



Dharani v Cnaan Developers Limited & 2 others; City County Government of Nairobi & 2 others (Interested Parties) (Environment & Land Case E042 of 2023) [2023] KEELC 20874 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E042 OF 2023**

**JO MBOYA, J
OCTOBER 19, 2023**

BETWEEN

RAHIM DHARANI APPLICANT

AND

CANAAN DEVELOPERS LIMITED 1ST RESPONDENT

CAANAN INFRATECH LLP 2ND RESPONDENT

BONAFIDE CLEARING & MANAGEMENT AUTHORITY .. 3RD RESPONDENT

AND

THE CITY COUNTY GOVERNMENT OF NAIROBI INTERESTED PARTY

DIRECTOR GENERAL, NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY INTERESTED PARTY

CHAIRMAN, NATIONAL ENVIRONMENTAL COMPLAINTS COMMITTEE INTERESTED PARTY

RULING

1. Vide Notice of Motion Application dated the 6th September 2023; the Applicant herein has approached the Honorable court seeking for the following reliefs;
 - i.Spent.
 - ii. The Honorable court be pleased to set aside the conservatory orders issued (sic) on the 10th August 2023.
 - iii. Costs of the proceedings be provided for.



- iv. The Honorable court be pleased any order as it deem fit and/or expedient.
2. The instant Application is premised on the grounds which have been enumerated in the body thereof. Furthermore the Application is supported by one , namely, Yohanes Kidane, sworn on the 6th September 2023; and to which the deponent has annexed assorted documents, inter-alia, the Environment Impact Assessment License issued on the 22nd August 2023.
 3. Upon being served with the instant Application, the Plaintiffs/Respondent filed a Replying affidavit sworn on the 19th September 2023; and in respect of which same has averred, inter-alia, that the purported Environment Impact Assessment License which has been exhibited by the Applicant is neither genuine nor authentic.
 4. Furthermore, the Plaintiff/Respondent has also averred that this court has hitherto found and held that same was seized of Jurisdiction to entertain and adjudicate upon the subject dispute; and hence the procurement of the EIA license, *ex-post-facto* cannot be relied upon to divest the court of the requisite Jurisdiction.
 5. Suffice it to point out that the Application herein though filed on the 6th September 2023, the court ordered and directed that same shall be heard and disposed of upon the delivery of the Ruling, which was pending as at the time when the Application was filed.
 6. Nevertheless, upon the delivery of the Ruling which was rendered on the 21st September 2023; this court made various observations and in particular, the Court stated as hereunder;

“ 66. Nevertheless, it is important to make it clear that in the event that the 1st and 2nd Respondents procure and obtain the requisite EIA License in accordance with Section 58 of the EMCA, 1999 and the Development approval from Nairobi City County Government, which is the designated Planning Authority; then the Jurisdiction of this court to deal with this matter in the first instance would cease”.
 7. Despite the foregoing statement by the court, the Parties herein still found it appropriate to canvass the current Application. For good measure, the Application beforehand was heard and disposed of vide oral submissions.

Parties' Submissions:

a.Applicant's Submissions:

8. The Applicant herein adopted and relied on the grounds contained at the foot of the Application, as well as the averments in the body of the supporting affidavit sworn on the 6th September 2023.
9. Furthermore, Learned counsel for the Applicant thereafter raised, highlighted and canvassed three (3) pertinent issues by the Honourable court.
10. Firstly, Learned counsel has submitted that the Applicant herein has since procured and obtained the requisite EIA License issued by National Environmental Management Authority (NEMA). In this respect, Learned counsel for the Applicants has invited the court to take cognizance of the License Number NEMA/EIA/PSL/27800, which was issued on the 22nd August 2023.
11. Secondly, Learned counsel for the Applicant has also submitted that other than the EIA license, the Applicants have similarly obtained the Development Approval from Nairobi City County



Government, which mandates and authorizes the Applicants to commence and proceed with the impugned development.

12. Arising from the fact that the Applicant has since obtained the EIA license and Development approval, respectively, Learned counsel for the Applicants has now submitted that the Jurisdiction of this court has since been ousted; and hence the court ought to down its tools as pertains to the subject dispute.
13. Additionally, Learned counsel for the Applicants has also submitted that henceforth, the Jurisdiction to challenge the validity of the EIA license vests with the National Environment Tribunal in accordance with the provisions of Section 129 of the *EMCA*, 1999 [2015].
14. Thirdly, Learned counsel for the Applicants has also submitted that the Jurisdiction to challenge the Development Approval issued by the Planning authority, namely, Nairobi City County Government also vests with the County Liaison Committee in accordance with the provisions of Section 51(3) of the *Physical and Land Use Planning Act* 2019.
15. In view of the foregoing, Learned counsel for the Applicants has thus submitted that even though the court had hitherto found that same was seized of the jurisdiction to entertain the subject suit, the intervening events have since ousted the Jurisdiction of the court and it is therefore imperative that the dispute be dealt with before the relevant and designated forum.
16. In support of the submissions that the Jurisdiction of the court has since been ousted, Learned counsel for the Applicants has cited and relied on, inter-alia, the case of *Bernard Murage v Fine Serve African Ltd & 3 Others* [2015]Eklr; *Kibos Distillers Ltd & 4 Others v Benson Ambuti Adega & 3 Others* [2020]eKLR; and The *Speaker of National Assembly v Njenga Karume* [1992]eKLR.

b. Respondent's Submissions:

17. The Respondent herein adopted and relied on the contents of the Replying affidavit sworn on the 19th September 2023; and thereafter same highlighted and canvassed three (3) pertinent issues for consideration by the Honourable court.
18. Firstly, Learned counsel for the Respondent has submitted that this Honorable court has since dealt with and adjudicated upon the question of Jurisdiction, which had previously been raised and canvassed by the current Applicants.
19. In this respect, Learned counsel has contended that having previously dealt with and determined the issue of Jurisdiction, then this court cannot be re-invited to re-look at the issue of Jurisdiction, either in the manner sought or at all.
20. Secondly, Learned counsel for the Respondent has submitted that even though the Applicants have contended that same have since procured and obtained the EIA license and the Development Approval from National Environment Management Authority and the County Government of Nairobi, respectively; the said documents are neither genuine nor authentic.
21. At any rate, Learned counsel for the Respondent has contended that the 1st and 2nd Interested Parties, who are alleged to have issued the impugned license and Development Approval, have neither filed any documents nor responded to the suit beforehand.
22. Based on the foregoing, Learned counsel for the Respondent has thus invited the court to find and hold that the impugned EIA license and the Development approval, which have been exhibited by the Applicants are therefore doubtful and not authentic.



23. Thirdly, Learned counsel for the Respondent has submitted that the Respondent herein is not in possession of any EIA License or Development approval; and in the absence of such documents, the Respondent cannot be expected to move and challenge the EIA License and Development approval before the statutory forum alluded to by the Applicants.

c. Applicant's Rejoinder Submissions:

24. Learned counsel for the Applicants thereafter made rejoinder submissions on two pertinent issues, namely, that the validity, propriety and/or legality of the EIA License and the Development approval, (which have been exhibited by the Applicants), can only be challenged in the manner provided for under the law.

25. Secondly, Learned counsel for the Applicants submitted that the Respondent herein has in any event proceeded to and indeed lodged an appeal before the National Environment Tribunal; and hence it is dishonest on the part of the Respondent to contend that same is not in possession of the requisite documents to facilitate the lodgment of an appeal.

26. Finally, Learned counsel for the Applicants has contended that even assuming that the Respondent did not have any document to facilitate the lodgment of the appeal before the statutory fora (which is not the case), the Applicants have since exhibited the said licenses, which can be relied upon by the Respondent in mounting the appeals, if at all.

27. Consequently and in the premises, counsel for the Applicants has thus submitted that the intervening events have therefore ousted and/or divested the court of the requisite Jurisdiction. In this regard, counsel has invited the court to vacate the conservatory orders.

Issues For Determination

28. Having reviewed the Application beforehand, as well and the Response thereto; and upon consideration of the oral submissions made on behalf of the Parties, the following issue does emerge/ arise and is thus worthy of determination:

- i. Whether the issuance of EIA License and the Development Approval during the intervening period have divested the court of the requisite Jurisdiction to adjudicate upon the subject dispute.

Analysis And Determination:

Issue Number 1. Whether the issuance of EIA License and the Development Approval during the intervening period have divested the court of the requisite Jurisdiction to adjudicate upon the subject dispute.

29. There is no gainsaying that Jurisdiction is essential and critical in the determination of a dispute lodged and/or mounted before a particular court. Instructively, Jurisdiction is a threshold question and hence whenever same is raised, it behooves the court to address and determine same at the earliest instance.

30. Furthermore, there is no gainsaying that where a court is devoid of Jurisdiction, then the court is called upon to down his/her tools. Additionally and in any event, it is common ground that where a court conducts proceedings and makes an order in a matter where same is divested of Jurisdiction, then the resultant proceedings and orders are a nullity ab initio.



31. To understand the significance of Jurisdiction and its impact on the proceedings before a court of law, it is instructive to take cognizance of the dictum in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, where the court of appeal stated thus;
- “ 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
 2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside *ex debito justitiae*. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.”
32. Arising from the foregoing and taking into account the dictum (*supra*), it now appropriate for this court to interrogate the obtaining situation; and in particular, the events that arose during the intervening period, long after the instant suit had been filed.
33. To start with, the Plaintiff filed the current suit and contended that the 1st and 2nd Defendants had commenced the impugned development/ construction albeit without procuring and obtaining the requisite Environmental Impact Assessment License and the attendant Development approval.
34. Based on the foregoing situation, this court entertained an Application for conservatory orders and furthermore, proceeded to and granted the consecratory orders pursuant to and by dint of the Ruling rendered on the 21st September 2023.
35. Nevertheless, it is appropriate to underscore that whilst granting the conservatory orders, (details in terms of the preceding paragraph), this Honourable court made the observation, which is articulated at the foot of paragraph 66 of the Ruling.
36. For ease of reference, the contents of paragraph 66 of the Ruling delivered on the 21st September 2023; is reproduced as hereunder;
- Nevertheless, it is important to make it clear that in the event that the 1st and 2nd Respondents procure and obtain the requisite EIA License in accordance with Section 58 of the *EMCA*, 1999 and the Development approval from Nairobi City County Government, which is the designated Planning Authority; then the Jurisdiction of this court to deal with this matter in the first instant would cease.
37. Suffice it to point out that this court was alive to the fact that the moment the EIA License and the Development approval are issued, then the only bodies vested with the mandate to impugn and/or negate same, are the ones created pursuant to Section 129 of *EMCA* 1999; and the County Liaison Committee created pursuant to Section 61 of the *Physical and Land Use Planning Act*, 2019.
38. Additionally, it is also appropriate to state and underscore that this court was also alive to the import and tenor of the decision of the Court of Appeal in the case of *Eaton Towers Kenya Limited v Kasing’a*



§ 5 others (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR) (28 April 2022) (Judgment), where the court found and held as hereunder;

“We find that the 1st respondent creatively couched his complaints as a constitutional petition, when he could easily have lodged them with the tribunal on the issuance of the EIA licence and to the committee concerning the development approval. This Court has made numerous pronouncements on this issue. It stated in Gabriel Mutava & 2 Others -vs- Managing Director Kenya Ports Authority & Another [2016] eKLR; “In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.” (Emphasis added)

39. Clearly and in view of the foregoing ratio decidendi, it is incumbent upon the Plaintiff/Respondent herein to proceed and challenge the validity of the EIA License before the National Environment Tribunal.
40. Similarly, the question pertaining to the validity of otherwise of the Development approval, can only be gone into and addressed before the County Liaison Committee in accordance Section 61(3) of the Physical and Land Use Planning Act, 2019.
41. Finally, it is appropriate to point out that even though the court had hitherto found and held that same was seized of Jurisdiction, there is no gainsaying that the jurisdiction of a court can be ousted by intervening circumstances; and in this case the Jurisdiction of the court has been ousted by the issuance of the EIA License and the Development approval, which can only now be challenged before appropriate fora.
42. To underscore the foregoing observation, namely, that the Jurisdiction of a court can be ousted by the intervening facts and circumstances, it is appropriate to take cognizance of the dictum in the case of The Anisminic Ltd v The Foreign Compensation Commission And Another, [1969]2 A.C. 147; [1969]2 WLR 163; 113 S.J. 55; [1969] 1 ALL ER 208.
43. Consequently and in view of the foregoing, I come to the conclusion that the intervening events, (whose details have been ably captured in the proceedings hereinbefore) have divested the court of the requisite Jurisdiction.
44. Invariably and in this respect, the Plaintiff/Respondent must therefore approach the correct fora with a view to procuring and obtaining appropriate and effective remedies, taking into account the Doctrine of Exhaustion. See the ratio in the case of Bethwel Allan Omondi Okal v Telkom [Founders] Kenya Ltd [2017]eklr.

Final Disposition:

45. Having reviewed the totality of the issues which were placed before the court and taking into account the fact that the 1st and 2nd Defendants have since procured the EIA License and the Development Approval, as pertains to the impugned development, it is now evident that the Jurisdiction of the court has been ousted.



46. Consequently and arising from the foregoing, it would be remiss of the court to bury its head under the sand and to pretend that the court can still (sic) entertain and adjudicate upon the matter, yet the Doctrine of Exhaustion dictates otherwise.
47. Furthermore, it would also be an exercise in futility to proceed with and entertain the subject proceedings, whilst knowing that at the tail- end of the proceedings; and when it would too late in the day, the court would be enjoined to strike out the suit on the basis of various binding decisions. See *Kibos Distillers Ltd & 4 Others v Benson Ambuti Adega & Others* [2020]eKLR.
48. Arising from the foregoing, I am therefore constrained to and do make the following orders;
- i. The Application dated the 6th September 2023; be and is hereby allowed.
 - ii. The conservatory orders issued at the foot of the ruling delivered on the 21st September 2023; be and is hereby discharge.
 - iii. The suit by and on behalf of the Plaintiff be and is hereby struck out.
 - iv. Each Party shall bear own costs of the Application and the suit.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of

Benson - Court Assistant.

Mr. Rashid Ngaira for the Applicant.

Mr. Mosota and Mr. Kipyegon for the 1st and 2nd Defendants/Applicants.

Mr. Migele for the 1st Interested Party.

