



Round Square Properties Limited v Winchester Ventures Company Limited & 2 others (Environment and Land Constitutional Petition E014 of 2023) [2023] KEELC 18962 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18962 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E014 OF 2023

MD MWANGI, J

JULY 18, 2023

IN THE MATTER OF THE ONGOING DEVELOPMENT OF FOUR (4) SEMI DETACHED BLOCK COMPRISING EIGHTEEN 18 FLOORS WITH A TOTAL OF 234 APARTMENTS ON PLOT NUMBER 209/4902 (ORIGINAL NO. 4639/18) ALONG RIVERSIDE GARDENS OFF RIVERSIDE DRIVE, NAIROBI COUNTY-

AND-

IN THE MATTER OF VIOLATION OF ARTICLE 10, 27 (1), 40, 42, 47, 69 AND 70 OF THE CONSTITUTION OF KENYA

BETWEEN

ROUND SQUARE PROPERTIES LIMITED PETITIONER

AND

WINCHESTER VENTURES COMPANY LIMITED 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 3RD RESPONDENT

RULING

(In respect of the preliminary objections by the respondents citing lack of jurisdiction and violation of the doctrine of exhaustion by the petitioner)



Background

1. Each of the 3 respondents in this matter has filed a preliminary objection challenging the court's jurisdiction to hear and determine both the Petition filed herein as well as the application for interim reliefs pending the hearing and determination of the Petition.
2. The preliminary objections by the parties are premised on the provisions of the *Environment Management and Co-ordination Act* (EMCA) and the *Physical Planning and Land Use Act*, 2019 (PPLUA). The Petitioner in an uncharacteristic manner filed what it termed as the 'Petitioner's Replying Affidavit on the Preliminary Objections.' I must confess that this is a new one. It is however, more of submissions than a replying affidavit. I will nonetheless consider it along the submissions filed on behalf of the Petitioner.
3. In the said replying affidavit, the Petitioner asserts that its Petition seeks redress for violations of fundamental rights and freedoms; not an appeal against an enforcement notice nor against the licensing decision of the National Environment Management Authority (NEMA). The deponent avers that the 1st Respondent and the 3rd Respondent, by their Preliminary Objections are attempting to convert the Petitioner's Petition into an appeal of an enforcement Notice and an appeal against a licensing decision by NEMA, which it is not. He affirms that this court has original jurisdiction to redress violations of fundamental rights and freedoms by virtue of the provisions of article 165(3) (d) (ii) as read with article 23(1) of *the Constitution* of Kenya, 2010.
4. The deponent asserts that section 13 (3) of the *Environment and Land Court Act*, as affirmed in the decision of *Mercy Wangari Buku v Nema & 3 others* [2021] eKLR, provides that nothing 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 article 42, 69 and 70 of *the Constitution*.
5. The petitioner terms the preliminary objections by the respondents meritless, misconceived and a way of obstructing the petitioner from obtaining redress for violation of its fundamental rights and freedoms including the right to a clean and healthy environment.

Court's directions

6. The court's directions were that all the 3 preliminary objections by the respondents be heard concurrently and by way of written submissions. The 1st and 2nd respondents and the petitioner complied and filed their submissions. The 3rd respondent did not. The court has had the opportunity to read the comprehensive submissions filed and the authorities referred to by the parties.

Issues for determination

7. The issue for determination in this matter is whether the court has the jurisdiction to hear and determine the petition and the application for interim reliefs as presented by the petitioner. Secondly and closely linked to that first issue is whether the Petition offends the doctrine of exhaustion in view of the various provisions of the statutes cited by the respondents in their preliminary objections.

Analysis and determination

8. I consider it appropriate to handle the two co-joined issues together.
9. It is necessary to dissect the petition filed herein in order to understand its basis for purposes of determining the merit of the preliminary objections raised by the respondents.



10. The factual basis of the petition is on part E of the amended petition where the petitioner describes the subject property as L.R. No. 209/4902 (Original No. 4639/18), a $\frac{3}{4}$ acre portion of Land located next to the Nairobi River on Riverside gardens off Riverside Drive in Nairobi county. The petitioner affirms that the 1st Respondent is in the process of developing and constructing on the subject property through the erection of a four (4) semidetached block comprising 18 floors with a total of 234 apartments of different.
11. The petitioner asserts that the intended development shall grossly interfere with and negatively affect the environment, comprising the subject property itself and the surroundings. The development, according to the petitioner, further blatantly breaches the area zoning laws and regulations. The Petitioner accuses the 1st Respondent of mischievously masking behind the designing of duplex apartments to cover up its real intentions.
12. In spite of the development breaching the zoning regulations of the area and consequently exposing the environment to harsh and destructive effects, the Petitioner avers that the National Environment Management Authority (NEMA) has issued the 1st Respondent a development license No. NEMA/EIA/PSL/18400 on 12th April 2022.
13. The Petitioner states that subsequent to the issuance of the NEMA license, it had lodged a complaint with the Nairobi City County's Director of Planning, Compliance and Enforcement, who upon considering the Complaint issued an Enforcement Notice dated February 8, 2023 to stop any further development on the subject property pending re-submission of the architectural plans by the 1st respondent and re-evaluation of the same by the Nairobi City County Government.
14. The petitioner alleges that despite the enforcement notice, the 1st defendant went on with the construction undeterred. The continued defiance by the 1st respondent necessitated further action by the Director who revoked the development approval earlier issued to the 1st defendant by the Nairobi City Government on November 20, 2022. Despite all the above stated action, the Petitioner reiterates that construction on the subject property is still on-going. This, it asserts, is in violation of its and the residents of Riverside Drive constitutional right to a clean and healthy environment.
15. Consequently, the Petitioner prays for various orders including a declaration that the construction on the subject property has infringed, continues to violate and or has threatened the Petitioner's right to a clean and healthy environment contrary to article 42 of *the Constitution* of Kenya, 2010. It also prays for damages and compensation for the violation of the rights and an environment restoration order.
16. Now, the issue of jurisdiction is core in every dispute and ought to be raised and determined at the earliest opportunity. As eloquently pronounced by Nyarangi J.A in the case of *Owners of Motor Vessel Lilian S v Caltex Oil(Kenya) Ltd* [1989] 1 KLR, jurisdiction is everything. The Judge was categorical that,

“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

17. Jurisdiction, as the Supreme Court of Kenya has aptly stated in its various decisions, flows from either *the Constitution* or a Statute or both. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the court stated that,

“A court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law.



It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the 1st and 2nd respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the court cannot entertain any proceedings”.

18. Regarding the jurisdiction of this court, article 162 of *the Constitution* provides as follows:

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”

19. In compliance with the dictates of *the Constitution* under article 162(2)(b), Parliament established this court through the enactment of the *Environment and Land Court Act*. The Act elaborates the jurisdiction of the court in section 13 as follows:

“(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of *the constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and Land.

- (2) In exercise of its jurisdiction under article 162(2)(b) of *the constitution*, the court shall have power to hear and determine disputes;
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management.
 - (d) relating to public, private and community land and contract, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) 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*.
- (4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of



subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

- (5) Deleted by Act No. 12 of 2012, Sch.
 - (6) Deleted by Act No. 12 of 2012 Sch.
 - (7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including;
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages
 - (d) Compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs”
20. The 1st Respondent’s preliminary objection is grounded on the provisions of sections 72 and 78 of the *Physical Planning and Land Use Act* (PPLUA), 2019.
21. The said section 72(3) and (4) of the PPLUA provides for determination of disputes relating to enforcement notices as follows:
- “(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
 - (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.”
22. The County Physical and Land Use Planning Liaison Committee is established under the provisions of section 78 of the *Physical Planning and Land Use Planning Act*, 2019. Under the said section, 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;
 - (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and



- (d) hear appeals with respect to enforcement notices”
23. On the other hand, section 129 of the *Environmental Management and Co-ordination Act* provides that: -
- “(1) Any person who is aggrieved by—
- (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
 - (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder
 - (c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
 - (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
 - (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
- (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.
- (3) Upon any appeal, the Tribunal may—
- (a) confirm, set aside or vary the order or decision in question;
 - (b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
 - (c) make such other order, including an order for costs, as it may deem just.
- (4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.”
24. The question before the court then is whether the Petitioner’s claim herein falls within the ambit of either sections 129 of EMCA or section 72 of the PPLUA.
25. As I already pointed out earlier on, the petitioner’s complaint/cause of action is that the construction on the suit property has infringed and or threatened to infringe on it right to a clean and healthy environment contrary to the provisions of article 42 of *the Constitution* of Kenya, 2010 amongst others. The ultimate prayers by the Petitioner are declarations on the infringement of its right to a clean



and healthy environment contrary to the provisions of article 42 of *the Constitution* of Kenya, 2010. The petitioner further prays for damages and compensation for the violation of those rights and an environment restoration order.

26. Under the provisions of *the Constitution* of Kenya, 2010 and section 13 (4) of the *Environment and Land Court Act*, it is this court which has the jurisdiction to determine if indeed the petitioners' rights under article 42, 69 and 70 of *the Constitution* have been or are likely to be infringed upon: not the National Environmental Tribunal (NET) nor the Physical Planning and Land Use Liaison Committee.
27. Considering that the Petitioners are not challenging the decision of NEMA or an enforcement notice by the Nairobi City County Government, it is my considered view that the Petitioner's complaints fall outside the scope of sections 129 of EMCA and section 72 of the PPLUA. The Petitioner's claim squarely falls within the jurisdiction of this court. The Issue whether the orders sought can or cannot be issued by the court is a different issue all together which is to be determined upon the hearing of the Petition.
28. Accordingly, all the preliminary objections by the Respondents herein are disallowed with costs to the Petitioner.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Chepkoyo holding brief for Ndalila for the Petitioner.

Ms. Irine Odhiambo holding brief for Mr. Bake for the 2nd Respondent.

Mr. Mango holding brief for Mr. Otieno for the 1st Respondent.

No appearance for the 3rd Respondent.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

