



Ahmed, Mohamed & Apunda (Suing as Chairman, Secretary and Treasurer of Langata Forest View Estate Association) & 4 others v Jaylani & 2 others (Environment & Land Case E024 of 2023) [2023] KEELC 16396 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16396 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E024 OF 2023
JO MBOYA, J
MARCH 16, 2023

BETWEEN

ABDULLAHI DAHIR SHEIKH AHMED, SAHARA MOHAMED & WILFRED ODHIAMBO APUNDA (SUING AS CHAIRMAN, SECRETARY AND TREASURER OF LANGATA FOREST VIEW ESTATE ASSOCIATION) 1ST PLAINTIFF
FEISAL ABDILE HAJI ABDI 2ND PLAINTIFF
ABDI DAYAH ALI 3RD PLAINTIFF
HUSEIN IBRAHIM AMIN 4TH PLAINTIFF
UGAS SHEIKH MOHAMED 5TH PLAINTIFF

AND

QADAR JAYLANI 1ST DEFENDANT
HADIJAH ABDULAHI MOHAMED 2ND DEFENDANT
ABDILAH I MOHAMED ABDI 3RD DEFENDANT

RULING

1. Vide Notice of Motion Application dated the January 19, 2023, Plaintiffs/Applicants have approached the Honourable court seeking for the following reliefs;
 - i. THAT the Application be certified as urgent and be heard Ex- Parte in the first instance.
 - ii. THAT a Temporary Injunction be issued against the Defendants/ Respondents by themselves, their agents, servants and/or representatives



stopping all construction works on Land Reference Number Land Reference Numbers 19952/366, 19952/108, 19952/109, 19952/110, 19952/111, 19952/112,19952/113,19952/114,19952/115, 19952/116, 19952/117 and 19952/177, located in Langata Forest View Estate within Langata Sub-County, Nairobi City County pending the hearing and final determination of this Application.

- iii. THAT a temporary injunction be issued against the Defendants/ Respondents by themselves, their agents, servants and/or representatives stopping all construction works Land Reference Number Land Reference Numbers 19952/366, 19952/108,19952/109, 19952/110,19952/111,19952/112,19952/113,19952/114,19952/115, 19952/116, 19952/117 and 19952/177, located in Langata Forest View Estate within Langata Sub-County, Nairobi City County pending the hearing and final determination of this Suit.
- iv. THAT the Officer Commanding Station, Langata Police Station be directed and/or lo authorized to ensure the above orders are enforced.
- v. THAT costs of this Application be in the cause.

2. The instant application is premised and anchored on the ground alluded to and enumerated in the body of the application. Besides, the instant application is supported by the affidavit sworn by the 1st Plaintiff/Applicant herein, albeit for and on behalf of the rest of the Plaintiffs.
3. Upon being served with the instant application, the Defendants/Respondents filed and lodged assorted preliminary objections; and in respect of which same challenged the jurisdiction of the Honourable court.
4. Essentially, the Defendants/ Respondents, contended that the dispute beforehand ought and should have been referred to the County liaison Committee in accordance with the provisions of the [Physical and Land Use Planning Act](#), 2019.
5. Other than filing a Notice of preliminary objection, the 3rd Respondent also filed a Replying affidavit sworn on the February 17, 2023, wherein same averred, inter-alia, that the impugned construction was duly approved by all the relevant authorities, including Nairobi City County Government.
6. Suffice it to point out that after being served with the assorted preliminary objections and the Replying affidavit by the 3rd Respondents, the Plaintiffs herein sought for and obtained Leave to file and serve a supplementary affidavit.
7. Consequently, the Plaintiff caused to be filed a supplementary affidavit sworn by the 1st Plaintiff/Applicant herein. For completeness, the supplementary affidavit was sworn on the February 22, 2023.
8. Other than the foregoing, the subject application came up for hearing on the February 9, 2023, whereupon direction were given, inter alia, that the application dated the January 19, 2023, shall be heard and canvassed alongside the various preliminary objections filed on behalf of the Respondents.
9. Furthermore, the Honourable court also directed that the application and the named preliminary objections were to be canvassed and ventilated vide oral submissions. In this regard, the matter was thereafter set down for hearing on March 1, 2023.



Submissions By The Parties

Applicants' Submissions:

10. Learned counsel the Applicants' adopted the grounds at the foot of the named application, as well as the contents of the supporting affidavit and the supplementary affidavit, respectively. Besides, counsel thereafter highlighted and amplified four salient issues for consideration by the Honourable court.
11. Firstly, learned counsel for the Applicants submitted that the Defendants/Respondents herein had commenced and undertaken assorted construction on the various plots, details contained at the foot of the application, albeit without procuring and obtaining the requisite approvals.
12. In particular, learned counsel contended that the impugned constructions and/or developments, that were being carried out by the Respondents, were contrary to and in contravention of the Zoning Regulations governing and relating to the area in question.
13. Furthermore, learned counsel added that insofar as the requisite approvals had neither been procured nor obtained, then the impugned and offensive construction(s), ought not to be allowed to proceed.
14. Secondly, learned counsel for the Applicants also submitted that this Honourable court is seized and vested with the requisite jurisdiction to entertain and adjudicate upon the issues in dispute. In particular, counsel added that this Honourable court is authorized and mandated the grant of orders of temporary injunction in the manner sought.
15. To this end, learned counsel for the Applicants invited the court to take cognizance of the provisions of Article 165(3) of the Constitution 2010, which according to counsel, vested the requisite Jurisdiction on the Environment and Land court.
16. In support of the foregoing submissions, learned counsel further referred the Honourable Court to the decision in the case of Parkside Medical Centre v Nairobi City County (2015) eKLR, where the Honourable High court interpreted the provisions of Articles 165(3) of the Constitution, 2010.
17. Thirdly, learned counsel submitted that the Plaintiffs herein are seized and possessed of the requisite Locus standi to commence and maintain the instant suit for and on behalf of Langata Forest View Estate Association, insofar as the persons named in the current proceedings, are the Bona fide officials of the said Association.
18. Additionally, learned counsel invited the Honourable court to take into account and consider the contents of paragraph 10 of the supplementary affidavit. For clarity, counsel pointed out that the contents of the said paragraph are pertinent and succinct, as far as (sic) capacity of the Plaintiffs' is concerned.
19. Fourthly, learned counsel for the Applicants has submitted that the offensive activities and in particular the constructions being carried out and undertaken by the Respondents shall occasion irreparable loss/harm to the Applicants herein.
20. Furthermore, the Applicants contended that unless the order of injunction is granted, the character of the suit property will be altered and thus same shall pose serious Environmental degradation.
21. In this regard, learned counsel invited the Honourable court to find and hold that the Applicants herein have established and demonstrated a sufficient basis to warrant the grant of the orders of temporary injunction, in the manner sought at the foot of the current application.



22. Other than the foregoing, learned counsel for the Applicants also submitted that the preliminary objection(s) that have been raised by and on behalf of the Defendants herein, are misconceived and merely intended to circumvent the rights of the Applicants to partake from and benefit from the Right for Clean and Healthy Environment.

1st Respondent's Submissions:

23. Learned counsel for the 1st Respondent intimated to the Honourable court that same has since filed skeleton written submissions dated the February 27, 2023 and in this regard, same sought to adopt and rely on the skeleton submissions.
24. Nevertheless, learned counsel for the 1st Respondent added that the issues beforehand ought to have been raised and canvassed before the Physical liaison committee in terms of the provision of Section 61, 78, 79 and 80 of the [Physical and Land Use Planning Act](#), 2019.
25. Consequently and in a nutshell, learned counsel submitted that this Honourable court is devoid and divested of the requisite Jurisdiction, on the basis of the Doctrine of Exhaustion.
26. Furthermore, learned counsel contended that the Applicants herein have neither shown nor demonstrated that the available alternative dispute resolution mechanism, are neither suitable nor applicable to the subject matter. In this regard, counsel added that it was not appropriate for the Applicants to overlook the statutorily established dispute resolution mechanism.
27. On behalf of the 2nd Respondent, learned counsel adopted the preliminary objection dated the February 8, 2023 and amplified the grounds that the issues beforehand touch on and concern, the approvals which were issued by the planning authority. In this regard, learned counsel submitted that the Applicants herein ought to have approached the established statutory body in the first instance and not otherwise.
28. Secondly, learned counsel for the 2nd Respondent submitted that the Doctrine of Exhaustion applies to the instant matter and therefore the Honourable court is divested of Jurisdiction to entertain and adjudicate upon the subject dispute, in the first instance. In this regard, counsel invited the Honourable court to take cognizance of the provisions of Article 159 (2) (c) of the [Constitution](#), 2010, that anchors alternative dispute resolutions.
29. Furthermore, learned counsel also invited the Honourable court to take cognizance of the provisions of the provisions of Section 76 and 80 of the [Physical and Land Use Planning Act](#), 2019, which contain clear and elaborate procedures to be complied with by any aggrieved party, the Applicants not excepted.
30. Thirdly, learned counsel for the 2nd Respondent also submitted that this Honourable court is conferred with both original and appellate Jurisdiction in matters pertaining to planning and hence where a court is vested with both Jurisdictions, it behooves the court to exercise deference and allow the requisite statutory body, established by Law, to deal with the dispute in the first instance.
31. To this end, learned counsel added that the dispute therefore ought to have been placed before the liaison committee and thereafter, reverted to the Environment and land court on appeal and not otherwise.
32. Finally, learned counsel for the 2nd Respondent submitted that the Applicants herein have neither met nor satisfied the requisite threshold to warrant the grant of the orders of temporary injunction, either as sought or at all.



33. For coherence, counsel added that the Applicants herein have neither established the existence of a prima facie case with probability of success nor that same are disposed to suffer Irreparable loss, unless the orders sought are granted.

Submissions By The 3rd Respondent

34. Learned counsel for the 3rd Respondent adopted the contents of the Replying affidavit sworn on the February 17, 2023; as well as the contents of the preliminary objection of even date.
35. Thereafter, learned counsel for the 3rd Respondent submitted that the Applicants herein are not the bona fide and registered officials of Langata Forest View Estate Association, either as alleged or at all. In this regard, counsel has therefore contended that the Plaintiffs/Applicants are therefore devoid and bereft of the requisite locus standi to mount and maintain the instant suit.
36. Furthermore, learned counsel for the 3rd Respondent has submitted that the burden of proving that the Applicants are the bona fide registered officials of the named association laid on the shoulders of the Applicants.
37. Nevertheless, counsel added that the Applicants herein have failed to discharge the burden, insofar as same have neither availed nor placed before the Honourable court any certificate from the registrar of society to denote that same are the registered officials.
38. Secondly, learned counsel has submitted that the impugned and enforcement notice which had hitherto been issued and served by Nairobi City County Government, has since been withdrawn. For clarity, counsel added that it was discovered that the Enforcement notice was procured and issued on the basis of non-disclosure.
39. Thirdly, learned counsel for the 3rd Respondent has also submitted that the construction complained of has since been completed and concluded. In this regard, counsel pointed out that the orders of temporary injunction being sought by the Applicant are thus, ineffective and ineffectual, insofar as what is complained about has already been concluded and completed.
40. Fourthly, learned counsel submitted that the impugned constructions and/or developments were duly approved by all the relevant authority inter alia, the National Construction Authority and Nairobi City County of Nairobi, the latter which is the planning authority in accordance with the provisions of the *Physical and Land Use Planning Act*, 2019.
41. To this extent, learned counsel invited the Honourable court to take cognizance of the contents of paragraph 10 of the Replying affidavit, which articulated and alluded to the various approvals issued in respect of the impugned construction.
42. Moreover, Counsel for the 3rd Respondent submitted that the subject suit is intended to impeach the various approvals, including the approval issued by the planning authority. Consequently, it was contended that the issues beforehand therefore ought to have been placed before the committee and dealt with in the manner prescribed under the law.
43. Whilst responding to the various issues raised by counsel for the Respondents, learned counsel for the Applicants contended that the question and issue of locus standi, is irrelevant and otherwise misconceived. In any event, counsel added that paragraph 4 of the supplementary affidavit sworn on the February 22, 2023, has ably addressed the question of locus standi.
44. Nevertheless, Learned counsel for the Applicant conceded and admitted that same has not placed before the Honourable court the minutes relating to the election of the Applicants or even the



certificate of registration issued by the Registrar of Societies, pursuant to the Provisions of the Societies Act, Chapter 108, Laws of Kenya.

45. On the other hand, learned counsel added that the failure to tender and place before the Honourable Court the requisite minutes of the elections of the Applicants was due to an inadvertent and honest mistake.
46. Secondly, learned counsel for the Applicants submitted that the approvals which have been relied upon by the Respondents to carryout and undertake the impugned development were issued by Nairobi Metropolitan Service, and not by Nairobi City County Government.
47. Be that as it may, counsel admitted that at the time when the named approvals were issued, Nairobi Metropolitan Service, was the appropriate authority and thus was conferred with the mandate/ authority, to issue the impugned approvals.
48. Thirdly, learned counsel for the Applicants submitted that the Doctrine of exhaustion does not apply to and in respect of the subject matter. Consequently, Learned counsel stated that this Honourable court has unlimited jurisdiction to entertain and adjudicate upon the dispute beforehand.
49. In view of the foregoing, learned counsel for the Applicants' has reiterated his earlier submissions and invited the Honourable court to grant the reliefs sought at the foot of the Application dated the January 19, 2023.

Issues For Determination

50. Having reviewed and evaluated the Application dated the January 19, 2023, together with the supporting affidavit and the supplementary affidavit attached thereto; and having taken into account the Responses filed by the Respondents and upon considering the oral submissions ventilated on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether the Applicants herein have the requisite Locus standi to commence, mount and maintain the current suit on behalf of Langata Forest View Estate Association.
 - ii. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject matter.

Analysis and Determination

Whether the Applicants herein have the requisite Locus standi to commence, mount and maintain the current suit on behalf of Langata Forest View Estate Association.

51. It is common ground that the current suit has been mounted and commenced by the various Plaintiffs, albeit in their capacities, as (sic) officials and members of Langata Forest View Estate Association.
52. Furthermore, the first set of the Plaintiffs have contended that same are the Bona fide and registered officials of the association.
53. Consequently and to be able to appreciate and understand the capacity which have been invoked and relied upon by the Plaintiffs to commence and originate the instant suit, it is appropriate to take cognizance of paragraphs 1 and 2 of the Plaint dated the January 19, 2023.



54. For ease of reference, the contents of paragraphs 1 and 2 of the Complaint are reproduced as hereunder;
1. THE 1st Plaintiff is a residents' association registered under *Societies Act* Cap 108 of the Laws of Kenya, whose membership is open to- and comprises of persons who own land and/or reside within Langata Forest View Estate within Langata Sub-County, Nairobi City County. Its address of service for purposes of service is care of the law firm of Messrs Naikuni, Ngaah & Miencha Company Advocates, It Floor, Harambee Avenue, PO BOX 4916-00100 Nairobi of the Republic of Kenya.
 2. THE 2nd, 3rd, 4th and 5th Plaintiffs are residents within Langata Forest View Estate and members of the 1st Plaintiff. Their address of service for purposes of service is care of the law firm of Messrs Naikuni, Ngaah & Miencha Company Advocates, 15th Floor, Harambee Avenue, PO BOX 4916-00100 Nairobi of the Republic of Kenya.
55. Having contended in the first instance, that same are the bona fide and registered officials of the named association, it was incumbent upon the 1st Plaintiff (read the Officials of the Association) to adduce and place before the Honourable court inter-alia, minutes pertaining to their election as officials of the named association and also the requisite certificate issued by the Registrar of Societies.
56. It is imperative to state and underscore that any association registered pursuant to and under the *Societies Act*, Chapter 108 Laws of Kenya, is required to hold elections on a regular basis and upon holding of such election to submit returns to the Registrar of Societies for endorsement and registration.
57. Furthermore, once the duly elected officials submit the requisite returns and minutes pertaining to the concerned elections, the Registrar of societies, is called upon to generate and issue a certificate authenticating the duly elected officials.
58. Consequently and in the premises, whenever an issue arises as to who are the bona fide and registered officials of a particular society, it behooves the person claiming to be the bona fide official to produce and tender to the court the requisite certificate confirming his/her election and registration by the registrar of societies.
59. However, in respect of the instant matter, it is no lost on the Honourable court that the Applicants herein neither adduced nor tendered before the Honourable court any minutes to confirm their elections, if any, or even the certificate of registration authenticating their elections.
60. In addition, it is worthy to recall that when the issue of the locus standi of the Applicants was raised, learned counsel for the Applicants acknowledged and admitted that same had not placed before the Honourable court the requisite evidence/material, to enable the court authenticate whether indeed the Applicants are the officials or otherwise.
61. On the other hand, the 2nd to 5th Applicants have contended that same are residents within Langata Forest View Estate Association and same are also members of the said association.
62. Nevertheless, it is imperative to state that in the body of the application and the annexed affidavit, there is no evidence to authenticate whether indeed the 2nd to 5th Applicants are members of the said/ named association.



63. Consequently, I must point out that the burden of proving that the Applicants are the lawful, bona fide and registered officials of the association rested with the Applicants. In this regard, it behooved the Applicants to place before the Honourable court sufficient material to establish, authenticate and confirm that same had the requisite locus standi to mount and maintain the subject suit.
64. Unfortunately and for reasons , only known to the Applicants, the same (Applicants herein) skirted the issue and avoided to address same, even though the question of locus standi was variously and repeatedly, raised by the Respondents.
65. Having failed to address the question of locus standi or better still, to place material before the Honourable court to warrant the foundation that same are indeed vested with the requisite locus standi, I come to the conclusion that the Applicants herein, are devoid and bereft of the requisite Locus standi.
66. Furthermore, I beg to state and underscore that in the absence of the requisite locus standi, the Applicants herein cannot originate, mount and maintain the subject suit, together with, the incidental Application thereto.
67. In addition, it is not lost on the Honourable Court that Locus standi is a threshold and critical issue/ question, that lies at the root of the Jurisdiction of the Honourable court to entertain a particular suit.
68. In this respect, it is imperative to take cognizance of the holding in the case of *Alfred Njau & 5 others versus City Council of Nairobi*[1983] eKLR, where the court stated and held as hereunder;

' The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding. Therefore the effect of the judge's finding here, which was made after hearing the evidence, and not treated as an isolated issue, the latter course being disapproved in the particular circumstances of that case by the House of Lords in IRC v National Federation of Self Employed and Small Businesses Ltd (supra), was that the appellant had no right to bring or to appear in this suit against the Council.'

69. Other than the foregoing, it is also imperative to state and reiterate that as concerns a registered society and an association, same can only sue or be sued through the bona fide and registered officials thereof; and not otherwise.
70. In the premises, if the Plaintiffs were keen to mount and maintain the current suit (sic) in their capacities as officials of the said Association, then same needed to establish and prove the existence of such capacities.
71. In this respect, I beg to adopt, re-state and reiterate the holding in the case of *Islamia Madrassa Society versus Zafar Niaz & 8 others* [2021] eKLR, where the court stated and held as hereunder;

'15. According to the pleadings the original officials were ousted through an 'unlawful meeting' and the defendants elected as the officials. Does that in itself give the plaintiff the power to file this suit in its own name when it has officials?

16. In the case of Trustees Kenya Redeemed Church & Anor vs Samuel M'Obiya & 5 others [2011] eKLR it was held thus:

'It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not been pleaded that the



2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.'

72. In a nutshell, I come to the conclusion that the Applicants herein have neither established nor demonstrated that same have the requisite locus standi to originate, mount and maintain the subject suit. Consequently and on the threshold of locus standi, the entire suit fails.

Whether the Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject matter.

73. The instant suit, was premised and anchored on the contention that the Defendants/Respondents had commenced and undertaken the offensive developments, albeit without the requisite approvals by the concerned authorities.

74. For the avoidance of doubt, the substratum of the Plaintiffs' suit is contained at the foot of paragraphs 10 and 11 of the Complaint dated the January 19, 2023.

75. For ease of reference, the contents of paragraph 10 and 11 of the Complaint herein are reproduced as hereunder;

10. THERE is no single signage displayed on the Suit Properties showing any approvals that has been issued. Efforts by the Plaintiff to reach out to the Defendants has proved futile. Investigations by the Plaintiff including from County Government, National Construction Authority and National Environment Management Authority have established that the developments have no approval.

11. THE Plaintiffs avers that the actions by the Defendants will not only lead to uncontrolled development within the Estate but is an infringement of the Plaintiffs' right to object to such development pursuant to section 78(a) of the Physical and Use Planning Act No 13 of 2019 which will be rendered otiose and the right to clean and healthy environment guaranteed under article 42 of the Constitution.

76. On the other hand, upon being served with the pleadings and the consequential application, the 3rd Defendant filed a Replying affidavit and in respect of which same pointed out inter-alia, that the impugned constructions and developments, were being carried out after procurement and obtaining all the requisite approvals, as required under the law.

77. Furthermore, the 3rd Respondent ventured forward and indeed exhibited the various approvals, which had been issued by inter-alia, the Planning authority, namely, Nairobi City County Government.

78. In this respect, it is appropriate to take cognizance of the contents of paragraph 10 of the Replying affidavit sworn on the February 17, 2023.

79. For ease of reference, same is reproduced as hereunder;

10. 'THAT I got the prerequisite to such development and acquired statutory requirement by applying and obtaining approval of the said constructions from the necessary bodies and I had also issued the 1st Applicant notice of the



construction. (Annexed hereto and Marked 'ABA-2' is a copy of the Building Planning Approvals from Nairobi County, approved plans and Nema).'

80. Despite the averment contained at the foot of paragraph 10 of the Replying affidavit, the Applicants herein did not endeavor to or otherwise challenge the veracity of the annexed approvals and the attendant documents.
81. In any event, it is imperative to recall that during the hearing of the application beforehand and the various preliminary objections filed by the Respondents, learned counsel for the Applicants finally conceded that indeed there were approvals that were issued towards and in respect of the impugned developments.
82. Notwithstanding the foregoing, counsel for the Applicants went further and contended that the impugned approvals were issued by Nairobi Metropolitan Services and not Nairobi City County Government.
83. Be that as it may, when questioned by the Honourable court as to whether at the material point in time Nairobi Metropolitan Service was the authorized authority, learned counsel for the Applicants answered in the affirmative.
84. In view of the foregoing, what becomes evident and apparent is that the impugned developments were being carried out and undertaken on the basis of approvals, which have been issued in accordance with and adherence to the provisions of the *Physical and land Use Planning Act*, 2019.
85. Consequently, the question that now arises is whether a challenge addressed to and calculated to impeach the approvals issued by the Planning Authority ought to be placed before the Environment and land court in the first instance or otherwise.
86. In my humble view, the challenge that is geared towards negating the approvals issued by the Planning Authority, in this case the Nairobi City County Government or better still, Nairobi Metropolitan Services (now defunct) ought to have been placed before the liaison committee in the first instance.
87. To this extent, the provisions of sections 61(3) and (4) and 78 (b) of the *Physical and land Use Planning Act*, 2019, are imperative and relevant.
88. For ease of reference, the provisions of Section 61(3) and (4) and 78 (b) of the *Physical and Land Use Planning Act*, 2019, are reproduced as hereunder;

61 When considering an application for development permission, a county
(1). executive committee member—

- (a) Shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans;
- (b) Shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought;
- (c) Shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought;



- (d) Shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and
 - (e) In the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.
- (2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may —
- (a) Grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; or
 - (b) Refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing.
- (3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
- (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court..

78. The functions of the County Physical and Land Use Planning Liaison Committee shall be to —

- (a) Hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- (b) Hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
- (c) Advise the County Executive Committee Member on



broad physical and land use
planning policies, strategies
and standards; and

- (d) Hear appeals with respect to
enforcement notices.

89. The foregoing provisions of the *Physical and Land Use Planning Act*, 2019, have domesticated and amplified the Doctrine of Exhaustion, which has also been underscored by dint of the provisions of Article 159(2) © of the *Constitution*, 2010.

90. Consequently, prior to and before approaching the Honourable court with a matter/dispute that falls within the *Physical and Land Use Planning Act*, it behooves the claimant to first and foremost exhaust the existing dispute resolution mechanism provided under the law.

91. Furthermore, it is now trite and established that where the statute has provided a dispute resolution mechanism outside the court then the provided dispute resolution mechanism must be exhausted before the Jurisdiction of the court can be invoked and/ or approached.

92. In this respect, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Bethwell Allan Omondi Okal versus Telkom Founders Ltd (2017)eKLR*, where the court stated and observed as hereunder;

' The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon Uhuru Kenyatta and others, Petition No 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.'

93. Additionally, the significance of the Doctrine of Exhaustion and its impacts on the Jurisdiction of the court(s) was also deliberated upon and discussed in the case of *Geoffrey Muthinja versus Samuel Munga Henry (2015)eKLR*, where the Court of Appeal stated and held as hereunder;

'We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked.

Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of



approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.'

94. Furthermore, the Supreme Court of Kenya has also added its voice to the importance, nay, significance of the Doctrine of Exhaustion in the case of *Albert Chaurembo Mumba & 7 others versus Maurice Munyao & 148 others (2019) eKLR*.

95. For coherence, the Supreme Court stated and held as hereunder;

' In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute'.

96. Most recently, the Honourable Court of Appeal had occasion to review a substantial number of case law, pertaining to and concerning the significance of the Doctrine of exhaustion and avoidance.

97. For clarity, this was undertaken in the case of *Eaton Towers Kenya Limited v Kasing'a & 5 others (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR) (28 April 2022) (Judgment)*.

98. For good measure, the Court in an elaborate decision stated and held as hereunder;

'38. The learned Judge erred by seeming to believe that adherence to the principle of avoidance was discretionary hence applicable only as a Judge deems fit. It is not so. The principle is an old adage principle that has been adhered to by courts not just in Kenya, but around the globe. This was articulated in John Harun Mwau -vs-peter Gastrow & 3 Others [2014] eKLR, where the Court stated that;'It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.' (See also Ashwander V Tennessee Valley Authority, 297 Us 288, 347 (1936) And SV Mhlungu, 1995 (3) SA 867 (CC).

39. On the multifaceted nature of the petition, the learned Judge pronounced;'I do not think given the multifarious nature of his complaint, the issues raised could be addressed comprehensively in any single forum unless that forum is this court Given the wide ranging complaint that encompasses several state players and individuals I cannot fault the petitioner for coming to court.'

40. We state categorically and without equivocation that the multifaceted nature of any petition, or suit for that matter, is not a basis to find a court to arrogate jurisdiction to itself.

This Court already made a finding on this issue and castigated such reasoning in *Kibos Distillers Limited & 4 Others -vs- Benson Ambuti Adegga & 3 Others* [2020] eKLR;'In the instant matter, the learned judge citing the case of *Ken Kasinga -vs- Daniel Kiplagat Kirui & 5 others*, [2015] eKLR, and other decisions from courts of coordinate jurisdiction held that where a claim in a



petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter.

With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings - that all that a litigant need to do is to draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.'

99. Premised on the ratio decidendi arising from the various decisions, (which have been alluded to in the preceding paragraphs), I come to the conclusion that the jurisdiction of this Honourable court has been approached prematurely and prior to exhausting the established and existing dispute resolution mechanism provided for and created under statute.
100. In the premises, I hold the humble view that this Honourable court is not seized of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute, either in the manner ventilated or at all.
101. In a nutshell, my answer to issue number two is to the effect that this Honourable court is divested and deprived of the Jurisdiction by dint of the provisions of Section 61 (3) and (4) and 78(b) of the [*Physical and Land Use Planning Act*](#), 2019.

Final Disposition

102. Having analyzed and evaluated the various issues that were alluded to and itemized in the body of the Ruling, I come to the conclusion that the Plaintiffs/Applicants herein were obliged and obligated to pursue the complaints pertaining to the approvals by the Planning Authority with the liaison committee prior to and before accessing the Jurisdiction of this Honourable court.
103. In the premises, it is evident and apparent that the entire suit by and on behalf of the Plaintiffs herein, is not only misconceived and Bad in law, but same is legally untenable.
104. Consequently and in the premises, the suit vide Plaint dated the January 19, 2023; and the attendant application made thereunder, be and are hereby struck out with costs to the Defendants/Respondents.
105. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16th DAY OF MARCH 2023.

OGUTTU MBOYA

JUDGE

