



**Sikalie (Chairman) (Suing on behalf of Karen Lang’ata District Association)
v Nairobi City County Government; Director General, Nairobi Metropolitan
Services & 3 others (Interested Parties) (Environment & Land Petition
E027 of 2022) [2023] KEELC 17572 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E027 OF 2022**

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

BETWEEN

**SAMORA SIKALIE (CHAIRMAN) PETITIONER
SUING ON BEHALF OF KAREN LANG’ATA DISTRICT ASSOCIATION**

AND

NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

AND

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED
PARTY**

**THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY INTERESTED PARTY**

PARLIAMENTARY SERVICE COMMISSION INTERESTED PARTY

APRIM CONSULTANTS LTD INTERESTED PARTY

RULING

1. This suit was commenced by way of a petition dated 7.7.2022 where the Petitioner claims that the 3rd Interested Party’s development on LR No. 28712 (herein after, the project) is unconstitutional for lack of public participation. The petition is opposed by the Respondent and the 3rd and 4th Interested Parties. The case against the 1st Interested party (Director General of NMS) was withdrawn on 20.2.2023. The 2nd Interested party (NEMA) was served but they did not file any documents herein.
2. The 4th Interested Party was not in the picture when the suit was filed. They came on board this suit vide their application dated 27.7.2022 which was allowed on 28.7.2022 without any opposition.



3. This suit has been characterized by the filing of various applications and preliminary objections whose net effect has been to clog the proceedings. This ruling relates to the initial Application dated 7.7.2022 filed by the petitioner seeking restraining orders against the 3rd Interested Party, as well as the 3rd Interested Partys' Preliminary Objection dated 25.7.2022 where it is averred that the suit is subjudice to another suit.

The preliminary Objection dated 25.7.2022

4. The 3rd Interested Party argues that the suit is subjudice, pointing out that there is a similar suit pending before this Court, being ELC No. E177 of 2022 Samora Sikalie and 2 others v the Director General, National Environment Management Authority and the Parliamentary Service Commission and another.

The Petitioner filed grounds of opposition dated 13.12.2022 indicating that the suit ELC No. E177 of 2022 was filed on 18.5.2022 and withdrawn on 15.6.2022. That averment has not been rebutted. In the circumstances, I find that the Preliminary Objection cannot be sustained.

The Application dated 7.7.2022

5. The above application was filed contemporaneously with the Petition, where the petitioner on behalf of Karen Langata District Association (KLDA) is seeking orders; that pending the hearing and determination of the petition, a conservatory order by way of an injunction, do issue restraining the 3rd Interested Party, from commencing and/or continuing with any development on Land L.R NO. 28712, allegedly being the construction of a training facility known as Parliamentary Studies and Training Centre(PSTC) consisting of 2 basements and 13 floors. Further, the petitioner seeks an order that the approvals for the aforementioned project issued to the 3rd interested party by the respondent and the 1st and 2nd interested parties be suspended.

Case for the Applicant

6. The application is premised on grounds on its face and on the supporting affidavit of Mr. Samora Machel Sikalie; the chairman of the Petitioner sworn on 7.7.2022. He deposes that the Petitioner is duly recognized by the Respondent as a Neighborhood/Residents association vide a recognition agreement signed on 3.3.2017, and that the said agreement was affirmed by the Court on 3.12.2021 in Petition No.40 of 2018, Professor Albert Mumma suing as Chairman on behalf of Karen Lang'ata Association (KLDA) v County Government of Nairobi.
7. He further deposes that contrary to the said judgement, the Respondent proceeded to approve and Licence the 3rd Interested Party to undertake the project under the Physical Land Use and Planning Act without giving the Petitioner all information and documents regarding the development and opportunity to participate in the decision making in terms of the recognition agreement.
8. He avers that the 2nd Interested Party has also issued the 3rd Interested Party with approvals to proceed with the project, of which the proposed development is of mixed use estimated to cost about Ksh 3 billion.
9. He further avers that the said development is within Zone 3, Bogani reserved for ½ acre residential use. The said project is therefore in breach of the local development plan (LPDP) of Karen/Lang'ata area, is against the Physical Land Use and Planning Act and Planning Laws and therefore not in keeping with the surroundings and zoning of low-density residential developments and institutions of not more than 3 floors.



10. He outlines the measures the Petitioners took to establish the process of approvals and licensing that had been followed before such approvals were granted. He points out that the Petitioner instructed Merss Mereca & Co. Advocates who made inquiries and received the letter dated 18.5.2022, where they learnt that the parcel of land LR No. 28712 belongs to the 3rd Interested Party, that the proposed development which was approved by the Respondent and the 1st and 2nd Interested Parties would have 8 floors and 1 basement to serve as Parliamentary Studies and Training Centre(CPST) and that the construction will consist of offices, lecture theaters, conference facilities and related facilities to support learning.
11. The deponent also states that they had objected to the change of user to the 1st Interested Parties vide letters dated 28.4.2022 and 4.6.2021 and they got a response that the development had been approved. The 1st Interested party wrote to the Petitioner vide the letter dated 24.5.2022 providing reasons for the approval of the development.
12. The deponent avers that If the project is allowed to continue, it will seriously affect provision of water, sewer, electricity, cause destruction of flora and fauna and bring insecurity, soil erosion and increased vehicular and human traffic, noise pollution and other environmental vices without corresponding or adequate mitigation measures. He avers that there is serious risk that the development will continue in haste and render the petition nugatory.
13. The submissions of the petitioner are dated 16.12.2022, where it is argued that the Respondent was under a duty and obligation to allow public participation by facilitating its meaningful engagement in the decision making as per the existing neighborhood agreement. On this point, the case of Robert Gakuru & others v Governor Kiambu County & 3 Others [2014] eKLR was proffered.
14. It was submitted that the 3rd Interested Party's claim of conflict of laws is baseless, since the Neighborhood Association Engagement Act has not been declared unconstitutional; thus this Court cannot be asked to find it in breach of the Constitution by way of submissions alone without a substantive suit seeking such orders.
15. The petitioners have relied on the Supreme Court decision in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR the case of Kenya Association of Manufacturers and 3 Others v Cabinet Secretary-Ministry of Environment and Natural Resources and 3 Others [2017] eKLR and the case of The Methodist Church in Kenya v Mohammed Fugicha & 3 Others [2019] eKLR to urge the court to issue conservatory orders within the framework of Article 23 pending hearing of the petition.
16. The Petitioners also cite the case of Judicial Service Commission v Speaker of The National Assembly and Another [2013] eKLR, Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others [2014] eKLR as well as the case of Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR to submit that that an interested party has no stake in proceedings and as such, its case is against the Respondent, thus the Interested Parties cannot argue successfully on the recognition agreement since they are not parties to the same.

Case for the Respondent

17. The application is opposed by the Respondent by way of the Replying Affidavit sworn on 16.12.2022 by Wilfred Wanyonyi who describes himself as an employee of the respondent in the capacity of a Deputy Director, Planning Compliance & enforcement. He avers that the 3rd and 4th Interested Parties duly complied with the Physical and Land Use Planning Act of 2019. He points out that they and



- applied for change of user from commercial (offices) to Educational (College and Auxiliary facilities) and a public notice was generated and placed on site.
18. He avers that the neighborhood development character is mixed development, neighboring institutions such as Tangaza University, Jomo Kenyatta University of Agriculture and technology, Kenya School of Law, Qwetu Hostels, Catholic university among others. In addition, the 3rd and 4th Interested Parties placed a site notice for Environmental Impact Assessment (EIA) on 9.7.2021.
 19. Upon being satisfied that the 3rd Interested Party had complied with the requirements under the *Physical and Land Use Planning Act*, the 3rd Interested Party was granted the requisite approvals.
 20. The case of the Respondent has also been advanced via the Replying Affidavit of one Patrick Analo Akivaga sworn on 13.12.2022. He describes himself as the Chief Officer Urban Planning of the respondent. He replicates what his colleague, Wilfred has deposed.
 21. The submissions of the Respondent are dated 15.2.2023 where they contend that the Petitioner has not established an arguable prima facie case to warrant the grant of the conservatory orders. It points out that the Neighborhood /Resident association agreement signed on 3.3.2017 was executed at a time when the Physical planning Act of 2012 was the parent law in operation and it did not have any provision for any manner of public participation. That since public participation was provided for under the 2010 Constitution, the said agreement was executed as a stop gap measure to cure the lacuna that existed in the then Physical Planning Act. It argues that the Physical Planning Act was subsequently amended and thus the *Physical and Land Use Planning Act* of 2019 which is now operational made provision for public participation at Section 58 as read together with Section 61 (1) (d). It argues that by dint of the amendments, the recognition agreement became obsolete by operation of law.
 22. It was submitted that public participation was conducted in the manner prescribed under the law; Equally, NEMA duly conducted an assessment as required by the applicable law.
 23. The Respondent urges the court to find that the conservatory orders will not serve the public interest as tax payers risk losing ksh.120 million. In support of their case, the Respondents relied on the cases of; Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others [2016] eKLR, and Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR.

Case for the 3rd Interested Parties

24. The application is opposed by the 3rd Interested Party vide the Replying Affidavits sworn by Eng. Kamau Nguru sworn on 14th and 18th October 2022. He describes himself as an employee of the 3rd Interested Party in his capacity as the Principle Engineer. He deposes that the Respondent has powers under Section 56 of the *Physical and Land Use Planning Act* of 2019 to undertake development control, subject to the provisions of the said Act, the *Urban Areas and Cities Act*, 2011 and the *County Governments Act*, 2012.
25. He further deposes that the 3rd Interested Party applied for development permission under Section 58 of the *Physical and Land Use Planning Act* 2019 and complied with all requirements thereof. It then engaged the 4th Interested Party who prepared plans and documents pursuant to Section 59 of the aforementioned Act.
26. He deposes that the Neighbourhood Associations Engagement Act of 2016 conflicts with the *Physical and Land Use Planning Act* 2019 to the extent that it abrogates powers of the Respondent under



- Section 56 of the *Physical and Land Use Planning Act* through a Recognition Agreement signed between the Respondent and the Residents' Association, thereby creating 2 conflicting centers of bureaucracy and as such, it should be declared unconstitutional and unlawful.
27. He avers that the 3rd Interested party conducted public participation in line with the provisions of Section 61(1) (d) of the *Physical and Land Use Planning Act*,2019; adding that a traffic impact assessment was approved by KURA. Further, the 3rd Interested Party duly obtained the requisite Environmental Impact Assessment Study report which was submitted to the NEMA (2nd Interested Party) who then issued a License Ref. No. NEMA/EIA/PSL/17887 dated 22.3.2022 which set the stage for commencement of the project.
 28. That prior to obtaining the various approvals, the general public and stakeholders were invited to give their views vide notices in the daily newspapers, as well as a notice on the fence of the suit property regarding the change of user and the Petitioner chose not to participate.
 29. The deponent points out that the contract is pricy, as the projected cost is ksh.4,257,000,000/= with damages for the delay pegged at 0.006% of the final contract price per day (approximately ksh.255,420/= per day) or 3% of the final contract price (approximately ksh.127,710,000) which would adversely impact upon, not just the 3rd Interested Party but the taxpayers as well.
 30. He avers that the development is a strategic investment for the 3rd Interested Party and the nation, thus public interest outweighs private interests of the Petitioner.
 31. The submissions of the 3rd Interested Party are dated 18.10.2022, where they aver that they complied with all the requirements of the *Physical and Land Use Planning Act* and the Environmental Management and Coordination Act. It was argued that the Recognition Agreement signed on 3.3.2017 imposes obligations on the Respondent and the Petitioner, but it does not affect the 3rd Interested Party's rights to property and is in conflict with registration.
 32. It was also submitted that the Petitioner has failed to meet the threshold for grant of injunctions as stated in *Giella v Cassman Brown*, pointing out that no prima facie case has been made since the statutory bodies which are mandated to issue approvals for construction have given the green light for the project to commence.
 33. It was also submitted that the Petitioner has not complied with the doctrine of exhaustion of the available dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019 and the impugned Recognition Agreement. It submits that by the financial magnitude of the project which is estimated to be over Sh.4.2 billion, there is a real likelihood that the Petitioners may be unable to compensate them.

Case for the 4th Interested party

34. The 4th Interested Party opposes the application vide the Replying Affidavit sworn on 16.12.2022 by Jared Momanyi its director. The contents thereof mirrors the averments of the Respondent. I have not seen any submissions of the 4th interested party.

Determination

35. The issue falling for determination is whether the Petitioners have met the threshold for grant of a conservatory order?. Its common ground that the 3rd interested party is putting up a mega project on its own parcel of land LR No. 28712. They have obtained the approvals from the Respondent and the 2nd interested party. The Petitioners contend that vide the recognition agreement of 3.3.2017 between



the Petitioners and the Respondent, the Petitioners were supposed to be involved in controlling the developments in their area.

36. A perusal of the prayers sought by the petitioners in the petition reveals that the crux of the dispute is anchored on the approvals granted unto the 3rd interested party by the Respondent. Which now invites the question; What is the applicable law on the issue at hand? A raft of laws have been cited by the warring parties, with the duel boiling down to two statutes; The Nairobi City County Community and Neighborhood Association Act of 2016 being relied on by the petitioners vis a vis The [Physical and Land use Planning Act](#) of 2019 cited by the Respondent and the interested parties.
37. Matters of planning and developments are provided for in the preamble of The [Physical and Land Use Planning Act](#) in the following words;
- “AN ACT of Parliament to make provision for the planning, use, regulation and development of land and for connected purposes”.
38. The issues relating to approvals of change of user, approvals of building, developments and plans are governed by the above statute whereby the provisions of Section 56 and 57 thereof gives the County governments the power to undertake development control. The said provisions reflect what was stipulated under Section 29 & 30 of the Physical Planning Act of 1996 (now repealed).
39. The [Physical and Land Use Planning Act](#) [2019] also provides for Dispute Resolution mechanisms, whereby Section 61 thereof provides for and enumerates the procedures that must be complied with in the event that someone is aggrieved and/or dissatisfied by the grant and/or refusal to grant any approval under the Act. Subsection 3 and 4 provides as follows;
- “(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 Emphasize added.”
40. Section 78 thereof further provides that:
- “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”;



41. Regulation 11 of the Physical and Land Use Planning (Liaison Committees) Regulations, 2020 provides that:
- “(1) A person who is aggrieved by a decision of the planning authority may file an appeal to the Committee in accordance with Section 32 (4) or 75(2) of the Act”.
42. As for the The Nairobi City County Community and Neighborhood Associations Engagement Act, 2016, the objectives of the said Act are set out under Section 4, the Recognition of Agreements is provided for under Section 6, while the delineation of zones is at Section 7. The Dispute Resolution Mechanism is provided for at Section 15 which stipulates that;
- “ Any dispute arising from the implementation of the provisions of this Act shall be referred to a mediation committee.....”.
43. What resonates from the above provisions of law is that matters of planning and development control are anchored under statutory frameworks where there are elaborate Dispute Resolution Mechanisms.
44. In *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR (Kibos case), 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”.
45. In yet another decision of the Supreme Court; *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR, it was stated thus;
- “We also take judicial notice that the superior courts’ findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to 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. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance”.
46. The doctrine of exhaustion of remedies has also been enunciated in a raft of decisions as in *Eaton Towers Kenya Limited v Kasing’a & 5 others* (Civil Appeal 49 of 2016) [2022] KECA 861 (KLR) (28 April 2022), *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, and *Jason Edward Matus & another v Summit Gehlot & another; National Environment Authority & 2 others (Interested Parties)* [2021] eKLR, where it has been held that Courts ought to be fora of last resort and not the first port of call the moment a storm brews.



47. The Petitioner herein is by and large challenging the development approval plans issued to the 3rd Interested Party by the respondent, going by the final prayers in the petition. The records availed by the 3rd Interested Party indicate that the newspaper advert for change of user was made on 26.5.2021 and a public notice to that effect was displayed on 27.5.2021. The letter at page 173 of Petitioners' documents indicate that the petitioners were aware of the proposed developments as their letter to the 3rd Interested Party is apparently dated 12.5.2021. Paragraph 18-23 of the Supporting Affidavit of the Petitioner gives an account of the various steps undertaken by the Petitioners in opposing the project. Nowhere do the Petitioners make reference to the Dispute Resolution Mechanisms provided for under the statutory frameworks.
48. On account of failure to apply the doctrine of exhaustion of remedies, the application must fail. Further, under the provisions of Section 61 (4) of the Physical and Land Use. Planning Act, the disputes relating to planning and developments ought to be brought to the Environment and Land Court as Appeals from the Planning Liaison Committee.
49. In the final analysis, I find that both the Application dated 7.7.2022 and the Preliminary Objection dated 25.7.2022 are not merited, the same are hereby dismissed. Each party to bear their own costs.

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

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mrs. Lichuma for Petitioner

Ms. Mwanzia for Respondent

Kamar for the 3rd Interested Party

M/s Abwao holding brief for Mr. Amadi for the 4th Interested Party

Court assistant: Eddel

