



**Eldama Ravine Road Residents Association & 3 others v Minara
Homes Limited & 5 others (Environment & Land Petition
E059 of 2022) [2023] KEELC 17566 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E059 OF 2022**

**LN MBUGUA, J
MAY 11, 2023**

BETWEEN

**ELDAMA RAVINE ROAD RESIDENTS ASSOCIATION 1ST PETITIONER
PINAL PATEL 2ND PETITIONER
ERICK MUTHAMIA 3RD PETITIONER
NEHA GUDHKA 4TH PETITIONER**

AND

**MINARA HOMES LIMITED 1ST RESPONDENT
THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY
(NEMA) 2ND RESPONDENT
THE DIRECTOR GENERAL-NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY (NEMA) 3RD RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER LANDS, URBAN
PLANNING, URBAN RENEWAL HOUSING AND PROJECT
MANAGEMENT 5TH RESPONDENT
COUNTY GOVERNMENT OF NAIROBI 6TH RESPONDENT**

RULING

1. The Petitioners are residents and home owners of an estate along Eldama Ravine road in westlands Nairobi county. The 1st Respondent is a developer of a mega high rise residential building christened 'Minara heights' (the project) on parcel no 1870/1/237 which is in the neighbourhood of the



- petitioners' estate. The petitioners are opposed to the construction of the said project. They therefore filed a Notice of Motion application alongside their petition dated December 7, 2022 seeking injunctive orders against the respondents. Subsequently thereafter, the 1st Respondent filed a Notice of Motion application dated January 30, 2023 seeking orders to strike out the petition.
2. On February 16, 2023, the Court directed that both applications be heard together and that the 1st Respondent's application dated January 30, 2023 be treated as a response to the Petitioners' application. By then, the 4th Respondent had filed their replying affidavit dated February 15, 2023 in opposition to the Petitioners' application. Equally, the 5th and 6th Respondents had filed Grounds of opposition, opposing the Petitioners application, but the said respondents were not opposing the application of the 1st Respondent. It was noted that the 2nd and 3rd Respondents who had been duly served had not filed any documents relating to the two applications.
 3. On the same date of February 16, 2025, the court gave further directions that the Petitioner and the 4th Respondent were to file and serve their respective responses to the application of January 30, 2023 by 02.03.2023; thereafter the Petitioner was to file and serve their written submissions by March 16, 2023, while the rest of the parties were to file and serve their written submissions by March 30, 2023.
 4. A perusal of the record in the digital platform (CTS) reveals that the Petitioners' Replying Affidavit is dated April 18, 2023, while their submissions are dated April 19, 2023, both filed outside the given timelines. I find that it would be prejudicial to the Respondents if this court was to consider the aforementioned documents of the Petitioners since none compliance has given rise to a ripple effect where the Respondents have not filed any submissions at all. The said documents of the Petitioners filed outside the given timelines are hereby expunged.
 5. The Petitioners seek a temporary injunction restraining the 1st Respondent from carrying on with construction of the project which is intended to include a total of 180 units distributed in 18 floors exclusive of the basement and ground floors. They further seek orders directing the Respondents to file all approvals, permits, licences, project reports and Environmental Impact Assessment study issued to or prepared by the 1st Respondent as the case may be in respect of its project on the suit property.
 6. The application is based on grounds on its face and on the 2nd Petitioner's Supporting affidavit sworn on December 7, 2022. He deposes that he is the chairman of the Residents' association (1st petitioner), of which their members are likely to be affected by the mega project, pointing out they have not been consulted as stakeholders in the process leading to the approvals of the project by the relevant authorities.
 7. He avers that the *Constitution* as read with Regulations 16 and 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 imposes an obligation on the state to encourage public participation in the management, protection and conservation of the environment. He points out that despite the obligation, the project was not publicised before an Environmental Impact Assessment Study was conducted and before development permission was issued by the 6th Respondent under the *Physical and Land Use Planning Act*, 2019.
 8. He further deposes that the 1st Respondent had an obligation to hold at least 3 public meetings with the affected parties to explain the project and its effects, so as to receive their oral/written comments. He adds that the Environmental & Social Impact Assessment Study dated December 24, 2021 gave false and misleading information in trying to procure development permission, permits and other approvals from the 2nd, 3rd, 4th and 5th Respondents.



9. Thus the Petitioners have been denied an opportunity to bring to the fore the impact that the project will have on motor vehicle traffic flow within the area, the electricity power supply in the area, the sewer line capacity among other utilities.
10. He deposes that the Petitioners have previously raised reservations against the project through the letters dated April 26, 2022 and June 14, 2022 in response to the Environmental & Social Impact Assessment Study. He contends that the Petitioners have been opposed to any approvals being granted for the project to commence before the 1st Respondent reduces the density of the proposed project. He is aware that the 1st Respondent has commenced the site preparation and other initial construction works for the project and there is need to halt it for being illegal.
11. The 1st Respondent on the other hand is seeking orders to strike out the instant petition of which their application is premised on the grounds on its face and on the supporting affidavit of its director, Mr Abdullahi Abdi Garane sworn on January 30, 2023. The deponent avers that 1st Respondent is the registered proprietor of all that property known as LR No 1870/1/237. That the 1st Respondent conceptualized a high-end residential project to be developed on the said property comprising of 18 floors, and having 180 units.
12. He points out that the Respondent sought vide electronic application reference Number PPA-CU-AAE358 dated April 29, 2021 a change of user from single dwelling to multi-dwelling units (apartments). That pursuant to the said application, the 1st Respondent caused to be published in a newspaper of nationwide circulation on May 3, 2021 an advertisement inviting any and all objections from any member of the public and no objections were presented by the Petitioners or any members of the public. Subsequently, the 5th Respondent issued approval for change of user vide notification of approval of development permission dated July 9, 2021.
13. The deponent further contends that after the 1st Respondent obtained the requisite development permission, it applied for a construction permit on November 9, 2021 and received approval on December 12, 2021.
14. He also deposes that the 1st Respondent was issued with a licence for the implementation of the project after an Environment Impact Assessment study was conducted in line with Section 58 of the *Environmental Management and Co-ordination Act*. That the 1st Respondent also obtained a certificate of compliance from the 4th Respondent certifying that the project is in full compliance with Section 5 of the *National Construction Authority Act*.
15. Mr Abdullahi states that the 1st Respondent conducted extensive public participation as required by the law and engaged key stakeholders within the communities and the neighbourhood, with the meeting of April 1, 2022 being a case in point. He adds that the Petitioner knew about the suit project and had even written to the 2nd and 3rd Respondents as well as the 5th and 6th Respondents through Merss. Hashim & Co Advocates seeking to halt the project instead of following statutory procedures for challenging the licence and development permission.
16. He avers that the petition does not meet the threshold of constitutional litigation as it does not disclose any material infringement or violation of constitutional rights.
17. The 4th Respondent opposed the application of the petitioners vide their Replying Affidavit sworn by its manager, compliance, one Arch. Stephen Mwilu on February 15, 2023. He deposes that the 4th Defendant's mandate under the *National Construction Authority Act* No 41 of 2011 and the National Construction Authority Regulations 2014 is to ensure compliance of a construction site with the required standards for construction, and that the proposed development on the suit



- property is duly registered with the 4th Respondent under project Reg No xxxx. He adds that the 1st Respondent furnished the 4th Respondent with all the requisite documents that informed the issuance of the certificate of compliance including the requisite statutory approvals from the 2nd and the 6th Respondents.
18. In opposition to the Petitioners' application, the 5th and 6th Respondents filed grounds of opposition dated 13.02.2023. They contend that the 5th Respondent has no capacity to be sued and that the petition offends the mandatory provisions of Section 61(3) of the *Physical and Land Use Planning Act*. They also contend that the Petitioners have not pleaded any violation against their rights by the 6th Respondent.
 19. The Issues falling for determination are;
 - a. Whether the Petition is an abuse of the Court process.
 - b. Whether the Court has jurisdiction to hear the matter in light of the doctrine of exhaustion.
 - c. Whether the Petitioners have made a case for grant of a temporary injunction.
 20. There is no controversy that the 5th Respondent had granted the 1st Respondent approval to construct a high-rise residential development on LR No 1870/1/237 situated along Ravine Road. Similarly, the 2nd Respondent also gave its permission for the development of the project. On its part, the 4th Respondent issued the 1st Respondent with a certificate of compliance for the proposed project.
 21. The Petitioners claims that the approvals were granted in contravention of the provisions of the *Constitution*, Environmental Management and Coordination Act and the *Physical and Land Use Planning Act* as there was no notice of the project and neither was there public participation.
 22. Among the prayers sought by the Petitioners in the petition dated December 17, 2022 is an order quashing all the approvals issued to the 1st Respondent. The 1st Respondent contends that the petition is an abuse of the Court process and should be dismissed. It contends that it has all the requisite approvals for the project and that the Petitioners failed to challenge the issuance of permissions in the prescribed procedure under the relevant statutes.
 23. Under the *Physical and Land Use Planning Act*, there is an elaborate Dispute Resolution Mechanism that is set out under Section 61. Subsection (3) thereof provides that;

' 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.'
 24. The Petitioners contend that they raised reservations on the project vide correspondence dated April 16, 2022 and June 14, 2022. Thus they were aware of the intention of the 1st Respondent to construct the development on the suit land. However, there is no evidence that they explored the Appeal processes as set out in the aforementioned statute.
 25. There is also no evidence to show that they challenged the licenses/approvals issued by 2nd Respondent to the National Environment Tribunal (NET) established under Section 125 of the Environmental Management and Coordination Act. Similarly, the petitioners failed to challenge the approvals by the 4th Defendant under Section 27 of the *National Construction Authority Act* No 41 of 2011.



26. In *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR*, the Court of Appeal stated that:

' 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 force of last resort and not the first port of call the moment a storm brews. 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 the Courts.'

Also see Court of Appeal decision in *Eaton Towers Kenya Limited v Kasing'a & 5 others (Civil Appeal 49 of 2016) [2022] KECA 861 (KLR) (28 April 2022)*.

27. In *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR*, the Supreme Court of Kenya stated that;

' 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. Emphasize added'.

28. Finally, I find that there exists a statute known as the Nairobi City County Community & Neighborhood Association Engagement Act of 2016 which provides for inter alia, sharing of information, public participation and engagement between Residents' Association and the County Government. The Petitioners have not indicated whether their area is a delineated zone as provided under Section 7 of the said Act, nor have they explored the Dispute Resolution Mechanisms provided for under Section 15 of the aforementioned Act.

29. What resonates from the foregoing case law and the various statutory frameworks is that litigants should not hide behind Constitutional questions to avoid abiding by the laid out Dispute Resolution Mechanisms. By and large, the petitioners are challenging the change of user and building approval plans issued to the 1st respondent as well as the Environmental Impact Assessment license which are issues falling under the various statutory bodies clothed with the mandate to deal with the issues raised therein. I find that Petition is premature and an abuse of the Court process as it was brought without exhausting the Dispute Resolution Mechanisms under the relevant Acts. In that regard, I proceed to give orders as follows;

1. The petitioners application dated December 7, 2022 as well as the entire suit are hereby struck out, thus the 1st respondent's application dated January 30, 2023 is allowed.
2. On costs, the court considers the litigation to be in public interest; I thus direct that each party shall bear their own costs of the suit and the various applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE



In the presence of:-

Musembi for Petitioner

Asli for 1st Respondent

Cindy Ogala for 4th Respondent

Nduati and Amingo or 5th and 6th Respondents

Court assistant: Eddel

