



Demeure Cloud Nine Limited v Nairobi City County Government (Environment & Land Case 285 of 2019) [2023] KEELC 16971 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 285 OF 2019**

**AA OMOLLO, J
APRIL 27, 2023**

BETWEEN

DEMEURE CLOUD NINE LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY GOVERNMENT DEFENDANT

RULING

1. On September 6, 2022, the defendant raised a preliminary objection to the plaintiff's suit pleading thus:
 - a. The suit herein ought to be struck out and dismissed with costs to the defendant as this honourable court has no jurisdiction under the Physical Planning Act to entertain a claim premised on an Enforcement Notice under these proceedings at all.
 - b. The Plaintiff in filing this suit herein failed to abide by the Doctrine of Exhaustion as laid out in the Physical Planning Act in respect of the defendant's Enforcement Notices No. 1249; No. 3093 No. 3659 dated 6th May, 2019, by reason of which the Court cannot entertain the proceedings based on the statutory procedure to resolve claims under such Notices.
 - c. The plaintiff by its suit herein has acted in breach of section 9(4) of the *Fair Administrative Action Act*, hence this Honourable Court ought to strike out the process.
 - d. Leave to the plaintiff to mend the plaint was granted on July, 27th 2022, and the Amended Plaint was to be served on the defendant within 14 days of lodging in court. The defendant was served on August 22nd 2022 with the purported Amended Plaint and hence leave to amend the plaint lapsed. There is no amended plaint before court.
2. In his submissions, the defendant set out the background of the plaintiff's case which he stated is premised on the Enforcement Notices dated May 6, 2019, August 28, 2019 and September 19, 2019 served on them by the defendant. The Notices specified that certain parts of the structures on



the plaintiff's property had been unlawfully erected in breach of the hitherto *Physical Planning Act* Cap 286.

3. The defendant submitted that by virtue of the fact that the only relief sought in the amended plaint is pegged on the defendant's implementing the notice, this court is divested of jurisdiction. He referred this court to provisions of section 38(1) of the *Physical Planning Act* cap 286 (repealed) which stated thus;

“When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.”

4. The defendant submitted further that section 15 of cap 286 required of the plaintiff to invoke the appeal process against the enforcement notices. He supported this argument by relying on the Court of Appeal decision in the case of *Whitehorse Investments Ltd v Nairobi City County Government* (2019) eKLR which held that

“My view is that, should the applicant pursue the statutory mechanism provided by Parliament under the Physical Planning Act as read together with the *Fair Administrative Action Act*, this court may ultimately be seized of questions relating to the validity of the said notice. Having rejected the motion on the ground that it is premature, it would be inappropriate and prejudicial to make pronouncements on the second issue.”

5. They averred that this court cannot convert itself into a forum for appeal when the statute in cap 286 provided an elaborate process of appeal. In buttressing the argument that this court's jurisdiction was ousted, the defendant cited the case of *International Center for Policy & Conflict and 5 others v Attorney General and 5 others* (2013) eKLR which held thus;

“Where there exist sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. We found that the mandate of IEBC and other statutory bodies in dealing with the issues of eligibility and integrity were not exhausted by the Petitioner before invoking the jurisdiction of this court.”

6. The plaintiff did file their submissions dated April 20, 2023 though outside the timelines set by the court. It submitted that a P.O should be founded on a settled and crisp point of law and referred the court to the decision in *IEBC v Jane Cheperenger & 2 others* (2015) eKLR. It submitted further that the defendant relied on the case of *WhiteHorse Investments Ltd supra* which was concerned with the regime under the repealed *Physical Planning Act*. That the repealed act never had the equivalent of section 93 of the *Physical Planning and Land Use Act* which grants this court jurisdiction for pending disputes as long as the Liaison Committees under that Act were yet to be established.

7. I have perused the amended plaint dated August 2, 2022 which pleaded thus at paragraphs 11 and 11A

“11 On August 28, 2019 and without any prior notice or at all, officers of the defendant's planning, compliance and enforcement department visited the plaintiff's property, stopped construction work on the plaintiff's premises, marked the building construction works as condemned and illegal, arrested 5 employees of the plaintiff and served the plaintiff with an irregular enforcement notice relating to another property known as I.R No. 1/845 whereas



the plaintiff's property is I.R No. 1/851 thereby completely restraining the plaintiff from proceeding with the construction on the said property.

11A The said visit of August 28, 2019 was the culmination of a number of stop orders issued by the defendant beginning with the one dated May 6, 2019."

8. I have considered the pleadings and the reliefs sought together with the provisions of legislation cited by the defendant in support of the preliminary objection. I am persuaded to find that indeed before filing this suit, the plaintiff ought to have lodged appeal with the Liaison Committee as provided in the *Physical Planning and Land Use Act* No 13 of 2019. The Plaintiff submitted that the P.O was premised on a repealed law, unfortunately that does not help its case as the new Act has similar provision in section 72(3)(1).
9. Although this court is clothed with both original and appellate jurisdiction, it is now an established principle of law that parties should exhaust all available mechanisms before filing the case. This position has been ably elaborated by the defendant in the cases they have cited two of which are quoted herein above so I need not repeat. Further, the Court of Appeal in the case of *Benson Ambuti and 2 others v Kibos Distillers Ltd* (2020)eKLR held thus at par 51;

"Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.
10. In light of the foregoing, I find that the preliminary objection raised is merited and is granted. Consequently, the plaintiff's suit is struck out with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2023

A. OMOLLO

JUDGE

In the Presence of:

Mr Kinyanjui advocate for the Defendant

Mr Malanga for the Plaintiff

