



**Irimu v Ndindiri & 4 others (Environment & Land Petition
E019 of 2022) [2023] KEELC 19245 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19245 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E019 OF 2022**

J OMANGE, J

JULY 27, 2023

BETWEEN

DR HENDERSON MUNENE IRIMU PETITIONER

AND

MONICAH NYAKIRINGA NDINDIRI 1ST RESPONDENT

NAIROBI METROPOLICAN SERVICE 2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 3RD RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT**

RULING

1. The petitioner vide Notice of Motion dated May 17, 2022 prays for the following orders;
 - a. Spent.
 - b. That pending the interparties hearing of the application herein, there be a conservatory order suspending the construction of the development by the 1st respondent on LR NO Nairobi Block 110/425 located in Thome-Nyati Drive, within Nairobi County being undertaken on the strength of unprocedural and illegal withdrawal of an Enforcement Notice issued on October 19, 2021.
 - c. That pending the interparties hearing of this application, this honourable court be pleased to issue an ex parte injunction order restraining the 1st respondent, her agents, servants, employees, accomplices or whomsoever acting under her authority, from constructing and/or continuing with any



further construction of the irregular construction on parcel known as Lr No. Nairobi Block 110/425.

- d. That pending the hearing and determination of this Petition this Honourable Court be pleased to issue an ex parte injunction order restraining the 1st respondent, her agents, servants, employees, accomplices or whomsoever acting under her authority, from constructing and/or continuing with any further construction of the irregular construction on parcel known as LR No. Nairobi Block 110/425.
 - e. That pending the hearing and determination of this application, this Honourable Court be pleased to stay the Consent Order and Judgement entered in Milimani ELC Petition Number E056 of 2021 withdrawing the Enforcement Notice dated October 19, 2021.
 - f. That pending the hearing and determination of this application, this honourable court be pleased to stay the proceedings in ELC Pet 23 of 2022.
 - g. That in the alternative and without prejudice to the above, this honourable court be pleased to maintain the status quo (no further construction) on the subject property pending the hearing and determination of this application and petition.
 - h. That the costs of this application to be provided for.
2. The application was supported by the affidavit of Edward Kimani Nganga. The gist of the application by the petitioners is that the 1st respondent's construction of a multi dwelling development in a low- density residential area is a violation of their right to a clean and healthy environment. The Petitioners aver that an enforcement notice that had earlier been issued in respect of the construction was irregularly withdrawn and amounted to a violation of their rights.
 3. The first respondent filed a replying affidavit in which she detailed the process she went through to acquire the necessary approvals. She urged the court to dismiss the Applicants' application.
 4. The application was opposed by the 4th respondent who filed grounds of opposition in which they stated that the *Physical and Land Use Planning Act* provides a forum for resolving disputes of this nature. The 4th Respondent further filed submissions in which they deponed that they had carried out their role as assigned by the law. They insisted that the duty of granting planning permission does not belong to them. The 5th respondent on their part filed a replying affidavit in which they detailed the process the approvals went through before the construction was approved.
 5. After parties had filed submissions in respect of the application dated May 17, 2022 and a Ruling date set, the 1st respondent filed an application dated May 2, 2023 wherein the 1st Respondent seeks the following order:
 - a. That notice of preliminary objection dated May 2, 2023 be heard on a priority basis before the scheduled hearing of application dated May 17, 2022.
 6. The third respondent filed a replying affidavit in which it supported the application dated May 2, 2023 application. The 3rd respondent argues that the court has no jurisdiction to hear the matter.
 7. The 4th respondent also filed a replying affidavit in which they supported the application by the 1st respondent.



8. The application was heard and the 1st respondent allowed to orally address the court on the preliminary objection. The grounds raised in the preliminary objection are that;
- i. The court lacks the jurisdiction to preside over and determine the suit pursuant to the mandatory provisions of section 129 of the *Environment Management and Coordination Act* as well as Provisions of section 61 of the *Physical and Land Use Planning Act*.
 - ii. The suit offends the mandatory provisions of section 6 of the *Civil Procedure Act* as disclosed by the petitioners and owing to the existence of Milimani ELC Civil suit Number 023; Monica Nyakiringa Ndindiri –versus Dr Munene Irimu & 3 others which preceded the current suit.
9. The court will determine the issues raised in the preliminary objection together with the application. In this regard, the court has identified the following issues for determination;
- i. Whether the court lacks jurisdiction to preside over the suit.
 - ii. Whether the suit offends the mandatory provisions of section 6 of the *Civil Procedure Act*.
 - iii. Whether the application for injunction is merited.

Whether the court lacks jurisdiction to preside over the suit

10. The Environment and Land Court in Kenya is a court with equal status with the High court established by article 162 (b) of the *Constitution* of Kenya under the provision of article 162 2(b). From the preamble of the ELC Act, the jurisdiction of the court is defined as “a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes”.
11. Section 13(2) of the Environment and Land Act gives the powers of the court as provided under article 162(2) (b) of the *Constitution*. This powers include but are not limited to disputes;
- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. relating to compulsory acquisition of land;
 - iii. relating to land administration and management;
 - iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;
 - v. any other dispute relating to environment and land.
12. Subsection 3 of the *Environment and Land Court* states “Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*”.



13. Section 129 of the *Environment and Management Coordination Act*, mandates the tribunal to hear appeals in relation to:-
- i. a refusal to grant a license or transfer of licenses,
 - ii. imposition of any condition, limitation or restriction licenses, revocation, suspension or variation licenses,
 - iii. the amount of money one is required to pay as a fee,
 - iv. the imposition against one of an environmental restoration order or environmental improvement order by the Authority.
14. The courts including this court have clearly stated that matters which should be heard by other entities should be handled by the bodies that have been granted jurisdiction to do so. In the case of *Benard Ambuti Andega & 2 others vs Kibos Distillers Ltd and 5 others* (2020) eKLR the Supreme Court restated the importance of a court exercising jurisdiction strictly in accordance to the law:- “This principle has been replicated in a plethora of determinations by this court, of common cause being that, a court, even this court, cannot arrogate itself jurisdiction through crafts of interpretation (see *Interim Independent Electoral Commission* Constitutional (Advisory Opinion) Application No. 2 of 2011) and a court ought to exercise its powers strictly within the jurisdictional limits (*Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* (*supra*)).”
15. The issue then is whether as drawn the petition is asking this court to adjudicate over a dispute which should statutorily be heard by another body. I have looked at the petition and note that in the petition the petitioners claim their rights have been violated by the Respondents handling of this matter. This is an issue that cannot be heard in the Tribunal or in the Physical Liaison Committee. As such the facts in this case are different from the case of *Samora Machel Sikali vs NEMA and 2 others* cited by counsel for the respondent wherein the prayers that were sought were exactly the prayers that would have been addressed at the tribunal. I therefore find that the court has jurisdiction to hear the matter.

Whether the suit offends the mandatory provisions of section 6 of the *Civil Procedure Act*.

16. Section 6 of the *Civil procedure Act* deals with then issue of sub judice and states
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claim”
17. The black laws dictionary defines sub judice as “before the court or Judge for determination”. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, the Supreme Court pronounced itself on the sub judice rule:-
- “The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction,



the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. “

18. The three elements that must be proved to establish a matter is sub judice are;
 - i. The matter in issue in the subsequent suit is directly and substantially in issue in the previously instituted suit.
 - ii. The parties in the both suits are the same, either directly or indirectly and
 - iii. The court in which the first suit is instituted, is a court of having jurisdiction or competent to grant the relief claimed in the subsequently instituted suit
19. Both parties have alluded to the fact that there is a pending case in court that is Elc civil suit no 023 of 2022 Monicah Nyakiringa Ndindiri vs Dr Munene Irimu & 3 others. The parties are the same as the petitioner herein is the defendant in the previous suit and the respondent herein is the plaintiff.
20. The issues in both suits center on construction works on Lr Nairobi Block 110/425. The substance of the suit is similar to the earlier suit. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously adjudicating upon two parallel cases in respect of same cause of action, same subject matter and the same relief. This is to ensure parties don't abuse the discretionary power to institute suits and place courts at a position where they can give contradictory findings in respect of the same set of facts. It is also aimed at preventing multiplicity of proceedings.
21. In view of the above and to reduce the spectre of two courts possibly issuing contradictory orders, I hereby order that in line with the advise given by the Supreme Court in the Kenya National Human Rights Commission case supra, this matter be stayed until the hearing and determination of ELC 023 of 2022.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY 2023.

JUDY OMANGE

JUDGE

IN THE PRESENCE OF: -

MS MWANGI FOR THE 5TH RESPONDENT

MS CINDY OGOLA FOR THE 4TH RESPONDENT

STEVE - COURT ASSISTANT

