



Patrick Musimba Limited v China Railway No 10 Engineering Group Company Limited & another (Environment & Land Case 194 of 2019) [2025] KEELC 1231 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 194 OF 2019
OA ANGOTE, J
MARCH 13, 2025**

BETWEEN

PATRICK MUSIMBA LIMITED PLAINTIFF

AND

CHINA RAILWAY NO 10 ENGINEERING GROUP COMPANY LIMITED 1ST DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 2ND DEFENDANT

RULING

1. Vide a Motion dated 23rd August, 2023 brought pursuant to the provisions of Articles 48 and 50(1) of *the Constitution* of Kenya, Sections 56 (c) and (g) of the *Physical and Land Use Planning Act*, 2019 and Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 of the Civil Procedure Rules, the 1st Defendant/Applicant seeks the following reliefs:
 - i. That the suit ELC 194 of 2019-Patrick Musimba Limited vs China Railway No 10 Engineering Group Company Limited filed with the Registry of this Honourable Court be struck out in limine for want of jurisdiction.
 - ii. That the costs of the Application to be provided for.
2. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Victoria Mukiri, the Director of the 1st Defendant/Applicant of an even date, who deponed that a court can only exercise jurisdiction conferred to it by *the Constitution* or any other written law and where *the Constitution* or legislation provides for such jurisdiction, the court must operate within the prescribed limits.



3. According to Ms Mukiri, pursuant to Section 56 (c) and (g) of the *Physical and Land Use Planning Act*, 2019, (PLUPA), County Governments have the power within their areas of jurisdiction to consider and approve all development applications and grant all development permissions as well as to consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas.
4. She deponed that by dint of Section 61(3) of the PLUPA, an Applicant or an Interested Party aggrieved by the decision of a County Executive Committee regarding an application for development permission may appeal against the decision to the County Physical and Land Use Planning Liaison Committee within 14 days of the decision thereof, and the Committee is required to hear and determine the appeal within 14 days of its filing and that pursuant to Section 61 (4) of the Act, an appeal from the decision of the County Physical and Land Use Planning Liaison Committee lies to this court.
5. The 1st Defendant's Director deponed that where Parliament has through statute established primary adjudicative bodies, the court should let them exercise their primary jurisdiction, and in this instance, this court should only exercise appellate jurisdiction; that the present suit constitutes an abuse of process; that this court has inherent jurisdiction to protect itself from the same; that judicial resources are scarce and should be prudently put to use and that in the circumstances, the interests of justice dictate that the suit be dismissed.
6. In response to the Motion, the Plaintiff/1st Respondent through its Director, Dr Patrick Mweu Musimba, swore a Replying Affidavit on the 31st January, 2024. He deponed that the Plaintiff is the registered proprietor of all that piece of land situate along Acacia Drive, in Karen known as L.R Number 194/33 while the 1st Defendant is the registered proprietor of the adjacent property being all that piece of land known as L.R Number 194/32 (hereinafter the suit property).
7. According to Dr. Musimba, pursuant to the Nairobi City Development Ordinances and Zones, the suit property is situated in zone 12 which allows for low density residential developments and that after the 1st Defendant purchased the suit property, it is presumed that it applied for, and was issued with the approval to construct a residential house as the zonal laws applicable restrict commercial use of the property.
8. On or about the 28th March, 2018, he stated, while construction of the purported residential house was still underway, a public notice was displayed at the gate informing members of the public of the 1st Defendants' application to extend its use from residential to include professional office (engineering) and that on the same day, the Karen and Langata District Association (KLDA), a duly registered residents' association filed an objection to various developments including the one carried out on the suit property.
9. According to the Plaintiff's Director, the Plaintiff immediately upon learning of the public notice filed an objection to the proposed extension vide a letter dated 6th April, 2018 and received by the 2nd Defendant on the same date; that other residents also filed their respective objections and that on 9th May, 2018, the residents received an email from the representative of the 1st Defendant in which they stated that their intention had always been to construct a residential house for the staff as well as have small offices for management.
10. It is the Plaintiff's Director's deposition that the email did not settle well with the residents who expressed their concerns and fears on the negative impact the extension of user would have on both the environment and security.



11. According to Dr Musimba, the 1st Defendant thereafter sent a response to all the objections raised wherein it once again confirmed that they intended to use the suit property to host six staff members who would mostly be dealing with paperwork and affirmed that having failed to convince the residents, they would not pursue the intended change and would proceed to construct a modern house and that they believed the matter to be settled until the 8th March, 2019 when an advert was published in the Daily Nation by the Nairobi County Secretary giving notice of an application for a change of use from residential to administrative offices.
12. The Plaintiff's Director deponed that on seeing the advert and upon receipt of the authority from the Plaintiff, he thereafter prepared an objection to the Notice of Change of User dated 12th March, 2019, received by the 2nd Defendant on the 13th March, 2019 and issued with a Ref: 173/13/03/19 and that there was no formal response by the 2nd Defendant leading them to believe that the issue had been settled.
13. He noted that the above notwithstanding, they noticed that the 1st Defendant's developments increasingly began to resemble a commercial and not residential property and upon going to the 2nd Defendant's office to peruse the approved plans, he noted that the 1st Defendant had obtained technical approval on the 3rd July, 2018, three months after the notice for application for extension of use to commercial was posted and apparently withdrawn and that it is evident that the 1st Defendant has no intention of constructing a modern house but an administrative center.
14. It was deponed that the suit seeks to challenge the regularity of the change of user of the suit property; that the 1st Defendant has not controverted the fact that the Plaintiff as the projects most affected person was never informed or aware of the process and/or decision of the change of user of the property and that the 2nd Defendant has never communicated its decision on the objections aforesaid to the Plaintiff who only became aware of the same upon commencement of construction by the 1st Defendant.
15. It is the Plaintiff's case that not having been notified, it was denied of the opportunity to be heard by the 2nd Defendant and by extension the Liaison Committee being unaware of the date of the decision anticipated in Section 61(3) of PLUPA.
16. Further, it was deponed, by virtue of Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, this court has jurisdiction to determine matters related to the environment and land including disputes involving land use planning.
17. The 1st Defendant/Applicant, through its Director, Victoria Mukiri, filed a Supplementary Affidavit on 5th July, 2024. She deponed that they are indeed the proprietors of the suit property having lawfully acquired the same and have undertaken all construction in strict compliance with all zoning laws; that they duly responded to the objections and followed the 2nd Defendant's procedures in regard to such objections and that they legally approached the 2nd Defendant for the requisite approvals, all of which were granted, and at no time did they mislead the Plaintiff or any other party.
18. The 1st Defendant deponed that the Plaintiff has failed to utilize the mechanisms set out by the law on the issues it is raising and approaching this court should be a last resort as the PLUPA confers jurisdiction to the bodies of the 2nd Defendant to act on such appeals. The 2nd Defendant/Respondent did not participate in this Motion.



Submissions

19. The 1st Defendant/Applicant filed submissions on 1st July, 2024. Counsel submitted that where there exists a statutory process which offers an alternative dispute resolution in place of the filing of a suit, the same should be followed and that the cause of action herein, being the change of user approval, falls under the ambit of PLUPA pursuant to Section 61(3) and (4) thereof.
20. Counsel submitted that rather than file an appeal as anticipated by PLUPA, the Plaintiff, in breach of the doctrine of exhaustion, filed the present suit and that consequently, this court is divested of jurisdiction to entertain the same. Reliance was placed on the case of *Buku vs National Environmental Authority & 3 Ors*[2021]KEELC 4752(KLR).
21. It was urged that it is apparent that this suit is improperly before the court and is ripe for dismissal and that having successfully made a claim for the dismissal of the suit, the 1st Defendant is entitled to costs of the Motion and the suit.
22. The Plaintiff/1st Respondent filed submissions on 11th November, 2024. Counsel submitted that the doctrine of exhaustion as espoused in *William Odhiambo Ramogi & 3 Others vs Attorney general & 4 Ors: Muslims for Human Rights & 2 Ors* [2020] eKLR requires a party to make use of appropriate forums in dispute resolution before approaching the court and that in the circumstances, the Plaintiff was never made aware of the approval of the 1st Defendant's change of user application and could therefore not have appealed against the same within the time frame envisaged in PLUPA. Reliance in this respect was placed on the case of *John Kabukuru Kibicho & Anor vs County Government of Nakuru & 2 Ors*[2016]eKLR.
23. According to Counsel, the 2nd Defendant's failure to communicate its decision and accord the Plaintiff an opportunity to be heard violated its right to fair administrative action; that the jurisdiction of the Liaison Committee could only be invoked or triggered by a decision of the 2nd Defendant and since no decision was made or communicated, it is only this court that can determine the matter pursuant to the jurisdiction granted to it as per Article 162(2) (b) of *the Constitution*.
24. In support of the foregoing, Counsel cited the cases of *Galot Industries Limited & 2 Ors vs Machakos County Government and 4 Ors: Erdemann Property Limited & 4 Others(Interested Parties)*[2023]eKLR and *Depar Limited vs County Executive Committee Member for Lands, Physical Planning, Housing & Urbanization & County Government of Nyeri*[2020]eKLR.
25. It was urged that guided by Section 27 (1) of the *Civil Procedure Act* and the case of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Anor*[2016]eKLR, the basic rule of costs is that costs follow the event and that having made a case for the dismissal of the suit, the 1st Defendant is entitled to the costs of the Motion.

Analysis and Determination

26. Having considered the Motion, responses and submissions, the sole issue that arises for determination is whether this suit should be dismissed for want of jurisdiction by the court.
27. Vide the present Motion, the 1st Defendant/Applicant seeks to have this suit struck out for want of jurisdiction by this court, on account of breach of the doctrine of exhaustion. The Plaintiff maintains that this court is well vested with the jurisdiction to entertain the same.



28. It is now well established that jurisdiction is everything. This position was succinctly captured by Nyarangi, J.A. in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. 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 the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

29. Expounding on the same, the Supreme Court in In the Matter of the Interim Independent Electoral Commission [2011]eKLR stated as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.” The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

30. The jurisdictional question raised herein is premised on the doctrine of exhaustion. Strictly speaking, it does not mean that the court is incapable of dealing with the matter, rather, that there is a primary dispute resolution mechanism for the issue at hand and that process should be followed before regard is had to this court.

31. The Supreme Court in Sammy Ndung’u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR underscored the importance of this principle by stating thus:

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be 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 the Courts.”

32. While appreciating the foregoing position, the court is also alive to the exceptions of the doctrine of exhaustion as laid down in *R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) Kenya and 6 others* [2017] eKLR thus:

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*”

33. Similarly, the court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others*(Interested parties) [2020]eKLR noted as follows:

“...The High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

34. The court is so guided.

35. By way of a brief background, vide the present suit, the Plaintiff seeks, inter-alia, for a declaration that the 1st Defendant’s development contravenes the Nairobi City Council Zoning Policy as read together with the Karengata Local Physical Development Plan and an order quashing the 2nd Defendant’s decision approving the application for change of user in respect of the suit property.



36. It further seeks an order directing the 1st Defendant to re-submit construction plans for use for residential purposes for the suit property and an order directing the Deputy Registrar to forward all the proceedings in relation to the matter to the office of the DPP to determine the legitimacy of the issuance of the change of user.
37. The 1st Defendant asserts that the Plaintiff has prematurely invoked this court's jurisdiction; that the Plaintiff's first port of call should have been the County Physical and Land Use Planning Liaison Committee pursuant to the provisions of Section 61(3) of the PLUPA and that this court's jurisdiction in this regard is appellate as guided by Section 61(4) of the Act.
38. While conceding that this suit is indeed based on the decision by the 2nd Defendant to issue the 1st Defendant with a change of user approval in respect to construction on the suit property, the Plaintiff contends that it was not privy to the issuance of this approval despite having filed an objection to the same upon the issuance of a public notice by the 2nd Defendant signaling the 1st Defendant's intent to seek extension of user to include professional offices.
39. Consequently, the Plaintiff states, not only was its right to fair administrative action and right to hearing contravened, it could not have appealed against the issuance of the change of user within the time frame envisaged in PLUPA.
40. Change of user is an aspect of development control pursuant to the 3rd Schedule of the Physical Land Use Planning Act, 2019. Indeed, the jurisdiction to approve development permissions falls within the mandate of the County Government. Section 56 of the PLUPA provides that:
- “Subject to the provisions of this Act, the [Urban Areas and Cities Act](#), 2011, and the [County Governments Act](#), 2012, the county governments shall have the power within their areas of jurisdiction to—
- (a) prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
 - (b) control or prohibit the subdivision of land;
 - (c) consider and approve all development applications and grant all development permissions;
 - (d) ensure the proper execution and implementation of approved physical and land use development plans;
 - (e) formulate by-laws to regulate zoning in respect of use and density of development;
 - (f) reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans; and
 - (g) consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas.”
41. Within the County Government, the County Executive Committee Member is responsible for development control and planning, meaning that they are responsible for, amongst other things, the



issuance of development approvals, compliance and licenses. Section 61(3) of the Act provides for a complaint mechanism against a decision of the County Executive Committee Member thus:

“An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”

42. Section 76 of the *Physical and Land Use Planning Act*, 2019 provides as follows:

“There is established a County Physical and Land Use Planning Liaison Committee for each county.”

43. Its functions as outlined in Section 78 include:

“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.”

44. Whereas Section 80 under the head ‘Appeal to a County Physical and Land Use Planning Liaison Committee’ provides as follows:

- “(1) A person who appeals to County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form.
- (2) A County Physical and Land Use Planning Liaison Committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination
- (3) The Chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court Procedure of the County Physical and Land Use Planning Liaison Committees. Appeal to a County Physical and Land Use Planning Liaison Committee 653 2019 Physical and Land Use Planning and published in the Gazette or in at least one newspaper of National circulation.”

45. The aforementioned sections clearly set out the procedure for complaints against the approval permissions issued by the county. It being apparent that the crux of this matter is the Plaintiff’s



grievance against the issuance of change of user approval by the 2nd Defendant, the first port of call in this respect is the County Physical and Liaison Committee.

46. However, in the circumstances, the Plaintiff has maintained that it was never informed of the decision to approve the change of user. This, even despite filing objections to the proposed change of user. This assertion has not been controverted.
47. It being evident that the Plaintiff was not notified of the decision to approve the change of user, it follows that it was deprived of its right to seek redress before the County Physical and Land Use Planning Liaison Committee, rendering the statutory remedy practically unavailable.
48. Moreover, the Plaintiff's grievance raises fundamental concerns of procedural fairness and the right to be heard as espoused under Articles 47 and 50 of *the Constitution*. Insisting on the exhaustion of remedies that were, in effect, inaccessible would undermine these constitutional values.
49. Ultimately, it is the finding of the court that the Plaintiff's recourse to this Court is both necessary and justified.
50. In the end, the court finds no merit in the present Motion. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

IN THE Presence of;

Mr. Mwachofi for 1st Defendant/Applicant

Ms. Mabango for Kimathi for Plaintiff/Respondent

Court assistant - Tracy

