



**Northern Block Residents Limited & another v Nairobi Baptist Church & 2 others;
National Environmental Management Authority (NEMA) (Interested Party) (Constitutional
Petition 8 of 2023) [2023] KEELC 21972 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CONSTITUTIONAL PETITION 8 OF 2023
MD MWANGI, J
NOVEMBER 30, 2023**

BETWEEN

NORTHERN BLOCK RESIDENTS LIMITED 1ST PETITIONER

LAKE VIEW ESTATE RESIDENTS' ASSOCIATION 2ND PETITIONER

AND

NAIROBI BAPTIST CHURCH 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT

THE CHIEF LANDS REGISTRAR 3RD RESPONDENT

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY
(NEMA) INTERESTED PARTY**

RULING

1. The Petitioners instituted this suit vide a Petition dated 4th May, 2023. Alongside the Petition, they filed a Notice of Motion application under Certificate of Urgency seeking for orders that:
 - a. Pending the hearing and determination of this Petition, this Court be pleased to grant an injunction restraining the 1st Respondent, its agents, servants and/or employees from constructing a church, cutting down trees, excavating and undertaking any construction work on LR No. 4950/10 situated in Kitisuru, along Ngecha Road.
 - b. Pending the hearing and determination of this Petition, this Court be pleased to grant an injunction restraining the 3rd Respondent, its agents, servants and/or employees from



accepting, acting upon or effecting the process of issuance of a new title in consideration at the change of user of L.R No. 4950/10.

- c. Costs of this application be provided for.
2. In response to the above application, the 1st Respondent filed a Replying Affidavit deposed by one Sammy Kent Mangeli on 20th June, 2023. The deponent raised the issue of the court's jurisdiction and deposed that both the Petition and the application were incompetent and bad in law for the reasons that the 2nd Petitioner lacks the locus standi to commence any proceedings against the Respondents in its personal capacity. Further, that the 1st Respondent is a Society registered under the [Societies Act](#), Cap 108 Laws of Kenya and therefore has no legal capacity to be sued in its own name. The deponent further avers that the Petitioner's claim is not a constitutional claim but only a challenge to the planning permissions issued to the 1st Respondent and accordingly ought to have been referred to the County Physical Planning Liaison Committee pursuant to the provisions of the [Physical and Land Use Planning Act](#), 2019. The constitutional Petition is not only improper but is intended to circumvent the applicable law and deny the full right and benefit of the law.
 3. The 2nd Respondent on the other hand filed grounds of opposition as follows:
 - a. This Honourable Court lacks jurisdiction to hear and grant the order sought in the Notice of Motion Application dated 4th May, 2023 as the matter is currently before the National Management Authority (hereinafter "the Authority")
 - b. In accordance with the [Environmental Management and Coordination Act](#), 1999 sometime in February, 2023, the Authority issued a Stop Order directing the 1st Respondent to stop all activities in the subject property until the 1st Respondent obtains the requisite environmental approvals from the Authority and that a continuation of the project will only follow the Authority's approval.
 - c. In accordance with the set directives the 1st Respondent is in the process of obtaining the requisite approval and in turn the Authority is yet to issue its approval on the same.
 - d. In the event an approval is issued, the Petitioner has the option to appeal the decision of the Authority before the National Environment Tribunal under section 129 of the [EMCA Act](#), 1999.
 - e. On the issue of the approvals obtained allowing change of users of the property known as LR No.4950/10, section 78 of the [Physical and Land Use Planning Act](#) provides for an appeal avenue before the County Physical and Land Use Planning Liaison Committee who have the requisite jurisdiction to hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county.
 - f. It is clearly evident that the Petitioners have failed to exhaust the internal remedies as set out in the aforementioned statutes prior to approaching this Honourable court.
 - g. In view of the Doctrine to Constitutional Avoidance which demand that an aggrieved party must first exhaust all internal remedies prior to raising a constitutional question before this Honourable Court the Petitioner had a duty to demonstrate that they have exhausted all avenues available before approaching this Court.
 - h. In view of the above, the proceedings before this court are premature.



- i. The Petition and Application both dated 4th May, 2023 are in contravention of the Constitution and inter alia the Fair Administrative Actions Act and the doctrine of constitutional avoidance.
- j. The Orders sought ought not to issue as the Petitioner's application is frivolous, vexatious and an abuse of due process of this Honourable Court and should therefore be dismissed with costs.

Court's Directions

4. With the agreement of the parties, on the 26th June, 2023, the court directed that the issue of jurisdiction be dealt with first. Parties were directed to file skeleton submissions with an opportunity to highlight the same before the court. This ruling is therefore on the issue of jurisdiction.

2nd Respondent's submissions

5. The 2nd Respondent submits that the first issue for determination is whether the Petition and Application as filed offend the twin doctrines of constitutional avoidance and the exhaustion. It submits that the court is devoid of jurisdiction to entertain this matter for reason that jurisdiction lies with the County Physical and Land Use Planning Liaison Committee under sections 76, 78(b) of the Physical and Land Use Planning Act No. 13 Of 2019 and as such offends the doctrines of exhaustion and constitutional avoidance.
6. The 2nd Respondent submits that the doctrine of exhaustion requires a party to first pursue all remedies available before seeking redress from a court of law in line with Article 159(2)(c) of the Constitution of Kenya 2010, which encourages the use of alternative dispute resolution mechanisms.
7. The doctrine of constitutional avoidance on the other hand deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. Noncompliance of the above requirements therefore this court is devoid of jurisdiction to hear and determine the Petition.
8. The second issue is whether the 1st Petitioner and the 1st Respondent have locus standi to sue or be sued in their own names. The 2nd Respondent avers that It is a well-established principle of law that a society and an association registered under the Societies Act Cap 108 are not legal entities capable of suing and being sued in their own names. The 1st Petitioner herein is a resident association and the 1st Respondent a society both registered under the Societies Act. It therefore follows that the 1st Petitioner does not have locus standi to bring the present suit and neither can they sustain the suit as against the 1st Respondent.

1st Respondent's Submissions

9. The 1st Respondent's submissions are dated 17th July, 2023. The 1st Respondent identified 3 issues for determination. The first issue is whether the 2nd Petitioner and 1st Respondent lack the locus standi to sue or be sued in their own names. The Respondent submits that it is a society registered under the Societies Act, Cap. 108 Laws of Kenya and therefore has no legal capacity to be sued in its own name. Similarly, the 2nd Petitioner being a resident's association registered and operating under the provisions of the Societies' Act, lacks the locus standi to institute any form of legal proceedings in its own name. The Petition and the application are therefore incurably defective.
10. The second issue for determination according to the 1st Respondent is whether the Petitioner are in breach of the doctrine of exhaustion and are guilty of the Constitutional avoidance doctrine. The 1st



Respondent submits that the Petitioners are in violation of both the Doctrine of exhaustion and that of Constitutional avoidance.

11. On the Doctrine of exhaustion, the 1st Respondent submits that the Petitioners being aggrieved over planning permissions issued to the 1st Respondent, the same should have been referred to the County Physical Planning Liaison Committee pursuant to Section 61 (3) of the [Physical Land Use Planning Act](#), 2019. The 1st Respondent submits that the jurisdiction at this stage lies with the County Physical Planning Liaison Committee pursuant to Section 78 of the [Physical Land Use Planning Act](#), 2019.
12. Regarding the doctrine of Constitutional avoidance, the 1st Respondent submits that the Petitioners have mischievously drafted the Petition as one presenting constitutional violation. This is intended to circumvent the applicable law, and deny the Respondents the full right and benefit of the law.
13. In conclusion, the 1st Respondent submits that this court lacks the jurisdiction to hear and determine this suit. The Preliminary Objection is therefore merited. As thus the Petition and the application should be dismissed with costs to the Respondent.

Petitioner's submissions

14. The Petitioner avers that a Preliminary Objection consists of a pure point of law which has been pleaded or which arise out of clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. The Petitioners argued that this is not the case here. The issues raised by the Respondents call for probing of disputed facts hence does not qualify to be argued as a Preliminary Objection.
15. The first issue for determination according to the Petitioners is whether the Honourable Court has jurisdiction to hear the application and the Petition. The Petitioners submit in the affirmative. They aver that the question of violation of the rights to a clean and healthy environment guaranteed under Articles 42 and 70 of [the Constitution](#) and can only be determined by this court. The Petitioners argued that this court has original and appellate jurisdiction over disputes relating to environment, use, occupation of, and title to land pursuant to Articles 22, 162 (2) (b) of [the Constitution](#) and Section 13 (1) and (2) of the [Environment and Land Court Act](#).
16. They submit that the jurisdiction under Articles 42 and 70 of [the Constitution](#) is exercisable notwithstanding the existence of other mechanisms. That a party can still maintain a court action regardless of the unexplored alternative remedies.
17. The Petitioners submits that second issue for determination is whether the 2nd Petitioner and 1st Respondent have legal capacity to sue and be sued in their own names. The Petitioners argue that [the Constitution](#) protects the Petitioners' rights to a clean and healthy environment under the Bill of rights. That pursuant to Article 22 of [the Constitution](#), the Petitioner have a right to access the Court under Article 22. While Article 258 allows the Petitioners to approach the Court when there is a threat to [the Constitution](#).
18. The Petitioners aver that striking-out the 2nd Petitioner and the 1st Respondent from the Petition as sought by the 1st Respondent will not determine the Application and the Petition given the multiplicity of parties in the Petition.
19. The Petitioners implore the Court to save the suit as stated by Madan J in *DT Dobie & Co. (K) Ltd. -vs- Muchina* (1982) KLR19. That the 2nd Petitioner's and 1st Respondent's standing can be cured through an amendment by dint of Article 159 (2) (d) of [the Constitution](#).



20. They submit that the Court should invoke its inherent power under Rule 18 of the Mutunga Rules and allow the Petitioners to amend the Petition, to the extent of the 2nd Petitioner and 1st Respondent's standing so that the Petition can be heard on merit.
21. Parties highlighted their respective submissions, each restating their averments contained in their skeleton submissions filed herein.

Analysis and Determination

22. The gist of the Petitioners' case is to be found at paragraphs 15 – 19 of the Petition dated 4th May, 2023. The Petitioners plead that they are aggrieved by the decision made by the 2nd Respondent in granting a change of user approval of the subject property to the 1st Respondent from a residential user to a religious user (Church) without their involvement in the decision-making process and in breach of the planning laws.
23. The Petitioners further assert that they are aggrieved by the fact that no Environmental Impact Assessment (EIA) was prepared by the 1st Respondent relating to the project on the subject property in accordance with EMCA and EIA and Audit Regulations 2003 which require that every development project must have an EIA report prepared for submission to NEMA.
24. The Petitioners disclose that they had objected to NEMA about the ongoing project. Consequently, and following their objection, NEMA issued a stop order directing the 1st Respondent to stop all activities on the subject property until they obtain the necessary environmental approvals. Further NEMA directed the 1st Respondent to submit for inspection at its headquarters their approval documents and that excavation works and any other activities would only resume after NEMA's approval.
25. The Petitioner therefore prays for a declaration that the change of user from residential to religious user is a threat/violation of the Petitioner's right to clean and healthy environment. Further, a declaration that the 2nd Respondent's Development permission issued to the 1st Respondent is illegal, irregular, wrongful, null and void.
26. The Application by the Petitioners dated 4th May, 2023 is off course premised on the same grounds as the petition.
27. The thrust of the Petition herein is challenging the development permission issued by the 2nd Respondent to the 1st Respondent and the change of user of the subject property, L.R. No. 4950/10. The provisions of the PLUPA are explicit on jurisdiction on that aspect.
28. Further, from the Petitioner's own pleadings, the issue is currently in the hands of NEMA, who have issued a stop order and conditions that must be complied with. In that regard, the petition herein is not only premature but without any legal basis.
29. I think the issue of the jurisdiction of the ELC court has now been litigated enough. The Supreme Court of this country has pronounced itself categorically on this issue; the Court of Appeal too. Article 163(7) of *the Constitution* is explicit that the decisions of the Supreme Court are binding on all court, other than the Supreme Court itself.



30. In the case of *Benard Murage - vs - Fine serve Africa Limited & 3 others* [2015] eKLR the Supreme Court stated that;

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

31. In *Samuel Kamau Macharia and another - vs - Kenya Commercial Bank Ltd and 2 Others*, the Supreme Court was unequivocal that jurisdiction cannot be conferred by way of judicial craft and innovation.

32. In the case *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR, the Court of Appeal reiterated that jurisdiction cannot be conferred by ‘the art and craft of counsel or a litigant drawing pleadings’ to confer or oust the jurisdiction conferred on a Tribunal or another institution by *the Constitution* or statute.

33. The court summarized on the issue of jurisdiction in the following words;

“To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

34. The Court further observed that the jurisdiction of the ELC is appellate under Section 130 of EMCA and Sections 15, 19 and 38 of the *Physical Planning Act*. Asike-Makhandia J.A stated that:

“An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction. A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.”

35. The Supreme Court upheld the decision of the Court of Appeal in the Kibos case.

36. For the reasons expounded above, the petition herein and the Notice of Motion application are struck out for want of jurisdiction with costs to the 1st and 2nd Respondents.

It is so ordered.



RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Deya for the Petitioners

Mr. Rao h/b for Dr. Ojiambo, SC for the 1st Respondent

Ms. Amuka h/b for Mr. Manwa for the 2nd Respondent

M. D. MWANGI

JUDGE.

