expected the 1st Respondent a committed investor to be the one hitting Court like an African drum full of complaints for it to have taken such a drastic decision onto their project instead of the Petitioners/Applicants.

89. Clearly, the Petitioners have not been successful on the grounds seeking for the review of the ruling of the order allowing the 1st Respondent to build 16 floors; it is clear from the ruling of this Honourable Court that the 1st Respondent/Applicant had demonstrated any sufficient reason to warrant a review of the Judgment of this Court. I gave conditions as to the smooth prosperity of the 1st Respondent as follows:-

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

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

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

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

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

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

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

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

90. Similarly, the request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction. Applying the Court's unfettered discretion, I did not find any reason as to award costs to the successful party but rather to the let every party bear its own costs. The provision of Section 27 of the *Civil Procedure Act* provides that: -

Section 27 provides: -

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such"

91. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

92. There is no dearth of authorities expounding on the above provision. The Court of Appeal in "Punchlines Limited – Versus - Joseph Mugo Kibaria & 10 others [2018] eKLR" discussed this provision at length, stating inter alia as follows: -

> " As for costs, the substantive law governing an award of costs is enshrined in section 27 of the *Civil Procedure Act* (CPA). It provides:.......
>
> The High Court in the *Party of Independent Candidates of Kenya - Versus - Mutula Kilonzo & 2 others, HC EP No. 6 of 2013*, had this to say on the issue of costs: -
>
> "It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion .... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."
>
> In Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101, the author states as follows:-"
>
> The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs- the court has no discretion and cannot take away the Plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the Plaintiff, the Plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course" ......(sic)".

93. The Court of Appeal proceeded to state that:-

> " In Devram Dattan - Versus - Dawda [1949] EACA 35, the predecessor of this court held, inter alia, that it is trite law that the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case. Being a judicial discretion, the law demands that it must be exercised judiciously on facts. The question of the sufficiency of the facts on the basis of which the trial Judge is called upon to exercise such discretion is entirely a matter for the Judge himself to decide, and the court of Appeal will not interfere with the exercise of such discretion except within the limits permitted by law.
>
> In *Supermarine Handling Services Limited - Versus - Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)*, the court provided guidelines that costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. Second, that where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. For example, where the trial court gives no reason for its decision; or alternatively where the reasons given do not constitute "good reason" within the meaning of the rule.
>
> See also cases of *James Koskei Chirchir - Versus - Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005)*, John Kamunya & another - Versus - John Ngunyi Muchiri & 3 others [2015] eKLR, and Robric Limited & another - Versus - Kobil Petroleum Limited & another, Nairobi *CA No. 109 of 2015*.Applying the above

threshold to the appellant's complaint on the award of costs made against it by the trial court, we find no justification in interfering with the trial Judge's order."

94. While the general rule is that, costs follow the event, and consequently that the successful party ought to be awarded costs, a court in the exercise of its discretion can depart from that stricture where there exist grounds to justify such a course of action. In arriving at the decision on costs, this court in its Application dated 30th April, 2024 set out reasons why costs would not follow the event. The Applicant may be aggrieved with the court's reasoning in respect of the order on costs, but it cannot approach the court to seek review of the order under the ground of error apparent on the face of the record.

95. In the court's considered view, what the Applicant is pressing as supposedly an error on the face of the record is essentially an error of law and or fact in the court's exercise of its discretion. This comprises a ground of appeal whereby this Court has now become "functus Officio" rather than a ground for review. In the case of:- "Abasi Belinda – Versus - Frederick Kagwamu and Another [1963] EA p.557", cited with approval by the Court of Appeal in "Solacher – Versus - Romantic Hotels Limited & another (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR)" it was held that:-

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

96. The court declines the Applicant's covert invitation to sit on appeal over its own decision. By virtue of the above discussed, the Notice of Motion application dated 31st May, 2024 must fail and is hereby dismissed with costs to the Respondents.

Issue No. b). Who bears the Costs of the Notice of Motion application dated 31st May, 2024

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

98. However, in the instant case, it is just reasonable, fair and Equitable in the given circumstances of this case that each party bear their own costs of the application whatsoever.

Conclusion and Disposition.

99. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the Petitioners in the Notice of Motion application dated 31st May, 2024 have not on balance and preponderance of probability established their claim for review of the Ruling delivered on 30th April, 2024. Therefore, for avoidance of any doubts, I proceed to specifically order: -

a. That the Notice of Motion application date 31 st May, 2024 be and is hereby found to lack merit and thus dismissed.

b. That the orders issued on 30 th April, 2024 remain in place until fulfilment.

c. That the Parties shall bear their own costs of the Notice of Motion application dated 31 st May, 2024.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 18 TH DAY OF NOVEMBER 2024.

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Mr. Griffin Tembe Advocate holding brief for Mr. J. Bwire Advocate for the Petitioners/Applicants.

Mr. J. Makau Advocate for the 1st Respondents.

No appearance for the 2nd & 3rd Respondents.