



**Abdalla & 5 others v Khansa Developers Limited & 3 others (Constitutional  
Petition 16 of 2022) [2023] KEELC 15889 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15889 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CONSTITUTIONAL PETITION 16 OF 2022**

**LL NAIKUNI, J**

**FEBRUARY 22, 2023**

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

**AND**

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

**BETWEEN**

**MOHAMMED AHMED ABDALLA ..... 1<sup>ST</sup> PETITIONER  
SALIM SAID ..... 2<sup>ND</sup> PETITIONER  
AMIN S. SALIM ..... 3<sup>RD</sup> PETITIONER  
ABDULLAZIZ ABBAS ..... 4<sup>TH</sup> PETITIONER  
BHARAT DEVIDAS VAITHA ..... 5<sup>TH</sup> PETITIONER  
KETAN DOSHI ..... 6<sup>TH</sup> PETITIONER**

**AND**

**KHANSA DEVELOPERS LIMITED ..... 1<sup>ST</sup> RESPONDENT  
RAMESH CHANDRA HARIA ..... 2<sup>ND</sup> RESPONDENT  
COUNTY GOVERNMENT OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
RESPONDENT**



## JUDGMENT

### I. Preliminaries.

1. This is a Judgement emanating from the filed Petition dated 5<sup>th</sup> May, 2022 filed on even date together with a Notice of Motion application brought under Certificate of Urgency by Mohammed Ahmed Abdalla, Salim Said, Amin S. Salim Abdullaziz Abbas, Bharat Devidas Vaitha and Ketan Doshi, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein.
2. Upon being served the Respondents filed their responses to both the application and the Petition hereof. It is instructive to note that pursuant to a request made by parties herein, on 10<sup>th</sup> November, 2022, the Honourable Court conducted an elaborate Site Visit (“Locus in Quo”) guided by the provision of the Law. It took place on 14<sup>th</sup> November, 2022 and a site report shared among the parties is part of this Judgement.

### II. The parties in the petition.

#### a. The Petitioners

3. The Petitioners describe themselves as the owners of Plot Numbers Mombasa/ Block / 1068, 840, 807, 961, 962, 963, 964, 404, 405, 406, 442, 443 and 444 which they refer as the Petitioners houses situated along the Rashid Sajjad Road in Kizingo which properties are adjacent to Plot number Mombasa/ Block/595 where the impugned development is located.

#### b) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents’ case.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are described as the owners of Plot number Mombasa/ Block/ 595. The Petitioners plead that that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are currently erecting an 18 floor storey thereon. The 3<sup>rd</sup> Respondent is the County government of Mombasa established under Article 176 of *the Constitution* with the powers and mandate to issue development approvals under the *Physical and Land Use Planning Act*, 2019. The 4<sup>th</sup> Respondent is a body corporate established under Section 7 of the Environmental Management and Coordination, Act 1999 whose mandate includes, ensuring sustainable environmental exploitation and development and development and issuing the necessary development licenses.

### III. The brief facts of the petition.

5. The Petitioners pleaded that they were the legal and registered owners of all that parcels of land known as Land Reference Numbers Mombasa/ Block / 1068, 840, 807, 961, 962, 963, 964, 404, 405, 406, 442, 443 and 444 respectively which they refer as the Petitioners houses situated along the Rashid Sajjad Road in Kizingo which properties are adjacent to Plot number Mombasa/ Block/595 where the impugned development is located.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are described as the owners of all that parcel of Land known as Land Reference Numbers Mombasa/ Block/595 and are currently erecting an 18 floor storey which development interferes with the Petitioners enjoyment and use of their properties.
7. The Petitioners averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s developments had been undertaken in total disregard to the environmental considerations and the same interferes with the natural status of the area “inter alia”:-



- i. The 1<sup>st</sup> Respondent's development is 18 storeys higher than those of the Petitioners and therefore greatly interferes with the Petitioners right to privacy.
  - ii. The 1<sup>st</sup> Respondent intends to build 53 apartments without proper social amenities including sewer system, water supply, access road and proper drainage.
  - iii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not provided proper mechanisms to caution the Petitioners from noise and air pollution as a result of mega development.
  - iv. The heavy machines used in the development was likely to affect the Petitioners' houses in the long term.
8. The Petitioners pleaded that they were aware that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had colluded with officers of the 1<sup>st</sup> Respondent and had issued development approvals to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without ensuring there was effective public participation prior to considering approvals for the project, failing to hold consultative meetings with affected stakeholders. The Petitioners further complained of not being adequately briefed and notify the affected parties of any decisions regarding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents developments.
  9. The Petitioners contended that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents also failed to enforce the applicable principles of the law, by –laws and guidelines and laws and regulations governing such developments within Mombasa County by failing to ensure compliance with the applicable laws and regulations as indicated above, the Respondents had fundamentally trampled upon the Petitioners rights to a clean and healthy environment and the development ought to be stopped and subjected to a proper environmental audit.

#### IV. The pleadings pertaining to the constitution petition.

10. The Petitioners being aggrieved, through the Law firm of Messrs. John Bwire & Associates approached the Court through a Constitution Petition dated 5<sup>th</sup> May 2022 filed on the even date in Court. Concomitantly, as indicated above filed with the suit was a Notice of Motion application dated the even date under Certificate of urgency. In the Petition, the Petitioners prayed for:
  - a. A declaration that the proposed that
    - i. The proposed development of 18 floors storey building Plot number Mombasa/ Block/XXVI595 is illegal for failure to comply with the provisions of articles 10, 40,42 and 69 of the Constitution.
    - ii. All development approvals issued by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents for the proposed development of 18 floors storey building Plot number Mombasa/ Block XXVI/595 without complying with Articles 10, 40, 42, 47 and 69 of the Constitution of Kenya are all illegal, therefore null and void;
  - b. Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their agents, employees or such other persons acting under their directions from carrying out, further carrying out or in any way proceeding with the proposed development of 18 floors storey building on Plot number Mombasa/ Block XXVI/595 until: -
    - i. A proper public participation is carried out and views of the members of the public taken into account;



- ii. Appropriate social amenities in particular, sewer system, water supply, access road and proper drainage is properly established.
  - iii. The Respondents provide proper mechanisms to caution the Petitioners and members of the public from the noise and air pollution as a result of mega development;
  - iv. A fresh environmental impact assessment is carried out within the law and a report submitted to the 4<sup>th</sup> Respondent, the Petitioners herein and the surrounding members of the public; and
  - v. The project is subjected to a proper environmental audit and a report prepared, detailing the short and long term significant effects of the project on not only the environment, but also to the Petitioners and members of the public
- c. A permanent injunction restraining the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from issuing any further development approvals to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and / or any other person acting under their directions, in respect to the proposed development of 18 floors storey building on Plot number Mombasa/Block XXVI/595 prior to compliance with prayer (b) above.
  - d. Costs of the Petition be provided to the Petitioners.
  - e. Such other reliefs the Court shall deem fit to grant in the Circumstances.

#### **V. The responses to the petition.**

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through a Memorandum of Appearance dated 24<sup>th</sup> May 2022 filed by the law firm of Messrs. J.M Makau & Company associates entered appearance raised a notice of preliminary objection on the Jurisdiction of the Court, filed responses to the main Petition and Cross Petition (though termed as Counter Claim) and a Replying affidavit sworn by Sammy Kamuiyo Mukuri who is the Director of the 1<sup>st</sup> Respondent herein.
12. On record there is a notice of appointment of advocates dated 20<sup>th</sup> May 2022 filed by the law firm of Messrs. Daly & Inamdar Advocates LLP. In the course of time, based on the legal ratio and principles enshrined in the now famous case of:- “Mukisa Biscuits – Versus – West End Manufacturers Limited.....” the Notice of Preliminary objection dated 24<sup>th</sup> May 2022 was dealt with as a matter of precedence and the Honourable Court rendered itself in a ruling on 26<sup>th</sup> July 2022 accordingly.
13. The 1<sup>st</sup> Respondent averred that it did duly apply and was granted by the 3<sup>rd</sup> Respondent a Change of User and duly followed the laid down procedure in creating public awareness and public participation as per the *Physical and Land use Planning Act*. It is pleaded that the 2<sup>nd</sup> Respondent was issued with a demolition permit upon payment of a sum of Kenya Shillings Ten Million (KShs. 10,000.00). The demolition permit was issued in the name of the 2<sup>nd</sup> Respondent because the title deed was yet to be transferred to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was said to have purchased the Plot No. Mombasa/ Block XXVI/ 595 from the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent was first demolishing an existing building and removing rubbles when the Petitioners stopped the works.
14. It was pleaded that the notice of the Change of User was duly pinned on the 1<sup>st</sup> Respondent’s gate and walls. Further it was contended that from the records from the lead expert report, the 1<sup>st</sup> Petitioner participated in the public participation exercise. To establish plot boundaries and avoid encroachments the 1<sup>st</sup> Respondent engaged a public surveyor. The 1<sup>st</sup> Respondent contended that it had duly observed all the environment issues pertaining to pollution and safety, namely: -



- i. site hoarding using dust nets;
  - ii. Regular sprinkling of water using dust hired water bower to kill dust;
  - iii. Controlled motor vehicle fleets to avoid traffic congestion and accidents;
  - iv. The debris/ rubbles were loaded into trucks using a backhoe.
  - v. (PPE) kits were issued to workers.
  - vi. The motor vehicle and machinery handlers were strictly advised and warned to minimize noise at the site.
  - vii. A bio digester, soak pit and septic tanks were to be provided upon completion.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents asserted that it was not true that the neighbourhood was solely earmarked for low level building otherwise the 3<sup>rd</sup> Respondent would not have authorized the construction of high-rise development. It was opined that the neighbourhood was full of such multi – storey buildings and invited the Court to visit the site if need be.

### **The documents by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

The Respondents relied on the following documents in support of their case. These were:-

- a. Certificate of incorporation
- b. Authority to plead
- c. Form PPA 2 notification of approval of the approval of the application for development permission issued to the 2<sup>nd</sup> Respondent by the Director of planning on the 24<sup>th</sup> May 2022 following an application for Change of user from Residential ( OPDH) to residential ( Multi dwelling)
- d. Form PPA 2 notification of approval of the application for development permission issued by the chief officer ( lands, physical planning, housing & urban development issued to the 1<sup>st</sup> Respondent following application submitted by the 1<sup>st</sup> Respondent on 8<sup>th</sup> March 2022 for proposed development on Plot No 595/ Section XXVI zone Mombasa island situated at Kizingo of 18 floors approved through permit number P.2022/00190
- e. A notice of Change of User advertisement published in one of the local dailies - “Taifa Leo” edition of 28<sup>th</sup> January 2022.
- f. Lodged construction document
- g. Certificate of official search dated 21<sup>st</sup> March 2022 indicating the plot is in the name of the 2<sup>nd</sup> Respondent
- h. Certificate of lease in the name of the 2<sup>nd</sup> Respondent
  - i. Certificate of lease in the name of the 1<sup>st</sup> Respondent
- j. Building / construction permit issued P/2022/00190 dated 1<sup>st</sup> April 2022
- k. An official receipt No BG2202-00017 dated 14<sup>th</sup> February 2022 for demolition.
- l. A letter dated 14<sup>th</sup> February 2022 by the County government of Mombasa to the 1<sup>st</sup> Respondent allowing the 1<sup>st</sup> Respondent to demolish



- m. Demolition permit.
  - n. Environmental impact assessment report prepared by Sigtuna Consultancy limited
  - o. Letter dated 24<sup>th</sup> February 2022 from Saleh & Co advocates indicating that the 1<sup>st</sup> Respondent had purchased the plot from the 2<sup>nd</sup> Respondent and were in the process of transferring the suit property.
  - p. Agreement for sale of the plot between the 1<sup>st</sup> Respondent as the purchaser and the 2<sup>nd</sup> Respondent as the vendor
  - q. Payment slips
  - r. National Environment Management Authority compliance/ inspection report
  - s. Photographs
  - t. Contract agreement entered between Khansa Developers and Samumu construction services
16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein filed a further list of documents dated 20<sup>th</sup> September 2022 comprising of: -
- a. A public meeting notice dated 27<sup>th</sup> July 2022.
  - b. Minutes of a public meeting of 3<sup>rd</sup> August 2022.
  - c. A letter to the County Government of Mombasa, Department of lands, planning and housing dated 25<sup>th</sup> August 2022.
  - d. National Environment Management Authority environmental impact assessment license dated 25<sup>th</sup> August 2022.
  - e. A certificate of compliance issued by the National Construction Authority dated 24<sup>th</sup> August 2022.
17. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein filed response to Petition and counter-claim dated 24<sup>th</sup> May 2022 praying for general damages, special damages of Kenya Shillings Seven Million Four Hundred and Fifty Two Thousand (Kshs. 7,452,000.00), costs of the suit and the interests
18. Through the firm of Messrs. J. M Makau & Co. Advocates the 1<sup>st</sup> Petitioner, proceeded to request for judgement under order 10 rule 4 (2) of the civil procedure rules claiming a liquidated sum of Kenya Shillings Seven Million Four Hundred and Fifty Two Thousand (Kshs. 7,452,000.00). The same was amended on 11<sup>th</sup> October 2022 as Amended Cross Petition and response reply to Cross Petition.
19. Under protest, the Petitioners filed response to Cross Petition terming it as bad in law and is not contemplated under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure rules. The Petitioners plead that the cross petition fails to disclose any violation of *the Constitution* as provided under Rule 10 (2). To the Petitioners general damages for defamation cannot be issued in a constitutional petition and the Court has no jurisdiction to hear and determine defamation cases, no elements of defamation has been proved, no loss has been proved and if loss has been established the same is as a result the 1<sup>st</sup> Respondent's illegalities and violations of *the Constitution*. The Petitioners term the special damages as speculative and prays the same be dismissed with costs.



## VI. The responses by the 3<sup>rd</sup> Respondent.

20. The 3<sup>rd</sup> Respondent filed notice of appointment dated 26<sup>th</sup> May 2022 appointing the County Attorney to act for it. The 3<sup>rd</sup> Respondent filed its replying affidavit sworn on 13<sup>th</sup> June 2022 by its director in charge of physical planning. The deponent avers that the 1<sup>st</sup> Respondent applied for a development approval pursuant to the *Physical and Land Use Planning Act* which the 3<sup>rd</sup> Respondent issued approval.
21. The 3<sup>rd</sup> Respondent lays down the process of seeking a development permission where the applicant goes through the following process and scrutiny: -
- The applicant lodges his/ her/ its application to the 3<sup>rd</sup> Respondent by attaching
- a. A Copy of Title.
  - b. Rates Clearance Certificate
  - c. Architectural Plans.
  - d. Structural Plans
  - e. Any Other Relevant Documents
22. Once the applicant lodges the above-mentioned documents, an invoice is generated with reference number where the applicant pays for the development permission. If the Applicant pays the documents presented by the applicant then circulates to various departments as follows: -
- a. Valuation to ensure rates are cleared and the title is authentic.
  - b. Planner who ensures the development plan presented conforms to the area the development is being undertaken.
  - c. Architect who ensures the actual construction and the architectural plan is in tandem with the plans presented and the boundaries of the development are within the beacons of the property
  - d. Environment, public health, and fire to ensure toilets, septic tanks, fire exits sanitation are properly catered for.
  - e. Engineering who ensures the materials used and the structural plans conform to the development standards and safety.
23. It is only after scrutiny is when an applicant is then presented with final approval which has a time frame and whenever a suit is instituted the time frame is against the developer. The approval for development has conditions attached
- i. No construction should commence on site unless EIA project report is prepared, submitted, and approved by NEMA as per EMCA and register the Project with the national construction Authority
  - ii. undertake adequate consultations with neighbours and neighbourhood.
  - iii. Ensure to provide bio digester or other approved appropriate sewerage management technology unless officially connected to the county sewer line.
24. The 3<sup>rd</sup> Respondent deposed that with the above conditions the Petitioner's fears are well catered for and there should be no reason for alarm. Further, to the 3<sup>rd</sup> Respondent the issue around public



participation did not concern the 3<sup>rd</sup> Respondent as the Environmental Impact Assessment was issued by the 4<sup>th</sup> Respondent who is better placed to respond to the issue of public participation. The 3<sup>rd</sup> Respondent contended that the Petitioners have not made any formal complaint as alleged by the Petitioners over the development

25. At paragraph 14 of the Replying Affidavit, the deponent averred that where a complaint is referred to this Court under Section 93 of the *Physical and Land use Planning Act*, the timelines delineated in the Act are to be followed. However, in the Petition, the Petitioners brought the Petition more than a period of 2 months from the date of approval complained of was granted. This nullified and obliterated the competence of their complaint and the Petition generally. This went against the wisdom of the legislature. The Petitioners had misled the Court by portraying that where the development was being undertaken was an area that did not have developments that translate to high rise building the 3<sup>rd</sup> Respondent denied all the allegations and prayed the Court to dismiss the Petition.

#### **The documents by the 3<sup>rd</sup> Respondent**

- i. Form PPA 2- Notification of approval of the application for development permission issued on 1<sup>st</sup> April 2022 by the Chief Officer (Lands, physical, housing and urban renewal) approving the 1<sup>st</sup> Respondents application submitted on 8<sup>th</sup> March 2022.

#### **The 4<sup>th</sup> Respondent's Response**

- ii. The Court has perused the record and there is no response filed by the 4<sup>th</sup> Respondent.

#### **VII. The Submissions.**

26. On 30<sup>th</sup> May, 2022 while in the presence of all the parties, the Honourable Court directed that the main Petition be canvassed by way of written submissions with given stringent timelines. All parties complied and the Court reserved a date for delivering of Judgement on 21<sup>st</sup> March, 2023 or all facts remaining constant earlier on notice.

#### **A. The Written and Oral Submissions by the Petitioners.**

27. On 7<sup>th</sup> October, 2022 through the Law firm of Messrs. John Bwire Advocates, the Petitioners filed written submissions dated 6<sup>th</sup> October 2022 in support of the Petition. Mr. Muliro Advocate for the Petitioners presented three (3) issues for determination; - Whether the Respondents conducted adequate and effective public participation prior to granting permits/licenses and/or approvals and consequently whether the Respondents have violated the provisions of Article 10 of *the Constitution*; whether the Respondents' actions are in violation of the Petitioners' right to fair administrative action under article 47 of *the Constitution*; whether the Respondents actions have violated or threatened to violate the Petitioners right to a clean healthy environment under the provision Articles 42, 69 and 70 of *the Constitution* of Kenya, 2010.
28. The Petitioners submitted that no adequate and effective public participation was conducted by the Respondents leading to change of user from residential to residential multiple dwelling. Further the Petitioners blame the Respondents for failing to conduct adequate and effecting public participation in the process leading to the grant of development approvals.
29. The Petitioners pleaded that the approval for construction of the multiple dwelling 19 storey building was issued on 1<sup>st</sup> April 2022 yet the change of user was granted on 1<sup>st</sup> April 2022. In other words, the 3<sup>rd</sup> Respondent issued approval for the construction of a residential multiple dwelling structure yet the land in question was still residential only. The Petitioners note that the 1<sup>st</sup> Respondent contends



- that the necessary public participation was conducted in the Environmental impact assessment report which not material to determine whether the 3<sup>rd</sup> Respondent conducted public participation. The 3<sup>rd</sup> Respondent states that the issue of public participation does not concern them yet they claim one of the conditions of the approval is the applicant undertakes adequate consultations with neighbours. The Petitioner submits that for a government organ to state that the issue of public participation is not a concern to them is already violation of article 10. While citing the Court of appeal in the case of:- ”Law Society – Versus -The Attorney General & 2 Others (2019) eKLR.
30. The Petitioner cites Section 55 (f) of Physical Land Use Planning Act which provides the objectives of development control include to promote public participation in physical and land use development decision. The Petitioner submits that the 3<sup>rd</sup> Respondent is presenting a view that as per their approval they invite stakeholders to express their views after they have already granted the approval and upon filing of the suit the Respondents now called for a consultative meeting on 3<sup>rd</sup> August 2022 as a cosmetic exercise. The Petitioner submits that being the most affected by the approval by virtue of being close neighbours must have a bigger say in granting the approval their views must be more deliberately sought.
  31. The Petitioners herein submitted that their right to fair administrative action under the provision Article 47 had been infringed, violated and infringed. The Petitioners submitted that they own and occupy plots neighbouring Plot No. 595 where the development was set to begin making them persons likely to be affected by the decisions of the 3<sup>rd</sup> Respondent had an obligation to give the Petitioners prior and adequate notice of the intention to grant development permission to the 1<sup>st</sup> Respondent allowing them to construct a 19 storey building next to their homes.; give reasons why they think such development was permissible and give Petitioners an opportunity to be heard and to make representations on the said application for approval.
  32. The Petitioners reiterated that the approvals issued by the 3<sup>rd</sup> Respondent are on the face of illegal and unreasonable as it was issued on 1<sup>st</sup> April 2022 yet the Change of User was granted on 24<sup>th</sup> May 2022. The Petitioners submitted that the area was a low - density area and the proposed developments were not permitted.
  33. The Petitioners submitted that their right to Clean and healthy environment under the provisions of Articles 42, 69 and 70 of *the Constitution* of Kenya, 2010 had been violated or threatened with potential negative impacts of the proposed development which impacts include:- dust, noise, increased of motor vehicle traffic in the area, increased demand for water and electricity supply, solid waste management issues, sewerage disposal challenges, reduced privacy to immediate neighbours which issues as per the Respondents report were not capable of being mitigated . In conclusion the Petitioners submitted that their right to clean healthy environment while urging the Court to allow the Petition.

#### **B. The Written Submission by 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

34. Vide submissions dated 11<sup>th</sup> October 2022 and received in Court on 12<sup>th</sup> October 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their written submissions through the Law firm of Messrs. Makau & Co Advocates. Mr. Makau Counsel, for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents framed five (5) issues for determination. It was the Petition properly instituted and do the Petitioners had the requisite Legal Capacity (“Locus Standi”) to have filed the Petition did the Honourable Court ruling of 26<sup>th</sup> May 2022 expressly allow the Preliminary objection dated 24<sup>th</sup> May 2022 to the effect that all Environmental Impact Assessment/ audit issues of the subject Petition be canvassed at the National Environment Tribunal; did the 1<sup>st</sup> Respondent violated the provisions in the Physical and Land Planning Act , the EMCA, 1999 and *the Constitution* have the conditional prayers set out in prayers (b) and (c) of the Petition been satisfied



- and therefore the Petition spent; have the 1<sup>st</sup> Respondent/Cross Petitioner suffered both general and special damages on account of the Petitioners actions
35. The Counsel relied on the provision of Order 1 Rule 8 of the Civil Procedure Rules, 2010 to argue that the instant Petition was not a representative suit or Petition and therefore any reference to the public should be deemed to refer to the 7 Petitioners. The Counsel submitted that this was not a public interest issue but a private Petition wrongly instituted by the seven (7) Petitioners. To the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' exhibited that the titled authority to swear did not bear the names and appended signatures of all the 7 Petitioners which was fatal as per the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010 and he place reliance in the case of: "James Ndugi & 4 Others - Versus - Jamleck Waithaka Kinyua & 4 Others, ELCC/ E126 of 2020". The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that they were not able to tell if the 7 Petitioners were the owners of the mentioned suit properties because the alleged official searches were not annexed to the Supporting Affidavit.
36. The Counsel submitted that the 2<sup>nd</sup> Respondent sold the suit plot to the 1<sup>st</sup> Respondent. At the time of filing the Petition a Certificate of Lease had been issued to the 1<sup>st</sup> Respondent. The Counsel stated that reliance was placed on a report prepared by the by Mr. John Wambua, the County Physical Planner, of the 3<sup>rd</sup> Respondent herein who stated that the project had been approved on account of small land mass within the island and the 3<sup>rd</sup> Respondent was encouraging developments as opposed to horizontal developments. He averred that the County was engaging what he termed as Urban renewal. It was submitted that the 1<sup>st</sup> Respondent followed all dues processes and continued even to follow even after being directed by the Court which notable the Petitioners failed to approached the NET even after being directed to do so by this Honourable Court. The 1<sup>st</sup> Respondents further reiterated the process giving rise to the approvals and the development. The 1<sup>st</sup> Respondent contended that it conducted further public participation on 3<sup>rd</sup> August 2022 and that it had made every effort to ensure that the Petitioners and any other interested parties were fully involved right from the Change of User notices and the two public participation exercise conducted thereof. He held that the 1<sup>st</sup> Respondent had fully adhered to the law so far as it concerned they were concerned.
37. The Counsel averred that the allegations meted by the Petitioners that the area was earmarked for low level buildings had not been proven. To him, the document annexed to the affidavit was not authentic and it appeared to have been authored about eight (8) years ago. The document marked as "MAA - 2" was from a 357 pages document yet the Petitioners had selectively only photocopied up to page 56. He stated that the annexure and marked as "MAA - 1" was the Mombasa structural plan which was a five (5) year Plan prepared in the year 1981 which was about forty one (41) years ago and had little relevance today.
38. The Counsel contention was that further that people in the neighbourhood area were experiencing medical conditions associated with air pollution had not been proved as no medical reports had been produced. Additionally, the Counsel held that the issue of noise pollution had not been proved as the Petitioner had not stated the acceptable limits against the noise produced at the site measured in decibels.
39. They submitted that the Petitioners had not proved violation of county by laws. Further that the Petitioners had complained blockage of easement but yet they had not demonstrated which particular easement had been blocked. Reliance was placed on the provision of Section 56 (c) of Physical Land Use Planning Act. He held that the changes on land use would occur from time to time since they were not in a static society and changes should be seen in the interests of general welfare and not few individuals so long as there was adhered to all the relevant laws. To the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Petitioners had not demonstrated how the provisions of Article 47 of *the Constitution* of Kenya, 2010



was contravened. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged the Court to dismiss the Petition with costs and allow the Cross Petition.

### **C. Written Submissions by 2<sup>nd</sup> Respondent**

40. On record is the 2<sup>nd</sup> Respondents submissions dated 9<sup>th</sup> November 2022 and received in Court on 11<sup>th</sup> November 2022 filed by the firm of Messrs. Daly Inamdar Advocates LLP. This law firm claimed to have filed a Notice of Change of Advocates on 11<sup>th</sup> October 2022 and yet there was a Notice of Appointment on record dated 20<sup>th</sup> May 2022 as appearing for the 2<sup>nd</sup> Respondent. M/s. Baraza the Counsel for the 2<sup>nd</sup> Respondent framed three (3) issues for determination. These were:-
- a. Whether the 2<sup>nd</sup> Respondent had been properly joined in these proceedings;
  - b. What were the available remedies to this honourable Court with respect to the 2<sup>nd</sup> Respondent;
  - c. Which party was entitled to costs of the proceedings.
41. It was the 2<sup>nd</sup> Respondent's submissions that he had been wrongly joined into the Petition yet he was not the legal registered proprietor of the suit property. The said suit property was owned by the 1<sup>st</sup> Respondent. To buttress the case, the 2<sup>nd</sup> Respondent relied on Rules 2 and 5 of the Constitutional Petition Rules – to the effect that the infringements upon which the Petitioners sought relief had no relation to the 2<sup>nd</sup> Respondent and neither would the 2<sup>nd</sup> Respondent be of any aid to this Court in determining the Petition. He then urged the Court to struck out the 2<sup>nd</sup> Respondent herein. They also relied on the provision of Section 26 of the *Land Registration Act*, No. 3 of 2012. Pursuant to Rule 26 of the Constitutional Rules the costs awards were discretionary. The 2<sup>nd</sup> Respondent submitted that the Petition was filed on 5<sup>th</sup> May 2022 whereas the transfer of lease and subsequent issuance of a lease were effected on 19<sup>th</sup> April 2022 and 26<sup>th</sup> April 2022 respectively. According to the Counsel, the Petitioners ought to have been vigilant enough to ascertain the proper parties to bring to Court as the Respondents taking that this information was available prior to filing of the Petition. They prayed that the filed Petition be dismissed with costs.

### **D. The Written Submission by the 3<sup>rd</sup> Respondent**

42. I have perused the record and I have not found written submissions filed by the 3<sup>rd</sup> Respondent opposing the Petition.

### **E. The Written Submissions by the 4<sup>th</sup> Respondent**

43. On 11<sup>th</sup> November, 2022, Through Learned Counsel M/s. Emma Lisanza, the 4<sup>th</sup> Respondent, NEMA filed their written submissions dated 10<sup>th</sup> November 2022 in Court. Counsel Lisanza in her submissions framed three (3) issues for determination. These were:-
- a. Did the Court ruling of 26<sup>th</sup> July 2022 expressly allow the preliminary objection dated 24<sup>th</sup> May 2022 to the effect that all the Environment Impact Assessment/ audit issues of the subject Petition be canvassed at the National Environmental Tribunal?;
  - b. Was the Court correct in ordering that it could hear what was otherwise reserved for the Physical Planning Liaison Committee as a Court of 1<sup>st</sup> Instance;
  - c. Who was liable for costs of the Petition.
44. The Counsel for the 4<sup>th</sup> Respondent submitted that by dint of a ruling of this Court of 26<sup>th</sup> July 2022, all the matters pertaining to environmental issues were referred to NET and the Petitioners should not



attempt to ventilate before this Court. The submissions dated 6<sup>th</sup> October 2022 were malafides and an attempt to hoodwink the Court past its earlier ruling.

45. The Counsel for the 4<sup>th</sup> Respondent further relied in the case of:- “Benson Ambuti Atega & 2 others - Versus - Kibos Distillers Limited & 5 Others” to submit that the Court had no jurisdiction to deal with the issues in the Petition as the same lied with the jurisdiction of the Physical Planning and Liaison Committee. To the 4<sup>th</sup> Respondent this Court was prohibited by the Doctrine of Exhaustion and avoidance from being the first port of call for planning appeals.
46. The Counsel submitted that it saw recipe for chaos in the severance of the issues granted and particularly the Court arrogating itself jurisdiction over physical planning appeals. The 4<sup>th</sup> Respondent urged the Court to dismiss the Petition with costs.

Republic of Kenya

In The Environment And Land Court

At Mombasa

Constitution Petition No. 16 of 2022

Mohammed Ahmed Abdalla.....1<sup>st</sup> Petitioner

Salim Said.....2<sup>nd</sup> Petitioner

Amin S. Salim .....3<sup>rd</sup> Petitioner

Abdullaziz Abbas.....4<sup>th</sup> Petitioner

.....5<sup>th</sup> Petitioner

Bharat Devidas Vaitha.....6<sup>th</sup> Petitioner

Ketan Doshi.....7<sup>th</sup> Petitioner

Versus

Khansa Developers Limited.....1<sup>st</sup> Respondent

Ramesh Chandra Haria.....2<sup>nd</sup> Respondent

County Government Of Mombasa.....3<sup>rd</sup> Respondent

National Environment Management Authority ....4<sup>th</sup> Respondent

**A Site Visit (“locus In Quo”) Report For The Site Visit Conducted At Kizingo Area  
Within The County Government Of Mombasa On 14<sup>th</sup> November, 2022 At 1.15  
P.M.**

**I. Present**

A. Court

1. Hon. Justice L.L. Naikuni – ELC No. 3.
2. M/s. Yumna – Court Assistant.
3. Mr. John Ngari – Assistant.

B. The Petitioners



1. Mr. Muliro Advocate for the Petitioners.
  2. Mr. Mohamed Ahmed – the 1<sup>st</sup> Petitioner.
  3. Mr. Salim Said – the 2<sup>nd</sup> Petitioner
  4. Mr. Waita Bharat – the 3<sup>rd</sup> Petitioner.
  5. Mr. Shabal Khan – a neighbor.
  6. Dr. Rashid Ali of Mombasa Dialysis Centre, (Neighbour).
  7. Mr. Abdulahi Aziz – Neighbour.
- C. The Respondents
1. Mr. Makau Advocate for the 1<sup>st</sup> Respondent
  2. Abdul Amid Khan – the 1<sup>st</sup> Respondent.
  3. Mr. Sammy Mukiri – Director to the 1<sup>st</sup> Respondent.
  4. Mr. Tajbhai – Advocate for 3<sup>rd</sup> Respondent.

Purely for the purposes of this report and ease of reference, the above persons present and participating during the Site Visit shall be referred to as “The Team”.

## II. The Purpose of the site Visit

- a. The purpose of the site visit was explained by Court to all the parties present. It was stated that pursuant to a court directive made on .....12<sup>th</sup> October, 2022 that there shall be Site visit conducted on 14<sup>th</sup> November, 2022 at 2.00pm. Each party to be at liberty to engage their own Private surveyor in future who will prepare reports to be filed in court for consideration. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-
  - b. Power to court to inspect;
  - c. “The court may at any stage of a suit inspect any property or thing concerning which any question may arise”
  - d. Ideally the site visit – the Locus in quo was with a view of gathering further evidence on the above stated parcels of land.
  - e. Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced, cross examination of any witness, filling in the gaps of the parties evidence but purely to check and confirm the evidence. A visit is an exception rather than the rule.
  - f. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient



findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

### **III. The Procedure**

It was explained that the team would commence by fully guided by the maps available, the filed pleadings and other relevant documents such as the Architectural Plans as a guide. The Advocates and their clients would also be of great use in terms of providing guidance of the tour.

### **IX. The Methodology**

- a. Making general inquiries from the parties;
- b. Using the filed pleadings.
- c. Walking around the compound and within the vicinity and neighbourhood.
- d. Survey plans and maps.

### **IV. The Procedure**

The court made inquiries on various matters emanating and founded at the suit property. Thereafter, the team took an elaborate tour round the suit property inspecting all the fixtures and development undertaken on the suit property. Thereafter, the team took an extensive walk around the whole neighbouring area and the vicinity from end to end with the sole aim of making observations of the surroundings. Part of the team, entered into the story residential houses for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, Mr. Mohammed Ahmed and Mr. Salim Said who are both neighbors to the suit properties. While at these two points, the part of the team present took a clear and high view of the whole area.

### **V. The observations**

From the inquiries made at site property and the tour conducted by the team around the vicinity (within the compound of the property and the surroundings), on without prejudice, biases or partiality, the following observations were made. These were:-

1. On the suit property:-
  - a. The suit property measures approximately 80 X 100 feet – that is 1/8 of an acre. Its rectangular shaped.
  - b. There was a nine (9) meter perimeter wall surrounding the whole compound, well painted in white colour. On top of the wall was a well mounted and maintained electric razor live wire for security purposes all-round the Compound.  
  
On top of the perimeter was there was a haphazard kept black safety precaution need. It was torn out and perhaps need to be replaced and well kept.
  - c. There were a few well grown trees and hedges scanty planted.
  - d. The team learnt that the suit property was acquired by the 1<sup>st</sup> Respondent on.....At the time of him taking vacant possession there existed a one story building old structure. We learnt that the 1<sup>st</sup> Petitioner bought the land with its fixtures.



His intention is eventually to build a 18 story structure on it. He informed us that the finalized structure and per the architectural plans and drawings already submitted in Court will have 51 apartments/units upon completion, 3 levels of car park – on the basement and ground floor. We learnt that there will be a bio digester plant, backup generator, swimming pool on the ground floor. Eventually, it will all be residential premises. As a result of this he caused the demolition of the old building to pave way for the Intended building. There were huge heaps of 3 to 4 piles of debris and other metallic, cement, build blocks, concrete, quarry chips, ballast, sand and other wastage from the demolished structure. We recommended that they be cleared for safety and cleaning liness of the environment.

- e. There was a borehole at the front side of the suit property though appeared to be disused. There was a sock pit at the back side of the property and some urinal makeshift structures a which were old and not utilized at all. They may be health hazard.
- f. There was also a huge underground water tank.
- g. There was a twin perimeter wall but only on one side of the compound. The Petitioner alleged that there was a Way Leave between the land for the Petitioner and 1<sup>st</sup> Respondent. There was no evidence to that assertion
- h. The suit land is surrounded by several buildings. The 1<sup>st</sup> Petitioner has a one story building – 4 bedroomed house, a Masonnette. They alleged it was a low density area.
- i. The Petitioners were neighbors who felt aggrieved by this intended development plan by the 1<sup>st</sup> Respondent. They raised many issues of environment degradation, pollution and other nuisances likely to be caused by this development. They strongly felt that this an area was exclusively intended and planned for a two story structure as per the By Laws of the County Government. They indicated not knowing when these laws or regulations ever changed if at all. They sounded and appeared extremely agitated.
- j. Generally, it was the team’s observation that the place was surrounded and occupied by a lot of one story buildings. However, the team also observed that there seem to be some upcoming very storey high rise structures scattered within the area. We noticed there were four such development though scattered at different positions of the said area. A close observation to one of them at a corner plot, the team observed that there was no National Construction Authority (NCA) building Board erected at the entrance or anywhere which ideally bears the details of the building being constructed, the client’s name, the main contractors and the Mechanical, Quality and



electrical engineers among other details. Hence it was difficult to know the proposed developments the contractor, the owner of the property and the compliance on EMCA Regulation, Physical Planning and Public health.

- k. There was a 9 metre wide tarmac road called Safad Road. We notice hardly could two vehicles cross each other on the road at the same time. We guessed it was because the road was intended for residential use only and not commercial purposes. In total there was 21 residential houses within the neighbors.
- l. There was no evidence of any clean water supply for human consumption. The residents depended mainly on bore holes and water supply from water boozers and tankers.
- m. From the roof top of the neighbors the whole area is clearly visible. The Petitioners informed the team that they were warned and advised by their hired experts that these structures would completely change the serenity and ambience of the locality the residence had enjoyed for many years. That the development would be obstructive in many ways in terms of overuse of the scarce resources such as water, insufficient of the natural day light and free flow of Human and Vehicle traffic. They were also warned of their peace, transparency and privacy getting interfered with.
- n. From the roof top of the 1<sup>st</sup> Petitioner, the suit property is clearly visible.

It was alleged there was a Way Leave between the 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent's house.

## **VI. Conclusion**

At 2.15 pm, the site visit was concluded with a word a prayer.

Court made the following directions

- a. Parties will be furnished with the site visit report within the next 7 days from today.
- b. Each party granted 7 days leave to file and exchange skeletal written submissions on the issues arising from the site visit.
- c. The 3<sup>rd</sup> Respondent granted 14 days extension to file and serve replies and submissions.

The Site Visit Report Dated And Signed At Mombasa This 28<sup>Th</sup> Day Of November 2022.

Hon. Justice L.L. Naikuni (judge)

Environment & Land Court At

Mombasa



### VIII. The issues for determination.

47. I have carefully read and considered the filed Petition, the Supporting documents, responses with supporting documents, written submissions and the cited authorities by all parties in light of the entire record and the relevant provision of *the Constitution* of Kenya, 2010 and the Statutes.
48. In order for the Honourable Court to arrive at an informed, just, fair and reasonable decision, I have distilled the following as the seven (7) issues for determination. These are:-
- a. Whether *the Constitution* Petition dated 5<sup>th</sup> May, 2022 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein meets the threshold required by Law and precedents.
  - b. Whether the Honourable Court herein has jurisdiction to hear and determine the instant Constitution Petition.
  - c. Whether the Petitioners have the legal capacity (“Locus Standi”) to institute the instant Constitution Petition.
  - d. Whether the 2<sup>nd</sup> Respondent is wrongly joined in the instant Constitution Petition.
  - e. Whether the Respondents (as the Proponents of the development) had complied with the fundamental Constitutional and statutory requirements pertaining to Environmental and Constructions development such as:-
    - i. On Environmental Impact Assessment (EIA); Environmental Impact Licence; Environmental Audit & Monitoring of Environment; adequate public participation in the management, protection and conservation as provided as provided for under the provision of Articles 10, 69 and 70 of *the Constitution*?
    - ii. Petitioners’ right to clean and healthy environment has been violated, threatened, denial and infringed under Articles 42, 69 and 70 *Constitution of Kenya, 2010*.
  - f. Whether the parties herein are entitled to reliefs sought from the Petition and the Cross Petition herein.
  - g. Who will bear the Costs of the Petition and the Cross Petition.

### IX. Analysis and Determination.

#### Issue No. a). Whether *the Constitution* Petition dated 5<sup>th</sup> May, 2022 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein meets the threshold required by Law and precedents.

49. The Constitutional basis of the Petition for the seven (7) Petitioners herein include:-
- a. Article 22 of Constitution of Kenya declaring the right upon any person or authorized representative to commence proceedings for declaration and compensation for violation of rights and fundamental freedom.
  - b. Article 23 of *the Constitution* of Kenya giving High Court jurisdiction to deal with such matters and out timing the nature of relief that can be granted.
  - c. Article 25 (c) of *the Constitution* which provides that the right to a fair trial shall not be limited despite any other provisions of *the Constitution* of Kenya.



- d. Article 40 (1) and (3) of *the Constitution* of Kenya declares the right to acquire and own property of any descriptions in any part of Kenya and protection from state deprivation unless procedurally done and due compensation was made.
- e. Article 42 of *the Constitution* of Kenya holds that every person has the right to a clean and healthy environment which included the right:-
  - i. To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated Article 69; and
  - ii. To have obligations relating to the environment fulfills under Articles 70.
- f. Article 47 of Constitution of Kenya on fair administrative action which provides for written reasons to be served upon a person whose right has been or is likely to be adversely affected by acts of the government.
- g. Article 64 on the right to private property in Kenya.
- h. Article 165 (3) (d) and 5 as read with Article 162 (2) (b) of *the Constitution* of Kenya giving this court jurisdiction to determine the questions whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened inland matters

As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;
  - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - c. Permits the development of the law; and
  - d. Contributes to good governance.....”
50. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided.

Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own” . I dare add that *The Constitution* is a real living tissue. And like any other tissue, it has to be fed and watered. They breathe and require oxygen supplied in them throughout. Without it they would die. These statements are not mere metaphorical. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

Based on the principles set out in the edit of The Court of appeal case of “the Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013) eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru –Versus - Republic [1980] eKLR 154 where the court is satisfied that the Petitioners’ claim were well pleaded and articulated with absolute particularity. It held:-

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



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

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

In application of these set out principles for filing a Constitutional

Petition to this case, the honorable court is fully satisfied that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the pleading for the prayers sought.

**Issue No. b). Whether the Honourable Court herein has jurisdiction to hear and determine the instant Constitution Petition.**

51. Before the Honourable Court makes one more step, the issue touching on the jurisdiction of this Court was raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide a notice of Preliminary Objection dated 24<sup>th</sup> May 2022 on the grounds that the Court be pleased to strike out forthwith the Petitioners Notice of Motion application dated 5<sup>th</sup> May 2022 as it offended the provision Section 72 (3) and (4) of the *Physical and Land use Planning Act* and Section 129 (1) of the EMCA and thus arising from the foretasted points of law the Court lacks jurisdiction.
52. It is well established that the question of jurisdiction can be raised at anytime of the proceedings. The Jurisdiction is the heart of the Court, it goes to the root of the Court to hear and determine a suit and if a Court lacks jurisdiction it must down its tools an issue supported in the famous case of “Owners of Motor MV Lilian Vessel – Versus – Caltex Oil Limited”
53. The Court of Appeal in “the National Social Security Fund Board of trustees - Versus - Kenya Tea Growers Association & 14 Others, Civil Appeal No. 656 of 2022” pronounced itself that:-

Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.
54. This Court dealt with the notice of preliminary and rendered itself vide a ruling dated 26<sup>th</sup> July 2022. While the Court thought that this was now a moot issue, the 4<sup>th</sup> Respondent in its submissions has again re – visited it by questioning the jurisdiction of the Honourable Court. To the 4<sup>th</sup> Respondent the Court has no jurisdiction and questions the legal rationale from ruling in which the Court rendered itself that it has jurisdiction to hear and determine the Petition albeit they never moved Court appropriately for either reviewing, setting aside or varying or appealing against the said decision. It is not lost as the Court “Suo Moto” can raise the issue of jurisdiction. Be that as it may, there has been no substantive reason to call for me to reconsider my ruling.
55. Fundamentally, the Court observes that Kenyans must take pride in the 2010 Constitution of Kenya 2010 which establishes the Environment and Land Court, a specialized Court with requisite expertise in complex area of environment and land playing pivotal role in development of the nation. Clean



and healthy environment is not an illusory principle, it is a fundamental right enshrined in our Constitution under articles 42, 69 and 70 of *the Constitution*. In tandem with *the Constitution* and all the statutory provisions, I am in concord with the holding of the Court in the case of “Kenya Association of Manufacturers & 2 others - Versus - Cabinet Secretary Ministry of Environment and Natural Resources and 3 Others [2017] eKLR where it was stated that a court seized of an environmental dispute is to bear in mind that through its judgment, the court plays a crucial role in promoting environmental governance, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.

56. Certainly, it will be superfluous for me to still dwell on this issue which I need not to belabour on. Let’s leave the matter to rest.

**Issue No. c). Whether the Petitioners have “Locus Standi” to institute the instant Petition.**

57. The concept of “Locus Standi” which means having Legal Capacity to institute suit is applicable to all cases. It is expected from public interest litigation that a person or persons instituting cases on behalf of the public should be having sufficient and appropriate interest in the suit.

58. Locus standi is defined in Black’s Law Dictionary, 9<sup>th</sup> Edition (page 1026) as “the right to bring an action or to be heard in a given forum”. Under the provision of Article 22 of *the Constitution* thus provides:

- “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members [emphasis supplied].”

59. It is imperative to hasten and remind ourselves of the decision in the case of:- “Wangari Maathai - Versus - Kenya Times Media Trust Limited [1989] eKLR” where the case was struck out on the grounds that the Plaintiff had no locus standi to file the suit . This happening was before the promulgation of the 2010 Constitution.

60. The provision of Article 42 of *the Constitution* decrees the right to clean and healthy environment. Pursuant to Article 70 (1) if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Section 3 (3) of the Environmental Management and Coordination Act is to the effect that If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully



available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to:—

- a. prevent, stop or discontinue any act or omission deleterious to the environment;
- b. compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- c. Require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- d. Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage
- e. Provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing. mage; and

61. The Supreme Court in case of:- “Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 others [2014] eKLR rendered itself on the issue of “Locus Standi” under the 2010 Constitution thus: -

“(67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of Locus Standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. In the case of:- ”John Wekesa Khaoya – Versus - Attorney General, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle (paragraph 4):-

“.....”the Locus Standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice...”

62. The jurisprudence emerging from the Court of appeal in case:- ”Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5 others (2013) eKLR is that the conservative requirements of locus that existed in the old regime that treated litigants, other than those directly affected, as mere or meddlesome busy bodies had the negative effect of limiting access to justice. These are the ills that existed in our law before the promulgation of *the Constitution* 2010 which is intended to cure and which must be emphasized. Before the promulgation of the new Constitution 2010, Public interest litigation was a thorny issue in this country and Courts as evidenced by the rulings in the two infamous cases, “Maathai - Versus - Kenya Times Media Trust Limited and Maathai & 2 others versus City Council of Nairobi & 2 others where the High Court stated that it was only the Attorney General that could institute cases on behalf of the public. The drafters of the new Constitution appear to have contemplated such scenarios when they included in the provision of Article 22(1) in *the Constitution* of Kenya 2010 to proffer guidance on ”Locus Standi”.

63. In the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have paused the questions to wit; is the Petition properly instituted and do the Petitioners have the requisite locus standi to file the Petition? This is on the basis



that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents propound a view that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein have not demonstrated that they are indeed the legal proprietors of the plots to claim to be the owners of the said properties and hence likely to be adversely affected by the development to be undertaken by the Respondents herein. Regarding whether the Petitioners have “the Locus standi” to institute the instant Petition, I take great cue from the provisions of the Constitution, statutes and case law and render myself that the Petitioners have the sufficient and appropriate interest (‘Locus Standi’) to file the Petition which is clothed and seeks reliefs in the nature of a public interest litigation in fours. Therefore, I hold that this Petition is properly before the court, it is a Constitutional Petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution. which this Court has jurisdiction to hear and determine. These rights founded under the Bill of Rights are safeguarded under the provisions of Articles 22, 23, 50, 40, 69 and 70 of the Constitution of Kenya, 2010.

64. Undoubtedly, the Petitioners are ordinarily residents living and carrying their livelihood chores out around the suit property who feel most affected by the development on the suit property. In our current law it is not necessary for one to demonstrate that he stands to be directly affected by the development project so long as such person considers the development project to be a threat to a right to a clean and healthy environment as decreed under Articles 42, 69, 70 (3) and Sections 3 (4) of the Environmental Management and Coordination Act
65. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relies on the provision of Order 1 Rule 8 of the Civil Procedure Rules, 2010 to argue that the instant Petition is not a representative suit or Petition and therefore any reference to the public should be deemed to refer to the 7 Petitioners. They submit that this is not a public interest but a private petition wrongly instituted by the 7 Petitioners. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have termed the instant Petition as a private Petition of the 7 Petitioners urging the Court not to deem it as a public interest litigation. While I am of the view while dealing with Constitution Petitions, unless otherwise stated or where there are no specific provisions within the Rules, the use of the Civil Procedure Rules need not take precedence. But all in all, the Supreme Court in the case of “Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 Others remarked on the importance of public interest litigation which had been thwarted under the old constitutional regime and stated as follows:-
- “Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it.”
66. The provision of Section 3 (4) of EMCA provides that a person proceeding under Subsection (3) of this Section shall have the capacity to bring an action notwithstanding that such a person cannot show that the Defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such action is not frivolous or vexatious; or is not an abuse of the court process.
67. Now coming back to the issue in question, the instant Petition was filed by the 7 Petitioners acting on their own, even if they are petitioning this Court on their own then the effect of the case affects not only the 7 Petitioners but a larger group of residents living around the suit Property. I say so taking note of the pivotal role of public interest litigation plays to ensure all the persons have access to justice and a roadway to the realization of the bill of rights enshrined in our Constitution. For these reasons,



and therefore, as already analyzed above, I am not in at all in agreement with the assertion advanced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.

**Issue No. d). Whether the 2<sup>nd</sup> Respondent is wrongly joined in the instant Constitution Petition.**

68. The 2<sup>nd</sup> Respondent has strongly contends that he has been wrongly joined in the Petition on grounds that the 2<sup>nd</sup> Respondent's property was transferred to the 1<sup>st</sup> Respondent. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice And Procedure Rules defines the Respondent as a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom.
69. Rule 5 *the Constitution* Rules provide for the procedure which applies with respect to addition, joinder, substitution and striking out of parties:—
- (a) Where the Petitioner is in doubt as to the persons from whom redress should be sought, the Petitioner may join two or more Respondents in order that the question as to which of the Respondent is liable, and to what extent, may be determined as between all parties.
  - (b) A Petition shall not be defeated by reason of the mis joinder or non - joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
  - (c) Where proceedings have been instituted in the name of the wrong person as Petitioner, or where it is doubtful whether it has been instituted in the name of the right Petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as Petitioner upon such terms as it thinks fit.
  - (d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
    - (i) order that the name of any party improperly joined, be struck out; and
    - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the Court adjudicate upon and settle the matter, be added.
  - (e) Where a Respondent is added or substituted, the Petition shall unless the Court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the Petition shall be served on the new Respondent and, if the court thinks, fit on the original Respondents.
70. Ideally, the provision of Section 26 of the *Land Registration Act*, No. 3 of 2012 provides that a Certificate of title is to be held as conclusive evidence of proprietorship of land. From the filed pleadings herein, it is to be noted that the 1<sup>st</sup> Respondent purchased the suit property from the 2<sup>nd</sup> Respondent in an agreement for sale dated 20<sup>th</sup> April 2022 giving rise to issuance of Certificate of Lease issued on 17<sup>th</sup> May 2022 in the name of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent has provided for a Certificate of search dated 21<sup>st</sup> March 2022 which indicates that the suit property was still in the name of the 2<sup>nd</sup> Respondent. The Petitioner has tendered 2 certificates of official searches which indicate the 2<sup>nd</sup> Respondent was the registered proprietor of the suit property as at 22<sup>nd</sup> February 2022 and 4<sup>th</sup> April 2022 with a Certificate of Lease still in the name of the 2<sup>nd</sup> Respondent herein. The Petition was filed on 5<sup>th</sup> May 2022 at a time which although the suit property was in the process of being transferred, that process was in motion and the person who was the registered proprietor is the 1<sup>st</sup> Respondent before



the ownership of the property exchanged hands. A letter dated 24<sup>th</sup> February 2022 from the Law firm of Messrs. “Saleh & Co Advocates” indicated that the 1<sup>st</sup> Respondent had purchased the plot from the 2<sup>nd</sup> Respondent and were in the process of transferring it.

71. Additionally, while perusing the record there is an annexure marked as “SKM – 2” annexed to the Supporting Affidavit of Sammy Kamuiyo Mukuri. It is Form PPA - 2 which is notification of approval of the application for development permission dated 24<sup>th</sup> May 2022 by the Director Planning to Ramesh Chandra Haria, the 2<sup>nd</sup> Respondent herein. The herculean question here is that why would the approval be issued in the name of the 2<sup>nd</sup> Respondent who supposedly ceased being the proprietor of the suit property from 17<sup>th</sup> May 2022 when a Certificate of lease was issued to the 1<sup>st</sup> Respondent.
72. Under the provisions of the Article 159 (2) (d) of *the Constitution* enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. There is no miscarriage of justice or any form of injustice or prejudice to be meted arising from the addition of the 2<sup>nd</sup> Respondent in the Petition. I find that the Petitioners conducted due diligence to established the correct Respondents. Thus, there is no good reason or justifiable cause whatsoever to fault the Petitioners. Be as it may be, it is well established law that the Petition cannot be defeated by reason of misjoinder.

**Issue No e). Whether the Respondents (as the Proponents of the development) had complied with the fundamental Constitutional and statutory requirements pertaining to Environmental and Constructions development such as:-**

- iii. on Environmental Impact Assessment (EIA); Environmental Impact Licence; Environmental Audit & Monitoring of Environment; adequate public participation in the management , protection and conservation as provided as provided for under the provision of Articles 10, 69 and 70 of *the Constitution*?
- iv. Petitioners’ right to clean and healthy environment has been violated, threatened, denial and infringed under Articles 42, 69 and 70 *Constitution of Kenya, 2010*.
73. Under this Sub heading, it contains a lot of weighty and substantial issues worth critical attention. To my mind the instant Petitions raises the question of whether Constitutional principle of the right to public participation public effective and adequate public participation was adhered in respect of the process leading to change of user and issuance of development permission, compliance with the constructions of buildings and Environment Impact Assessment Licences and permits. I will determine these issues concurrently.
74. Under the provision of Article 2 (1) embodies *the Constitution* as the supreme law of the Republic and binds all persons and all State organs at both levels of government. Under Article 10 (2) a of *the Constitution* outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Article 69(1) (d) of *the Constitution* provides that the State shall encourage public participation in the management, protection and conservation of the environment. Principle 10 of the Rio Declaration on Environment and Development (1992) also states as follows:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities,



including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process...”

75. In the case of:- “Mui Coal Basin Local Community & 15 Others – Versus - Permanent Secretary Ministry of Energy and 17 Others [2015] eKLR, the Court set out the minimum basis for adequate public participation as follows: -

“From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”

- c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.



- d) Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e) Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional Box.
- f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

76. This Court accepts the principles set out in the case of "Mui Coal Basin case (Supra) as the applicable principles in examining the threshold of public participation that should be met in undertaking environmental projects.

77. The provision of Section 4 of the *Physical and Land Use Planning Act* provides for Values and principles. Every State organ, State officer, public officer and person engaged in physical planning or land use regulation is bound by *the Constitution* and in particular—

- a. The national values and principles set out in Articles 10 and 232 of *the Constitution*;
- b. the principles of land policy set out in Article 60 of *the Constitution*;
- c. the leadership and integrity principles set out in Articles 73 and 75 of *the Constitution*; and (d) the principles, procedures, and standards of physical and land use planning contemplated in this Act.

78. The provision of Section 55 of the Physical Use And Land Planning Act decrees the objectives of development control: -

- (1) The objectives of development control are—
  - (a) to ensure orderly physical and land use development;
  - (b) to ensure optimal land use;



- (c) to ensure the proper execution and implementation of approved physical and land use development plans;
- (d) to protect and conserve the environment;
- (e) to promote public safety and health;
- (f) to promote public participation in physical and land use development decision-making; (emphasis supplied).
- (g) to ensure orderly and planned building development, planning, design, construction, operation and maintenance; and
- (h) to promote the safeguarding of national security.

79. The provision of Section 58 of the Physical Land Use Planning Act stipulates:

- (7) A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe.
- (8) The notification referred to under Sub-Section (7), shall invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration.

80. In respect of the above, the 1<sup>st</sup> Respondent in its submissions dated 5<sup>th</sup> December 2022 submits that a Change of User was duly issued but the Petitioners failed to utilize that window. However, subsequent opportunities have been provided including the public participation of 3<sup>rd</sup> August 2022. It is uncontroverted that the Petitioners failed to raise their objections against the change of user of the suit property which I must strongly reprimand and vouch the Petitioners for this act of omission and commission. They ought to have complied or fully participated for their case to have been considered.

81. The provision of Section 58 (1) and (2) of EMCA provides as follows:

- (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
- (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority; Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.

82. As regards the public participation leading to change of user. The 1<sup>st</sup> Respondent has provided for change of user advertisement in one of the local dailies “the Taifa Leo” of 28<sup>th</sup> January 2022 taking that the Kiswahili language is the dominant within the Coast regional of the County of Mombasa. The Respondent also caused to be pinned enlarged copies of the advertisement on the suit property inviting any member of the public to file their objections within 14 days.



83. The Petitioners pleaded that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had violated the provision of Article 10 of *the Constitution* which provides that all state organs, state officers and public officers shall allow participation of the people before making any decisions that affects the people. The Petitioners argue that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have in total violation of the of Article 10 colluded with the 1<sup>st</sup> Respondent by issuing development approvals without ensuring there is effective public participation prior to considering approvals for the project. Regulation 17 of the Environment (Impact Assessment and Audit) regulations 2003 stipulates:-

“ 17. Public participation

1. During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
2. In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall-
  - (a) Publicize the project and its anticipated effects and benefits by-
    - i. posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
    - ii. publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
    - iii. Making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks.
  - (b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
  - (c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
  - (d) ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments



and any translations thereof received during all public meetings for onward transmission to the Authority”

84. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents at paragraph 9 of the Replying Affidavit sworn by Sammy Kamuio Mkuri, the director of the 1<sup>st</sup> Respondent company averred that the 1<sup>st</sup> Respondent conducted a public participation exercise through lead expert, Sigtuna Consultancy Limited who also indicated that the 1<sup>st</sup> Respondent participated in the exercise and followed the laid down procedures and the law.
85. The Honourable Court noted that the undated Environmental Impact Assessment (EIA) report which was prepared on behalf of the 1<sup>st</sup> Respondent indicates that the lead expert undertook consultations with neighbours from the vicinity with copies of the questionnaire survey responses annexed thereof. For purposes of record. May I rehash some of the responses from the said questionnaires. From the questionnaire dated 17<sup>th</sup> March, 2022, Mr. Suresh K. Patel states that the 1<sup>st</sup> Respondent should stop the development for now and clear through public participation. Application for change of user (share if available) Salima Baisa.
86. The provision of Section 61 (d) of Physical Land Use Planning Act mandates the 3<sup>rd</sup> Respondent in decision making and communication to take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area. The 3<sup>rd</sup> Respondent depones that with the above conditions the Petitioners fear are well catered for and there should be no reason for alarm. Further, to the 3<sup>rd</sup> Respondent the issue around public participation does not concern the 3<sup>rd</sup> Respondent as the Environmental Impact Assessment is issued by the 4<sup>th</sup> Respondent who is better placed to respond to the issue of public participation. The 3<sup>rd</sup> Respondent contends that the Petitioners have not made any formal complaint as alleged by the Petitioners over the development.
87. In the case of “Independent Electoral and Boundaries Commission (IEBC) – Versus - National Super Alliance(NASA) Kenya & 6 others [2017] eKLR:-
80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither inspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be inspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259 (1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.
88. Taking into account the wisdom arsing above, it is absurd that in the current constitutional era a County Government established under the Constitution can take a wrong approach like in the instant case. Public participation is entrenched in our legal regime and must be taken seriously at any step.



89. In the case of "Law Society of Kenya - Versus - Attorney General & 2 others [2019] eKLR, the Court of appeal rendered itself thus:-

“From the finding above, the Learned Judge ought to have found in favour of the appellant based on the claim made on the lack of public participation. It was an error for the Learned Judge to require the Appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was. Much weight has been placed on public participation because it is the only way to ensure that the Legislature will make laws that are beneficial to the mwananchi, not those that adversely affect them.

90. As I understand the concept above is that when the Petitioners raise a claim that there was no public participation giving rise to the development permissions then the burden shifted to the Respondents to tender evidence that indeed there was public participation. The 1<sup>st</sup> Respondent have used the questionnaire survey forms to demonstrate that there was public participation. The 3<sup>rd</sup> Respondent has shifted the burden to the 4<sup>th</sup> Respondent.

91. To the 3<sup>rd</sup> Respondent with conditions the Petitioners' fears are well catered for and there should be no reason for alarm. Further, to the 3<sup>rd</sup> Respondent the issue around public participation does not concern the 3<sup>rd</sup> Respondent as the Environmental Impact Assessment is issued by the 4<sup>th</sup> Respondent who is better placed to respond to the issue of public participation. The 3<sup>rd</sup> Respondent contends that the Petitioners have not made any formal complaint as alleged by the Petitioners over the development. The 4<sup>th</sup> Respondent on the other has not made any shred of effort to demonstrate effective and adequate public participation conducted.

92. Questionnaire survey responses on record are dated 17<sup>th</sup> March 2022, 16<sup>th</sup> March 2022, 10<sup>th</sup> March 2022, while one is undated. As already noted, a certificate of lease in the name of the 2<sup>nd</sup> Respondent is dated 17<sup>th</sup> May 2022. Assuming that the Environmental Impact Assessment report prepared by Sigtuna Consultancy limited is to be taken into account as a form of public participation is to be taken into account then it means the questionnaire survey leading to the compilation of the report for the 1<sup>st</sup> Respondent was prepared even before the suit property was registered in the name of the 1<sup>st</sup> Respondent.

93. Public participation is one of the fundamental principles which to my mind has multiples stages. On 27<sup>th</sup> July 2022 the 1<sup>st</sup> Respondent gave a notice for a public meeting being part of an environmental impact assessment process to discuss a proposed project on the suit property, fundamentally is that the 1<sup>st</sup> Petitioner in the minutes dated 11<sup>th</sup> August 2022 notes that was the first public meeting. Of concern to the Court is the failure to conduct public participation at the beginning of the process giving rise to development permissions and after the project as began and to just act as a formality a person purports to conduct public participation.

94. To examine this issue further from the minutes produced by the 1<sup>st</sup> Respondent. Mr. Jonathan Doshi noted that the meeting was being held after the EIA report had been submitted to the 4<sup>th</sup> Respondent the meeting was unlawful. Mr Bharat states that they were not consulted and wondered when the consultation took place. Mr Jamal Abas who says he is the owner of the two houses next door has main concern and wanted to understand how drawings of the proposed project were approved by the 3<sup>rd</sup> Respondent before public participation was done.



95. In the case:- ”Robert N. Gakuru & Another - Versus - Governor Kiambu County & 3 others [2013] eKLR; the Court stated:-
- “In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates.
96. I have no difficulty stating that our Constitution is emphatic in unambiguous terms, that where public participation is required, public views must be sought and considered in the decision making process. I am of the view, it does not matter how public participation is done, the basic line is that any public participation should meet the test of meaningful and qualitative public participation and not just mere cosmetic one. Consultations should also be qualitative and meaningful and not just cosmetic. In the instant petition, there is undisputed evidence, that the alleged public hearing and consultation did not take place as required for the quantitative and meaningful consultation to be applicable and reliance.
97. I conclude on this issue affirming the dictates of *the Constitution* and hereby render myself in unequivocal terms that there was no effective and adequate public participation as required by law.
98. The provision of Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70.
99. Section 3 of Environmental Management and Coordination Act gives effect to the entitlement to a clean and healthy environment which is enshrined in Article 42 of *the Constitution*. Every person has a duty to safeguard and enhance the environment. That section empowers a person alleging that the right to a clean and healthy environment has been or is being denied, violated, infringed or threatened to approach the Environment and Land Court for redress.
100. As was held in the case of “Ken Kasinga - Versus - Daniel Kiplagat Kirui & 5 Others (2015) eKLR, where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat. The evidence before this Court shows that the appellants did not only breach the provisions of Section 58 and 59 of the *Environmental Management and Co-ordination Act*, but also Article 69(1) (d) of *the Constitution* which provides that the State shall encourage public participation in the management, protection and conservation of the environment.
101. To the Petitioners plead that the area is a low-density area and high rise buildings are prohibited and faults the 3<sup>rd</sup> Respondent for failing to enforce the bylaws and relies on Mombasa Development Plan marked as MAA-1 which the 1<sup>st</sup> Respondent describes as not authentic and terms it of no relevance in this age.
102. The Petitioners plead that: -
- i. The 1<sup>st</sup> Respondent’s development is 17 storey higher than those of the Petitioners and therefore greatly interferes with the Petitioners right to privacy.
  - ii. The 1<sup>st</sup> Respondent intends to build 53 apartments without proper social amenities including sewer system, water supply, access road and proper drainage.
  - iii. The Respondents have not provided proper mechanisms to caution the Petitioners from noise and air pollution as a result of mega development



- iv. The heavy machines used in the development is likely to affect the Petitioners houses in the long term.
103. It is prudent to note that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents avers that it is not true that the neighbourhood is solely earmarked for low level building otherwise the 3<sup>rd</sup> Respondent would not have authorized the construction of high-rise. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have annexed photographs that the neighbourhood is full of multi storey buildings. In the minutes of a meeting held on 3<sup>rd</sup> August 2022 who states that as a department mandated with development control, the department feels it is good to have vertical department instead of horizontal development.
104. The Petitioners plead that are aware that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have colluded with officers of the 1<sup>st</sup> Respondent and have issued development approvals to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without ensuring there is effective public participation prior to considering approvals for the project, failing to hold consultative meetings with affected stakeholders. The Petitioners further complain of not being adequately briefed and notify the affected parties of any decisions regarding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents developments.
105. The Petitioners contend that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents also failed to enforce the applicable principles of the law, by –laws and guidelines and laws and regulations governing such developments within Mombasa County by failing to ensure compliance with the applicable laws and regulations as indicated above, the Respondents have fundamentally trampled upon the Petitioners rights to a clean and healthy environment and the development ought to be stopped and subjected to a proper environmental audit.
106. Before I retired to write this judgement, it occurred to me that it was to visit the site of the suit property. The visit did give me a good visual and understanding of the development project and the surrounding environment. Parties also made submissions. I could observe that the project was out of character in the area and bore no board by the National Construction Authority bearing any details of the project being undertaken. The residents in the area depended mainly on boreholes boozers and tankers for water supply.
107. Perusing the Environmental Impact Assessment on record I note that among the potential negative impacts of the project are as follows:
- i. Dust disturbance;
  - ii. Noise disturbance;
  - iii. Increased in vehicular traffic in the area;
  - iv. Increased demand for water and electricity supply to the area;
  - v. Impacts of solid waste from the building during occupancy. (emphasis added)
  - vi. Occupational injuries
  - vii. Reduced privacy to immediate neighbours (emphasis added)
108. The potential positive impacts are listed as: -
- i. Creation of jobs;
  - ii. Increase in property value;
  - iii. Boosting of housing housing facilities within the County;



- iv. Support of local business;
  - v. Infrastructure development;
  - vi. Revenue to Mombasa County;
109. The report has also proposed mitigation measures which I have considered. I subscribe to the definition that development must be judged by its impact on the people, not only in changes in their income but more generally in terms of their choices, capabilities and freedoms.
110. The Court is persuaded by the findings in the case of:- ”Kiriinya M. Mwenda - Versus - Runda Water Limited & Another (2014) eKLR, where the Court held that: -
- “...I wish to point out that the petitioner’s right to own, use and develop his property is not absolute. He lives in a community of other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The Petitioner as a resident of the area cannot insist on exercising his rights without regard for the rights of others and or benefit from services without paying for them”.
111. The area which the development project is being undertaken is a development control area. I do agree with the Petitioners that the area is earmarked for low level building. Indeed, this is the reason the 1<sup>st</sup> Respondent sought change of user to allow grant of the development permission. The development threatens the Petitioners right to a clean and healthy environment. Having visited the site I noted that the Petitioners houses will not have any natural light and their right to privacy is highly jeopardized. The 1<sup>st</sup> Respondent’s right to own, use and develop the suit property is not absolute. The 1<sup>st</sup> Respondent purchased the suit property within a community of the Petitioners and other property owners who have voluntarily agreed to live by certain rules to ensure that they maintain certain standards and quality of life by making provisions for certain services. The 1<sup>st</sup> Respondent cannot insist on exercising its rights without regard for the rights of others.
112. In nutshell, development permission was granted to the 1<sup>st</sup> Respondent on 1<sup>st</sup> April 2022, at the time of filing the instant petition on 5<sup>th</sup> May 2022 it is pleaded that the 1<sup>st</sup> Respondent had begun development on the suit property. While at this point, I have noted that the Respondents have stated here the umpteenth times and its an issue that featured extensive during the Site Visit by Court to the effect that the Petitioners who were relying on old and outdated construction policy to the effect that the area was only meant for low horizontal and high rise buildings to be conservative and outdated. The Respondents advanced the argument that development was organic and should be permitted to prosper. In any case there were for such high end builds under going construction within the vicinity. These are extremely strong arguments just to think of it. However, the question would be very simple, were high - end buildings of cement and mortar development in the real sense? It is becoming evident that “uncontrolled development” of high rise apartments in various know places within the City of Nairobi such as Kilimani, Kileshwa and Lavington areas are now putting a strain on the available amenities and may soon turn the areas into vertical slums if left unchecked. The County of Mombasa up market areas such as Nyali, Kizingo, Bamburi, Tudor and Kizingo just to name a few are not an exception to this rule. In any case, the best definition and widely accepted view of “Development” is one by Amartya Sen holds that:-“Development must be judged by its impact on people, not only by changes in their income but more generally in terms of their choices, capabilities and freedoms; and we should be concerned about the distribution of these improvements, not just the simple average for a society...” . It simply means, putting up layers and layers of cement and motar within residential



areas such as the suit property where the residence are denied to such fundamental rights as free air and day light sunshine and lighting should never be misconstrued to mean development at all. This must stopped.

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

**Issue No. (f) Whether the parties are entitled to the reliefs sought.**

114. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed response to petition and counter-claim dated 24<sup>th</sup> May 2022 praying for general damages, special damages of Kenya Shillings Seven Million Four Fifty Two Thousand (Kshs. 7,452,000.00) costs of the suit and the interests. Through the Law firm of Messrs. J. M Makau the 1<sup>st</sup> Respondent proceeded to request for judgement under the provision of Order 10 Rule 4 (2) of the Civil Procedure Rules, 2010 claiming a liquidated sum of Kenya Shillings Seven Million Four Fifty Two Thousand (Kshs. 7,452,000.00) The same was amended on 11<sup>th</sup> October 2022 as amended cross petition. The 1<sup>st</sup> Respondent/Cross Petitioner has provided particulars of general damages as: -

- i. Loss of reputation particularly to its clients due to cancellation of ground breaking.
- ii. Defamation by the Petitioners
- iii. Damages occasioned by the suspension of approvals.

115. The 1<sup>st</sup> Respondent/Cross Petitioner particularized special damages and arrived at a sum of Kenya Shillings Seven Million Four Fifty Two Thousand (Kshs. 7,452,000.00), Vide request for Judgement dated 19<sup>th</sup> September 2022, the 1<sup>st</sup> Respondent requested judgement for liquidated claim in the counterclaim and also sought for formal proof.

116. Pleadings is the heart and soul of litigation, I need to pass information to advocates to have full grasp of proper pleadings. What is before the Court is a Constitutional Petition, to my mind a Counter Claim or request for judgement is not known, strange and not applicable in a constitutional petition.

117. Under protest, the Petitioners filed response to Cross Petition terming it as bad in law and is not contemplated under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure rules. The Petitioners plead that the cross petition fails to disclose any violation of *the Constitution* as provided under Rule 10 (2). To the Petitioners' general damages for defamation could not be issued in a Constitutional Petition and the Court has no jurisdiction to hear and determine defamation cases, no elements of defamation has been proved, no loss has been proved and if loss has been established the same is as a result the 1<sup>st</sup> Respondent's illegalities and violations of *the Constitution*. The Petitioners term the special damages listed as speculative and prays the same be dismissed with costs.

118. Rule 2 of *The Constitution* of Kenya (Protection Of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013 commonly referred to as the Mutunga Rules defines the petitioner to means any person who institutes proceedings or Cross Petitions under these rules and for the purposes of a cross Petition includes a cross petitioner while respondent means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom. Rule 15 (3) states that the Respondent may file a cross-petition which shall disclose the matter set out in Rule 10 (2). Rule 10 (2) states that the petition shall disclose the following: -

- a. the Petitioner's name and address;



- b. the facts relied upon;
  - c. the constitutional provision violated;
  - d. the nature of injury caused or likely to be caused to the Petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
  - e. details regarding any civil or criminal case, involving the Petitioner or any of the Petitioners, which is related to the matters in issue in the Petition;
  - f. the Petition shall be signed by the Petitioner or the Advocate of the Petitioner; and
  - g. the relief sought by the Petitioner;
119. Before I delve into the Cross Petition let me rehash the test of a Constitutional Petition as is now settled in the celebrated case of “Anarita Njeru Karimi - Versus - Republic (No.1) (1979) 1 KLR 154. The test was stated thus:-
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”
120. In the case of:- “Mumo Matemo - Versus - Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) eKLR the Court said:
- “...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”
121. The Mumo Matemu case (supra) underscores that If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
122. Having established the tests in a constitutional petition above, I now apply the same test in the cross petition. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their response to petition and counter-claim dated 24<sup>th</sup> May 2022 prays for general damages, special damages of Kenya Shillings Million Four Hundred Fifty (Kshs. 7,452,000.00) costs of the suit and the interests. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents then proceeded to request for judgement under order 10 rule 4 (2) of the civil procedure rules claiming a liquidated sum of Kenya Shillings Seven Million Four Fifty Two Thousand (Kshs. 7,452,000.00). The same was amended on 11<sup>th</sup> October 2022 as amended cross petition.
123. On looking at the Cross- Petition, the Court cannot help but notice by and large that the Cross Petition does not in any manner disclose any substantive cause of action or violation of rights. It is the right of every person to institute proceedings on denial, violation or infringement of any constitutional right



as provided for under Articles 22 and 23. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Cross Petition is an attempt to thwart this right and scare the Petitioners. For argument sake, if the Plaintiff was to file a suit against a Defendant then the same Defendant files a case against the Plaintiff for suing him/ her seeking damages on the basis of the previous suit and the Court in the subsequent suit allows the Claim, will that not amount to the Court being used to limit the right of any person to institute a suit?

124. In conclusion, therefore, I find that the Cross - Petition offends the mandatory provisions of the law and procedure and does not disclose any provisions of *the Constitution* allegedly breached by the Petitioner. In the circumstances, I do not find any merit whatsoever in the Cross - Petition, I therefore, decline to enter judgement in favour of the 1<sup>st</sup> Respondent and against the Petitioners herein.
125. I take this opportunity to express my sincere appreciation to all the Counsels and parties who appeared in the Petition for their dedication, devotion, diligence, resilience, well - prepared pleadings and their well - researched arguments and submissions. I dare say that the bar is safe in your presence.
126. I take cognizance of the Court of Appeal in the case of:- “Kibos Distillers Limited & 4 others - Versus - Benson Ambuti Adega & 3 others [2020] eKLR, the Court rendered itself thus: -

“I affirm the right to a clean and healthy environment as guaranteed in Article 42 of *the Constitution*. I will not shy away to direct polluters of the environment to follow constitutional, statutory and regulatory norms for the protection, preservation and conservation of the environment. Consequently, I am not averse to ordering National and County implementing agencies to discharge their constitutional and statutory obligations to protect the environment in appropriate cases.

#### **Issue No. (g) Who will bear the Costs?**

127. The issue of Costs is the discretion of Court. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of: “Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

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

128. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. In the instant case, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein have successfully established their case and thus they are entitled to Costs for the Petition and the dismissed Cross – Petition thereof.

#### **X. Conclusion and Disposition.**

129. Ultimately, having conducted such an elaborate and indepth analysis of the framed issues emanating from the filed Petition and the Cross Petition, the Honourable Court is fully satisfied that the Petitioners have proved their case as presented accordingly. On the same breath, the Court finds the



Cross Petition without any merit and hence fails. Specifically, and for avoidance of any doubt, I proceed to enter judgment on the following terms: -

- a. That Judgement be and is hereby entered in favour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein with costs.
- b. That the “Counter Claim”/Cross – Petition by the 1<sup>st</sup> Respondent dated 4<sup>th</sup> 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 3<sup>rd</sup> and 4<sup>th</sup> 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 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Petitioners herein.

It Is So Ordered Accordingly

**JUDGEMENT DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF FEBRUARY 2023**

**HON. JUSTICE MR. L.L NAIKUNI (JUDGE)**

**THE ENVIRONMENT AND LAND COURT AT MOMBASA**

In the presence of:

- a. M/s. Yumnah, the Court Assistant,
- b. Mr. Muliro holding brief for Mr. Bwire Advocate for the Petitioner.
- c. No appearance for the 1<sup>st</sup> Respondent.
- d. No appearance for the 2<sup>nd</sup> Respondent.
- e. Mr. Tajbhai Advocate for the 3<sup>rd</sup> Respondent.
- f. No appearance for the 4<sup>th</sup> Respondent.

