



**Nova Holdings Limited & another v County Government of Mombasa & 2 others  
(Constitutional Petition 52 of 2021) [2024] KEHC 6688 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 6688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 52 OF 2021**

**LL NAIKUNI, J**

**MARCH 20, 2024**

**IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR  
COURT UNDER ARTICLE 23 (1), ARTICLE 162 (1), (2) (B),  
ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS AND BREACH OF ARTICLES 10 (2) (B), 19 (2), 20 (4)  
(A), 28,40, 47,50 AND 157 (11)OF THE CONSTITUTION OFKENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 258 OF THE CONSTITUTION OF KENYA,  
2010 AND ALL ENABLING POWERS AND PROVISIONS OF THE LAW**

**AND IN THE MATTER OF: SECTIONS 64 (1), 65,71,72,92(1) AND  
92 (2)OF THE PHYSICAL AND LAND USE PLANNING ACT,2019**

**AND**

**IN THE MATTER OF: SECTION 135(1) OF THE  
CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA**

**BETWEEN**

**NOVA HOLDINGS LIMITED ..... 1<sup>ST</sup> PETITIONER**

**ASHOK LABSHANKER DOSHI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE MEMBER, LAND,HOUSING AND  
PHYSICAL PLANNING. .... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

### I. Preliminaries

1. The Judgment of this court pertains to the filed Constitution Petition dated 17<sup>th</sup> November, 2021 and filed in Court on 18<sup>th</sup> November, 2021 by Nova Holdings Limited and Ashok Lanshanker Doshi, the Petitioners herein. It was against the County Government of Mombasa, the County Executive Committee Member, Land, Housing and Physical Planning and the Director of Public Prosecution, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein. *The Constitution* Petition is brought under the dint of the provisions of Articles 10 (2) (b), 19 (2), 20 (4) (a), 23 (1), 28, 40, 47, 50, 157 (11), 162 (1) (2) (b), 165 (2) (d) (ii) and 258 of *the Constitution* of Kenya 2010, Section 64 (1), 65, 71, 72, 92 (1) and 92 (2) of the *Physical and Land Use Planning Act* and Section 135 (1) of the Criminal Procedure Code Cap. 75.
2. Upon service of the Petition upon the Respondents, the 1<sup>st</sup> Respondent entered appearance through filing of a Replying Affidavit in response to the Petition dated 23<sup>rd</sup> February, 2023. The petitioners also filed a supplementary affidavit in response to Replying affidavit by the 1<sup>st</sup> Respondent dated and filed on 23<sup>rd</sup> February, 2023.
3. The 1<sup>st</sup> Petitioner is described as a limited liability company duly incorporated in the Republic of Kenya. The 2<sup>nd</sup> Petitioner is a Director of the 1<sup>st</sup> Petitioner. The 1<sup>st</sup> Respondent is a county government created under Article 176 of *the Constitution* of Kenya, 2010 and the *County Governments Act*, 2012. The 2<sup>nd</sup> Respondent is the County Chief Officer for Land Planning and Housing in the County Government of Mombasa appointed under section 45 of the *County Governments Act*, 2012. The 3<sup>rd</sup> Respondent Director of Public Prosecutions, an office created under Article 157 of *the Constitution* of Kenya, 2010 and operationalized through the *Office of the Director of Public Prosecutions Act* No.2 of 2013.

### II. The 1st and 2nd Petitioners Case

4. From the filed Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners sought for the following orders:-
  - a. A declaration be and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision and action to serve the 1<sup>st</sup> Petitioner with the Enforcement Notice Reference Number DPH/Form PPA7/034/1/1 dated 28<sup>th</sup> September 2021 over one year after the 1<sup>st</sup> Petitioner's development had been concluded, supervised and approved by the 1<sup>st</sup> Respondent is illegal null and void..
  - b. A declaration be and is hereby made that the Enforcement Notice Reference Number DPH/Form PPA7/034/1/1 dated 28<sup>th</sup> September 2021 served upon the 1<sup>st</sup> Petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is illegal, null and void and of no legal consequences.
  - c. A declaration be and is hereby made that the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to constitute and convene the Mombasa County Physical and Land Use Planning Liaison Committee to hear and determine the appeal lodged by the Petitioners against the Enforcement Notice Reference Number DPH/Form PPA7/034/1/1 dated 28<sup>th</sup> September 2021 within 30 days as provided for in section 72 (3) of the *Physical and Land Use Planning Act*, 2019 or at all is in violation of the Petitioner's constitutional rights as guaranteed by Article 50 (1) of *the Constitution* of Kenya, 2010.



- d. A declaration be and is hereby issued that the criminal prosecution of the 2<sup>nd</sup> Petitioner herein, Ashok Labshanker Doshi at the County Court in Mombasa Criminal Case No. M. 402 of 2021: Republic v Ashok Labshanker Doshi is unconstitutional, illegal, null and void.
- e. An order of certiorari be and is hereby issued removing into this Honourable Court and quashing the criminal proceedings against the 2<sup>nd</sup> Petitioner at the Mombasa County Court in Criminal Case No.M.402 of 2021:Republic v Ashok Labshanker Doshi.
- f. An order of prohibition and permanent injunction be and is hereby issued restraining the Respondents, whether by themselves agents, servants and/or whosoever is acting on their authority, behalf and/or instruction, from in any manner whatsoever interfering with the 1<sup>st</sup> Petitioner's ownership, occupation and use of the property known as Mombasa/Block XLVIII/157 and/or from interfering with the employees, tenants, members of the public or any other person authorized by the Petitioners to access, occupy, use and visit the property known as Mombasa/Block XLVIII/157.
- g. An order that the Respondents, jointly and severally, to pay to the Petitioners compensation and damages for interfering with their ownership, use and occupation of the property known as Mombasa/Block XLVIII/157 and for malicious charging and/or prosecution of the 2<sup>nd</sup> Petitioner.
- h. The costs of this Petition be paid by the Respondents jointly and severally.
- i. Any further relief or order that this Honourable Court shall deem just and fit to grant.

### III. The Legal foundation of the Petition

5. The Petition was founded on the following legal basis:
  - a. Under the provision of Article 40 of *the Constitution* of Kenya 2010, the Petitioners have a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondents breached the Petitioners' right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioners' property and making it impossible for the Petitioners, their tenants, employees and officers to access and enjoy the said property and by literally curtailing their ability to freely use and enjoy the property without any intimidation of arrest, prosecution and general threats.
  - b. Preferring criminal charges against any person was a serious matter which not only threatened one's liberty but also had the potential of denting the person's image in the society. The 2<sup>nd</sup> Petitioner was a renowned businessman who was highly respected in County of Mombasa, the entire Republic of Kenya and beyond. By prosecuting the 2<sup>nd</sup> Petitioner in a baseless, reckless and unfair manner and in utter disregard of the 1<sup>st</sup> Respondent's own Enforcement Notice which clearly stipulated that the same was suspended pending appeal, the Respondents had caused the 2<sup>nd</sup> Petitioner's reputation to be demeaned in a way that was in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20(4) (a) and Article 28 of *the Constitution* of Kenya, 2010.
  - c. The Respondent's officers, employees and county askaris had been storming the Petitioner's property known as Likoni Mall, causing commotion therein, harassing, intimidating and threatening the Petitioners' employees, agents and tenants. As a consequence, the operations at Likoni Mall had been immensely affected in a negative way thereby reducing the value of the Shopping Mall and giving up its value to the competition which would not have happened



if the Respondents had not interfered. Some tenants had threatened to vacate the property. Accordingly, the Petitioners' right to own and quietly and peacefully enjoy their property under Article 40 of *the Constitution* of Kenya 2010 had been breached by the Respondents.

- i. By prosecuting the 2<sup>nd</sup> Petitioner in a baseless, reckless and unfair manner and in utter disregard of the 1<sup>st</sup> Respondent's own Enforcement Notice which clearly stipulated that the same was suspended pending appeal, the Respondents had caused the 2<sup>nd</sup> Petitioner's reputation to be demeaned in a way that is in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20(4) (a) and Article 28 of *the Constitution* of Kenya, 2010.
- ii. As at 19<sup>th</sup> October 2021 when the Respondents prepared the 2<sup>nd</sup> Petitioner's charge sheet and as at 27<sup>th</sup> October 2021 when the Respondents charged the 2<sup>nd</sup> Petitioner in court, the Enforcement Notice was not operational because it had been automatically suspended when the Petitioners appealed against it at the Liaison Committee. Under the provision of Section 72 (5) of the *Physical and Land Use Planning Act*, 2019 an offence is created only in instances where a person who was served with an enforcement notice and failed to comply with the provisions of the notice. The omission which the 2<sup>nd</sup> Petitioner was accused of committing was failing to comply with a suspended Enforcement Notice. Failing to comply with a suspended and un - operational enforcement notice was not an offence in Kenya. Therefore, the Respondents violated and breached the 2<sup>nd</sup> Petitioner's constitutional right to a fair trial as guaranteed by Article 50 (2) (n) (i) of *the Constitution* of Kenya, 2010 which prohibited the charging and convicting a person for an act or omission which was not an offence in Kenya.
- iii. Under the provision Article 157 (11) of *the Constitution* of Kenya, 2010, the 3<sup>rd</sup> Respondent, in exercising the power to institute criminal charges, must had regard to the interests of administration of justice and the need to prevent and avoid abuse of the legal process. The 3<sup>rd</sup> Respondent violated provision of Article 157 (11) of *the Constitution* of Kenya, 2010 by:
  - i. Charging the 2<sup>nd</sup> Petitioner with an omission which never constitute a criminal offence at the material time because the Enforcement Notice was under suspension and did not require any compliance with.
  - ii. Accepting to be used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their officers to bring criminal charges against the 2<sup>nd</sup> Petitioner with the sole motive to coerce, intimidate and threaten the 2<sup>nd</sup> Petitioner to drop the cases he was pursuing against the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's Governor.
- iv. The Respondents, being public institutions, office and officer respectively, were enjoined by the provision Article 47 of *the Constitution* of Kenya, 2010 to observe fairness in their actions. The Respondents failed to observe fairness in their actions thereby violating Article 47 of *the Constitution* by:
  - a. Serving an enforcement notice upon the 1<sup>st</sup> Petitioner yet there was no development being undertaken by the Petitioners because the 1<sup>st</sup> Petitioner's development had been completed over one year earlier with very tight supervision and approval of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.



- b. Charging the 2<sup>nd</sup> Petitioner with failing to comply with a suspended and un-operational enforcement notice.
- v. Under the provision of Article 50 (1) of *the Constitution* of Kenya, 2010, every person had the right to have any dispute that could be resolved by the application of law decided in a fair and public hearing before a court, tribunal or body. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent violated the Petitioners' constitutional right under Article 50 (1) when they failed to constitute the Mombasa County Physical and Land Use Planning Liaison Committee to hear and determine the appeal lodged by the Petitioners. The 30 - day period stipulated in the provision of Section 72 (3) of the *Physical and Land Use Planning Act*, 2019 when the Petitioners' appeal was supposed to be heard and determined expired on 4<sup>th</sup> November 2021 yet the appeal was not heard because of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failure to constitute the Liaison Committee.
- vi. Under Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010, this Superior Court of the same status as the High Court has jurisdiction to determine the question of whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*. The Petitioners ask the Honourable

#### IV. Brief Facts

6. The brief facts of the Petition was that the 1<sup>st</sup> Petitioner is the registered owner of property known as Mombasa/Block XLVIII/157 (Hereinafter referred to as "The Suit Property"). There was a warehouse and a shopping Mall known as Likoni Mall erected on the suit property. The 1<sup>st</sup> Petitioner applied for development permission for the extension and alteration to the warehouse on the said property. The development permission was granted by the 1<sup>st</sup> Respondent on 10<sup>th</sup> September 2018 under Approval No. PPA 2 P/2018/435. On 28<sup>th</sup> September 2021, the 1<sup>st</sup> Petitioner was surprised when the 2<sup>nd</sup> Respondent served the 1<sup>st</sup> Petitioner with an Enforcement Notice Reference Number DPH/FORM PPA7/034/1/1 dated 28<sup>th</sup> September 2021 (Hereinafter referred "the Enforcement Notice") requiring the 1<sup>st</sup> Petitioner to stop and restore the land to its original form.
7. In addition to serving the 1<sup>st</sup> Petitioner with the Enforcement Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been incessantly sending their employees, officers and county askaris to the suit property to harass and threaten the Petitioners, the Petitioners' employees and authorized agents. On 4<sup>th</sup> October 2021, the Petitioners lodged an appeal against the Enforcement Notice at the Mombasa County Physical and Land Use Planning Liaison Committee (hereinafter the "Liaison Committee"). The Enforcement Notice clearly stipulated that the lodging of appeal at the Liaison Committee would automatically suspend the operation of the Enforcement Notice pending hearing and determination of the appeal. While the Petitioners' appeal was still pending at the Liaison Committee, the Respondents maliciously charged the 2<sup>nd</sup> Petitioner at the County Court in "Criminal Case (Mombasa) No. M. 402 of 2021: Republic v Ashok Labshanker Doshi (hereinafter referred to as "Criminal Case No.M.402 of 2021").
8. The Petitioner relied on the following issues in dispute:-
  - a. The Enforcement Notice served upon the 1<sup>st</sup> Petitioner was defective, illegal and was served upon the 1<sup>st</sup> Petitioner to advance and achieve ulterior motives.



- b. The Petitioners also contended that the criminal charges and proceedings in Criminal Case No. M.402 of 2021 were illegal, unconstitutional. They were instituted against the 2<sup>nd</sup> Petitioner to achieve ulterior motives.
  - c. The charging of the 2<sup>nd</sup> Petitioner was not only illegal and unconstitutional but was also sheer abuse of the criminal process. It was a clear manifestation of the malice and vendetta which the Respondents had against the Petitioners.
  - d. The Petitioners contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions of harassing, intimidating and interfering with the Petitioners' suit property was illegal and unconstitutional and the Petitioners invited the Honourable Court to make a finding under the provision of Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were inconsistent with and in contravention of *the Constitution* of Kenya 2010.
  - e. The Petitioners also contended that the Respondents' actions of charging the 2<sup>nd</sup> Petitioner Criminal Case No. M. 402 of 2021 were illegal and unconstitutional and the Petitioners invited the Honourable Court to make a finding under the provision of Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said prosecution under the circumstances herein was intended to achieve ulterior motives. Therefore, it was inconsistent with and in contravention of *the Constitution* of Kenya 2010.
  - f. The harassment of the Petitioners and their employees and agents as well as the criminal prosecution of the 2<sup>nd</sup> Petitioner were instigated and undertaken by the Respondents in an irregular and illegal manner and was intended to achieve ulterior motives, namely, to avenge against the 2<sup>nd</sup> Petitioner and to coerce and intimidate the 2<sup>nd</sup> Petitioner to give up a case he had filed against the 1<sup>st</sup> Respondent (ELC No. 33 of 2019: Ashok Labshaker Doshi & Anor – Versus - The County Government of Mombasa & Anor) as well as a Constitutional Petition which the 2<sup>nd</sup> Petitioner had filed against the 1<sup>st</sup> Respondent's Governor seeking to bar the said Governor from holding public office (Petition No. E042 of 2021: Ashok Labshaker Doshi & Anor Versus - Ali Hassan Joho & Anor).
9. The Petitioner relied on the following facts in support of the Petition:-
- a. The Enforcement Notice served upon the 1<sup>st</sup> Petitioner was on the following ground:
 

“..... that you have developed or carried out development without permission or in breach of the conditions of development permission as follows:  
Building structure along road of access and service road blocking the same.”
  - b. The Enforcement Notice clearly informed the 1<sup>st</sup> Petitioner of its right to appeal to the Liaison Committee in the following manner:
 

“If you are aggrieved by this notice you may appeal to the County Physical and Land Use Liaison Committee as the case may be under the provisions of Part VI of the Act before the aforesaid day of 5/10/2021 in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal.”
  - c. From the word go, the Petitioners knew that the Enforcement Notice was served with ulterior motives rather than ends of justice.



- d. Knowing that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were out to commit some mischief and any misstep by the Petitioners would be explored and taken advantage of by the Respondents, the 1<sup>st</sup> Petitioner exercised its right of appeal as outlined in the Enforcement Notice by lodging appeal against the same to the Liaison Committee on 4<sup>th</sup> October 2021, a day before the expiry of the deadline for appealing as given in the Enforcement Notice.
  - e. The appeal was duly served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 4<sup>th</sup> October 2021 together with a letter dated 4<sup>th</sup> October 2021 written by the Petitioners' advocates on record informing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the appeal had been filed and that the operation of the Enforcement Notice stood suspended.
  - f. As if to confirm the Petitioners' fears that the Enforcement Notice was intended to achieve ulterior motives, the Respondents charged the 2<sup>nd</sup> Petitioner in Criminal Case No. M.402 of 2021 with failure to comply with the Enforcement Notice which criminal charges were brought against the 2<sup>nd</sup> Petitioner before the appeal lodged at the Liaison Committee was heard and determined and during a period which the operation of the Enforcement Notice was under suspension pending determination of the appeal.
  - g. The 2<sup>nd</sup> Petitioner could not be accused of failure to comply with the Enforcement Notice because the said Notice was under suspension and was not operational at the material time.
10. The Petitioners relied on the following breaches to the statute and constitutions:-
- i. There was absolutely no legal basis for serving the 1<sup>st</sup> Petitioner with the Enforcement Notice because the 1<sup>st</sup> Petitioner was not carrying out and had not carried out any development without permission or in breach of the conditions of development permission as alleged or at all.
  - ii. Further, there was no justification or legal basis for the Enforcement Notice because of the following reasons:
    - a. The 1<sup>st</sup> Petitioner had notified the 1<sup>st</sup> Respondent of its intention to commence construction on 19<sup>th</sup> October 2019. The 1<sup>st</sup> Respondent's Building Inspector/ Development Control Officer, acknowledged receipt of the said Notice and stamped on it accordingly and inscribed thereon the word "noted" as an indication that the Respondents had acknowledged and taken note of the said Notice.
    - b. The allegation contained in the Enforcement Notice that the 1<sup>st</sup> Petitioner was "building a structure along road of access and serviceroad blocking the same" was incoherent and never made any sense. The Petitioners never comprehended and indeed no one could comprehend what the allegation was. In any event, if what the 1<sup>st</sup> and 2<sup>nd</sup> Respondents meant was that the 1<sup>st</sup> Petitioner had built a structure along access and service road, then such allegation was not true because of the following reasons:
      - a. The 1<sup>st</sup> Petitioner's development was never being undertaken presently. The development was completed in September 2020, over one year before the date of the Enforcement Notice and was duly approved and supervised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. There was no development that could be legally stopped once completed no competent Enforcement Notice could be issued in respect of a development which was completed and certified by the 1<sup>st</sup> Respondent one year before.



- b. The 1<sup>st</sup> Petitioner's development was not on or along access road and service road and never blocked any road. Before commencing construction, the 1<sup>st</sup> Petitioner had identified the beacons of the property where the development was to be undertaken and notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the same. The beacons were inspected by the 1<sup>st</sup> Respondent's Building Inspector/Development Control Officer by the name of Mr. Luseno on 20<sup>th</sup> October 2018 who duly stamped on the 1<sup>st</sup> Petitioner's Notice.
  - c. Therefore, it was not true that the development was on access road and service road otherwise the 1<sup>st</sup> Respondent would have stopped it at the time of inspection of the beacons or even during its construction.
  - d. The portion of the property in dispute was not under the Respondent's mandate. The portion was owned by Kenya Railways Limited and not the County Government. Kenya Railways Limited had not complained that there was blockage of access or service road.
  - c. The Petitioners notified the 1<sup>st</sup> Respondent at every stage of the development. The 1<sup>st</sup> Respondent's Building Inspector/Development Control Officer inspected every stage of the development and approved the same without raising any issue.
  - d. Upon completion of the development in September 2021, the 1<sup>st</sup> Petitioner's contractor, Bulkon Builders Limited, informed the 1<sup>st</sup> Respondent of the completion and applied for Occupation Permit.
  - e. On 8<sup>th</sup> October 2020, the 1<sup>st</sup> Respondent issued the 1<sup>st</sup> Petitioner with Occupation Permit Serial Number 0000516.
  - f. Therefore, it was clear that not only did the 1<sup>st</sup> Petitioner followed the law but the development was inspected and approved by the 1<sup>st</sup> Respondent at every stage.
  - g. If it were true as alleged by the Respondents that the 1<sup>st</sup> Petitioner's development was on access road and service road, the 1<sup>st</sup> Respondent would have stopped the development in its formative stages and more so at the time of inspection of the beacons or even during its construction.
- iii. In the same vein, there was absolutely no legal basis for charging the 2<sup>nd</sup> Petitioner in Criminal Case No. M.402 of 2021 with the offence of failure to comply with the Enforcement Notice because the Enforcement Notice was not operational and was under suspension at the time due to the appeal lodged by the Petitioners at the Liaison Committee as clearly indicated on the face of the Enforcement Notice.
  - iv. The reasons and explanation why the Respondents served the 1<sup>st</sup> Petitioner with the Enforcement Notice and subsequently charged the 2<sup>nd</sup> Petitioner in Criminal Case No. M.402 of 2021 were as follows:
    - a. The 2<sup>nd</sup> Petitioner sued the 1<sup>st</sup> Respondent in "ELC No. (Mombasa) No. 33 of 2019: Ashok Labshaker Doshi & Anor – Versus - The County Government of Mombasa & Anor (Hereinafter referred to as "ELC NO. 33 OF 2019") where orders were issued to restrain the 1<sup>st</sup> Respondent and its officers from interfering with the 2<sup>nd</sup> Petitioner's property.



- b. The 2<sup>nd</sup> Petitioner then secured a conviction against the 1<sup>st</sup> Respondent's Governor for disobedience of the order issued in ELC No. 33 of 2019 and the said Governor was sentenced to a fine of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000.00/=) in default of which he was to serve 60 days imprisonment.
  - c. The 2<sup>nd</sup> Petitioner subsequently filed a Petition against the 1<sup>st</sup> Respondent's Governor seeking to bar the said Governor from holding public office being "High Court (Mombasa) Constitutional Petition No. E042 of 2021: Ashok Labshaker Doshi & Anor v Ali Hassan Joho & Anor (Hereinafter referred to as "Petition No. E042 of 2021").
  - d. The Enforcement Notice, the numerous visits by the officers from the County Government of Mombasa to the Petitioners' premises and the charging of the 2<sup>nd</sup> Petitioner are calculated and aimed at avenging against the 2<sup>nd</sup> Petitioner and to intimidate, threaten and silence the 2<sup>nd</sup> Petitioner so that he can withdraw and drop the cases he has filed against the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent's Governor.
  - e. The 1<sup>st</sup> Petitioner's subject development was completed over one year earlier and its construction was not only supervised by the 1<sup>st</sup> Respondent's officers at every stage but the same was approved and given a clean bill of health at its completion in September 2020 and an Occupation Certificate was duly issued by the 1<sup>st</sup> Respondent.
  - f. The timing of the pursuit of the Petitioners by the Respondents, the issuance of the Enforcement Notice and the charging of the 2<sup>nd</sup> Petitioner in Criminal Case No. M.402 of 2021 had come at a time when the 2<sup>nd</sup> Petitioner was aggressively pursuing his Constitutional Petition filed against the 1<sup>st</sup> Respondent's Governor seeking to bar him from holding the office of the Governor of the County of Mombasa and any other public office.
  - g. It was not just a mere coincidence that the harassment of the Petitioners was coming hot on the heels of the Petition seeking to bar the 1<sup>st</sup> Respondent's Governor from holding the said office and any other public office.
  - h. The Respondents had stooped too low and permitted their respective offices to be used by the 1<sup>st</sup> Respondent's Governor so as to intimidate and silence the 2<sup>nd</sup> Petitioner and to arm-twist him to drop and withdraw the ELC No. 33 of 2019 and Petition No. E042 of 2021 thereby achieving ulterior motives that was not intended by law and the criminal justice system.
  - i. The 1<sup>st</sup> Respondent was a public and constitutional institution, the 2<sup>nd</sup> Respondent was a public and constitutional office and the 3<sup>rd</sup> Respondent was a public and constitutional officer. Such public and constitutional institution/office/officer respectively should not allow and permit themselves to be used, abused, disused and misused to achieve ulterior motives and achieve ends other than the ends of law and justice.
- v. The Petitioners contended that the Enforcement Notice as served upon the 1<sup>st</sup> Petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was defective, illegal and has been served upon the 1<sup>st</sup> Petitioner illegally and to achieve ulterior motives.

12. The Petitioners relied on the following particulars of defect and illegality of the enforcement notice:



- a. The Enforcement Notice never met the threshold provided for in the provision of Sections 71 and 72 (2) of the *Physical and Land Use Planning Act*, 2019 because:
    - i. It never specified the development being carried out without development permission;
    - ii. It did not specify the conditions of the development permission dated 10<sup>th</sup> September 2018 under Approval No.PPA 2 P/2018/435 which the 1<sup>st</sup> Petitioner contravened.
  - b. An enforcement notice could only be issued and served upon a developer in instances where a development permission was not granted or where the same was granted but there was breach of the conditions thereof. Since the 1<sup>st</sup> Petitioner herein had a valid development permission and none of the conditions specified therein was alleged to have been breached, the Enforcement Notice could not stand the test provided for in the provision of Sections 71 and 72 (2) of the *Physical and Land Use Planning Act*, 2019.
  - c. There was only one explanation why the Respondents had ignored their own inspections and approvals and now turned round and issued the Petitioners with the Enforcement Notice. The reason was that the Enforcement Notice is driven by malice and had been served upon the Petitioners to achieve ulterior motive as particularized below.
13. The Petitioner relied on the following particulars of malice and ulterior motive:-
- a. The 2<sup>nd</sup> Petitioner herein who is a Director and the main shareholder of the 1<sup>st</sup> Petitioner lodged Petition No. E42 OF 2021 seeking a declaration that the office of the Governor of Mombasa County had become vacant and that Mr. Ali Hassan Joho be barred from holding any public office in future.
  - b. The Petition was advertised in the Newspaper on 3<sup>rd</sup> September 2021. It never lasted one month after the notice was published in the said Newspaper before the Respondents descended on the Petitioners' development purporting to challenge the same on the basis that the development was on public access road as indicated in the Enforcement Notice.
  - c. Thereafter, the 2<sup>nd</sup> Petitioner was charged with failure to comply with the Enforcement Notice which as at that time was not operational because the appeal lodged by the Petitioners at the Liaison Committee was still pending.
  - d. The timing of the Enforcement Notice and the prosecution of the 2<sup>nd</sup> Petitioner coming shortly after the Petition was advertised in the newspapers was a clear manifestation that the machinery of the County Government of Mombasa (the 1<sup>st</sup> Respondent), the offices of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the law (more specifically the provisions of the *Physical and Land Use Planning Act*, 2019) and the criminal justice system is being used and abused by the Respondents to coerce, threaten and intimidate the 2<sup>nd</sup> Petitioner to drop the cases he had filed against the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent's Governor.
  - e. The Respondents should not allow their institutions, offices and officers to be used to abuse the law and achieve ulterior motives.
  - f. The coincidence of the Enforcement Notice and the 2<sup>nd</sup> Petitioner's prosecution, coming one year after the 1<sup>st</sup> Petitioner's development was completed and the Occupation Permit issued on 8<sup>th</sup> October 2020, and the Petition by the 2<sup>nd</sup> Petitioner all point to the fact that the Respondents had agreed to be used to achieve malice and ulterior motives by hitting back at, revenging and retaliating against the 2<sup>nd</sup> Petitioner for his decision to file cases against the 1<sup>st</sup>



Respondent and its Governor rather than to achieve the genuine legal process provided for and intended by the criminal justice system and the *Physical and Land Use Planning Act*, 2019.

- g. Otherwise it would not have taken the Respondents almost one year to serve the Enforcement Notice.
14. The Petitioners relied on the following issues on the abuse of criminal process, bad faith, malice and ulterior motive:-
- a. The Respondents acted in bad faith and in utter abuse of the criminal legal process by prosecuting the 2<sup>nd</sup> Petitioner on the basis of an omission which never constituted an offence as already pleaded hereinbefore.
  - b. Despite of clear indication on the face of the Enforcement Notice that an appeal to the Liaison Committee would automatically suspend the said notice, the Respondents proceeded to charge the 2<sup>nd</sup> Petitioner for failing to comply with the very suspended Enforcement Notice.
  - c. The Respondents charged the 2<sup>nd</sup> Petitioner with second count of causing and obstruction of a road as indicated in the Enforcement Notice which was under suspension. Further, the subject road was not a county road and never fell under the jurisdiction of the 1<sup>st</sup> Respondent. By charging the 2<sup>nd</sup> Petitioner with blocking a road which was not under the jurisdiction of the 1<sup>st</sup> Respondent, the Respondents acted in bad faith and abused the criminal process.
  - d. The timing of the Enforcement Notice served upon the 1<sup>st</sup> Petitioner and the prosecution of the 2<sup>nd</sup> Petitioner one year after the 1<sup>st</sup> Petitioner's development had been successfully concluded and approved by the 1<sup>st</sup> Respondent and coincidentally at a time when the 2<sup>nd</sup> Petitioner was aggressively pursuing a Petition seeking to bar the 1<sup>st</sup> Petitioner's Governor from holding the said and any public office, the Respondents acted maliciously by accepting to be used to coerce, intimidate and threaten the 2<sup>nd</sup> Petitioner to abandon the cases he had filed against the 1<sup>st</sup> Respondent and its Governor. That clearly amounted to an abuse of the criminal process to achieve ulterior motives and other objectives apart from those intended for and by the criminal justice system.
14. The Petition was grounded on the facts, testimonies and the averments on the face of the Petition and further 48 Paragraphed affidavit in support of the Petition of ASHOK LABSHANKER DOSHI the 2<sup>nd</sup> Petitioner and director of the 1<sup>st</sup> Petitioner and the 22 annexures marked as "AD1 to AD 22" annexed hereto. He averred that:-
- a. The Petitioner was the registered owner of the property known as MOMBASA/BLOCK XLVIII/157 (Hereinafter referred to as "The Suit Property"). Annexed herewith and marked as "AD 1" were a true copy of the title document.
  - b. There was a warehouse and a shopping mall known as Likoni Mall.
  - c. The 1<sup>st</sup> Petitioner applied for development permission for the extension and alteration to the warehouse on the said property.
  - d. The development permission was granted by the 1<sup>st</sup> Respondent on 10<sup>th</sup> September 2018 under Approval No. PPA 2 P/2018/435. Annexed in the affidavit and marked as "AD 2" a true copy of the Approval (PPA 2).
  - e. The 1<sup>st</sup> Petitioner notified the 1<sup>st</sup> Respondent of its intention to commence construction on 19<sup>th</sup> October 2019. The 1<sup>st</sup> Respondent's Building Inspector/Development Control Officer,



acknowledged receipt of the said Notification, stamped on it and inscribed thereon the word “NOTED” as an indication that the Respondents had acknowledged and taken note of the said Notice. Annexed in the affidavit and marked as “AD 3” a true copy of the Notice of Intention to Commence Construction.

- f. The Petitioners notified the 1<sup>st</sup> Respondent at every stage of the development. The 1<sup>st</sup> Respondent’s Building Inspector/ Development Control Officer inspected every stage of the development and approved the same without raising any issue. Annexed in the affidavit and jointly marked as “AD 4” a true copies of the Inspection Forms for every stage of the development.
- g. Upon completion of the development in September 2020, the 1<sup>st</sup> Petitioner’s contractor, Bulkon Builders Limited, informed the 1<sup>st</sup> Respondent of the completion and applied for Occupation Permit. Annexed in the affidavit and marked as “AD 5” a true copy of the letter dated 30<sup>th</sup> September 2020 by Bulkon Builders Limited.
- h. On 8<sup>th</sup> October 2020, the 1<sup>st</sup> Respondent issued the 1<sup>st</sup> Petitioner with Occupation Permit Serial Number 0000516. Annexed in the affidavit and marked as “AD 6” a true copy of the Occupation Permit dated 8<sup>th</sup> October 2020.
- i. Therefore, it was clear that not only did the Petitioners follow the law but the development was inspected and approved by the 1<sup>st</sup> Respondent at every stage.
- j. The Petitioners were therefore surprised when on 28<sup>th</sup> September 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents served the 1<sup>st</sup> Petitioner with an Enforcement Notice Reference Number DPH/FORM PPA7/034/1/1 dated 28<sup>th</sup> September 2021 (hereinafter “the Enforcement Notice”) requiring the 1<sup>st</sup> Petitioner to stop and restore the land to its original form. Annexed in the affidavit and marked as “AD 7” a true copy of the Enforcement Notice dated 28<sup>th</sup> September 2021.
- k. Earlier, on 17<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent’s officers from the Public Health Department had visited the suit premises and served upon the 1<sup>st</sup> Petitioner’s employees an “Intimation Notice” requiring the 1<sup>st</sup> Petitioner to provide “service extinguishers,” “Covid – 19 compliance” and “occupancy certificate.” The 1<sup>st</sup> Respondent did not and has never elaborated to the Petitioners what those requirements are and under what law the Petitioners were required to provide them. Annexed in the affidavit and marked as “AD 8” a true copy of the “Intimation Notice.”
- l. On 29<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent’s officers visited the suit property and served the Petitioner’s employees with a document called “Demand Notice” dated 29<sup>th</sup> September 2021 which alleged that the 1<sup>st</sup> Petitioner was “operating as a supermarket without observing proper safety measures contrary to County Government of Mombasa by - laws”. Annexed in the affidavit and marked as “AD 9” a true copy of the “Demand Notice”.
- m. The said “Demand Notice” was served upon the 1<sup>st</sup> Petitioner in bad faith because the 1<sup>st</sup> Petitioner was the owner of the Shopping Mall (landlord) but the supermarket was being operated by a distinct and separate entity known as Naivas Supermarkets Limited and who was just but the 1<sup>st</sup> Petitioner’s tenant.
- n. There was no law which mandated the 1<sup>st</sup> Respondent to demand for “service extinguishers,” “covid compliance” and “occupancy certificate” which documents are themselves unknown in



law. The Enforcement Notice served upon the 1<sup>st</sup> Petitioner was based on the following ground reproduced verbatim:

“...that you have developed or carried out development without permission or in breach of the conditions of development permission as follows:

Building structure along road of access and service road blocking the same.”

- o. The Enforcement Notice clearly informed the 1<sup>st</sup> Petitioner of its right to appeal to the County Physical and Land Use Planning Liaison Committee in the following manner:

“If you are aggrieved by this notice you may appeal to the County Physical and Land Use Liaison Committee as the case may be under the provisions of Part VI of the Act before the aforesaid day of 5/10/2021 in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal.”

- p. On 4<sup>th</sup> October 2021, the Petitioners lodged an appeal against the Enforcement Notice at the Liaison Committee. Annexed in the affidavit and marked as “AD 10” a true copy of the Appeal.
- q. Upon filing the appeal, the Petitioners served the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and formally advised them of the filing of the appeal through a letter dated 4<sup>th</sup> October 2021 written by Messrs. Oluga & Company Advocates on behalf of the Petitioners. Annexed in the affidavit and marked as “AD 11” a true copy of the letter dated 4<sup>th</sup> October 2021 by Messrs. Oluga & Company Advocates. The Enforcement Notice clearly stipulated that the lodging of appeal at the Liaison Committee would automatically suspend the operation of the Enforcement Notice pending hearing and determination of the appeal.
- r. While the Petitioners’ appeal was still pending at the Liaison Committee, the Respondents maliciously charged the 2<sup>nd</sup> Petitioner at the County Court in Criminal Case No. M.402 of 2021”. Annexed in the affidavit and marked as “AD 12” a true copy of the Charge Sheet dated 19<sup>th</sup> October 2021. Although the Summons requiring his attendance to court. His Charge Sheet were prepared and signed on 19<sup>th</sup> October 2021, the Respondents waited until 26<sup>th</sup> October 2021 at 4pm, the eve of the date for his plea taking which was scheduled for 27<sup>th</sup> October 2021 to serve him with the Summons requiring his appearance in court the following day. Annexed in the affidavit and marked as “AD 13” a true copy of the Summons with endorsement at the back that he was served on the eve of the plea taking day at 4 pm.
- s. Service of the Summons was not only effected late but the same was not served upon him personally. It was served upon his employees at Likoni Shopping Mall. The Respondent's intention behind the late and non-personal service of Summons was such that he could fail to attend court so that warrants of arrest be issued against him. He never appeared in person for the plea taking on 27<sup>th</sup> October, 2021 because of ill health. He sent Mr. Willis O. Oluga, Advocate who informed the trial magistrate of his health status and the plea taking was deferred to 2<sup>nd</sup> December 2021. The Enforcement Notice served upon the 1<sup>st</sup> Petitioner was defective, illegal and was served upon the 1<sup>st</sup> Petitioner to advance and achieve ulterior motives.
- t. In addition to serving the 1<sup>st</sup> Petitioner with the Enforcement Notice the Intimation Notice and the Demand Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been incessantly sending their employees, officers and county askaris to the suit property to harass, intimidate and threaten the Petitioners, the Petitioners’ employees and authorised agents.



- u. From 17<sup>th</sup> September 2021, employees, officers and county askaris from the County Government of Mombasa had consistently and frequently visited the Petitioner's suit property known as Likoni Mall without any valid reason and just cause. Their latest visit was on 16<sup>th</sup> November 2021 whereby three officers from the County Government of Mombasa by the names Mr. John Wambua, Mwakavi Munyoki and Benson Rapando visited the suit property without any mission or purpose but to surreptitiously, covertly and indeed overtly intimidate, harass and threaten the Petitioners' workers, employees, tenants and members of the public who visit the Shopping Mall. Annexed in the affidavit and marked as "AD - 14" was a true of the extract of the Visitors' Book where the said personnel from the 1<sup>st</sup> Respondent duly signed when they visited the suit premises.
- v. In addition to serving the 1<sup>st</sup> Petitioner with the Enforcement Notice the Intimation Notice and the Demand Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been incessantly sending their employees, officers and county askaris to the suit property to harass, intimidate and threaten the Petitioners, their employees, agents, tenants and members of the public using the Shopping Mall. One of their employees called Harun Chege Willy had been variously harassed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's officers and even arrested, taken to two different police stations and asked to record a statement. As a result of his arrest, the rest of the employees at the Shopping Mall had been scared out of their skin and they presently lived in utter apprehension not knowing when the County Officers or even the police would pounce on and arrest them without valid reason.
- w. The main reason why the Respondents had taken the actions described herein was so as to hit back and revenge against him because of two cases which he had filed against the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's Governor respectively as discussed hereunder:
  - i. "ELC No. 33 of 2019" which his wife and he filed to restrain the 1<sup>st</sup> Respondent herein and another person from interfering with a property owned by his wife and himself and situated in Changamwe, Mombasa County.
  - ii. He and his wife managed to successfully secure a conviction against the 1<sup>st</sup> Respondent's Governor, Ali Hassan Joho for disobeying the order issued in ELC No. 33 of 2019 pursuant to which the said Governor was sentenced to pay a fine of a sum Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000.00/=) in default of which he serves a jail term of 60 days. Annexed in the affidavit and marked "AD 15" was a true copy of the ruling which had found the 1<sup>st</sup> Respondent's Governor to be guilty of disobeying lawful court order and marked as "AD 16" was a true copy of the ruling through which the 1<sup>st</sup> Respondent's Governor was sentenced.
  - iii. Subsequently he and his wife filed a Constitutional Petition against the 1<sup>st</sup> Respondent's Governor seeking to bar the said Governor from holding the office of the Governor and any public office being "Petition No. E042 OF 2021"). Annexed in the affidavit and marked as "AD 17" was a true copy of the Petition.
  - iv. He filed Petition No. E042 OF 2021 on 30<sup>th</sup> July 2021 and the same was advertised in the Standard Newspaper with leave of court on 3<sup>rd</sup> September 2021. Annexed in the affidavit and marked as "AD 18" was a copy of the newspaper advertisement. Other than being advertised in the Standard Newspaper, Petition No. E042 of 2021 received wide media coverage. Annexed in the affidavit and marked as "AD 19" was a sample of media reports. The 1<sup>st</sup> Respondent's Governor entered appearance in Petition No.



E042 of 2021 on 16<sup>th</sup> September 2021 and the following day, on 17<sup>th</sup> September 2021, officers from the County Government of Mombasa stormed the Petitioners' Shopping Mall, caused commotion and served the "Intimation Notice." Annexed in the affidavit and marked as "AD 20" was a true copy of the memorandum of appearance in Petition No. E042 OF 2021.

- v. From 17<sup>th</sup> September 2021 forwarded, the Petitioners had never known peace because the Respondents had been visiting the suit property and levelling all manner of accusations against the Petitioners and their employees. The timing of the harassment of the Petitioners, the service of Notices upon the 1<sup>st</sup> Petitioner and his prosecution had all coincided with our filing of Petition No. E042 of 2021. It was clear that the actions taken by the Respondents the subject of the complaints herein were intended to revenge against him for filing Petition No. E042 of 2021 seeking to bar the 1<sup>st</sup> Respondent's Governor from holding the said office and any other public office and the county government machinery has been unleashed against him in revenge and to intimidate and threaten him to drop the Petition.
- x. The Enforcement Notice and the criminal charges brought against him in were illegal, unconstitutional. They were in utter breach of the Petitioners' constitutional rights as pleaded in the Petition. Further, the Enforcement Notice and the criminal charges against him being used to achieve ulterior motive namely to coerce, intimidate and threaten him to drop the cases he had filed against the 1<sup>st</sup> Respondent and its Governor. The Respondents herein had accepted to be used by the 1<sup>st</sup> Respondent's Governor to advance, champion and achieve purposes that was not in consonance with the law and the criminal justice system. The Respondents had acted against the Petitioners with sheer malice because of the following reasons:
  - i. Despite the Enforcement Notice clearly indicating that the same would be suspended upon lodging of an appeal at the Liaison Committee, the Respondents proceeded to charge him with failing to comply with the Enforcement Notice which stood suspended when the Petitioners filed their appeal at the Liaison Committee on 4<sup>th</sup> October 2021.
  - ii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had adamantly refused to constitute and convene the Liaison Committee to hear and determine our appeal despite reminders. The 30-day period stipulated in the provision of Section 72 (3) of the Physical and Land. Annexed in the affidavit and marked as "AD 21" was a true copy of a reminder letter dated 11<sup>th</sup> November 2021 by Oluga & Company Advocates.
  - iii. Used the Planning Act, 2019 when their appeal was supposed to be heard and determined expired on 4<sup>th</sup> November 2021 yet the appeal was not heard because of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's failure to constitute the Liaison Committee.
- y. The criminal charges against him was not only illegal and unconstitutional but amounted to sheer abuse of the criminal justice system and process and was a clear manifestation of the malice and vendetta which the Respondents had against him. The Respondents had breached of the Petitioners' constitutional rights and violation of the constitution and the law as clearly and expressly pleaded in the Petition. More specifically:
  - i. Under Article 40 of the Constitution of Kenya 2010, the Petitioners had a right to acquire and own property. The said right included the right to occupy, use and develop such property. The Respondents had breached the Petitioners' right to acquire and



own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioners' property and making it impossible for the Petitioners, their tenants, employees and officers to access and enjoy the said property and by literally curtailing their ability to freely use and enjoy the property without any intimidation of arrest, prosecution and general threats.

- ii. Preferring criminal charges against any person was a serious matter which not only threatens one's liberty but also had the potential of denting the person's image in the society. He was a renowned businessman who was highly respected in Mombasa County, the entire Republic of Kenya and beyond. By prosecuting him in a baseless, reckless and unfair manner and in utter disregard of the 1<sup>st</sup> Respondent's own Enforcement Notice which clearly stipulated that the same was suspended pending appeal, the Respondents had caused his reputation to be demeaned in a way that was in breach of his constitutional right to dignity under the provision of Article 10 (2) (b), Article 19 (2), Article 20 (4) (a) and Article 28 of *the Constitution* of Kenya, 2010.
  - iii. The Respondent's officers, employees and county askaris had been storming the Petitioner's property known as Likoni Mall, causing commotion therein, harassing, intimidating and threatening the Petitioners' employees, agents and tenants. As a consequence, the operations at Likoni Mall had been immensely affected in a negative way thereby reducing the value of the Shopping Mall and giving up its value to the competition which would not have happened if the Respondents had not interfered. Some tenants had threatened to vacate the property. Accordingly, the Petitioners' right to own and quietly and peacefully enjoy their property under the provision of Article 40 of *the Constitution* of Kenya 2010 had been breached by the Respondents.
- z. If the orders sought in the application and this Petition were not granted the Petitioners would suffer great prejudice because the harassment, intimidation and threats of the Petitioners and their employees, tenants and authorized agents as well as breach of the Petitioner's constitutional rights by the Respondents would continue wantonly and unabated. The harassment, intimidation and threats by the Respondents had been exhibited by their actions described herein and in the Petition which could be summarized as follows:-
- i. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents served upon the 1<sup>st</sup> Petitioner an Intimation Notice which did not have basis.
  - ii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents served upon the 1<sup>st</sup> Petitioner an Demand Notice which never had any basis.
  - iii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents served upon the 1<sup>st</sup> Petitioner an Enforcement Notice which never had any basis.
  - iv. Officers from the 1<sup>st</sup> Respondent had incessantly continuously visited the suit property without basis causing unnecessary commotion.
  - v. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent arrested and/or caused to be arrested the Petitioner's agents and employees thereby interfering with their liberty and subjecting them to immense threats and intimidation.
  - vi. The 3<sup>rd</sup> Respondent working in cahoots with and on instructions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent caused him to be charged with failure to comply with an Enforcement Notice which was under suspension at the material time and was therefore not in operation and incapable of being complied with.



- vii. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had refused to constitute the Mombasa County Physical and Land Use Planning Liaison Committee to hear and determine the appeal lodged by the Petitioners.
  - aa. The 3<sup>rd</sup> Respondents acted in bad faith and in utter abuse of the criminal legal process by accepting to be used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 1<sup>st</sup> Respondent's Governor to mount baseless, illegal, unjustified and unwarranted criminal charges against him. The Respondents charged him with second count of causing and obstruction of a road as indicated in the Enforcement Notice which was under suspension. Further, the subject road was not a county road and never fell under the jurisdiction of the 1<sup>st</sup> Respondent. The road was under Kenya Railways Limited which had not complained that the road was being blocked by the Petitioners. Annexed in the affidavit and marked as "AD 22" was a true copy of a letter dated 4<sup>th</sup> November 2021 from the Chief Land Registrar confirming that the access road was surrendered to Kenya Railways Limited.
  - ab. By charging him with the blocking of a road which was not under the jurisdiction of the 1<sup>st</sup> Respondent, the Respondents acted in bad faith and abused the criminal process. He made the affidavit in support of the Petition, he urged the Honourable Court to grant the orders sought in the Petition.

## V. The Response to the Petition

- 15. While opposing the Petition dated 17<sup>th</sup> November, 2023, the 1<sup>st</sup> Respondent filed a 27<sup>th</sup> Paragraphed Replying Affidavit dated and sworn on 23<sup>rd</sup> February, 2023 sworn by Mr. John Wambua Francis, with two annexures marked as "JWF - 1 and 2" annexed thereto. He averred that:-
  - a. He was the Physical Planner with the 1<sup>st</sup> Respondent hence competent to swear this affidavit on its behalf.
  - b. The 1<sup>st</sup> Respondent herein had been mandated by *the Constitution* of Kenya 2010 under the forth schedule at Section 8 which states:  
The functions and powers of the County are--  
"County Planning and Development, including-
    - a) .....;
    - b) land survey and mapping;
    - c) boundaries and fencing;
    - d) .....and
  - c. Further the functions and powers of the 1<sup>st</sup> Respondent which regards to planning and development control is buttressed in the *Physical and Land Use Planning Act* No. 13 of 2019 together with the various regulations.
  - d. Now that the function and powers of the 1<sup>st</sup> Respondent had been clearly set out, the 1<sup>st</sup> Respondent must ensure that there was proper planning and development within the jurisdiction of County of Mombasa.



- e. The contents of Paragraph 4 of the Petition was denied and the mandate and/or powers of the 2<sup>nd</sup> Respondent were not derived from the provision of Section 45 of the [County Governments Act 2012](#).
- f. The approval attached in the affidavit was issued by the 1<sup>st</sup> Respondent. However, the said approval had conditions attached to it.
- g. Further to the foregoing in Paragraph 8 above, condition No.4 of the said approval stated as follows:  

“Not constituting part of public land earmarked for repossession or private land with ownership disputes”
- h. There was clear encroachment by the Petitioners wherein they had built structures along a road access and service road (that was used in case of emergencies) and as such encroaching on public land. (Attached in the affidavit and marked as “JWF-1” was a topo cadastral map an aerial view of the plot and the encroachment).
- i. The Petitioner had blocked and encroached into a road that had made it impossible for the general public to use. Thus they were denying the public of the free use and passage and a threat to emergencies. (Attached in the affidavit and marked as “JWF – 2” was a Survey Plan where the surroundings of the Parcel No. 157 which belonged to the Petitioners and was surrounded by a road that had since been blocked and/or encroached by the Petitioners).
- j. There was a clear admission by the Petitioners in their Petition that they carried out developments on property known as Mombasa/BlockXLVIII/157.
- k. Further to the above, there was also an admission by the Petitioners that the 1<sup>st</sup> Petitioner is the registered owner of Property known as Mombasa/Block XLVIII/157.
- l. The provision of Section 72 of the Physical and Land Use Act No. 13 of 2019 gave powers to the 2<sup>nd</sup> Respondent to issue an enforcement notice if any of the condition of a development permission had not been complied with and in this case the Petitioners had not complied with the development permission granted to them by developing on a road.
- m. The averments by the Petitioners that the enforcement notice was served upon them to achieve ulterior motives with due respect was a side show and the fact that the Petitioners, more specifically the 1<sup>st</sup> Petitioner had encroached and/or blocked a road never changed.
- n. The 1<sup>st</sup> Respondent was carrying out their constitutional and legislative mandate in ensuring developments was controlled and planning was proper especially with regards to encroachment to roads which results to public interest rights and they needed to be protected both by the 1<sup>st</sup> Respondent and this Honourable Court.
- o. Any other matters touching on either the former Governor and the 2<sup>nd</sup> Petitioner in other court cases were private issues and should not be mixed with the issues raised in their enforcement notice, public health notice and that of the fire department. Those were under the mandate of the 1<sup>st</sup> Respondent. It was the duty of the 1<sup>st</sup> Respondent to ensure the safety of the general public.
- p. The notices issued to the Petitioners were straight forward and the only aspect it attracted was compliance. If they had complied with the said notices then no sanctions would have arisen.



- q. The Petitioners were using the “back door” and misleading this Honourable Court to “sanitize” an illegal, irregular development that encroached into an access road and a service road. They prayed to this Honourable Court that it should not entertain such an action.
- r. Before issuance of the enforcement notice, they had carried out an investigation and confirmed that the Petitioner had encroached on public access road.
- s. The Petitioners had further informed this Honourable Court that they identified the beacons of the property where the development was to be undertaken and that they had notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the same. Further, they stated that the beacons were inspected by the 1<sup>st</sup> Respondent’s building inspector/Development control officer by the name of Luseno on 20<sup>th</sup> October 2018. This was a clear misrepresentation and this Honourable Court should not be persuaded by the same for the following reasons:-
  - i. The Petitioners never identified the beacons and never invited the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein;
  - ii. The building inspector/development control officer never inspected the beacons as he was not the technical person to do so as it would have ideally been a County surveyor who would have inspected the beacons. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents would have officially written to the Petitioners over the issue of the beacons through a Survey Report;
  - iii. The Petitioner had not submitted a Survey Report in support of their Petition as they clearly were aware that they had encroached into a road by developing on a road; and
  - iv. The forms the Petitioners were referring to were mere notices of intention to commence construction. No way do those forms amount to an inspection but just a notice by the Petitioners that they intend to commence construction.
- t. The 1<sup>st</sup> Respondent tried to move this Honourable Court in getting a just determination in this suit, by requesting to conduct a survey. However, the same was blocked by the Petitioners and a ruling entered in their favour on 21<sup>st</sup> July 2022.
- u. Before issuance of the enforcement notice, they had carried out an investigation and confirmed that the Petitioner had encroached on public access road.
- v. Further investigations were carried out using survey maps and it was not in contention that the Petitioner had encroached and/or blocked public access road, the only challenge would be to establish the extent of the encroachment and blockage if at all this Honourable Court agreed with the Respondents that indeed the Petitioners were at fault.
- w. This affidavit was in opposition to the Petition.

## **VI. The Supplementary Affidavit in response to the Response to the Petition**

- 16. With the leave of Court, the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners responded to the contents made out in the filed Replying Affidavit dated 23<sup>rd</sup> February, 2023. This was through an 11<sup>th</sup> Paragraphed Supplementary Affidavit sworn on 20<sup>th</sup> July, 2023 by the 2<sup>nd</sup> Petitioner herein and a Director of the 1<sup>st</sup> Petitioner. He averred that:-
  - a. The allegations at made out under the contents of Paragraphs 10, 11, 20 and 21 that the Petitioners had encroached on public land were not true.



- b. The suit property was never encroaching on public land as confirmed by the Survey Report by Edward Kiguru dated 13<sup>th</sup> March 2023. The report confirmed that the building was erected within the property boundaries. Annexed in the affidavit and marked “A” a true copy of the Survey Report.
- c. Although the 1<sup>st</sup> Respondent is alleging that the sui property encroaches on public road, no survey report was produced in court to support that allegation. Instead, the 1<sup>st</sup> Respondent relying on Google maps to support their allegation on encroachment. He was advised by Mr. Edward Kiguru who was a renowned surveyor, which advise was contained in Mr. Kiguru's Survey Report filed in the affidavit and that the Google maps could be used for showing “general bird's eye view” of the property but the same were not authority on the boundaries of the suit property.
- d. The Respondent's conduct in this matter clearly and loudly spoke of malice.
- e. For the instance, the 1<sup>st</sup> Respondent served the Petitioners with an Enforcement Notice alleging that there was encroachment yet the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had never undertaken any survey of the suit property. After serving the Enforcement Notice, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought to sanitize their allegations by asking this court to allow them to conduct an ex post facto survey so as to confirm their allegations on encroachment. The application was declined by this court.
- f. The Respondents had never conducted a survey of the suit property and their allegations that there was encroachment were just hot air.
- g. Since they were very desperate, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had now relied on Google maps which were not authority on property boundaries.
- h. He urged the Honourable Court to ignore the allegation that there was encroachment on public road.

## **VII. Submissions**

17. On 5<sup>th</sup> December, 2023 in the presence of both parties the Court directed that the Petition dated 17<sup>th</sup> November, 2021 be dispensed off by way of written submissions. By the time of penning down this Judgement, the Court realized that despite of all the reminders made, its only the Petitioners who filed their written Submissions and hence the court will proceed to render the final decision based on the merit of the case.
18. Pursuant to that, on 31<sup>st</sup> January, 2024 after the Honourable Court confirmed compliance the Honourable Court issued a Judgment date on notice accordingly.

### **A. The Written Submissions by the 1st & 2nd Petitioners**

19. The Petitioners through the Law firm of Messrs. Oluga & Company Advocates, filed their written submission dated 26<sup>th</sup> July, 2023. Mr. Oluga Advocate commenced his submissions by stating that the Petitioners' submissions was on the main Petition dated 17<sup>th</sup> November 2021 and filed on 18<sup>th</sup> November 2021. The Petition was supported by the Supporting Affidavit of Ashok Labshanker Doshi, the 2<sup>nd</sup> Petitioner. He adopted the Supporting Affidavit in respect of the Notice of Motion dated 17<sup>th</sup> November 2021 for conservatory orders. Therefore, the Petition is in essence supported by the Supporting Affidavit in support of the application for conservatory orders and the exhibits thereto as it was not necessary to replicate the same. The 1<sup>st</sup> Petitioner is the registered owner of the suit property. There was a warehouse and a Shopping Mall known as Likoni Mall erected on the suit property. The



- 1<sup>st</sup> Petitioner applied for development permission for the extension and alteration to the warehouse on the said property. The development permission was granted by the 1<sup>st</sup> Respondent on 10<sup>th</sup> September 2018 under Approval No. PPA 2 P/2018/435.(See annexure marked as “AD 2”).
20. According to the Learned Counsel, the 1<sup>st</sup> Petitioner notified the 1<sup>st</sup> Respondent of its intention to commence construction on 19<sup>th</sup> October 2019. The 1<sup>st</sup> Respondent’s Building Inspector/ Development Control Officer, acknowledged receipt of the said Notification, stamped on it and inscribed thereon the word “Noted” as an indication that the Respondents had acknowledged and taken note of the said Notice.(See annexure marked as marked as “AD 3”).The Petitioners notified the 1<sup>st</sup> Respondent at every stage of the development. The 1<sup>st</sup> Respondent’s Building Inspector/ Development Control Officer inspected every stage of the development and approved the same without raising any issue. (See annexures jointly marked as “AD 4”). Upon completion of the development in September 2020, the 1<sup>st</sup> Petitioner’s contractor, Bulkon Builders Limited, informed the 1<sup>st</sup> Respondent of the completion and applied for Occupation Permit. (See annexures marked as “AD 5”).
21. The Learned Counsel averred that on 8<sup>th</sup> October 2020, the 1<sup>st</sup> Respondent issued the 1<sup>st</sup> Petitioner with Occupation Permit Serial Number 0000516. (See annexures marked as “AD 6”). Therefore, it was clear that not only did the Appellant follow the law but the development was inspected and approved by the 1<sup>st</sup> Respondent at every stage. The Petitioners were therefore surprised when on 28<sup>th</sup> September 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents served the 1<sup>st</sup> Petitioner with an Enforcement Notice Reference Number DPH/Form PPA7/034/1/1 dated 28<sup>th</sup> September 2021 requiring the 1<sup>st</sup> Petitioner to stop and restore the land to its original form.
22. Earlier, on 17<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent’s officers from the Public Health Department had visited the suit premises and served upon the 1<sup>st</sup> Petitioner’s employees an “Intimation Notice” requiring the 1<sup>st</sup> Petitioner to provide “service extinguishers,” “Covid compliance” and “occupancy certificate.” The 1<sup>st</sup> Respondent never and had never elaborated to the Petitioners what those requirements were and under what law the Petitioners were required to provide them. On 29<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent’s officers visited the suit property and served the Petitioner’s employees with a document called “Demand Notice” dated 29<sup>th</sup> September 2021 which alleged that the 1<sup>st</sup> Petitioner was “operating as a supermarket without observing proper safety measures contrary to County Government of Mombasa by-laws.
23. The Learned Counsel contended that the said “Demand Notice” was served upon the 1<sup>st</sup> Petitioner in bad faith because the 1<sup>st</sup> Petitioner was the owner of the Shopping Mall (landlord) but the supermarket was being operated by a distinct and separate entity known as Naivas Supermarkets Limited and who was just but the 1<sup>st</sup> Petitioner’s tenant. The Enforcement Notice served upon the 1<sup>st</sup> Petitioner was based on the following ground reproduced verbatim:
- “.....that you have developed or carried out development without permission or in breach of the conditions of development permission as follows:
- Building structure along road of access and service road blocking the same.”
24. The Enforcement Notice clearly informed the 1<sup>st</sup> Petitioner of its right to appeal to the Liaison Committee in the following manner:
- “If you are aggrieved by this notice you may appeal to the County Physical and Land Use Liaison Committee as the case may be under the provisions of Part VI of the Act before the



aforsaid day of 5/10/2021 in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal.”

25. On 4<sup>th</sup> October, 2021, the Petitioners lodged an appeal against the Enforcement Notice at the Mombasa County Physical and Land Use Planning Liaison Committee as (seen from Annexure marked as “AD 10”). Upon filing the appeal, the Petitioners served the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and formally advised them of the filing of the appeal through a letter dated 4<sup>th</sup> October 2021 written by Oluga & Company Advocates on behalf of the Petitioners. (Seen from Annexures marked as “AD 11”). The Enforcement Notice clearly stipulated that the lodging of appeal at the Liaison Committee would automatically suspend the operation of the Enforcement Notice pending hearing and determination of the appeal.
26. The Learned Counsel further stated that while the Petitioners’ appeal was still pending at the Liaison Committee, the Respondents maliciously charged the 2<sup>nd</sup> Petitioner at the County Court the “Criminal Case No. M. 402 of 2021”). Although the Summons requiring the 2<sup>nd</sup> Petitioner’s attendance to court and his Charge Sheet were prepared and signed on 19<sup>th</sup> October 2021, the Respondents waited until 26<sup>th</sup> October 2021 at 4pm, the eve of the date for plea taking which was scheduled for 27<sup>th</sup> October 2021 to serve the 2<sup>nd</sup> Petitioner with the Summons requiring his appearance in court the following day. Service of the Summons was not only effected late but the same was not served upon the 2<sup>nd</sup> Petitioner personally. It was served upon his employees at Likoni Shopping Mall. The Respondents’ intention behind the late and non-personal service of Summons was such that the 2<sup>nd</sup> Petitioner could fail to attend court so that warrants of arrest be issued against him.
27. In addition to serving the 1<sup>st</sup> Petitioner with the Enforcement Notice the Intimation Notice and the Demand Notice, the Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents incessantly sent their employees, officers and county askaris to the suit property to harass, intimidate and threaten the Petitioners, the Petitioners’ employees and authorized agents. The particulars of such harassment have been given in the Petition and Supporting Affidavit. The Petitioners submit that the main reason why the Respondents had taken the actions complained of was so as to hit back and revenge against the 2<sup>nd</sup> Petitioner because of two cases which he lodged filed against the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent’s then Governor, Ali Hassan Joho respectively as discussed hereunder:
  - i. ELC No. 33 of 2019: Ashok Labshaker Doshi & Anor V The County Government of Mombasa & Anor (hereinafter “elc No.33 of 2019”)
  - ii. Mombasa Constitutional Petition No. E042 of 2021: ashok Labshaker Doshi & Anor V. Ali Hassan Joho & Anor (hereinafter “petition No.e042 of 2021”).
28. On the jurisdiction of this Court, the Learned Counsel submitted that under Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010, this Superior Court of the same status as the High Court has jurisdiction to determine the question of whether anything said to be done under the authority of *the Constitution* or of any law was inconsistent with, or in contravention of *the Constitution*. The Petitioners asked the Honourable Court to make a determination whether the following actions and decisions of Respondents was in contravention of *the Constitution*:
  - i. The decision and action to serve the 1<sup>st</sup> Petitioner with the Enforcement Notice under Section 72 (1) and (5) of the *Physical and Land Use Planning Act*, 2019 over one year after the 1<sup>st</sup> Petitioner’s development had been concluded, supervised and approved by the 1<sup>st</sup> Respondent.
  - ii. The decision and action to charge the 2<sup>nd</sup> Petitioner with failing to comply with the Enforcement Notice which was itself under suspension and therefore not in operation.



- iii. The decision and action to charge the 2<sup>nd</sup> Petitioner with blocking a road contrary to Section 7 (a) (v) as read with section 7 (a) of the Mombasa Roads Act, 2016 yet the subject road does not fall under the jurisdiction of the County Government of Mombasa.
  - iv. The failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to constitute and convene the Mombasa County Physical and Land Use Planning Liaison Committee to hear and determine the appeal lodged by the Petitioners within 30 days as provided for in Section 72 (3) of the *Physical and Land Use Planning Act*, 2019 or at all.
29. According to the issues in dispute, the Learned Counsel submitted that the Enforcement Notice served upon the 1<sup>st</sup> Petitioner was defective, illegal and was served upon the 1<sup>st</sup> Petitioner to advance and achieve ulterior motives. The Petitioners also contended that the criminal charges and proceedings in Criminal Case No. M. 402 of 2021 was illegal, unconstitutional and were instituted against the 2<sup>nd</sup> Petitioner to achieve ulterior motives. The charging of the 2<sup>nd</sup> Petitioner was not only illegal and unconstitutional but was also sheer abuse of the criminal process and was a clear manifestation of the malice and vendetta which the Respondents had against the Petitioners. The Petitioners contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions of harassing, intimidating and interfering with the Petitioners' suit property was illegal and unconstitutional and the Petitioners invited the Honourable Court to make a finding under the provision of Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said actions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was inconsistent with and in contravention of *the Constitution* of Kenya 2010.
30. The Petitioners also averred that the Respondents' actions of charging the 2<sup>nd</sup> Petitioner Criminal Case No. M. 402 of 2021 were illegal and unconstitutional and the Petitioners invited the Honourable Court to make a finding under Article 165 (2) (d) (ii) of *the Constitution* of Kenya 2010 that the said prosecution under the circumstances herein was intended to achieve ulterior motives and was therefore inconsistent with and in contravention of *the Constitution* of Kenya 2010. The harassment of the Petitioners and their employees and agents as well as the criminal prosecution of the 2<sup>nd</sup> Petitioner were instigated and undertaken by the Respondents in an irregular and illegal manner and was intended to achieve ulterior motives, namely, to avenge against the 2<sup>nd</sup> Petitioner and to coerce and intimidate the 2<sup>nd</sup> Petitioner to give up a case he had filed against the 1<sup>st</sup> Respondent as well as a Constitutional Petition which the 2<sup>nd</sup> Petitioner had filed against the 1<sup>st</sup> Respondent's Governor seeking to bar the said Governor from holding public office.
31. On the facts in support of the Petition, the Learned Counsel submitted that the Enforcement Notice served upon the 1<sup>st</sup> Petitioner was on the following ground:
- “...that you have developed or carried out development without permission or in breach of the conditions of development permission as follows:
- Building structure along road of access and service road blocking the same.”
32. The Enforcement Notice clearly informed the 1<sup>st</sup> Petitioner of its right to appeal to the Liaison Committee in the following manner:
- “If you are aggrieved by this notice you may appeal to the County Physical and Land Use Liaison Committee as the case may be under the provisions of Part VI of the Act before the aforesaid day of 5/10/2021 in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal.”



33. From the word go, the Petitioners knew that the Enforcement Notice was served with ulterior motives rather than ends of justice. Knowing that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were out to commit some mischief and any misstep by the Petitioners would be explored and taken advantage of by the Respondents, the 1<sup>st</sup> Petitioner exercised its right of appeal as outlined in the Enforcement Notice by lodging appeal against the same to the Liaison Committee on 4<sup>th</sup> October 2021, a day before the expiry of the deadline for appealing as given in the Enforcement Notice. The appeal was duly served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 4<sup>th</sup> October 2021 together with a letter dated 4<sup>th</sup> October 2021 written by the Petitioners' Advocates on record informing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the appeal had been filed and that the operation of the Enforcement Notice stood suspended.
34. As if to confirm the Petitioners' fears that the Enforcement Notice was intended to achieve ulterior motives, the Respondents charged the 2<sup>nd</sup> Petitioner in Criminal Case No. M. 402 of 2021 with failure to comply with the Enforcement Notice which criminal charges were brought against the 2<sup>nd</sup> Petitioner before the appeal lodged at the Liaison Committee was heard and determined and during a period which the operation of the Enforcement Notice was under suspension pending determination of the appeal. The 2<sup>nd</sup> Petitioner could not be accused of failure to comply with the Enforcement Notice because the said Notice was under suspension and was not operational at the material time.
35. According to the Learned Counsel, the 1<sup>st</sup> Respondent opposed the Petition through a Replying Affidavit sworn by JOHN WAMBUA FRANCIS sworn and filed on 23<sup>rd</sup> February 2023. The gist of the 1<sup>st</sup> Respondent's response was that the Petitioners had encroached on public land by building on a road access. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents never filed a response to the Petition. Based on the foregoing, they submit that there were three main issues for determination before court, to wit: Firstly, whether the Petitioners encroached on a road access. The Learned Counsel submitted that the 1<sup>st</sup> Respondent never presented a Survey Report to prove its allegations of encroachment. Instead, the 1<sup>st</sup> Respondent relied on Google maps. To rebut the 1<sup>st</sup> Respondent's allegations on encroachment, the Petitioners filed a Survey Report by EDWARD KUGURU dated 13<sup>th</sup> March 2023 which was attached to the Supplementary Affidavit by the 2<sup>nd</sup> Petitioner sworn on 20<sup>th</sup> July 2023. Mr. Kiguru, a seasoned Surveyor of many years' experience, clearly stated in his report that Google maps could be used for showing "general bird's eye view" of the property but the same was never an authority on the boundaries of the suit property.
36. It would also be remembered that despite of serving the Petitioners with notices indicating that the Petitioners had encroached on road access, the 1<sup>st</sup> Respondent had not undertaken any survey of the suit property at the time of serving those notices. Indeed, after this suit was filed, was when the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed an application dated 20<sup>th</sup> April 2022 seeking an order to allow their surveyor to carry out a survey of the suit property. The application was dismissed by this court vide a ruling delivered on 21<sup>st</sup> July 2022. To date, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had never undertaken a survey of the suit property and they could not tell whether the same encroached on the road access. On their part, the Petitioners had exhibited a survey report by MR. EDWARD KIGURU showing that there was no encroachment as alleged.
37. Further the Learned Counsel stated that it was sad that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleged that that there was encroachment and served the Petitioners with notices to that effect yet they had not undertaken any survey and had not undertaken any survey to date. After accusing the Petitioners of encroachment and serving notices in which the allegation of encroachment was made, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought to rubber stamp their allegation by seeking an order of this court to undertake survey. It was a good thing that the court declined to aid them. In light of the foregoing, the Learned



Counsel urged the court to make a finding that the 1<sup>st</sup> Petitioner's suit property never encroached on any road access.

38. Secondly, on whether there was breach of *the Constitution* and statute. The Learned Counsel contended that they highlighted the breach as follows. There was absolutely no legal basis for serving the 1<sup>st</sup> Petitioner with the Enforcement Notice because the 1<sup>st</sup> Petitioner was not carrying out and had not carried out any development without permission or in breach of the conditions of development permission as alleged or at all. Further, there was no justification or legal basis for the Enforcement Notice because of the following reasons:
- i. The 1<sup>st</sup> Petitioner had notified the 1<sup>st</sup> Respondent of its intention to commence construction on 19<sup>th</sup> October 2019. The 1<sup>st</sup> Respondent's Building Inspector/Development Control Officer, acknowledged receipt of the said Notice and stamped on it accordingly and inscribed thereon the word "NOTED" as an indication that the Respondents had acknowledged and taken note of the said Notice.
  - ii. The allegation contained in the Enforcement Notice that the 1<sup>st</sup> Petitioner was "building a structure along road of access and service road blocking the same" was incoherent and never made any sense. The Petitioners never comprehended and indeed no one could comprehend what the allegation was. In any event, if what the 1<sup>st</sup> and 2<sup>nd</sup> Respondents meant was that the 1<sup>st</sup> Petitioner had built a structure along access and service road, then such allegation is not true because of the following reasons:
    - a. The 1<sup>st</sup> Petitioner's development was not being undertaken presently. The development was completed in September 2020, over one year before the date of the Enforcement Notice and was duly approved and supervised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. There was no development that could be legally stopped once completed no competent Enforcement Notice could be issued in respect of a development which was completed and certified by the 1<sup>st</sup> Respondent one year before.
    - b. The 1<sup>st</sup> Petitioner's development was not on or along access road and service road and does not block any road. Before commencing construction, the 1<sup>st</sup> Petitioner had identified the beacons of the property where the development was to be undertaken and notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the same. The beacons were inspected by the 1<sup>st</sup> Respondent's Building Inspector/Development Control Officer by the name of Mr. Luseno on 20<sup>th</sup> October 2018 who duly stamped on the 1<sup>st</sup> Petitioner's Notice.
    - c. It was therefore not true that the development was on access road and service road otherwise the 1<sup>st</sup> Respondent would have stopped it at the time of inspection of the beacons or even during its construction.
    - d. The portion of the property in dispute was not under the Respondent's mandate. The portion was owned by Kenya Railways Limited and not the county Government. Kenya Railways Limited had not complained that there was blockage of access or service road.
  - iii. The Petitioners notified the 1<sup>st</sup> Respondent at every stage of the development. The 1<sup>st</sup> Respondent's Building Inspector/ Development Control Officer inspected every stage of the development and approved the same without raising any issue.



- iv. Upon completion of the development in September 2021, the 1<sup>st</sup> Petitioner's contractor, Bulkon Builders Limited, informed the 1<sup>st</sup> Respondent of the completion and applied for Occupation Permit.
  - v. On 8<sup>th</sup> October 2020, the 1<sup>st</sup> Respondent issued the 1<sup>st</sup> Petitioner with Occupation Permit Serial Number 0000516.
  - vi. It was therefore clear that not only did the 1<sup>st</sup> Petitioner follow the law but the development was inspected and approved by the 1<sup>st</sup> Respondent at every stage.
  - vii. If it were true as alleged by the Respondents that the 1<sup>st</sup> Petitioner's development was on access road and service road, the 1<sup>st</sup> Respondent would have stopped the development in its formative stages and more so at the time of inspection of the beacons or even during its construction.
39. In the same vein, according to the Learned Counsel there was absolutely no legal basis for charging the 2<sup>nd</sup> Petitioner in Criminal Case No.M.402 of 2021 with the offence of failure to comply with the Enforcement Notice because the Enforcement Notice was not operational and was under suspension at the time due to the appeal lodged by the Petitioners at the Liaison Committee as clearly indicated on the face of the Enforcement Notice. The reasons and explanation why the Respondents served the 1<sup>st</sup> Petitioner with the Enforcement Notice and subsequently charged the 2<sup>nd</sup> Petitioner in Criminal Case No.M. 402 of 2021 were as follows:
- i. The 2<sup>nd</sup> Petitioner sued the 1<sup>st</sup> Respondent in ELC (Mombasa) No. 33 of 2019 where orders were issued to restrain the 1<sup>st</sup> Respondent and its officers from interfering with the 2<sup>nd</sup> Petitioner's property.
  - ii. The 2<sup>nd</sup> Petitioner then secured a conviction against the 1<sup>st</sup> Respondent's Governor for disobedience of the order issued in ELC (Mombasa) No. 33 of 2019 and the said Governor was sentenced to a fine of Kenya Shillings two Hundred and Fifty Thousand (Kshs. 250,000.00) in default of which he is to serve 60 days imprisonment.
  - iii. The 2<sup>nd</sup> Petitioner subsequently filed a Petition against the 1<sup>st</sup> Respondent's Governor seeking to bar the said Governor from holding public office being Petition No. E042 of 2021.
  - iv. The Enforcement Notice, the numerous visits by the officers from the County Government of Mombasa to the Petitioners' premises and the charging of the 2<sup>nd</sup> Petitioner were calculated and aimed at avenging against the 2<sup>nd</sup> Petitioner and to intimidate, threaten and silence the 2<sup>nd</sup> Petitioner so that he could withdraw and drop the cases he has filed against the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent's Governor.
  - v. The 1<sup>st</sup> Petitioner's subject development was completed over one year earlier and its construction was not only supervised by the 1<sup>st</sup> Respondent's officers at every stage but the same was approved and given a clean bill of health at its completion in September 2020 and an Occupation Certificate was duly issued by the 1<sup>st</sup> Respondent.
  - vi. The timing of the pursuit of the Petitioners by the Respondents, the issuance of the Enforcement Notice and the charging of the 2<sup>nd</sup> Petitioner in Criminal Case No. M. 402 of 2021 had come at a time when the 2<sup>nd</sup> Petitioner was aggressively pursuing his Constitutional Petition filed against the 1<sup>st</sup> Respondent's Governor seeking to bar him from holding the office of the Governor of the County of Mombasa and any other public office.



- vii. It was not just a mere coincidence that the harassment of the Petitioners was coming hot on the heels of the Petition seeking to bar the 1<sup>st</sup> Respondent's Governor from holding the said office and any other public office.
  - viii. The Respondents had stooped too low and permitted their respective offices to be used by the 1<sup>st</sup> Respondent's Governor so as to intimidate and silence the 2<sup>nd</sup> Petitioner and to arm-twist him to drop and withdraw ELC No. 33 of 2019 and Petition No. E042 of 2021 thereby achieving ulterior motives that was not intended by law and the criminal justice system.
  - ix. The 1<sup>st</sup>, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were a public and constitutional institution; a public and constitutional office and a public and constitutional officer. Such public and constitutional institution/office/officer respectively should not allow and permit themselves to be used, abused, disused and misused to achieve ulterior motives and achieve ends other than the ends of law and justice.
40. The Learned Counsel contended that the Enforcement Notice as served upon the 1<sup>st</sup> Petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was defective, illegal and has been served upon the 1<sup>st</sup> Petitioner illegally and to achieve ulterior motives for the reasons discussed in the subsequent paragraphs. The Enforcement Notice ever met the threshold provided for in the provision of Sections 71 and 72 (2) of the [Physical and Land Use Planning Act](#), 2019 because:
- i. It never specified the development being carried out without development permission;
  - ii. It never specified the conditions of the development permission dated 10<sup>th</sup> September 2018 under Approval No. PPA 2 P/2018/435 which the 1<sup>st</sup> Petitioner contravened.
41. The Learned Counsel submitted that an enforcement notice could only be issued and served upon a developer in instances where a development permission was not granted or where the same was granted but there was breach of the conditions thereof. Since the 1<sup>st</sup> Petitioner herein had a valid development permission and none of the conditions specified therein was alleged to have been breached, the Enforcement Notice could not stand the test provided for in sections 71 and 72 (2) of the [Physical and Land Use Planning Act](#), 2019. There was only one explanation why the Respondents had ignored their own inspections and approvals and now turned round and issued the Petitioners with the Enforcement Notice- the Enforcement Notice was driven by malice and had been served upon the Petitioners to achieve ulterior motive as particularized below:-
- i. The 2<sup>nd</sup> Petitioner herein who was a Director and the main shareholder of the 1<sup>st</sup> Petitioner lodged Petition No. E42 of 2021 seeking a declaration that the office of the governor of Mombasa County had become vacant and that Ali Hassan Joho be barred from holding any public office in future.
  - ii. The Petition was advertised in the Newspaper on 3<sup>rd</sup> September 2021. It did not last one month after the notice was published in the said Newspaper before the Respondents descended on the Petitioners' development purporting to challenge the same on the basis that the development is on public access road as indicated in the Enforcement Notice.
  - iii. Thereafter, the 2<sup>nd</sup> Petitioner was charged with failure to comply with the Enforcement Notice which as at that time was not operational because the appeal lodged by the Petitioners at the Liaison Committee was still pending.
  - iv. The timing of the Enforcement Notice and the prosecution of the 2<sup>nd</sup> Petitioner coming shortly after the Petition was advertised in the newspapers was a clear manifestation that the machinery



of the County Government of Mombasa (the 1<sup>st</sup> Respondent), the offices of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the law (more specifically the provisions of the [Physical and Land Use Planning Act, 2019](#)) and the criminal justice system was being used and abused by the Respondents to coerce, threaten and intimidate the 2<sup>nd</sup> Petitioner to drop the cases he had filed against the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent's Governor.

- v. The Respondents should not allow their institutions, offices and officers to be used to abuse the law and achieve ulterior motives.
  - vi. The coincidence of the Enforcement Notice and the 2<sup>nd</sup> Petitioner's prosecution, coming one year after the 1<sup>st</sup> Petitioner's development was completed and the Occupation Permit issued on 8<sup>th</sup> October 2020, and the Petition by the 2<sup>nd</sup> Petitioner all point to the fact that the Respondents had agreed to be used to achieve malice and ulterior motives by hitting back at, revenging and retaliating against the 2<sup>nd</sup> Petitioner for his decision to file cases against the 1<sup>st</sup> Respondent and its Governor rather than to achieve the genuine legal process provided for and intended by the criminal justice system and the [Physical and Land Use Planning Act, 2019](#).
  - vii. Otherwise it would not have taken the Respondents almost one year to serve the Enforcement Notice.
42. The Learned Counsel submitted that as at 19<sup>th</sup> October, 2021 when the Respondents prepared the 2<sup>nd</sup> Petitioner's charge sheet and as at 27<sup>th</sup> October 2021 when the Respondents charged the 2<sup>nd</sup> Petitioner in court, the Enforcement Notice was not operational because it had been automatically suspended when the Petitioners appealed against it at the Liaison Committee. Under section 72 (5) of the [Physical and Land Use Planning Act, 2019](#) an offence was created only in instances where a person served with an enforcement notice failed to comply with the provisions of the notice. The omission which the 2<sup>nd</sup> Petitioner was accused of committing was failing to comply with a suspended Enforcement Notice. Failing to comply with a suspended and unoperational enforcement notice was not an offence in Kenya. Therefore, the Respondents violated and breached the 2<sup>nd</sup> Petitioner's constitutional right to a fair trial as guaranteed by Article 50(2) (n) (i) of [the Constitution](#) of Kenya, 2010 which prohibited the charging and convicting a person for an act or omission which was not an offence in Kenya.
43. Under the provision of Article 157 (11) of [the Constitution](#) of Kenya, 2010, the 3<sup>rd</sup> Respondent, in exercising the power to institute criminal charges, must have regard to the interests of administration of justice and the need to prevent and avoid abuse of the legal process. The 3<sup>rd</sup> Respondent violated Article 157 (11) of [the Constitution](#) of Kenya, 2010 by:
- a. Charging the 2<sup>nd</sup> Petitioner with an omission which never constituted a criminal offence at the material time because the Enforcement Notice was under suspension and never required any compliance with.
  - b. Accepting to be used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their officers to bring criminal charges against the 2<sup>nd</sup> Petitioner with the sole motive to coerce, intimidate and threaten the 2<sup>nd</sup> Petitioner to drop the cases he was pursuing against the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's Governor.
44. According to the Learned Counsel, the Respondents, being public institutions, office and officer respectively, are enjoined by Article 47 of [the Constitution](#) of Kenya, 2010 to observe fairness in their actions. The Respondents failed to observe fairness in their actions thereby violating Article 47 of [the Constitution](#) by:



- a. Serving an enforcement notice upon the 1<sup>st</sup> Petitioner yet there was no development being undertaken by the Petitioners because the 1<sup>st</sup> Petitioner's development had been completed over one year earlier with very tight supervision and approval of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  - b. Charging the 2<sup>nd</sup> Petitioner with failing to comply with a suspended and unoperational enforcement notice.
45. Under Article 50 (1) of *the Constitution* of Kenya, 2010, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, tribunal or body. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent violated the Petitioners' constitutional right under Article 50 (1) when they failed to constitute the Mombasa County Physical and Land Use Planning Liaison Committee to hear and determine the appeal lodged by the Petitioners. The 30-day period stipulated in section 72 (3) of the *Physical and Land Use Planning Act*, 2019 when the Petitioners' appeal was supposed to be heard and determined expired on 4<sup>th</sup> November 2021 yet the appeal was not heard because of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's failure to constitute the Liaison Committee. For the foregoing reasons, the Learned Counsel urged the Honourable Court to make a finding that the Respondents breached *the Constitution* and statute.
46. Thirdly, on whether there was breach of the Petitioners' constitutional rights. The Learned Counsel submitted that there was breach of the Petitioners' constitutional rights under Article 40 of *the Constitution* of Kenya 2010. The Petitioners had a right to acquire and own property. The said right included the right to occupy, use and develop such property. The Respondents had breached the Petitioners' right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioners' property and making it impossible for the Petitioners, their tenants, employees and officers to access and enjoy the said property and by literally curtailing their ability to freely use and enjoy the property without any intimidation of arrest, prosecution and general threats.
47. Preferring criminal charges against any person was a serious matter which not only threatens one's liberty but also has the potential of denting the person's image in the society. The 2<sup>nd</sup> Petitioner was a renowned businessman who was highly respected in Mombasa County, the entire Republic of Kenya and beyond. By prosecuting the 2<sup>nd</sup> Petitioner in a baseless, reckless and unfair manner and in utter disregard of the 1<sup>st</sup> Respondent's own Enforcement Notice which clearly stipulated that the same was suspended pending appeal, the Respondents have caused the 2<sup>nd</sup> Petitioner's reputation to be demeaned in a way that was in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20(4) (a) and Article 28 of *the Constitution* of Kenya, 2010. The Respondent's officers, employees and county askaris had been storming the Petitioner's property known as Likoni Mall, causing commotion therein, harassing, intimidating and threatening the Petitioners' employees, agents and tenants. As a consequence, the operations at Likoni Mall had been immensely affected in a negative way thereby reducing the value of the Shopping Mall and giving up its value to the competition which would not have happened if the Respondents had not interfered. Some tenants had threatened to vacate the property. Accordingly, the Petitioners' right to own and quietly and peacefully enjoy their property under Article 40 of *the Constitution* of Kenya 2010 has been breached by the Respondents.
48. The Learned Counsel submitted that the Respondents acted in bad faith and in utter abuse of the criminal legal process by prosecuting the 2<sup>nd</sup> Petitioner on the basis of an omission which never constituted an offence as already pleaded hereinbefore. Despite of clear indication on the face of the Enforcement Notice that an appeal to the Liaison Committee would automatically suspend the said notice, the Respondents proceeded to charge the 2<sup>nd</sup> Petitioner for failing to comply with the very suspended Enforcement Notice. The Respondents charged the 2<sup>nd</sup> Petitioner with second



count of causing and obstruction of a road as indicated in the Enforcement Notice which was under suspension. Further, the subject road was not a county road and never fell under the jurisdiction of the 1<sup>st</sup> Respondent. By charging the 2<sup>nd</sup> Petitioner with blocking a road which was not under the jurisdiction of the 1<sup>st</sup> Respondent, the Respondents acted in bad faith and abused the criminal process.

49. The timing of the Enforcement Notice served upon the 1<sup>st</sup> Petitioner and the prosecution of the 2<sup>nd</sup> Petitioner one year after the 1<sup>st</sup> Petitioner's development had been successfully concluded and approved by the 1<sup>st</sup> Respondent and coincidentally at a time when the 2<sup>nd</sup> Petitioner was aggressively pursuing a Petition seeking to bar the 1<sup>st</sup> Petitioner's Governor from holding the said and any public office, the Respondents acted maliciously by accepting to be used to coerce, intimidate and threaten the 2<sup>nd</sup> Petitioner to abandon the cases he had filed against the 1<sup>st</sup> Respondent and its Governor. That clearly amounted to an abuse of the criminal process to achieve ulterior motives and other objectives apart from those intended for and by the criminal justice system.
50. In conclusion, the Learned Counsel stated that for the reasons addressed in the Petition, the Supporting Affidavit and the Supplementary Affidavit and as discussed in these submissions, the court should allow the Petition in its entirety and ward costs of the same to the Petitioners.

### **VIII. Analysis and Determination**

51. I have carefully considered all the filed pleadings pertaining to the Petition dated 17<sup>th</sup> November, 2021, the Supporting affidavit, the written submissions by the Petitioner, the cited authorities and the relevant provisions of [Constitution of Kenya, 2010](#) and the the statutes.
52. To reach informed, just, reasonable and Equitable decision. The Honourable Court has crystalised the subject matter into the following three (3) salient issues for its determination. These are:-
  - a. Whether the Petitioner through the filed Petition dated 17<sup>th</sup> November, 2021 has met the threshold of a Constitutional Petition.
  - b. Whether the Petitioner's fundamental rights and freedoms have been infringed, violated and/or threatened upon by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents herein; and
  - c. Who should bear the costs of the Petition?

#### **IssueNo. a.) Whether the Petitioner through the filed Petition dated 17<sup>th</sup> November, 2021 has met the threshold of a Constitutional Petition.**

53. Under this sub heading, the Honourable Court assesses the Petition dated 17<sup>th</sup> November, 2021 where the Petitioner seeks for above set out reliefs. From the very onset, the Court has the fundamental task to determine whether the Petition is in conformity with the required standards for such Constitution suits. Under [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a Petitioner must disclose facts relied upon, constitutional rights and freedoms violated, nature of injury caused, capacity to bring the Petition, details relating to related civil/criminal matter and the reliefs sought.
54. This Honourable Court must establish the constitutional basis of the Petition which is founded under several Paragraphs which include:-
  - a. Under Article 40 of [the Constitution](#) of Kenya 2010, the Petitioners have a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondents have breached the Petitioners' right to acquire and own property under Article 40 of [the Constitution](#) of Kenya 2010 by interfering with the Petitioners' property and making it



impossible for the Petitioners, their tenants, employees and officers to access and enjoy the said property and by literally curtailing their ability to freely use and enjoy the property without any intimidation of arrest, prosecution and general threats.

- b. Preferring criminal charges against any person is a serious matter which not only threatens one's liberty but also has the potential of denting the person's image in the society. The 2<sup>nd</sup> Petitioner is a renowned businessman who is highly respected in Mombasa County, the entire Republic of Kenya and beyond. By prosecuting the 2<sup>nd</sup> Petitioner in a baseless, reckless and unfair manner and in utter disregard of the 1<sup>st</sup> Respondent's own Enforcement Notice which clearly stipulated that the same is suspended pending appeal, the Respondents have caused the 2<sup>nd</sup> Petitioner's reputation to be demeaned in a way that is in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20(4) (a) and Article 28 of the Constitution of Kenya, 2010.
  - c. Under Article 157 (11) of the Constitution of Kenya, 2010, the 3<sup>rd</sup> Respondent, in exercising the power to institute criminal charges, must have regard to the interests of administration of justice and the need to prevent and avoid abuse of the legal process. The 3<sup>rd</sup> Respondent violated Article 157 (11) of the Constitution of Kenya, 2010 by:
    - i. Charging the 2<sup>nd</sup> Petitioner with an omission which did not constitute a criminal offence at the material time because the Enforcement Notice was under suspension and did not require any compliance with.
    - ii. Accepting to be used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and their officers to bring criminal charges against the 2<sup>nd</sup> Petitioner with the sole motive to coerce, intimidate and threaten the 2<sup>nd</sup> Petitioner to drop the cases he was pursuing against the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's Governor.
  - d. The Respondents, being public institutions, office and officer respectively, are enjoined by Article 47 of the Constitution of Kenya, 2010 to observe fairness in their actions. The Respondents failed to observe fairness in their actions thereby violating Article 47 of the Constitution.
  - e. Under Article 50 (1) of the Constitution of Kenya, 2010, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, tribunal or body. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent violated the Petitioners' constitutional right under Article 50 (1) when they failed to constitute the Mombasa County Physical and Land Use Planning Liaison Committee to hear and determine the appeal lodged by the Petitioners. The 30-day period stipulated in section 72 (3) of the Physical and Land Use Planning Act, 2019 when the Petitioners' appeal was supposed to be heard and determined expired on 4<sup>th</sup> November 2021 yet the appeal was not heard because of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's failure to constitute the Liaison Committee.
  - f. Under Article 165 (2) (d) (ii) of the Constitution of Kenya 2010, this Superior Court of the same status as the High Court has jurisdiction to determine the question of whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. The Petitioners ask the Honourable.
55. As a matter of course, the Constitution of Kenya under the provision of 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.....”

56. This Honourable 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 (tissue) having a soul and consciousness of its own.” Just like all other tissues, it has to be fed and watered. It breathes. Without oxygen and freshness, it will wither and die. I have learnt that these things are not just metaphorical. They are real. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
57. Paragraphs 1 to 5 of the Petition dated 17<sup>th</sup> November, 2021 describes the parties to this Petition, whereas paragraphs 6 to 14 gives the factual basis of the Petition. Paragraph 15 to 20 of the Petition discusses the issues in dispute and in the petition.
58. At Paragraph 36 of the Petition dated 17<sup>th</sup> November, 2021 the Petitioners lay out the Constitutional violations by the Respondents contending that under the provision of Article 40 of *the Constitution* of Kenya 2010, the Petitioners have a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondents have breached the Petitioners' right to acquire and own property under the provision of Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioners' property and making it impossible for the Petitioners, their tenants, employees and officers to access and enjoy the said property and by literally curtailing their ability to freely use and enjoy the property without any intimidation of arrest, prosecution and general threats. The Petitioner also contended that preferring criminal charges against any person is a serious matter which not only threatens one's liberty but also has the potential of denting the person's image in the society. The 2<sup>nd</sup> Petitioner is a renowned businessman who is highly respected in Mombasa County of Mombasa, the entire Republic of Kenya and beyond. By prosecuting the 2<sup>nd</sup> Petitioner in a baseless, reckless and unfair manner and in utter disregard of the 1<sup>st</sup> Respondent's own Enforcement Notice which clearly stipulated that the same is suspended pending appeal, the Respondents have caused the 2<sup>nd</sup> Petitioner's reputation to be demeaned in a way that is in breach of his constitutional right to dignity Article 10 (2) (b), Article 19 (2), Article 20(4) (a) and Article 28 of *the Constitution* of Kenya, 2010.
59. From the filed Petition, the Petitioners proceeded to seek for nine (9) key prayers. The threshold of what amounts to constitutional Petition was set out in the now famous case of:- “Anarita Karimi Njeru v Republic [1979]eKLR” and “Trusted Alliance Society of Human Rights v Attorney General & 5 Others [2013] eKLR”. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:

“We would however again stress that if a person is seeking redress from 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/her 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.” where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-



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

60. Further, in the “Thorp v 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 other words, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”

61. Additionally, in the case of:- “Meme v Republic [2004] 1 E.A. 124”, the court held a Petitioner must set out with reasonable degree of precision the complaint and the manner in which the rights have been infringed with clear focus on fact, law and *the Constitution*. This was the same position in the case of:- “Mumo Matemu v Trusted Society of Human Rights Alliance & Others [2013] eKLR” and “John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR”.

62. The Petitioner is required to demonstrate that an impugned decision or action violates or threatens to violate the bill of rights or *the Constitution* for that matter. The test is whether the decision, act or omission complained about falls within the ambit of an administrative action in line with Section 2 of the *Fair Administrative Action Act*, 2015.

63. Before examining whether the Constitutional rights of the Petitioners were violated, this Honourable Court must examine whether or not the title of the suit land held by the Petitioner is valid and lawful. According to the Petitioners, the 1<sup>st</sup> Petitioner was the registered owner of the suit property. There is a warehouse and a shopping Mall known as Likoni Mall erected on the suit property. The 1<sup>st</sup> Petitioner applied for development permission for the extension and alteration to the warehouse on the said property. The development permission was granted by the 1<sup>st</sup> Respondent on 10<sup>th</sup> September 2018 under Approval No. PPA 2 P/2018/435. On 28<sup>th</sup> September 2021, the 1<sup>st</sup> Petitioner was surprised when the 2<sup>nd</sup> Respondent served the 1<sup>st</sup> Petitioner with an Enforcement Notice Reference Number DPH/FORM PPA7/034/1/1 dated 28<sup>th</sup> September 2021 - the Enforcement Notice requiring the 1<sup>st</sup> Petitioner to stop and restore the land to its original form.

64. It is evident that the rights of a registered owner of property are clearly set out under the provision of Sections 24, 25 and 26 of the *Land Registration Act* 2012, which provide as follows:-

24. “Subject to this Act(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

65. Further Section 25(1) provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. This Honourable Court is satisfied that the Petitioners are the bona fide owner of the suit property.

66. In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the



Petitioner herein pleaded with reasonable precision as founded in the “Anarita Karimi (Supra)”. To respond to this query, and despite of the Petitioner making such general allegation that there has been breach, violation and denial of the provisions of Articles 40 and 47, of *the Constitution* of Kenya 2010; perpetrated by the Respondents, the Honorable court is completely satisfied that the Petitioners had dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and for the prayers sought. The next question would be whether the Petitioner had proved the alleged breach of the rights particularized in the Petition as to fair administration in furtherance to the rights of the Petitioners on the suit property.

ISSUE No. b.) Whether the Petitioner’s fundamental rights and freedoms have been infringed, violated and/or threatened upon by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents herein.

67. Under this sub heading, while considering the aspects of whether there existed any violation, infringement and denial of the fundamental rights entitled to the Petitioners, it’s imperative to extrapolate indepth on the concept of enforcement notice. Whilst the Petitioners heavily relied on the provision of Article 40 of *the Constitution* of Kenya, 2010, on the protection of the right to property, the Respondents on their part and defence, depended on the provisions of Section 38 of the Physical Planning Act. Section 38 provided that:

“Enforcement notice

1. When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.
2. An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.
3. Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.
4. If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.
5. Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.
6. An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.



7. Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6)”.
68. The enforcement notice was issued in line with the provisions of Section 38 of the Physical Planning Act (now the *Physical and Land Use Planning Act* of 2019). The Physical Planning Act established an elaborate mechanism for resolving any disputes/ complaints that may arise from exercise of powers donated by that Act to the respondents or any other public authority created under the Act. To this end, Section 7 of the Act established Physical planning Liaison Committees whose functions are set under Section 10 of the Act. Section 13 provided for the Appeals to liaison committees, while Section 15 also made provision for Appeals to the National liaison Committee and to the High Court.
69. The Petitioners have alleged that its fundamental rights were infringed upon. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu v Trusted Society of Human Rights Alliance & Another (Supra)” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru v Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-
- “Constitutional violations must be pleaded with a reasonable degree of precision.....”
70. Before going into the merits of the Constitutionality of the Enforcement notice, from the material on record, it indicates that the 1<sup>st</sup> Petitioner is the registered owner of the suit property. (See annexure marked as “AD 1”). There was a warehouse and a Shopping Mall known as Likoni Mall erected on the suit property. The 1<sup>st</sup> Petitioner applied for development permission for the extension and alteration to the warehouse on the said property. The development permission was granted by the 1<sup>st</sup> Respondent on 10<sup>th</sup> September 2018 under Approval No. PPA 2 P/2018/435.(See annexure marked as “AD 2”). The 1<sup>st</sup> Petitioner notified the 1<sup>st</sup> Respondent of its intention to commence construction on 19<sup>th</sup> October 2019. The 1<sup>st</sup> Respondent’s Building Inspector/Development Control Officer, acknowledged receipt of the said Notification, stamped on it and inscribed thereon the word “NOTED” as an indication that the Respondents had acknowledged and taken note of the said Notice.(See annexure marked as marked as “AD 3”).The Petitioners notified the 1<sup>st</sup> Respondent at every stage of the development. The 1<sup>st</sup> Respondent’s Building Inspector/Development Control Officer inspected every stage of the development and approved the same without raising any issue. (See annexures jointly marked as “AD 4”). Upon completion of the development in September 2020, the 1<sup>st</sup> Petitioner’s contractor, Bulkon Builders Limited, informed the 1<sup>st</sup> Respondent of the completion and applied for Occupation Permit. (See annexures marked as “AD 5”).
71. On 8<sup>th</sup> October 2020, the 1<sup>st</sup> Respondent issued the 1<sup>st</sup> Petitioner with Occupation Permit Serial Number 0000516. (See annexures marked as “AD 6”). Therefore, it was clear that not only did the Petitioners followed the law but the development was inspected and approved by the 1<sup>st</sup> Respondent at every stage. The Petitioners were therefore surprised when on 28<sup>th</sup> September 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents served the 1<sup>st</sup> Petitioner with an Enforcement Notice Reference Number DPH/FORM PPA7/034/1/1 dated 28<sup>th</sup> September 2021 (hereinafter “the Enforcement Notice”) requiring the 1<sup>st</sup> Petitioner to stop and restore the land to its original form.(See annexures marked as “AD 7”).
72. From the pleadings and the evidence adduced, earlier, on 17<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent’s officers from the Public Health Department had visited the suit premises and served upon the 1<sup>st</sup> Petitioner’s employees an “Intimation Notice” requiring the 1<sup>st</sup> Petitioner to provide “service extinguishers,” “covid compliance” and “occupancy certificate.” The 1<sup>st</sup> Respondent did not and has



never elaborated to the Petitioners what those requirements are and under what law the Petitioners were required to provide them. (See annexures marked as “AD 8”). On 29<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent’s officers visited the suit property and served the Petitioner’s employees with a document called “Demand Notice” dated 29<sup>th</sup> September 2021 which alleged that the 1<sup>st</sup> Petitioner was “operating as a supermarket without observing proper safety measures contrary to County Government of Mombasa by-laws.”(See annexures marked as ‘AD 9’).

73. According to the Petitioners, the Enforcement Notice served upon the 1<sup>st</sup> Petitioner was based on the following ground reproduced verbatim:

“...that you have developed or carried out development without permission or in breach of the conditions of development permission as follows:

Building structure along road of access and service road blocking the same.”

ac. The Enforcement Notice clearly informed the 1<sup>st</sup> Petitioner of its right to appeal to the County Physical and Land Use Planning Liaison Committee in the following manner:

“If you are aggrieved by this notice you may appeal to the County Physical and Land Use Liaison Committee as the case may be under the provisions of Part VI of the Act before the aforesaid day of 5/10/2021 in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal.”

74. On 4<sup>th</sup> October, 2021, the Petitioners lodged an appeal against the Enforcement Notice at the Mombasa County Physical and Land Use Planning Liaison Committee (hereinafter the “Liaison Committee”). (See Annexure marked as “AD 10”). Upon filing the appeal, the Petitioners served the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and formally advised them of the filing of the appeal through a letter dated 4<sup>th</sup> October 2021 written by the Law firm of Messrs. Oluga & Company Advocates on behalf of the Petitioners. (See Annexures marked as “AD 11”). The Enforcement Notice clearly stipulated that the lodging of appeal at the Liaison Committee would automatically suspend the operation of the Enforcement Notice pending hearing and determination of the appeal.

75. The Respondents on the other hand contended that the approval attached in the affidavit was issued by the 1<sup>st</sup> Respondent. However, according to them, the said approval had conditions to be fulfilled attached to it. Further to the foregoing, condition No. 4 of the said approval states as follows:

“Not constituting part of public land earmarked for repossession or private land with ownership disputes”

76. As far as they were concerned, there was clear encroachment by the Petitioners wherein they had built structures along a road access and service road (that were used in case of emergencies) and as such encroaching on public land. (Attached in the affidavit and marked “JWF-1” was a topo cadastral map an aerial view of the plot and the encroachment). The Petitioners has blocked and encroached into a road that has made it impossible for the general public to use, thus denying the public of the free use and passage and a threat to emergencies. There was a clear admission by the Petitioners in their Petition that they carried out developments on the suit property. Further to the above, there is also an admission by the Petitioners that the 1<sup>st</sup> Petitioner is the registered owner of suit Property.

77. The provision of Section 72 of the Physical and Land Use Act No. 13 of 2019 gives powers to the 2<sup>nd</sup> Respondent to issue an enforcement notice if any of the condition of a development permission has not been complied with. As far as the Respondents were concerned, In this case the Petitioners had not complied with the development permission granted to them by developing on a road.



78. Both the Petitioners and the Respondents have agreed that the 1<sup>st</sup> Petitioner is the registered owner of the suit property. Having been issued with the certificate of registration upon purchase is deemed as the absolute and indefeasible owner of the suit property. Legally speaking, as a registered proprietor of the suit property, then the Petitioners' rights were vested with the indefeasible right, title and interest on the suit property vested in them by the provisions under Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012. Such rights include exclusive use of the suit property, quiet and peaceful enjoyment of the same and uninterrupted use of the said parcel of land.
79. The Petitioners have further averred that after the acquisition of the suit property, it applied to the 1<sup>st</sup> Respondent for development permissions and the 1<sup>st</sup> Respondent approved the same. Indeed the 1<sup>st</sup> Respondent through the Directorate of Physical Planning approved the said development plans. The said approvals were produced as exhibits in court. Therefore, it is evident that the Petitioners' construction was commenced on the suit property with the approval of the 1<sup>st</sup> Respondent through the City Planning Department.
80. The Petitioners also alleged that as it continued with the development and construction on the suit property, the 1<sup>st</sup> Respondent's personnel inspected the said development time and again and there was no objection at all. According to the Petitioners, the 1<sup>st</sup> Respondent did not specify the conditions of the development permission dated 10<sup>th</sup> September 2018 under Approval No.PPA 2 P/2018/435 which the 1<sup>st</sup> Petitioner contravened. Therefore the Court will find and hold that indeed the 1<sup>st</sup> Petitioner constructed the suit property with the approval of the 1<sup>st</sup> Respondent who continued to inspect the said construction and eventually after the completion of the same, the 1<sup>st</sup> Respondent issued the 1<sup>st</sup> Petitioner with a occupation permit issued on 8<sup>th</sup> October, 2020. The continued inspection of the construction by the 1<sup>st</sup> Respondent there was no way the 1<sup>st</sup> Respondent could have missed construction of the same contrary to the approved plans.
81. The Petitioners further averred that the 1<sup>st</sup> Respondent was out to harass them. Indeed, they used the 3<sup>rd</sup> Respondent to do that through Criminal Case No. M. 402 of 2021 and who had no justification to do so. This Court will indeed find and hold that the Enforcement Notice issued by the 1<sup>st</sup> Respondent on Reference Number DPH/FORM PPA7/034/1/1 dated 28<sup>th</sup> September 2021 after it had approved the construction was not justifiable and was just an act of harassment and intimidation to the Petitioners. The Court finds that issuance of the said Enforcement Notice is null and void.
82. As regards the issue on the criminal case in the Chief Magistrates Court where the 2<sup>nd</sup> Petitioner is an accused person. According to the provision of Article 162(2) (b) of [the Constitution](#) on the other hand empowers Parliament to "establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land." In this regard and pursuant to Article 162(3) or [the Constitution](#), Parliament enacted the [Environment and Land Court Act](#), Act No. 19 of 2011. Section 13 of the [Environment and Land Court Act](#) outlines the jurisdiction of the Environment and Land Courts as follows:-
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162 (2)(b) of [the Constitution](#), the Court shall have power to hear and determine disputes-



- a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) Relating to compulsory acquisition of land;
- c) Relating to land administration and management;
- d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.

83. Therefore, this Court has held that since the promulgation of *the Constitution* of Kenya, 2010, the terrain under the current prosecutorial regime has changed. To that effect, the discretion granted to the Director of the Public Prosecution is not absolute but must be exercised within certain laid down standards provided under the provision of Article 157 (1) to (12) of *the Constitution* of Kenya, 2010 and the *Office of the Director of Public Prosecutions Act*. Where it is alleged that these standards have not been adhered to, it behoves this Court to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, *the Constitution* itself. It is on this basis, that I fully understand the holding made from the case of:- “Nakusa v Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565” to the effect that:-

“the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the Judgement of Dominic Arony Amolo – Versus - Attorney General Miscellaneous Application No. 494 of 2003 is that interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time..... In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

84. Thus, it is clear that where the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognized under *the Constitution* and the *Office of the Director of Public Prosecutions Act*, that would, in my view, constitute an abuse of the legal process. In such circumstances, it would entitle the Court to intervene and bring to an end such wrongful exercise of discretion. As



was held by Wendoh, J in the case of:- “Koinange v Attorney General and Others [2007] 2 EA 256”:  
as such:-

“Under Section 26 of *the Constitution* the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney General's inherent powers to investigate and prosecute may be exercised through other offices in accordance with *the Constitution* or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of *the Constitution* and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of *the constitution*; (iii) Whether the prosecution is against public policy.”

85. Hence, it is clear that this Court has the power and indeed the duty to bring to a halt, criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the 3<sup>rd</sup> Respondent (DPP) and the police.
86. Additionally, in the case of:- “Meixner & Another v Attorney General [2005] 2 KLR 189”, the same Court expressed itself as hereunder:

“The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of *the Constitution*. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of *the Constitution*). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in *the Constitution* particularly the right to the protection by law enshrined in section 77 of *the Constitution*.....Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

87. Critically, the rationale for not permitting criminal process to assist the litigants in the settlement of their civil disputes as appreciated in “Republic v Chief Magistrate’s Court at Mombasa Ex Parte Ganjee & Another [2002] 2 KLR 703”, where it was held that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it



is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the Appellant is to over-awe the Respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in... In this case it is asked to step in to grant an order of prohibition. Prohibition looks into the future and can only stop what has not been done. It is certiorari that would be efficacious in quashing that which has been done but it is not prayed for in this matter. There was no order granted for stay of further proceedings when leave was granted and it is possible that the private prosecution has proceeded either to its conclusion or to some extent. In the former event an order of prohibition has no efficacy and the court would be acting in vain to grant one. What is done will have been done. If there is anything that remains to be done in those proceedings, however, the order of prohibition will issue to stop further proceedings.”

88. Fundamentally, there is a duty cast upon the Prosecutor to ensure that he/she has conviction that the criminal process is appropriate to the circumstances of the case was placed beyond doubt in “R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001” where it was held that:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

89. In the said case, the Court expressed itself “inter alia’ as follows:

“The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the Courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all...Although the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and in doing so he is not controlled by any other person or authority, this does not mean that he may exercise that discretion arbitrarily. He must exercise the discretion within lawful boundaries...Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High



Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...In doing so the Court may be guided by the following principles: (i). Where the criminal prosecution amounts to nothing more than an abuse of the process of the court, the Court will employ its inherent power and common law to stop it. (ii). A prosecution that does not accord with an individual's freedoms and rights under *the constitution* will be halted: and (iii). A prosecution that is contrary to public policy (or interest) will not be allowed...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case. Evidence of extraneous purposes may also be presumed where a prosecution is mounted after a lengthy delay without any explanation being given for that delay...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...A criminal prosecution that does not accord with an individual's freedoms and rights, such as where it does not afford an individual a fair hearing within a reasonable time by an independent and impartial court, will be the clearest case of an abuse of the process of the Court. Such a prosecution will be halted for contravening the constitutional protection of individual's rights...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds."

90. Essentially, unless the Prosecutor exercises his powers in accordance with the law and *the Constitution*, the Court will intervene in order to bring him/her back on track. In "Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170", the Court of Appeal held:

".....the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

91. According to "The Judicial Review Handbook, 6<sup>th</sup> Edition' by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.



92. Therefore, the people placed in charge of investigation and prosecution must, in deciding whether to prefer criminal charges, ask themselves whether in the circumstances, a fair trial is possible notwithstanding the material placed before them. In other words, the police and the DPP ought not to conduct themselves as if they are an appendage of the complainants. In exercising their discretion to charge a person both the police and the DPP's office must take into account and must exercise the discretion on the evidence of sound legal principles. As was held by Ojwang, J (as he then was) in Nairobi "HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another":

“.....policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.....I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”

93. It follows that the burden is on the Prosecutor to show by way of admissible evidence that he/she is in possession of material that disclose the existence of a prosecutable case since as was held in the case of: “Stanley Munga Githunguri v R [1986] eKLR” at page 18 and 19 by a three bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru:

“ A prosecution is not to be made good by what it turns up. It is good or bad when it starts.”

94. It is now clear that the mere fact that the applicant will be subject to a criminal process where he will get an opportunity to defend himself is not reason for allowing a clearly flawed, unlawful and unfair trial to run its course. As was appreciated in the case of:- “R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001”:

“Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case.”

95. On 4<sup>th</sup> October 2021, the Petitioners lodged an appeal against the Enforcement Notice at the Liaison Committee. The Enforcement Notice clearly stipulated that the lodging of appeal at the Liaison Committee would automatically suspend the operation of the Enforcement Notice pending hearing and determination of the appeal. While the Petitioners' appeal was still pending at the said Liaison Committee, the Respondents maliciously charged the 2<sup>nd</sup> Petitioner at the County Court in Mombasa Criminal Case No. M. 402 of 2021. Although the Summons requiring his attendance to court and his Charge Sheet were prepared and signed on 19<sup>th</sup> October 2021, the Respondents waited until 26<sup>th</sup> October 2021 at 4.00pm, the eve of the date for his plea taking which was scheduled for 27<sup>th</sup> October 2021 to serve him with the Summons requiring his appearance in court the following day. Annexed in the affidavit and marked as “AD - 13” was a true copy of the Summons with endorsement at the



back that he was served on the eve of the plea taking day at 4.00 pm. Service of the Summons was not only effected late but the same was not served upon the 2<sup>nd</sup> Petitioner personally. It was served upon his employees at Likoni Shopping Mall. The Respondents' intention behind the late and non-personal service of Summons was such that he could fail to attend court so that warrants of arrest be issued against him. He did not appear in person for the plea taking on 27<sup>th</sup> October, 2021 because of ill health. He sent Mr. Willis O. Oluga, Advocate who informed the trial magistrate of his health status and the plea taking was deferred to 2<sup>nd</sup> December 2021.

96. The Respondents have not provided this Honourable Court with affidavits sworn by the complainants indicating the nature of the complaint which they lodged against the Petitioners. Suffice it to say, It is clear that the civil proceedings seeking recovery of the land were instituted before the criminal process was commenced. Whereas the mere ground that facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case as stated "Republic – v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another (supra)" it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases otherwise it would amount to abuse of the process of the court. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.

97. It was similarly held by the Court of Appeal in the case of:- "Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR" that:

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations."

98. In the instant case, it is not denied that the facts forming the subject of the civil proceedings are the same facts upon which the criminal proceedings are being based. The standard of proof in criminal cases is beyond reasonable doubt while the standard in civil suits is below that in criminal cases. If the criminal proceedings are determined in favour of the Complainant, the Respondents herein, and the civil proceedings are successful as already been determined in this judgment previous, the judicial process would be made to look like a circus. In the circumstances of this case, it is my view that the Criminal proceedings started after the Petition in this suit had been filed. Therefore it will only be prudent if the Criminal Proceedings are discontinued. Unfortunately, this Honourable Court is not the right forum to give such orders. For that reason, I discern that Prayers ( d ), ( e ) and ( g ) of the Petition should be directed to a competent court.

99. On the prayer seeking a permanent and prohibitory injunction as set out from the Petition. This Honourable Court opines that when it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning



taken by the court in the case of:- “Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR” when it rendered itself thus:

“.....the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd V. Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

100. A permanent injunction is different from a temporary/interim injunction. A temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Respondents in order for the rights of the Petitioners to be protected.
101. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.
102. In the instant case, the Honourable Court has already discussed in this Judgment that the Petitioners have established their claim against the Respondents. Therefore the prayer for permanent and prohibitory injunction restraining the Respondents, whether by themselves agents and servants and/or whosoever is acting on their authority or instruction, from stopping or in any other manner whatsoever interfering with the suit property is hereby found to be meritorious hence must be granted.

**IssueNo. c). Who will bear the Costs of the Petition dated 17<sup>th</sup> November, 2021.**

103. The issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action or proceedings in any litigation process. 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”.
104. It is not well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Court. In exercising its discretion to award costs, the court shall take appropriate



measures to ensure that every person has access to court to determine their rights and fundamental freedoms. Further, the Proviso of the provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai v Tarhochan Singh [2014] eKLR and Mary Wambui Munene v Ihururu Dairy Cooperative Societies eKLR [2014]. The Courts held:

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

105. In the instant case the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners have succeeded in its claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents case and gotten the orders sought. Thus, they are entitled to costs to be paid by the Respondents jointly and severally.

### **IX. Conclusion And Disposition**

106. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court specifically arrives at the finding that: -
- a. That Judgement be and is hereby entered in favour of the 1st & 2nd Petitioners in terms of the Petition dated 17th November, 2021 save for Prayer (d), (e) and (g) of the Petition which were deferred to be entertained and dealt with by a different competent Court rather than this Court.
  - b. That a declaration be and is hereby made that the 1st and 2nd Respondents' decision and action to serve the 1st Petitioner with the Enforcement Notice Reference Number DPH/Form PPA7/034/1/1 dated 28th September 2021 over one year after the 1st Petitioner's development had been concluded, supervised and approved by the 1st Respondent is illegal null and void.
  - c. That a declaration be and is hereby made that the Enforcement Notice Reference Number DPH/FORM PPA7/034/1/1 dated 28th September 2021 served upon the 1st Petitioner by the 1st and 2nd Respondents is illegal, null and void and of no legal consequences.
  - d. That a declaration be and is hereby made that the failure by the 1st and 2nd Respondents to constitute and convene the Physical and Land Use Planning Liaison Committee for the County of Mombasa to hear and determine the appeal lodged by the Petitioners against the Enforcement Notice Reference Number DPH/FORM PPA7/034/1/1 dated 28th September 2021 within 30 days as provided for in section 72 (3) of the *Physical and Land Use Planning Act*, 2019 or at all is in violation of the Petitioner's constitutional rights as guaranteed by the provision of Articles 25 (c), 47, 48 and 50 (1) & (2) of *the Constitution* of Kenya, 2010;
  - e. That an order of prohibition and permanent injunction be and is hereby issued restraining the 1st, 2nd & 3rd Respondents, whether by themselves agents, servants and/or whosoever is acting on their authority, behalf and/or instruction, from in any manner whatsoever interfering with the 1st Petitioner's ownership, occupation and use of the property known as Mombasa/BLOCK XLVIII/157 and/or from interfering with the employees, tenants, members of the public or any other person authorized by the Petitioners to access, occupy, use and visit the property known as Mombasa/BlockXLVIII/157;-
  - f. That costs of the suit to be awarded to the Petitioners to be borne by the Respondents jointly and severally.



It Is So Ordered Accordingly.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF MARCH 2024.**

.....

**HON. JUSTICE L.L NAIKUNI**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

**Judgement delivered in the presence of:-**

- a. M/s. Firdaus Mbula, – the Court Assistant.
- b. Mr. Kilonzo Advocate holding brief Mr. Oluga Advocate for the Petitioner.
- c. No appearance for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.

**JUDGMENT: CONSTITUTIONAL PET NO. 52 OF 2021 Page 21 of 21 JUSTICE L.L. NAIKUNI (JUDGE)**

