



REPUBLIC OF KENYA



**Toshike Construction Co. Ltd & 5 others v Sokhi & 25 others (Environment & Land  
Petition E058 of 2022) [2023] KEELC 22047 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22047 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E058 OF 2022**

**MD MWANGI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**TOSHIKE CONSTRUCTION CO. LTD ..... 1<sup>ST</sup> APPLICANT  
TOSHIKE CONSTRUCTION CO. LTD ..... 2<sup>ND</sup> APPLICANT  
DANNS JUNGLE INVESTMENTS LTD ..... 3<sup>RD</sup> APPLICANT  
DANNS JUNGLE INVESTMENTS LTD ..... 4<sup>TH</sup> APPLICANT  
WOKABI MWAGO ..... 5<sup>TH</sup> APPLICANT  
WOKABI MWAGO ..... 6<sup>TH</sup> APPLICANT**

**AND**

**KUKU SINGH ALIAS SOKHI ..... 1<sup>ST</sup> RESPONDENT  
KUKU SINGH ALIAS SOKHI ..... 2<sup>ND</sup> RESPONDENT  
NAIROBI CITY COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT  
NAIROBI CITY COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [NEMA] .... 5<sup>TH</sup>  
RESPONDENT  
AUTHORITY [NEMA ..... 6<sup>TH</sup> RESPONDENT  
NATIONAL CONSTRUCTION AUTHORITY ..... 7<sup>TH</sup> RESPONDENT  
NATIONAL CONSTRUCTION AUTHORITY ..... 8<sup>TH</sup> RESPONDENT  
MANSAAT HOLDINGS LIMITED ..... 9<sup>TH</sup> RESPONDENT  
MANSAAT HOLDINGS LIMITED ..... 10<sup>TH</sup> RESPONDENT  
FUAD HUSSEIN ..... 11<sup>TH</sup> RESPONDENT**



FUAD HUSSEIN .....	12 <sup>TH</sup> RESPONDENT
STEPHEN GATHUITA MWANGI .....	13 <sup>TH</sup> RESPONDENT
STEPHEN GATHUITA MWANGI .....	14 <sup>TH</sup> RESPONDENT
PATRICK ANALO AKIVAGA .....	15 <sup>TH</sup> RESPONDENT
PATRICK ANALO AKIVAGA .....	16 <sup>TH</sup> RESPONDENT
MAMO BORU MAMO .....	17 <sup>TH</sup> RESPONDENT
MAMO BORU MAMO .....	18 <sup>TH</sup> RESPONDENT
DANIEL WANJIRU .....	19 <sup>TH</sup> RESPONDENT
DANIEL WANJIRU .....	20 <sup>TH</sup> RESPONDENT
MAURICE AKETCH MBS .....	21 <sup>ST</sup> RESPONDENT
MAURICE AKETCH MBS .....	22 <sup>ND</sup> RESPONDENT
ENG. KANDA BOWEN .....	23 <sup>RD</sup> RESPONDENT
ENG. KANDA BOWEN .....	24 <sup>TH</sup> RESPONDENT
SILAS JOHN SANYA OGENGO .....	25 <sup>TH</sup> RESPONDENT
SILAS JOHN SANYA OGENGO .....	26 <sup>TH</sup> RESPONDENT

## RULING

### Background

1. The Plaintiffs filed this suit vide the Complaint dated 17<sup>th</sup> February, 2023. The suit was originally filed against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only.
2. The Plaintiffs' case was that the 1<sup>st</sup> Defendant was the owner and or beneficial owner of the parcel of Land known as L.R. No. 209/5665/2- Mwambao Lane, off Limuru Road, Parklands, Nairobi. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs on their part are residents, occupiers and beneficial owners of the properties known as Maisonnettes I, H & G respectively erected on L.R. No. 209/7546, City Park Drive off, Limuru Road, in Parklands, Nairobi which according to the Plaintiffs, neighbours the 1<sup>st</sup> Defendant's property. Prior to November, 2022, the 1<sup>st</sup> Defendant relied on a private sewer line that passes through, among other properties, the Plaintiffs' properties, for disposal of toilet and bathroom effluents.
3. The Plaintiffs averred that on or about the month of November, 2022, the 1<sup>st</sup> Defendant/his servants/agents/developer/proponent started developing his suit premises from a single residential dwelling house to commercial (shops) cum multi-dwelling residential apartments by demolishing the single dwelling house and other structures thereon, cutting down the trees and other vegetation that existed thereon and excavating the suit premises grounds.
4. It was the Plaintiffs' contention that the 1<sup>st</sup> Defendant had not obtained the requisite development permissions, permit/licences from the 2<sup>nd</sup> Defendant's County Executive Committee Member in charge of Built Environment and Urban Planning prior to, or at the time of embarking on the said developments. The Plaintiffs alleged that they had brought to the attention of the 2<sup>nd</sup> Defendant, the



- unauthorized developments being undertaken by the 1<sup>st</sup> Defendant, but the 2<sup>nd</sup> Defendant had not taken any remedial action against the 1<sup>st</sup> Defendant/his agents/servants/developer/proponent.
5. The Plaintiffs further contended that the development by the 1<sup>st</sup> Defendant had also not obtained approvals, licenses and or permission from the National Environment Management Authority – NEMA, and National Construction Authority – NCA.
  6. The Plaintiffs asserted that the actions by the 1<sup>st</sup> Defendant amounts to a violation and breach of Article 42 and 70 of the Constitution, the physical and Land Use Planning Act, 2019, the National Construction Authority Act and the Environmental Management Act as well as the Rules and Regulations. The Plaintiffs particularized the alleged breaches, violations, disregards and disobediences of the Constitution and other Laws, at paragraph 15(a) to (j) of their plaint.
  7. The Plaintiffs accused the 2<sup>nd</sup> Defendant of failing to perform its statutory obligations by issuing an order to the 1<sup>st</sup> Defendant to stop the development and restore the suit premises to its original condition or to as near as its original condition within 90 days of such an order as provided by the law. The works though had been stopped by the NCA *vide* a notice dated 16<sup>th</sup> January 2023, but the 1<sup>st</sup> Defendant had ignored the notice and continued with the developments. The Plaintiffs further alleged that the 1<sup>st</sup> Defendant had also ignored an order by NEMA.
  8. As a result of the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants’ breaches and violations of the Constitutional and Statutory provisions cited, the Plaintiffs alleged that they had suffered and would continue to suffer violation of their fundamental rights, injuries, losses, annoyances, nuisances and inconveniences as particularized in paragraph 19(a) to (h) of the Plaint. The Plaintiffs intimated that the 1<sup>st</sup> Defendant and the Member of County Assembly in charge of the Eastleigh Airbase Ward had threatened and intimidated the 2<sup>nd</sup> Plaintiff Company director’s life and his family after he complained to NCA, NEMA and the 2<sup>nd</sup> Defendant on the ongoing development. Despite reporting to the Criminal Investigations Department, the threats had not stopped.
  9. The Plaintiffs consequently prayed for judgment against the Defendants for a permanent injunction to stop the development by 1<sup>st</sup> Defendant, an order of demolition of the development, general and aggravated damages amongst others.
  10. Alongside the plaint, the Plaintiff filed a Notice of Motion Application under Certificate of Urgency of even date seeking temporary injunctive orders to restrain the 1<sup>st</sup> Defendant from undertaking any further development activities on L.R. No. 209/5665/2, Mwambao Lane off Limuru Road in Parklands.
  11. On 29<sup>th</sup> March, 2023, the Court issued an order of temporary injunction pending hearing and determination of the application. The Court further ordered that the Plaint and the application be amended to include NEMA as a party. This was informed by the fact that NEMA had been adversely mentioned in the Plaint the application and one of the prominent issues to be determined was whether NEMA had approved the alleged development on the 1<sup>st</sup> Defendant’s parcel of land.
  12. The Amended Plaint and the amended Notice of Motion application were filed on 6<sup>th</sup> April, 2023, including NEMA as the 3<sup>rd</sup> Defendant. The Plaintiffs however, on their own initiative added 10 others Defendants including, NCA, an entity referred to as Mansaat Holdings Ltd, and other individuals. The individuals include the CECM in Charge of the 2<sup>nd</sup> Defendant’s Built Environment and Urban Planning Sector, the Director-General & CEO of NEMA, and the CEO of NCA, expressed to have been sued in both their official and or individual capacities.



13. The Defendants/Respondents responded in various ways, including filing of replying affidavits and Preliminary Objections. The Court has so far determined the Preliminary Objection by the 5<sup>th</sup> Respondent, dismissing the same with costs.
14. This ruling is in respect of the Plaintiffs' Amended Application dated 6<sup>th</sup> April, 2023 and the 1<sup>st</sup> Defendant's Application dated 18<sup>th</sup> April 2023, as per the Court's directions issued on 4<sup>th</sup> July, 2023.
15. I note that at the time of the issuance of the Court's directions on 4<sup>th</sup> July, 2023 and on the subsequent ones of 26<sup>th</sup> September 2023, the 3<sup>rd</sup> Respondent, NEMA and its officers who have been joined into the suit as Defendants had not appointed an Advocate and or entered appearance in this matter. They only filed a Memorandum of Appearance on 3<sup>rd</sup> February, 2023 dated 29<sup>th</sup> September, 2023. The said Memorandum was filed by Brenda A. Majune Advocate for the 3<sup>rd</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants. The Memorandum of appearance was filed alongside a Notice of Preliminary Objection of even date challenging the jurisdiction of this Court to entertain the Plaintiffs' application on the basis that an EIA License had been issued to the 5<sup>th</sup> Defendant/Respondent in respect to the suit premises on 13<sup>th</sup> June, 2023. Consequently, under the provisions of Section 129 of the Environmental Management and Co-ordination Act (EMCA), any person aggrieved by a decision in respect to the issuance of an EIA License under the Act and the regulations has a right of appeal against the said decision to the National Environment Tribunal (NET).
16. The 3<sup>rd</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents further had filed a Replying Affidavit deposed by one Catherine Thaithi, the Nairobi County Director of Environment on 29<sup>th</sup> September, 2023. In the said affidavit, the deponent deposes that prior to and after the institution of this suit, the 3<sup>rd</sup> Respondent's officers had made impromptu inspections at the suit property after a complaint was lodged with them about an illegal excavation being carried out at the site of the suit premises.
17. Following the inspection, they had issued an improvement notice to one Mr. Abdullahi Osman, requiring the stoppage of the excavation and all related activities on site until an EIA license was acquired. The 5<sup>th</sup> Defendant went ahead and took out an EIA License No. NEMA/EIA/PSL/26369 which was issued by the 3<sup>rd</sup> Respondent for purposes of Construction of a twenty-one (21) storey residential building and features appurtenant to, on the suit property L.R. No. 209/5665/2 off Limuru Road in Parklands, Nairobi. The deponent attached the license as annexure 'CT -2'.
18. Following the issuance of the license, the improvement notice issued earlier on was vacated.
19. The 3<sup>rd</sup>, 9<sup>th</sup> & 10<sup>th</sup> Defendants/Respondents filed submissions too in respect to the Plaintiffs' Amended Application.

## Determination

### The 1<sup>st</sup> Defendant's Application Dated 18<sup>th</sup> April 2023

20. The 1<sup>st</sup> Defendant's application is supported by his affidavit sworn on 18<sup>th</sup> April, 2023. He asserts that he is not the owner of the suit property and has no interest whatsoever in the suit property. The assertions by the 1<sup>st</sup> Defendant have been supported by the 5<sup>th</sup> Defendant who confirms ownership of the suit property.
21. The Plaintiffs however, adamantly insist that the 1<sup>st</sup> Defendant is the owner of the suit property without providing any documentary evidence to contradict the document presented by the 1<sup>st</sup> Defendant. From the affidavit of the 3<sup>rd</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants, it is also clear that the EIA license was issued to the 5<sup>th</sup> Defendant, further supporting the 1<sup>st</sup> Defendant's claim.



22. Considering the materials placed before me, I am persuaded that the 1<sup>st</sup> Defendant has established that he is no longer the owner of the suit property. The 5<sup>th</sup> Defendant has positively affirmed its ownership of the suit property. Accordingly, there is and there was no basis – legal or factual of filing and maintaining the suit against the 1<sup>st</sup> Defendant. It was the Plaintiffs’ responsibility to establish ownership of the suit property prior to filing the case.
23. Accordingly, the Plaintiff’s suit against the 1<sup>st</sup> Defendant is hereby struck out with costs.
24. On the issue of costs however, the Court will award nominal costs to the 1<sup>st</sup> Defendant against the Plaintiffs taking into account the fact that the suit is still at its early stages. The nominal costs assessed at Kshs 50,000 only.

**A. The Plaintiff’s Amended Notice Of Motion Application Dated 6<sup>th</sup> April, 2023.**

25. The Application by the Plaintiffs is premised on the grounds that the developments on the suit property had not been approved/permitted by NEMA and the Nairobi City County Government.
26. From the affidavit evidence presented before the Court, it is clear that the 5<sup>th</sup> Defendant had not only obtained the approval of the Nairobi City County Government but also change of user in respect of the suit property as well. The Plaintiffs’ in response to those assertions introduced a new issue that there was no public participation.
27. While lack of public participation may as well be a valid ground of objection to the grant of change of user of the suit property, the appropriate forum provided for under the *Physical and Land Use Planning Act* is the County Physical and Land Use Planning Liaison Committee.
28. In regard to the NEMA License, it is now clear that the license was issued on 15<sup>th</sup> June, 2023. The same has been attached as annexure ‘CT -2’ in the replying affidavit filed on behalf of the 3<sup>rd</sup>, 9<sup>th</sup> & 10<sup>th</sup> Defendants. This is a fact which has not been challenged. The Court cannot close its eyes to it. As I noted earlier, the replying affidavit is part of the record of this Court.
29. The import of the issuance of the EIA license by NEMA is that any complaints against the issuance of E.I.A Licence must first and foremost be lodged with the Tribunal established under EMCA. The Court has no jurisdiction at the first instance. This position was pronounced in the Kibos Case by the Court of Appeal sitting in Kisumu and upheld by the Supreme Court.
30. 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.
31. 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.”

32. 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.”

33. I note that Preliminary Objections have been filed to challenge the jurisdiction of the Court. Though the Court’s directions were in respect of the application by the Plaintiffs and that of the 1<sup>st</sup> Defendant, jurisdiction however, is an issue that is central in every case. It need not be raised by any party. The Court on its own motion must, satisfy itself that it has jurisdiction. At the point of determining the Preliminary Objection by the 5<sup>th</sup> Defendant which the Court dismissed, sufficient evidence had not been availed to support the Preliminary Objection. That situation has since changed. The Court having considered all the materials placed before it and having considered the Plaintiff’s case in its totality is convinced that it lacks jurisdiction to determine the Plaintiff’s case in the first instance. The pronouncement in the above cited binding decision of the Court of Appeal upheld by the Supreme Court is unequivocal. I find it necessary to repeat it here for emphasis, 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.”

34. The Plaintiffs have not exhausted the statutory foras provided under the provisions of the EMCA and the PLUPA. I further agree with the holding of my brother Judge Oguttu Mboya in the case of *Mercy Wangari Buku vs NEMA & 3 others* (2021) eKLR, where he stated as follows;

“In this regard, I share the strong position that the Honourable Court must be the Forum of the last call and not the Port of first call. In support of the foregoing position, I am compelled to take guidance in the case of *Geoffrey Muthinja Kabiro v Samuel Muguna Henry* [2015] eKLR, where the honourable court held as hereunder; ‘It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews .... The exhaustion doctrine is a sound one and serves the purpose



of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

35. I will desist from discussing the merits, or otherwise of the Plaintiff's suit at this point in time in order not to prejudice their case should they opt to go to the other fora under EMCA and PLUPA.
36. Consequently, I strike out the Plaintiffs' suit in its entirety and off course the application under consideration and any other pending application for want of jurisdiction.
37. I will however spare the Plaintiffs the costs for the reason that, at least for the NEMA License, it is clear that one had not been issued at the time the Plaintiffs filed this suit.
38. The upshot from the foregoing is that the Plaintiffs' suit against the 2<sup>nd</sup>-13<sup>th</sup> Defendants is struck out but with no order as to costs for want of jurisdiction. As against the 1<sup>st</sup> Defendant, nominal costs of Kshs.50,000/- are awarded.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Mavisi holding brief for Mr. Thongori for the Plaintiffs/Applicants.

Mr. Adano for the 5<sup>th</sup> Defendant, also holding brief for Mr. Haji for the 1<sup>st</sup> Defendant/applicant

Ms. Majune for the 3<sup>rd</sup>, 9<sup>th</sup> & 10<sup>th</sup> Defendants/Respondents

No appearance for the 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup> & 13<sup>th</sup> Defendants.

YVETTE: COURT ASSISTANT.

