REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Ouko, SCJJ)

PETITION NO. 7 OF 2017

-BETWEEN-

PATRICK THOITHI KANYUIRA.....APPELLANT

-AND-

KENYA AIRPORTS AUTHORITY.....RESPONDENT

(Being an appeal against the judgment of the Court of Appeal in Civil Appeal No. 308 of 2014 ***Visram, Karanja, & Azangalala, JJ. A*** *dated 24th March, 2017)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appellant is aggrieved by the Judgment of the Court of Appeal *(Visram, Karanja, & Azangalala, JJ.A.)* dated 24th March 2017, which had affirmed the finding of the High Court, that the Respondent acted within its statutory powers, when it declined to approve the construction of 24 maisonettes by the appellant in a parcel of land adjacent to Wilson Airport, in Nairobi, and; that the respondent's aforesaid decision did not amount to compulsory acquisition of the latter's property to warrant compensation.

B. FACTUAL BACKGROUND

[2] The appellant is the registered proprietor of a parcel of land known as L.R No 209/11444 (the suit property), adjacent to the Wilson Airport. He secured financing in the sum of Kshs. 67,671,000.00 to develop some twenty-four (24) maisonettes on this property. No sooner had he commenced the construction than

the respondent, in exercise of its powers under the Kenya Airports Authority (the KAA) Act issued a ***cessation order*** dated 30th September, 2008, to stop any construction or development on the ground that the suit property falls within the protected aircraft runway protection zone of the Wilson Airport.

C. LITIGATION BACKGROUND

(i) Judicial Review in the High Court

[3] Aggrieved by the cessation order, the appellant instituted judicial review proceedings for orders of *certiorari* and prohibition against the Respondent in ***HC Misc. No. 86 of 2009, R v. Managing Director, Kenya Airports Authority ex-parte Patrick Thoithi Kanyuira.*** By a judgment delivered on the 14th October 2010, *Wendoh, J.* dismissed the application being satisfied that continued development on the suit property would interfere with security and safety of aircrafts. The appellant has not sought to review this determination or challenged it on appeal.

(ii) Before the Environment and Land Court

[4] Following the decision in ***(i)*** above, the appellant filed in the Environment and Land Court **ELC Cause No. 98 of 2011**, against the respondent for compensation. In the meantime, on the 9th of March 2011, he filed an application for a temporary order of injunction to restrain the respondent from demolishing the developments, entering or in any manner interfering with the suit property. This application was withdrawn on 20th September, 2011.

[5] Following this withdrawal, the respondent filed an application dated 18th October 2011, within the suit, seeking a mandatory injunction to demolish construction on the suit property. Before that application could be heard, the appellant withdrew **ELC No. 98 of 2011** taking away the forum for hearing of the respondent's application for a mandatory injunction.

(iii) Back to High Court

[6] Subsequently, the appellant yet again filed in the High Court, ***Nairobi HC Petition No. 83 of 2012, Patrick Thoithi Kanyuira v. Kenya Airports Authority*** for the following reliefs: *that the respondent's notice and the cessation order made on the 30th September 2008 constitutes breach of the appellant's constitutional rights under Articles 2, 3, 19, 20, 21, 23, 28, 40(2)(a) and (b), 40(3)(b), 47(1), 66 and 165 of the Constitution; that pursuant to the respondent's notice and cessation order made on the 30th September 2008 in respect of developments made on the suit property, the respondent was liable to compensate the appellant in the sum of Kshs.992,336,004 for the loss and damage suffered as a consequence thereof; general damages; and costs*

[7] *Lenaola, J. (now a member of this Court)* heard the petition and finding no merit, dismissed it in its entirety. In doing so he held that by issuing a cessation order, the respondent did not compulsorily acquire the suit property; that there was no evidence by way of a Kenya Gazette notice to demonstrate that the respondent intended to expand the airport from class 2B to class 2C; and that the cessation order only restricted the activities that could be carried out on the suit property without extinguishing the appellant's ownership rights. The learned Judge was persuaded that the respondent acted well within its statutory powers; and that the appellant ought to have sought the respondent's permission or approval prior to embarking on the construction.

(iv) In the Court of Appeal

[8] The Court of Appeal *(Visram, Karanja, and Azangalala, JJ. A)* upheld the decision of the High Court. The Appellate Justices noted that the requirement to seek approval before development of the land was crucial and the fact that the appellant went ahead with construction in defiance of the cessation order and without approval by the respondent was a risk whose outcome the appellant ought to have foreseen. The learned Justices were in agreement that the actions of the

respondent did not amount to compulsory acquisition; that Article 40 of the Constitution did not apply; and further, that had the appellant sought and obtained the necessary approvals then later it turned out that safety was compromised, then compensation would have been due. But as this was not the case, and in light of public interest involving rights to security and safety of the large number of people likely to use or living around Wilson Airport, the latter overrode the individual right of the appellant to own and enjoy the suit property.

[9] Moreover, they found, the back and forth communication showed that the appellant was accorded a fair hearing; and that the cause of action having taken place between 2007 and 2009, prior to the existence of Article 47 of the Constitution, the Article could not apply retroactively.

[10] Consequently, the Court of Appeal found that the High Court had properly balanced the public's right to safety and security and the appellant's right to enjoy the property, and that the balance in favour of the larger public did not contravene Article 24 of the Constitution.

[11] The learned Justices also noted that there were attempts to amicably resolve this dispute as evident from the letters written by the Corporation Legal Secretary of the respondent dated 21st August 2009, proposing transfer of the parcel of land from the appellant to the respondent in exchange of lease of suitable property. In their view, this was a manifestation or demonstration on the part of the respondent that it harboured no intention to compulsorily acquire the suit property.

v) In the Supreme Court

[12] Further aggrieved by the above decision, the appellant has moved to this Court citing Articles 10(a), 24(1)(2)(3), and 40 of the Constitution and seeks:

a. *A declaration that the Court of Appeal in its decisions made on the 24th September 2014, in* ***Nairobi Civil Appeal no 308 of 2014, Patrick Thoithi Kanyuira v. Kenya Airports Authority****, violated the Constitutional Principles and Rights of the appellant as provided under Articles 10(a), 24 and 40 of the Constitution;*
b. *An order setting aside the entire judgment and decree of the Court of Appeal made in* ***Nairobi Civil Appeal no 308 of 2014, Patrick Thoithi Kanyuira v. Kenya Airports Authority;***
c. *An order allowing the appellant's Petition in* ***Nairobi High Court Petition No 83 of 2012, Patrick Thoithi Kanyuira v. Kenya Airports Authority.***
d. *Costs incidental to the Petition.*

[13] According to the appellant, the questions for determination before this Court include, whether the Court of Appeal erred by; *finding that under Section 14 of KAA Act, the appellant was required to seek the respondent's approval to put up building on his property notwithstanding having procured the approval of the then City Council of Nairobi; misapplying the provisions of Article 40 of the Constitution; misapplying the provisions of Article 40(3) (b) of the Constitution that provides for the prompt payment in full of just compensation to a person who has been deprived of property or an interest thereon; misapplying the provisions of Article 24 of the Constitution in finding that the respondent's action amounted to a justifiable limitation of the appellant's right to property in the circumstances of this case; failing to apply the provisions of the Fourth Schedule of the Constitution that provides for the functions and powers of the County Government to include county planning and development, namely land survey, mapping and housing, a function conferred upon a county government by the Constitution cannot be divested to a state organ such as the respondent on the basis of statute and; violating the constitutional principle provided under Article*

159 (e) of the Constitution, which enjoins a court to protect and promote the purposes of the Constitution in its decision including enforcing the Bill of Rights to the fullest extent possible.

[14] Though the matters raised in **Paragraphs 12** and **13** above constitute the grounds and reliefs in the instant appeal, in arguing the appeal before us on behalf of the appellant, however Mr. Charles Njenga led by Mr. Paul Muite, SC addressed us as follows;

> ***"...The first ground upon which the Court of Appeal made its decision, is that it found as a matter of fact that the buildings or the constructions of the appellant had made on his property were a danger to the safety and security of the Wilson Airport. The Court of Appeal also made a determination of facts that the respondent had applied for authority from the respondents and that that authority had been denied.***
>
> ***My Lady allow me to be dispel those two factual findings and put context to the matter. That firstly, as we speak today and now before the court, the claim for compensation for land is no longer in contention because the petitioner was allowed to continue with his construction and finalize his development. That is not in dispute. So the claim that remains is a claim for lost earnings as set out at paragraph 14 of the petition that was in the High Court....."***

The effect of this submission, if we understood it right, is that the appellant has abandoned all the previous claims, save for the prayer for compensation for loss of earnings. This decision, according to the appellant was informed by the fact that

he has been permitted by other bodies, not the respondent, to continue with the construction and finalize the development on the suit property.

[15] The relief is premised on the fact that the respondent, without any lawful authority, issued a cessation order which resulted in loss and damage to the appellant; that having consulted the National Land Commission, the Kenya Civil Aviation Authority, the City Council of Nairobi (CCN), the National Environment Management Authority, it became apparent to him that the respondent had no role in the approval of his project. However, his attempt to introduce approval letters from these bodies by a motion for the introduction of additional evidence failed after this Court found that the application did not meet the strictures of Rule 26 of the Court's Rules and was accordingly dismissed.

[16] The appeal is opposed by the respondent relying on the Replying Affidavit of Katherine Kisila, its Corporation Secretary, filed on 11th July 2017.

D. PARTIES' SUBMISSIONS

(i) The Appellant

[17] The thrust of the appellant's case is that the respondent did not have any power in law to issue the cessation order of 30th September 2008; that the effect of the order was to interfere with the appellant's developments without offering corresponding compensation; and that the right to interfere provided for under Section 14 of the KAA Act, is qualified with a mandatory imperative to compensate affected persons for any loss sustained. In that regard, the appellant maintains that it was incumbent upon the court, simultaneously with its finding that the respondent had power to interfere with the appellant's use and development of his land, to consider whether the respondent's interference had occasioned any loss to the appellant for which the appellant would be entitled to an order for compensation.

[18] He argues that a plain reading of Section 15 of the KAA Act, should lead to the inevitable conclusion that the only cause of action that was available to the respondent in the present situation was to make a determination based on empirical evidence that the appellants' structures were detrimental to the safety of the operation of the airport. Consequently, if the owner of the structures/buildings had not obtained approval of the KAA, the Managing Director, KAA would apply to the High Court for a court order for the intended demolition or modification of such a building. In the appellant's view, it was only then that the High Court, in considering such an application, would make an order for the payment of compensation and costs to the owner of the structures. It is the appellant's position that the law does not provide any blanket powers to the respondent to interfere with structures constructed on private land of a third party and where there is good reason to so interfere, judicial sanction is required and corresponding compensation to the owner of such structures has to be provided.

[19] The appellant posits that in finding that the respondent has power to interfere with the appellant's developments on the suit property, the Court of Appeal wrongly relied on Section 10 of the Civil Aviation Act Cap 394 (now repealed) as adopted by the Civil Aviation Act, 2013 at Section 57 and; that a plain reading of the Civil Aviation Act, would show that it does not provide for the office of the Managing Director of KAA and neither does it create the institution of the said KAA. He contends that all the powers and duties with regard to air safety and operations, are vested in the Director General of the Kenya Civil Aviation Authority, who was not a party to the proceedings before the High Court, adding that no adverse action was taken against the appellant by the Director General whose power is not contested. The appellant maintains that the power the respondent purported to exercise on this occasion could only be exercised exclusively by the Director General.

[20] The appellant therefore insists that the court misdirected itself in finding that the respondent acted within its mandate in purporting to issue a cessation order that can only be issued bona fide by the Director General of the Kenya Civil Aviation Authority.

[21] The appellant asserts that the cessation order issued by the respondent halting his development constituted actual, functional, effective, physical and/or constructive acquisition of his property by the respondent in terms of the cessation order that the property and project were on a flight path "*where any development cannot be allowed*." As a corollary, he deems as erroneous the finding of the superior courts that in the absence of a formal notice to acquire the suit property and a gazette notice to that effect and for that purpose, there could not have been compulsory acquisition of the suit property and any basis for compensation.

[22] It is his contention that, even without any physical occupation of the suit property, the respondent's action amounted to deprivation of the appellant's right to construct on, develop and derive commercial gain from the suit property; and that such a chance having been delayed for years as a result of the cessation order, he was entitled to be compensated for lost earnings.

[23] Further, it is his case that the respondent has clearly admitted on record that it is in the process of expanding the airport to class 2C for which purpose it will require the suit property to be kept obstacle-free with the consequence that it prohibited the appellant from undertaking any form of development activity thereon and to remove all the existing structures. He has urged the Court to find that, on the pleadings and evidence, the respondent has appropriated the suit property to facilitate its use to expand the airport to achieve Category 2C status; and that in all fairness, the appellant deserves to be compensated as prayed in the petition.

[24] Finally, the appellant submits that the planning function lies with the local authority within whose jurisdiction the development is being undertaken. In this case, the City Council of Nairobi, the predecessor of the Nairobi City County (NCC). The respondent ought to have consulted the City Council of Nairobi, the relevant local authority that had granted the appellant the approval before commencing the development on the suit property. In view of the foregoing, the appellant prays that the appeal be allowed.

(ii) The Respondent

[25] In its submissions dated 22nd June, 2020 the respondent is in support of the Court of Appeal's determination and argues that the court correctly interpreted and applied the law and properly found that the appellant ought to have obtained approval from the respondent prior to commencing construction on the suit property. It argues that where there is a general and specific law dealing with a particular issue, the provisions of the specific law always take precedence over general law. For this proposition, it relied on the case of ***Commercial Tax Officer, Rajasthan v. M/S Binani Cement Ltd & Another,*** Civil Appeal No 336 of 2003 and; ***Secretary of the East African Community v. Angella Amudo*** [2013] eKLR.

[26] According to the respondent the repealed Physical Planning Act, 1996 generally provided for development approvals in the local authorities. However, where the development being undertaken was next to the airport, the appellant ought to have obtained approval from the respondent as the custodian of all airport lands and the body mandated by statute to ascertain whether the development near the airport was likely to interfere with the operation of aircrafts. Therefore, the approval from the then City Council of Nairobi could not substitute or supersede that of the respondent.

[27] The respondent submits that the power conferred on it under Sections 10(1)(b) and 15(3) of the KAA Act to require the removal of structures that it deems hazardous to aircraft operations is a legitimate and lawful power whose purpose is to prevent occurrence of any accident. It cannot be equated to compulsory acquisition; and that the decision in the cessation order was made in the course of performance of the respondent's statutory function, in good faith and for public good.

[28] The respondent contends also that, had it intended to compulsorily acquire the suit property, it would have exercised its powers under Section 13(1) of the KAA Act; that the cessation order did not in any manner invoke that provision and was incapable of arbitrarily depriving the appellant of his property rights.

[29] The respondent urges that there was no issue around the application of the Fourth Schedule of the Constitution before the High Court; that there is clear material that this was not the thrust of the appellant's argument in the Court of Appeal; and that this issue is being raised for the first time in this Court and ought to be disallowed. We have been urged to be persuaded by the case of ***Wachira v. Ndanjeru*** (1987) KLR 252, for the proposal that a party will not be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court.

[30] Citing ***Godfrey Paul Okutoyi v. Habil Olaka – Executive Director (Secretary) of Kenya Bankers Association & Another,*** [2017] eKLR the respondent further contends that apart from the appellant merely alleging violation of the Constitution, he has failed to plead the precise infringement and the jurisdictional basis for it.

[31] In its supplementary submissions dated 9th November, 2021 the respondent further argues that the approvals issued by the defunct City Council of Nairobi and the National Environment Management Authority (NEMA) were issued on the

express condition that the appellant would comply with such other requirements as provided by other relevant authorities.

[32] For instance, the approval granted by the City Council of Nairobi contained an express condition that its grant operated only for the purpose of the requirement of the Local Government (Adoptive By-Laws) Building) Order 1968 LN 15/1969, the City Council of Nairobi (Building) By-Laws 1948 GN 313/1949, the Public Health Act (Cap 242), Sections 36,41 and 52 of the Physical Planning Act and any other rules made thereunder. This approval, the respondent submits did not absolve the appellant from seeking approvals from other relevant authorities; and that the approval granted by NEMA similarly provided that the appellant would comply with the relevant principal laws, by-laws and guidelines issued for development of such a project within the jurisdiction of City Council of Nairobi, Ministry of Housing, Nairobi Water and Sewerage Company Limited, Ministry of Roads and Public Works, Ministry of Lands and Settlement and other relevant authorities.

[33] Regarding the claim of Kshs. 214,614,047 being the amount stated as the value of the appellant's property hence the loss, the respondent submits that this amount was challenged during cross examination where the appellant's valuer, confirmed that she did not indicate in her report how she arrived at the figures contained in the Valuation Report. This fact was confirmed by the quantity surveyor who testified that the figures in the Bill of Quantities were estimates and did not include the cost of excavation; and that the land value of Kshs. 40,000,000 was given to him by his client, the appellant, and not a figure that he had himself arrived at based on his own independent and expert valuation. On his part, the appellant's auditor, also confirmed that he did not have the primary documents to show how he arrived at the figure of Kshs. 67,000,000 as construction costs.

[34] The respondent has also raised an objection to the jurisdiction of the Court to entertain this matter, it argues that the appeal as framed deals with issues which were conclusively heard and determined by the **High Court in JR No. 89 of 2009: *Republic v. Managing Director, Kenya Airports Authority ex parte Patrick Thoithi Kanyuira***, which decision was never challenged in the Court of Appeal; that following its dismissal, the appellant instead instituted a fresh action in the Environment and Land Court, **ELC No. 98 of 2011** in which he sought to be compensated for loss, injury and damage suffered as a result of the cessation order; that instead of prosecuting the case, the appellant withdrew it to defeat an application that had been filed by the respondent to compel him to remove the structures from the suit property; and that the appellant brought the action subject of this appeal, in the High Court claiming violation of his right to property following the issuance of the cessation order and claiming compensation.

[35] The respondent reiterates that nowhere in the cessation order did it invoke its powers under Section 13(1) of the KAA Act to compulsorily acquire the suit property; that the cessation order merely informed the appellant of the danger posed by the structures under construction on the safety and operations of aircrafts, hence, merely restricting and not prohibiting completely any development on the suit property; and that the notice did not extinguish the appellant's right of ownership of the suit property.

[36] The respondent further argues that the approvals obtained by the appellant from the City Council of Nairobi could not cure the appellant's failure to obtain approval from it as required under Section 15(3) of the KAA Act; that even under the Physical Planning Act, the City Council of Nairobi is not the body with the mandate to control developments near the airports.

[37] For those reasons, the respondent submits that since the appeal is misconceived and lacks merit, it ought to be dismissed with costs.

E. ISSUES FOR DETERMINATION

[38] Having carefully re-evaluated the arguments in this appeal, the pleadings and the unanimous decisions of the two courts below, we are of the considered view that the following three broad issues arise;

i. *Whether the Court has jurisdiction under Article 163(4)(a) of the Constitution to determine the merits of this appeal;*
ii. *Whether the cessation order issued by the respondent amounted to unlawful interference with the appellant's private property; and*
iii. *If the answer to the above two questions are in the affirmative, whether the appellant was entitled to compensation*

F. ANALYSIS AND DETERMINATION

i) Jurisdiction under Article 163(4)(a) of the Constitution

[39] The jurisdiction of this Court to hear and determine this appeal has been questioned by the respondent in its supplementary submissions, to the effect that the issues framed in this appeal are not the same issues that were the subject of determination by both courts below; and that the appeal as framed is *res judicata* as it deals with issues which were conclusively heard and determined by the High Court in JR No. 89 of 2009, ***Republic v. Managing Director, Kenya Airports Authority ex parte Patrick Thoithi Kanyuira***, which decision remains unchallenged to this date.

[40] The statement made many decades ago by the Court of Appeal in the case of ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil, (Kenya) Ltd*** [1989] KLR 1), that **"Jurisdiction is everything. Without it, a court has no power to make one more step"** was perhaps an echo in our time of the words in the United States of America Supreme Court decision of 1915 in the case of ***McDonald v. Mabee***, 243 U.S. 90,91 (1915), where that Court explained that, 'Jurisdiction is power.' In its absence, the court can do nothing but dismiss the

case. Without jurisdiction, the court cannot proceed to judgment on the merits; if it does, the result is *coram non judice*-a nullity, the Court rendered. See also this Court's decision in ***Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others,*** SC Application No. 2 of 2011; [2012] eKLR, where it was emphasized that a court's jurisdiction flows from either the Constitution or legislation or both; that a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity; and that Parliament cannot confer jurisdiction upon a court beyond the scope defined by the Constitution.

[41] It is now settled, from the plain reading of Article 163(4) and a long line of decisions of this Court, that appeals from the Court of Appeal will lie, as of right to this Court under Article 163(4) of the Constitution, if they involve constitutional interpretation and application, or upon certification, by either the Court of Appeal or this Court, that matters of general public importance are involved.

[42] The Court has consistently underscored the need to invoke the correct constitutional or statutory provision that clothes it with jurisdiction to entertain any matter before it. See: ***Suleiman Mwamlole Warrakah & 2 Others v. Mwamlole Tchappu Mbwana & 4 Others,*** SC Petition No. 12 of 2018; [2018] eKLR; ***Nasra Ibrahim Ibren v. Independent Electoral and Boundaries Commission & 2 Others,*** SC Petition No. 19 of 2018; [2018] eKLR; ***Daniel Kimani Njehia v Francis Mwangi,*** SC. Civil Application No. 3 of 2014; [2015] eKLR and ***Margaret Wanjiru Wainaina & another v. James Njenga Kinyanjui & 4 others,*** SC Petition No. 19 of 2019; [2020] eKLR.

[43] The appeal before us, we confirm, is brought as, **"In the Matter of Articles 24(1)(2) and (3) and Article 40 of the Constitution of Kenya"**. It specifies Articles 24(1)(2) and (3) and 40 as its linchpin. The claim for violation of the

appellant's constitutional right to property and for compensation runs through the 26 paragraphs of the petition. There were specific prayers in that regard.

[44] Before the High Court the crux of the appellant's claim was the alleged restriction of his right to develop his land contrary to Article 40(2)(b); deprivation of his rights and interest over the suit property contrary to Article 40(3)(b)(ii); and subjecting him to unreasonable administrative action by the respondent contrary to Article 47(1), all of which he contended exposed him to loss and damage for which he believed entitled him to compensation. Upon dismissal of his petition by the High Court, the appellant's appeal to the Court of Appeal was, once again anchored on Articles 24, 40 and 47 of the Constitution.

[45] It is therefore evident that the appellant's claim has throughout been based on the interpretation and application of the Constitution, specifically that his property rights under Article 40 were violated by the cessation order and that he was entitled to compensation under Article 23 as read with Article 24 of the Constitution. It is for this reason that we arrive at the conclusion, on this point, that the Court has jurisdiction under Article 163(4)(a) of the Constitution to determine this appeal.

[46] We also note that the appellant as one of his grounds of appeal, faults the Court of Appeal for failing to apply the provisions of the Fourth Schedule of the Constitution that provides for the functions and powers of the County Government to include county planning and development, namely land survey, mapping and housing, a function conferred upon a county government by the Constitution which according to him, cannot be divested to a state organ such as the respondent on the basis of statute. We agree with the respondent's contention that this issue is being raised for the first time before this Court and for this reason, we disallow it.

[47] On the second limb of its argument, the respondent essentially contends that the appeal is *res judicata*, the issues between the parties having been fully settled in JR No. 89 of 2009: ***Republic v. Managing Director, Kenya Airports Authority ex parte Patrick Thoithi Kanyuira,*** which decision was not set aside on review or appealed.

[48] On the validity of cessation order, *Wendo, J*. was categorical that;

> ***"It is clear from the above provision that the applicant was supposed to seek approval of the Managing Director KAA before embarking on the project. The correspondence exhibited by the respondent in the letters J1, 1, 2, 3, 4, 5 and 6 all go to demonstrate that the applicant did seek the permission of the Managing Director KAA to develop the said plot but the same was declined on grounds that the plot was within the approach funnel in the main runway at Wilson Airport....***
>
> ***Whereas it is true that the Director of the Civil Aviation has jurisdiction to make orders under Section 10 of the Civil Aviation Act, the Managing Director KAA too has the powers to stop any construction or interference with the security and safety of air craft....***
>
> ***The Applicant can therefore not deny that the Respondent lacked the authority to stop the construction. After all, the Applicant sought the said authority of KAA on 10.1.2008 well after the said construction had commenced in 2007..... The Respondent was exercising a statutory duty under Cap 395 Laws of Kenya and cannot be said to have acted without jurisdiction or ultra vires, unlawfully or illegally."***

[49] When an objection was raised before *Lenaola, J*. as he then was, that the issues in the petition before him were *res judicata,* having been determined by *Wendo, J*. he was of a different opinion and dismissed the objection thus;

> ***"...the issue then is whether the present Petition raises matters that are res judicata. On reflection, I do not think so on the whole. Whereas it can be said that the parties in this Petition as well as in the HCC Misc Applic No. 86 of 2009 are the same save that in the Judicial Review Proceeding, the Managing Director of the Respondent is the one who had been sued, the other considerations are not as clear cut.***
>
> ***I say so because on the subject matter, the Petitioner in the Judicial Review Proceedings sought to challenge the propriety or otherwise of the order of the Respondent's Managing Director made on the 30th September 2008.***
>
> ***..... As can be seen above, the Petitioner had sought orders of certiorari to quash the Managing Directors decision contained in the notice of 30th September 2008. There was no demand for compensation or a determination of the constitutionality of the actions of the Respondent. If I understood the Petitioner well, he in fact agrees that the notice was properly issued but he claims now his rights to property are likely to be infringed as he has not been compensated for the land and developments thereon. He has therefore invoked this Court's jurisdiction under Articles 22, 23 and 165(3) (b) of the Constitution. That being so, whereas the facts are the same as those in HCC Misc Applic No. 86 of 2009 I am not prepared to block***

the Petitioner from ventilating his claim for violation of his fundamental rights and freedoms as enshrined under Articles 40 and 47 of the Constitution. To sum up therefore and in the totality of the facts and evidence before me, I do not find that the Petition raises similar matters that were raised in HCC Misc Applic No. 86 of 2009 and the doctrine of res judicata cannot therefore be invoked in this proceeding and I so find".

[50] Whereas the learned Judge was right in drawing the distinction between the causes of action in the two suits, that in one the appellant had sought the quashing of the cessation order by *certiorari*, while the petition before him was for compensation for violation of the appellant's constitutional rights, to conclude that the matter was not *res* judicata, the respondent's concern was specific to the finding on the validity of the cessation notice. Did *Wendo, J.* make any finding on the validity of the notice?

[51] We readily find, on this question that one of questions posed in the review application was whether the respondent acted outside its mandate, to which *Wendo, J.* as shown in the above passage **[paragraph 48]** was clear that the cessation order was properly issued by the respondent. To that extent, that issue was *res judicata*. It was a decision *in rem*, confirming that one of the bodies whose authorisation had to be obtained before making any development in the vicinity of the airport was the respondent.

[52] But like the Court of Appeal, we are of the view that, part of what was raised before *Lenaola, J*, which was also the subject matter in the Court of Appeal was the effect of the cessation order on the appellant's project, and whether it was an act of interference with the use of private property which would in turn entitle the appellant to be compensated.

[53] In affirming the High Court in the passage below that the appellant's fundamental right to property under Article 40 was not violated; and that there was no basis upon which an order could be made for compensation for the losses and damages allegedly sustained as sought in the petition, the Court of Appeal concluded that;

> ***"..... section 15(3) of the KAA Act, shows that it is necessary for one before constructing any structures near the respondent's facilities to seek the approval of the Managing Director, failing which the respondent can go to court and seek demolition orders, if the erected structures are found to interfere with the safety, and security of the respondent's facilities. Section 15 KAA Act may not expressly say so but the interpretation is simple, unambiguous and on point.***
>
> ***.....Indeed, from the appellant's own conduct, he must have been aware of this requirement and that would explain why he sought the approval in the first place. As noted earlier, the approval sought was denied and an appeal against that refusal was also denied.***
>
> ***In our view, the construction of the said structures, and buildings in express and flagrant defiance of the respondent's decision, was a high risk venture, whose outcome the appellant must have foreseen. Any prudent person would have ensured that he overcame that hurdle of obtaining all the necessary approvals, before sinking his funds into such a project, or even taking a loan to finance the same. If he was unhappy with the decision of Wendo, J. of failing to quash the cessation order, he had recourse of***

preferring an appeal against the decision, which he did not do.

We find that indeed, the appellant was in the wrong for neglecting to obtain the necessary approval before embarking on his project. We find that he was solely to blame for the loss that befell him, as he deliberately aggravated his loss by failing to heed the warning given by the respondent as demonstrated earlier. He even conceded before the trial court that by the time the denial of the approval by the respondent was communicated to him, the project was at excavation stage.

If indeed he was concerned about mitigating his loss, he should not have proceeded with the project until the issue of the approval was resolved. We find that indeed, the appellant was the author of his own misfortune. He cannot be allowed to benefit from his intransigence.

In as much as we sympathise with the appellant for his loss, neither the law, nor equity can come to his aid".

[54] The three courts having come to the conclusion that the appellant ought to have heeded the caution in the execution of the project on the suit property, can he claim compensation for any loss he has suffered on account of the so-called unlawful action by the respondent? It is to this question that we now turn.

ii) Whether the cessation order issued by the respondent amounted to an unlawful interference with the appellant's private property.

[55] The right to own property and develop it to its full potential is a human right, recognized not only by the Constitution but also by international and regional instruments that Kenya is a party to, like the Universal Declaration of Human

Rights, International Convention on the Elimination of All Forms of Racial Discrimination, the African Charter on Human and Peoples' Rights.

[56] Article 40 (1) of the Constitution guarantees every person;

> **"……the right, either individually or in association with others, to acquire and own property––**
>
> **(a) of any description; and**
>
> **(b) in any part of Kenya"**;

and further that, no law can be enacted that permits the State or any person to arbitrarily deprive a person of any property or any interest in, or right over, any property, or

> **"(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)".**

However, and only in the following circumstances, among others, can the State deprive a person of property, or of any interest in, or right over, property, namely, if the deprivation is for a public purpose or in the public interest and is carried out in accordance with the Constitution;

> **"and any Act of Parliament that requires prompt payment in full, of just compensation to the person; and allows the person…… a right of access to a court of law".**

[57] The appellant is the holder of a certificate of title to the suit property issued under the repealed Registration of Titles Act, which by section 23 guaranteed its sanctity by providing that the certificate would be conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, only subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon. The terms of the grant of the

title permitted the appellant to construct housing units within six months of issue and the suit property was to be used only for residential purposes.

[58] Out of prudence and judgment, it appears to us, the appellant sought approval from regulatory agencies, that in his view were necessary, such as City Council of Nairobi, NEMA, Kenya Civil Aviation Authority and the respondent. On 10th January 2008 the appellant wrote to the Airport Manager, Wilson Airport seeking approval to develop 24 maisonettes. The appellant wrote again on 18th January, 2008, upon which receipt the respondent advised him, by a letter dated 24th January, 2008, that the property lies within the approach funnel to Wilson Airport's main runway and the appellant's development would pose a threat to aviation safety and security. The approval, for that reason was rejected. Several letters were exchanged between the parties. The respondent addressed the appellant again by its letter of 19th March, 2008 in which it directed the appellant not to proceed with further construction. This was followed by another letter of 16th April 2008, a subsequent on 8th May 2008, all of which reminding the appellant that he was proceeding with the project without approval.

[59] As a matter of fact, at one point there were attempts to settle the controversy by the respondent offering to the appellant an alternative property. The end of those negotiations are not apparent from the record. On record is a letter dated 4th November 2008 from the respondent to D. Njogu & Company Advocates, advocate for the appellant indicating that respondent was considering acquisition of the suit property in exchange for allocation of land at an alternative suitable site for the purpose. D. Njogu & Company Advocates by a letter dated 8th December 2008 responded by accepting the proposal.

[60] The real issue here, however is whether the cessation order was valid, or asked differently, whether the respondent had the power and authority to stop the development in the suit property. If the answer is in the affirmative, that will be the end of the appellant's claim and a closure to this controversy and if in the

negative, it will also mark the end of his long journey in search of justice, with the only question being the quantum of compensation.

[61] The KAA Act is expressed in the long title to be an Act of Parliament to establish the Kenya Airports Authority, to provide for the powers and functions of the Authority and for connected purposes.

[62] The Authority which is established under Section 3 is authorized, pursuant to Sections 14, 15 and 16 of the KAA Act, to enter upon any land to conduct a survey, to remove or cause to be removed any obstruction, materials, structures or buildings, including slaughterhouses which are likely to attract birds that may be hazardous to aircraft operations; to enter upon any land to prevent accidents by;

> (a) cutting down or remove any tree or other obstruction, not being a building; or
>
> (b) executing such other works as may be necessary to prevent the occurrence of any accident or to repair any damage caused as a result of any accident.

[63] The Authority or any of its authorized employee may also enter upon any land and alter the position of any pipe, electric, telephone or telegraphic wire after giving reasonable notice. These are no doubt wide powers to be exercised by the Authority upon private land, with the sole aim of making airports adjacent to private land secure and safe.

[64] But at the heart of this controversy is subsection (3) which we now set out here below;

> ***"Where any person erects any building which in any way interferes with the operation of any service provided by the Authority under this Act, the Authority may, unless such person has previously obtained the approval of the managing director to the erection of such building, or has***

modified it to the satisfaction of the managing director, apply to the High Court for an order for the demolition or modification of such building, or, as the case may require, for the payment to the Authority of the cost incurred in the resetting or replacement necessary to prevent such obstruction or danger and the court at its discretion may grant such order as it may deem fit as to the payment of compensation and costs". [our emphasis]

[65] Prior approval of the Director is a necessary pre-condition and requirement, from our plain reading of this subsection. Only for the purpose of demolition or modification of any building within the proximity of the airport which may pose aviation risk, is the respondent required to obtain an order of the court. It was precisely because of this that the respondent filed in the Environment and Land Court (ELC) **ELC No. 98 of 2011** pursuant to Section 15(3) an application dated 18th October 2011, seeking an order of the court to demolish the structures on the suit property, which we have explained stood spent after the appellant ingeniously withdrew the suit taking away the forum for hearing of the application.

[66] Read in the context of the statute, all the powers vested in the respondent by Sections 14, 15 and 16 aforesaid, we reiterate, are aimed at guaranteeing the safety of aircrafts, vehicles and persons using the aerodrome as well as to prevent danger to the public. There is, therefore no logic in the argument that there was no basis for the respondent to stop the construction without evidence of how it would interfere with aviation safety and security.

[67] In the instant case, however, there was proof presented to the trial court at the *locus in quo* by three pilots that indeed the construction would be a danger to aircrafts using Wilson Airport. The pilots Richard Kimeu Ngovi, a pilot with over 30 years experience, Captain Gad Kamau, an Aviator (pilot) also of over 30 years in the industry and Captain Robert Chepkwony of almost a similar experience in

the field, who shared his practical ordeal following a plane crash in which he was personally involved near the suit property; that upon crashing, his aircraft burst into flames that would have consumed the suit property had it been constructed.

[68] Prior approval or rejection must, of necessity be based on the independent assessment by the respondent of architectural designs of any proposed construction from which matters like the height of the proposed building can be ascertained. It would be irrational for an investor to put up a building and then seek authorization with the attendant risk of rejection by the authorizing agency.

[69] Purely just as an example, on record are letters exchanged between the respondent and one Mohamed Abdi Shukri, a developer and owner of LR No. 209 13711, South C who was in a similar predicament as the appellant, which confirms that, it was from the architectural drawings that the respondent was able to decide whether to approve or reject the project.

[70] Because the suit property is adjacent to the airport, it is common factor that the appellant sought approval from the respondent pursuant to the provisions of Section 15 of the KAA Act. At no point, in the course of exchanging correspondence did the appellant question the respondent's authority to control the use of land adjacent to airports. Indeed, in the passage reproduced at **paragraph 49,** the learned trial Judge got the feeling that the appellant was not challenging the power of the respondent to control structures around the airports, or even the validity of the cessation order. And to the extent that the appellant himself sought from the respondent prior approval on 10th January, 2008, was itself evident that he appreciated and recognized the authority of the respondent. It is that acknowledgment that would explain why, after the approval was denied, the appellant moved to court to challenge the decision, and when the Court declined to sanction the unauthorized development, he abandoned that cause and initiated a new one which he later withdrew.

[71] Even as he pursued the matter in court, there is uncontroverted evidence that the appellant, without approval of the respondent went on with the construction as if nothing was happening in court regarding this very project. An application in **ELC No. 98 of 2011** by the respondent for the demolition of the structures was frustrated as explained elsewhere in this judgment.

[72] It is to us therefore as perplexing as it is disconcerting that the appellant would, after all the foregoing exchanges and engagement with the respondent turn around and claim that the respondent had no role in approving his project and insist that, the KCAA, as the only body, in law from which he required approval, and from which he had in fact obtained such authorization, there was no basis for the respondent to insist on compliance with the cessation order.

[73] It is equally unfortunate for the appellant to contend that, in any case the project having also been approved by the then City Council of Nairobi on 28th November, 2011 and by NEMA on 11th March, 2008, he did not require approval from the respondent. We need to point out at this stage that, by the time the appellant applied to the respondent for approval on 10th January, 2008 and even as NEMA gave its approval the appellant had commenced the construction in 2007. We note also specifically that the letter of 19th March, 2008 written to the appellant by the respondent, in which the latter continued to remind the appellant that the continued construction was in defiance of the cessation order, was copied to the Director General KCAA.

[74] While we believe that, apart from the respondent, there are other regulatory agencies whose authorization would be necessary for and must be obtained before any development can be commenced within the proximity of the aerodrome areas in Kenya, such as the KCAA, NEMA and NCC, it is the approval of each that would give a licence for any proposed develop in such areas. One or two approvals without

the concurrence of the other will not do, hence the need for close coordination between all these bodies to avoid anarchy, particularly in such sensitive areas as airports. Disjointed approach will certainly compromise the security and safety of the public. We shall shortly return to this question of coordination of licensing process.

[75] Sections 9 of the repealed Civil Aviation Act which is worded in the same terms as Section 56 of the Civil Aviation Act, 2013, and despite the provisions of any **"law, or the terms of any deed, grant, lease or license concerning the use and occupation of land, the Cabinet Secretary may, where he considers it to be necessary in the interests of the safety of air navigation, by order published in the Gazette, prohibit the erection within a declared area of any building or structure above a height specified in the order"**. "Declared area" is defined to mean **"any area adjacent to or in the vicinity of an aerodrome".**

[76] On the other hand, Section 10 of the repealed Act, which is reproduced in Section 57 of the 2013 Act, if the Director-General considers that provisions for civil aviation safety and security or efficiency of air navigation ought to be made, whether;

> **"(a) by lighting or otherwise for giving aircraft warning of the presence of any building, structure, tree or natural growth or formation on or in the vicinity of an aerodrome; or**
>
> **(b) by the removal or reduction in height of any such obstruction or surface, he or she may by order, and subject to any conditions specified in the order, require or authorise either the owner or occupier of the land on which the obstruction is situated or any person acting on behalf of the Director-General to enter upon the land and carry out**

such work as is necessary to enable the warning to be given or the obstruction to be reduced in height".

[77] Further, the Cabinet Secretary under Section 82(2)(x) may regulate or prohibit in the vicinity of any aerodrome the emission or causing of smoke, soot, ash, grit, dust and any other substance whatever which obscures or may obscure visibility.

[78] Submitting before us learned counsel for the appellant contended that, since 9th August, 2019 after obtaining authorization from the KCAA, the construction commenced and has been going on; that as a result the appellant made a decision to pursue compensation from the respondent for lost earnings for the entire period when the project was stopped by the cessation order. This claim was however denied by learned counsel for the respondent who has maintained that if it is indeed true that the construction is going on, then it is in defiance of several letters issued by the respondent to the appellant.

[79] We turn to NEMA, which according to the appellant is another body vested with the authority to approve and indeed did approve the project upon being satisfied that it met all environmental quality standards and that upon systematic examination, NEMA found that the project would have no adverse impacts on the environment.

[80] NEMA is responsible for promoting the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable basis. This in turn ensures the improvement of the quality of human life in Kenya. See Section 9(2)(a) of the Environmental Management and Coordination Act (EMCA). In this regard, environmental considerations are equally fundamental before any development approval can be granted, hence the requirement for environmental impact assessment under Section 58 (1) of the EMCA which stipulates as follows:

> ***"(1)Notwithstanding any approval, permit or license granted under this Act <u>or any other law in force in Kenya, any person, being a proponent of a project, shall</u> before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, <u>submit a project report to the Authority</u>, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.***
>
> ***(2) <u>The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority</u>, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs."*** [our emphasis]

[81] We have emphasized the fact that the approval must be obtained prior to commencement of a project; that it is the duty of the proponent of a project to undertake an environmental impact assessment study and submit a report for consideration by NEMA; that the approval of a proposed project by NEMA is subject to approval by any other body authorized to do so by any law; and that approval by NEMA is subject to environmental impact of the project.

[82] Similarly **CCN**, the predecessor of Nairobi City County, as a local authority had the sole mandate of physical planning in the city. Under the repealed Physical Planning Act, no development within the city could be carried out without a

development permission granted by NCC. Indeed, it was a punishable offence to contravene that requirement. See Section 30. Therefore, any person intending to carry out any development in the city could only do so after obtaining what the Act termed "development permission" from the Director of Physical Planning.

[83] Before granting permission NCC was required by Section 32(2) to consult several bodies including;

> **"(a) the Director of Survey;**
>
> **(b) the Commissioner of Lands;**
>
> **(c) the Chief Engineer (Roads), Ministry of Public Works and Housing;**
>
> **(d) the Chief Public Health Officer of the Ministry of Health;**
>
> **(e) the Director of Agriculture;**
>
> **(f) the Director of Water Development;**
>
> **(g) the Director of Livestock Development;**
>
> **(h) the Director of Urban Development;**
>
> **(i) the Chief Architect, Ministry of Public Works and Housing;**
>
> **(j) the Director of Forests; and**
>
> **(k) <u>such other relevant authorities as the Local Authority deems appropriate</u>".** [our emphasis]

[84] We have set out the functions and powers of all the three bodies above relevant to this dispute to demonstrate their crosscutting roles. Each of these multi-actor regulatory agencies inevitably involve highly-specialized expertise, with different legal mandate and framework. Their mandates may at times overlap or contradict. That is why, instead of looking at single institutions, for instance

NEMA, one must map the full and relevant existing legislative spectrum to appreciate their linkage.

[85] As should be apparent from the arguments of the parties, the fragmentation of roles between the regulators only goes to blur their jurisdictional boundaries, often making it difficult to decipher when the jurisdiction of one regulator ends and that of the other begins. So as to avoid this, the agencies must develop and maintain synchrony with each other.

[86] Such synergy was created, for instance in Section 10(1) of the repealed Civil Aviation Act, where the National Civil Aviation Security Committee responsible for, among other things, co-ordinating security activities between agencies and other organizations, airports and aircraft operators and other entities concerned with or responsible for the implementation of various aspects of the civil aviation security was established. Its membership, appointed by the Minister, included the respondent. Section 32(2) of the repealed Physical Planning Act is another example. See **Paragraph 82** above.

[87] Section 6 of the Physical and Land Use Planning Act, 2019, which repealed the Physical Planning Act establishes the National Physical and Land Use Planning Consultative Forum, whose functions are, *inter alia,* to provide a forum for consultation on the national physical and land use development plan; promote effective co-ordination and integration of physical and land use development planning and sector planning; and consider national security and advise on strategic physical and land use development projects of national, inter-county, county, or transnational importance.

[88] It is perhaps in acknowledgment and appreciation of the need for synergy between the regulating agencies that NEMA, for instance, in granting authorization to the appellant in the letters dated 11th March,2008 made it clear in paragraph 4, that the approval was subject to the appellant complying with all the relevant principal laws, by-laws and guidelines issued for the development of the

project by all relevant authorities. In the subsequent letter of 7th July, 2008, NEMA was specific, once more in paragraph 4, that the appellant was to comply, not only with the principal laws and by-laws but also with **"guidelines issued for development of such a project within the jurisdiction of Kenya Airport Authority, Kenya Civil Aviation Authority, Nairobi City Council, Ministry of Housing, Ministry of Lands, ……and other relevant Authorities".**

[89] If further evidence to show that the regulatory agencies must work and that in this case they did work in coordination is required, one will be found in a letter written on 24th January 2008 by the respondent in response to the Director General KCAA's letter explaining to the latter that it had not approved the on-going developments on the suit property for the reason that it lay within the approach funnel of the main Runway of Wilson Airport.

[90] It is therefore surprising that there would be an approval by KCAA that the appellant is exclusively relying on to continue with the construction in the absence of one from the respondent. If that be the case, and in view of what we have said, regarding the appellant's efforts to obtain an approval from the respondent, then we are afraid, he is on a bad and unhelpful frolic.

[91] On this question, and for the foregoing reasons, we have no difficulty in arriving at the conclusion that the respondent lawfully and within the remit of the Constitution issued cessation order in issue.

iii Whether the appellant was entitled to compensation

[92] This question does not arise in light of what we have said in the preceding part of this judgment. The compensation contemplated by Articles 22 and 23 can only be awarded where there is proof that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The appellant has specifically pleaded as special damages for loss of earnings, a liquidated sum

of ***Kshs. 992,336,004*** which he claims is loss suffered based on violations of his right to property. This Court in the case of ***Gitobu Imanyara & 2 Others v. Attorney General***, SC Petition 15 of 2017, held that a claim in public law for the deprivation of fundamental rights and freedoms, compensation can include loss of earnings. There is nothing in Section 33 of the KAA Act that would entitle the appellant to be compensated in the claimed sum of ***Kshs. 992,336,004***. This is so because his loss, injury or damage, if any were as a result of his own subversive actions. We couldn't agree more with the conclusion of the Court of Appeal that the appellant;

> ***"... was solely to blame for the loss that befell him, as he deliberately aggravated the loss by failing to heed the warning given by the respondent as demonstrated earlier. He even conceded before the trial court that by the time the denial of the approval by the respondent was communicated to him, the project was at excavation stage.***
>
> ***.....the appellant was the author of his own misfortune. He cannot be allowed to benefit from his intransigence".*** [our emphasis]

[93] Furthermore, the right to property under Article 40 is not an absolute right. In appropriate circumstances, it can be limited by the law. The respondent in this regard has produced evidence in support of the justification to stop the project pursuant to the KAA Act. In our considered view, the security and safety of flight paths is in public interest which permits the limitation on enjoyment of the right and freedoms in the Bill of Rights of a private individual. See ***Karen Njeri Kandie v. Alassane Ba & another,*** Petition No. 2 of 2015; [2017] eKLR, where the Court stressed that, in determining whether the limitation of a right is justifiable, a court must consider the nature of the right, the importance of the

purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of others.

[94] The respondent's action did not extinguish the appellant's ownership rights to the suit property nor did it technically amount to acquisition of the suit property by the respondent. The cessation order only sought to restrict the activities that, in the view of the respondent would compromise aviation safety and security.

[95] If the submissions by Mr. Munyu, learned counsel for the respondent is any consolation to the appellant, and bearing in mind the efforts to settle this dispute out of court, the appellant ought to go back to the drawing board and retrace his steps by engaging the respondent on how best this long-drawn dispute can be resolved without the latter resorting to the threatened demolition of the structures on the suit property. Counsel suggested;

> ***"He (the appellant) remains in possession and in control of his land. All that he should have done is to go back to the Airport's Authority and state; what can we do? what developments would be acceptable within your limitation, what are the developments that would be acceptable so that he can get the approval.***
>
> ***And that is even what Kenya Civil Aviation talks about. Questions of lighting, questions of height of buildings those are things that should have been pursued".***

[96] In conclusion and for all the reasons given, we find no error in the decision of the Court of Appeal issued on 24th March 2017 and instead find no merit in this appeal which we, accordingly reject.

G. ORDERS

[97] Consequent upon our conclusion above, we order that:

i) The appeal dated 21st April, 2017 is hereby dismissed.

ii) Costs are awarded to the Respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **17th** Day of **June 2022.**

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....	.....
M.K. IBRAHIM	**S.C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA