



**Kamau & 6 others (Suing on their Behalf and on Behalf of the Residents and Home owners of Migaa Integrated Golf Estate) v Sycamore Pine Limited & 2 others; National Environment Management Authority & another (Interested Parties) (Environment & Land Petition E003 of 2021) [2023] KEELC 18148 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18148 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION E003 OF 2021**

**BM EBOSO, J**

**JUNE 13, 2023**

**BETWEEN**

**FRANCIS MUGARAMI KAMAU ..... 1<sup>ST</sup> PETITIONER  
CHRISTINE WAMBUI MWANGI ..... 2<sup>ND</sup> PETITIONER  
KIM MUTURI MATU ..... 3<sup>RD</sup> PETITIONER  
ANNET WANJIKU MBURU ..... 4<sup>TH</sup> PETITIONER  
ISABEL ACHIENG OLWENYO ..... 5<sup>TH</sup> PETITIONER  
ROBERT ODUOR OTIENO ..... 6<sup>TH</sup> PETITIONER  
MATHEW KIMOLO NZUKI ..... 7<sup>TH</sup> PETITIONER  
SUING ON THEIR BEHALF AND ON BEHALF OF THE RESIDENTS AND  
HOME OWNERS OF MIGAA INTEGRATED GOLF ESTATE**

**AND**

**SYCAMORE PINE LIMITED ..... 1<sup>ST</sup> RESPONDENT  
HOME AFRICA COMMUNITIES LIMITED ..... 2<sup>ND</sup> RESPONDENT  
KIAMBU COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED  
PARTY  
MIGAA GOLF ESTATE RESIDENTS ASSOCIATION ..... INTERESTED PARTY**



## RULING

1. The petitioners brought this petition on 27/5/2021. Their case was that they were residents and property owners within Migaa Integrated Golf Estate, a gated community-based development that was conceptualized on the tenets of environmental sustainability, with 50% open green space, translating into an acre of green for every acre of built area. They had learnt that the 1st respondent had been handed a total of 17.2 acres out of the 19.86 acres that had been planned and designated as Migaa Commercial and Office Park [the Commercial Node], and that the 1st respondent had commenced the construction of low-cost residential apartments in the name of Samara Estate on the said land, consisting of 28 high-rise apartment blocks with a total of 1,959 residential units. They contended that the construction of the 28 high-rise apartment blocks was out of character with the permitted land use in the area; was being carried out in direct breach of the Estate's approved and registered master plan; and was being carried out in contravention of the framework in the [Physical and Land Use Planning Act 2019](#) ("the PLUPA"), and the [Environmental Management and Co-ordination Act](#) (the EMCA).
2. The petitioners specifically contended that the said development was being carried out without the requisite environmental impact assessment licence and the physical and land use planning permission. Further, the petitioners contended that the 3rd respondent had failed to provide them with information relating to the Estate's master plan, and the circumstances under which the impugned development was being undertaken.
3. Consequently, the petitioners sought the following verbatim reliefs against the respondents:
  - a. A declaration that the 3rd respondent contravened Article 35 of the [Constitution](#) by refusing to respond to the petitioners' letters dated 17/2/2021 and 6/4/2021 and declining to supply them with the information as requested.
  - b. A declaration that the respondents have breached Articles 40 and 42 of the [Constitution](#) by allowing and/or carrying out unlawful construction in the property known as Unit No. CC01 situated on LR No. 29059 within the Migaa Integrated Golf Estate in Kiambu County.
  - c. A declaration that the 2nd and 3rd respondents breached Article 47 of the [Constitution](#) by failing to inform the petitioners and the area residents on their decision (if any) to issue change of use of the commercial zone to make way for the impugned development.
  - d. A declaration that the 3rd respondent breached Article 42 of the [Constitution](#) by failing to ensure that the subject development complies with the zoning policy and the master plan of the Migaa Integrated Golf Estate in Kiambu County.
  - e. An order of permanent injunction restraining the respondents from advertising for sale, constructing, carrying on with the impugned construction of low-cost apartments numbering 1,959 comprised in 28 high-rise blocks of apartments in the property known as Unit No CC01 situated on LR No 29059 within the Migaa Intergrated Golf Estate in Kiambu County.
  - f. An order compelling the 1st respondent to demolish all offensive unlawful developments in the property known as Unit No CC01 situated on LR No. 29059 within the Migaa Integrated Golf Estate in Kiambu County and restore the site to its previous state.
  - g. An order of permanent injunction restraining the respondents from irregularly and without compliance with the due process and consultation, interfering with and/or altering the master plan of the Migaa Integrated Golf Estate in Kiambu County as registered on 23/3/2012.



- h. A declaration that the respondents are liable to pay damages to the residents of Migaa Estate for the breaches of their constitutional rights.
  - i. Costs of this petition.
  - j. Any other reliefs the honourable court may deem fit and just to grant.
4. On 4/6/2021, this court [Gacheru J] rendered a ruling in the petition in which she granted an order of status quo forbidding further construction, pending the hearing and determination of the two preliminary objections which the respondents had filed. On 6/12/2021, this court [Eboso J] rendered a ruling on the two preliminary objections in which it rejected the preliminary objections. On 18/7/2022, this court [Eboso J] rendered a ruling on the petitioners' application dated 20/5/2021 through which the court granted the petitioners a conservatory order.
  5. Subsequent to that, the 1st respondent brought a notice of motion dated 24/10/2022 seeking: (i) an order discharging the conservatory orders that had been issued on 18/7/2022; and (ii) an order striking out the petition. The said application is the subject of this ruling.
  6. The application was supported by the affidavit of Hon Irungu Nyakera sworn on 24/10/2022. It was canvassed through written submissions dated 27/2/2023, filed by M/s Muriu, Mungai & Company Advocates LLP. The submissions were highlighted orally in the virtual court on 23/3/2023.
  7. The case of the applicants is that, subsequent to the filing of this petition, the 1st respondent obtained all the requisite approvals and that by dint of the approvals, this court is no longer seized of jurisdiction to entertain the petition and should strike it out. The applicant contends that given that they now have the approvals, this court should discharge the preservative orders. The applicant adds that primary jurisdiction over disputes relating to approvals under the [Physical and Land Use Planning Act](#) is now vested in the County Physical and Land Use Planning Liaison Committee. The applicant further contends that primary jurisdiction over disputes relating to licensing under the [Environmental Management and Co-ordination Act](#) is vested in the National Environment Tribunal (the NET).
  8. The applicant argues that notwithstanding that the cause of action may have arisen in May 2021, issuance of the approvals divested from this court the jurisdiction to adjudicate the dispute in this petition.
  9. The 2nd and 3rd respondents filed a replying affidavit sworn by Hannah Maranga. They support the application. The position of the 3rd respondent is that this dispute should go to the Physical and Land Use Planning Liaison Committee for adjudication in light of the fact that the County Physical and Land Use Planning Authority has now granted relevant permissions to the project proponent.
  10. The petitioners oppose the application through a replying affidavit sworn by Kim Muturi Matu on 31/1/2023 and written submissions dated 21/3/2023 filed by M/s Prof Albert Mumma & Company Advocates. The case of the petitioners is that the application is *res judicata* because this court considered the question of its jurisdiction and determined the question through its ruling rendered on 6/12/2021. The petitioners further contend that the plea for an order discharging the subsisting conservatory order is *res judicata* because the issues raised in the application were considered and determined in this court's ruling rendered on 18/7/2022.
  11. The petitioners fault the applicant, contending that the applicant had frustrated the disposal of this petition while engaged in clandestine procurement of irregular approvals during the pendency of the petition and is now waving the irregular licences as a basis for striking out this petition. The petitioners contend that approvals which were obtained during the pendency of the petition cannot be a basis for



- striking out the petition, adding that the approvals cannot apply retrospectively. They urge the court to dismiss the application.
12. The 2nd interested party similarly opposes the application, contending that when the petition was filed, there were no approvals in place. The 2nd interested party argues that a party cannot use its own illegality to oust the jurisdiction of the court.
  13. I have considered the application; the responses to the application; and the submissions tendered by the parties. I have also considered the relevant legal frameworks and jurisprudence. The following are the key issues that fall for determination in the application: (i) Whether the plea for an order striking out this petition on the ground that the 1st respondent has now procured the requisite approvals is *res judicata*; (ii) Whether the plea for an order discharging the conservatory order on the ground that the 1st respondent has now procured the requisite approvals is *res judicata*; (iii) Whether the approvals obtained during the pendency of this petition oust the jurisdiction of this court to further deal with the issues in this petition; (iv) Whether the applicant has made out a proper case for an order striking out this suit; (v) Whether there is a proper basis for wholly discharging the subsisting conservatory order. I will briefly analyze and dispose the issues in the above order.
  14. The first issue is whether the plea for an order striking out this petition on the ground that the 1st respondent has now procured the requisite approvals is *res judicata*. The doctrine of *res judicata* is anchored on two key elements:
    - (i) the element of cause of action in the suit; and
    - (ii) the element of the issues in the suit. The two elements are critical when a court is determining whether a suit as a whole is *res judicata*. On the other hand, the element of issues is what the court looks at when answering the question as to whether an interlocutory application or any other application brought within a cause is *res judicata*.
  15. The impugned plea was brought through an application within a cause. The question which this court is therefore expected to answer is whether the relevant issue that falls for determination within the application has been previously considered and determined in the cause or in any other cause. What is the relevant issue in relation to the prayer or plea that is contained in the application under consideration?
  16. In my view, the relevant issue in the application is whether the approvals obtained by the 1st respondent during the pendency of this petition ousts the jurisdiction of this court to adjudicate the issues that are raised in the petition. Has that particular issue been considered and determined by this court? My answer to the above question is in the negative. The issues that were considered in the preceding applications and rulings were different. The question as to whether the jurisdiction of this court has been ousted by the obtention of the approvals has never been considered and determined by this court. Consequently, the plea for an order striking out this petition on the ground that the 1st respondent has now obtained the requisite approvals is not *res judicata*. It is not *res judicata* because it has neither been previously canvassed in this cause nor has it been determined in this cause. That is my finding on the first issue.
  17. The same analysis and reasoning applies to the second issue in this ruling. There is no evidence by the applicant, and indeed the court record does not bear any evidence, to the effect that this court has previously considered and determined the issue as to whether the subsisting conservatory order should be discharged on account of the fact that the 1st respondent procured the requisite approvals during the pendency of this petition. That issue has been brought for consideration and determination in this



- petition for the first time through the present application. It cannot therefore be said to be *res judicata*. That is my finding on the second issue.
18. The third issue for determination is whether the approvals obtained during the pendency of the petition ousts the jurisdiction of this court to further deal with this petition. First the jurisdiction of this court is donated by Article 162(2)(b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#). The court has both original and appellate jurisdiction over disputes relating to the environment and the use, occupation of, and title to, land.
  19. Secondly, the cause of action in this petition relates to allegations that the 1st respondent commenced construction of the alleged low-cost and high-rise residential apartment blocks on the suitland without the relevant change of user and building approvals under the [Physical and Land Use Planning Act 2019](#) (“the PLUPA”) and without the relevant licence under the Environmental Management and Coordination Act [“the EMCA”]. The key issue to be determined in relation to the said cause of action is whether the 1st respondent commenced construction works without the requisite approvals as alleged. That is an issue that remains to be considered and determined by this court, whether or not the approvals and/or licences were subsequently obtained during the pendency of this petition.
  20. This court is alive to the circumstances under which the National Environment Tribunal is seized with jurisdiction to determine environment disputes. Decisions or actions by the National Environment Management Authority (NEMA) are what trigger proceedings at the NET. If a developer commences a development without a NEMA licence, an aggrieved party has no basis upon which to initiate proceedings at the NET [See Section 129 of the [EMCA](#)]. The proper forum for ventilating such grievances are the courts vested with jurisdiction under the [Environment & Land Court Act](#).
  21. The same applies to persons who are aggrieved by a development that is commenced without approval of change of user or building approval under the PLUPA. Unless and until the Physical and Land Use Authority makes a decision or takes an action, an aggrieved member of the public has no basis upon which to initiate proceedings at the Liaison Committee.
  22. In my view, as long as the case of the petitioners remains that the 1st respondent commenced the impugned development without the requisite approvals, this court is properly vested with jurisdiction to deal with the dispute. Procurement of approvals during the pendency of a suit does not in any way affect a cause of action that accrued prior to the obtention of the approvals. It is emphasized, however, that grievances arising from the approvals are to be ventilated in the necessary adjudicatory organs.
  23. For the above reasons, it is the finding of this court that the approvals obtained during the pendency of this petition do not oust the jurisdiction of this court to adjudicate the causes of action that had accrued prior to the obtention of the approvals.
  24. The fourth issue is whether the 1st respondent has made out a proper case for an order striking out this petition. The plea for an order striking out this petition was anchored on the fact that during the pendency of the petition, the 1st respondent obtained all the necessary approvals. The cause of action in this petition is alleged to have accrued in or prior to May 2021. This petition was brought in May 2021. I have observed that obtention of approvals during the pendency of this petition did not and does not affect the cause of action that accrued prior to the obtention of the licences. In my interpretation of the law, obtention of the approvals during pendency of this petition cannot be a proper basis for striking out the petition. The approvals do not affect causes of action which accrued prior to their obtention.
  25. The last issue is whether there is a proper basis for discharging the subsisting conservatory order. The 1st respondent urged the court to discharge the conservatory order on the ground that the requisite



approvals had been obtained. A key consideration which informed the decision of the court at the time of granting the conservatory order was the fact that the 1st respondent did not demonstrate existence of the requisite approvals. The 1st respondent has now come to court with approvals that they allege were obtained during the pendency of this petition. Some of the approvals were or are valid for only twelve months.

26. This court is alive to the fact that it did not prohibit the processing of applications for approvals by the relevant regulatory bodies. All it prohibited was the undertaking of the project in contravention of the law. The need to prevent breach of the law remains. Obtention of the approvals does not therefore render the conservatory order unnecessary. What, in my view, is necessary is to reword the existing conservatory order to take into account the changing circumstances. The court will review the wording of the subsisting conservatory order to accommodate the changing circumstances.
27. In summary the court's findings are as follows:
- i. The plea for an order striking out this petition on the ground that the 1st respondent has now procured the necessary approvals is not *res judicata*.
  - ii. The plea for an order discharging the conservatory order on the ground that the 1st respondent has now procured the necessary approvals is not *res judicata*.
  - iii. The approvals obtained during the pendency of this petition do not oust the jurisdiction of this court in the present petition because the causes of action which the court is expected to consider arose before the approvals were procured.
  - iv. Given the circumstances of this petition, there is no proper basis for striking out the petition.
  - v. To the extent that the 1st respondent has demonstrated that he has obtained the required approvals, the subsisting conservatory order shall be reworded to take into account the changing circumstances.

### **Disposal Orders**

28. The 1st respondent's notice of motion dated 24/10/2022 is disposed in the following terms:
- a. The plea for an order striking out this petition is rejected.
  - b. The subsisting conservatory order is hereby reworded to read as follows:

“A conservatory order is hereby issued restraining the 1st respondent, its agents, servants, employees or otherwise, against carrying on unapproved constructions on Unit No CC01 situated on LR No 29059 within Migaa Integrated Golf Estate in Kiambu County.”
  - (c) Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF JUNE 2023**

**B M EBOSO**

**JUDGE**

In the presence of: -

Mr Kimathi for the Petitioners



Mr Kenneth Wilson for the 1st Respondent

Mr Wanjohi for the proposed Interested parties

Mr Kirathe for the 3rd Respondent

