



Maina & 2 others v Atlas Tower Group & 4 others (Constitutional Petition 6 of 2022) [2023] KEELC 22054 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22054 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
CONSTITUTIONAL PETITION 6 OF 2022**

**BM EBOSO, J
NOVEMBER 28, 2023**

BETWEEN

**JULIUS WAINAINA MAINA 1ST PETITIONER
JOHANA WAINAINA NGIYA 2ND PETITIONER
JAMES MUGO KIMANU 3RD PETITIONER**

AND

**ATLAS TOWER GROUP 1ST RESPONDENT
SAMUEL N. KIMANI 2ND RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 3RD
RESPONDENT
COMUNICATION AUTHORITY 4TH RESPONDENT
COUNTY GOVERNMENT OF KIAMBU, DEPARTMENT OF URBAN &
PHYSICAL PLANNING 5TH RESPONDENT**

RULING

1. Through the notice of motion dated 25/4/2023, the 1st and 2nd respondents seek an order striking out the amended petition dated 10/8/2022 on the ground of want of jurisdiction, and on the ground that the petition offends the doctrine of exhaustion of constitutional and statutory remedies. The said application is the subject of this ruling. The application is anchored on the grounds set out in the notice of motion and it is supported by the affidavit of Samuel Makau, sworn on 27/4/2023.
2. The gist of the application is that the dispute to be determined in the petition revolves around the issuance of licences and approvals for setting up a Base Transceiver Station (BTS) to the 1st and 2nd respondents. The respondents contend that Section 78 (b) of the *Physical and Land Use Planning*



Act, 2019 provides that any person aggrieved by a decision made by the planning authority with regard to physical and land use development plans in the County shall appeal against such decisions to the County Physical and Land Use Planning Liaison Committee.

3. They add that Section 129(1)(a) of the Environmental Management and Co-ordination Act, 1999 [the EMCA] as read together with Regulation 46(1) (1) of Environmental (Impact Assessment and Audit) Regulations, 2003 provide that any person aggrieved by the grant of an Environmental Impact Assessment Licence [the EIA Licence] or permit should challenge such decision in the National Environment Tribunal [the NET].
4. The respondents further contend that the two statutes provide that the jurisdiction of this court can only be invoked by way of an appeal from decisions of the County Physical and Land Use Planning Liaison Committee and from the decision of the National Environment Tribunal respectively, as the case may be. The respondents add that given that the petitioners seek to challenge the licences and approvals obtained by the applicants from the County Government and from the National Environment Management Authority [NEMA], the available statutory remedies ought to be exhausted before invoking the jurisdiction of this court. The applicants urge the court to strike out the amended petition for want of jurisdiction and for failure to exhaust the available remedies.
5. Despite the petitioners being given numerous opportunities to file a response to the application, they failed to do so. Their counsel on record, Mr. Mungai, informed the court that he could not trace the petitioners to get further instructions on the application. Nonetheless, when the application was canvassed through oral submissions on 26/9/2023, Mr Mungai made submissions opposing the application. He submitted that at the time of filing the petition, the Kiambu Physical and Land Use Planning Liaison Committee had not been operationalized, hence the court was the only adjudicatory body available to determine the dispute. Counsel submitted that the court was properly seized of jurisdiction given that it has both original and appellate jurisdiction. Counsel further submitted that the petitioners were not aware that the 1st and 2nd respondents had been issued with an Environmental Impact Assessment Licence given that it was introduced through the response to the petition. Lastly, counsel submitted that should the court find that its jurisdiction was invoked prematurely, then the court ought to transfer the petition to the relevant adjudicatory bodies.
6. I have considered the application together with the rival submissions. I have also considered the relevant legal frameworks. Two issues fall for determination in the motion. The first issue is whether, by dint of the provisions of Section 129(1) of the Environmental Management and Co-ordination Act, this petition offends the doctrine of exhaustion of remedies. The second issue is whether, by dint of Section 78 (b) of the Physical and Land Use Planning Act 2019, this petition offends the doctrine of exhaustion of remedies. I will dispose the two issues sequentially through brief analysis.
7. The case of the applicants is that the petitioners ought to exhaust the appeal mechanism provided under Section 129(1) and (2) of the Environmental Management and Co-ordination Act before invoking the jurisdiction of this court. Section 129 of the Environmental Management and Co-ordination Act provides as follows;

- “(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.”

8. The petitioners elected not to file a response to the application. In his oral submissions in the virtual court, counsel for the petitioners stated from the bar that they were not aware that an Environmental Impact Assessment Licence had been issued to the project proponent. This is a factual statement constituting evidence that ought to have been placed before the court through an affidavit. The petitioners were granted the opportunity to respond to the application but elected not to do so. The assertion by their counsel from the Bar is clearly inadmissible evidence. Consequently, the objection to this petition on account of the provisions of Section 129 of the *Environmental Management and Co-ordination Act* has not been controverted through evidence.

9. Secondly, perusal of the reliefs sought in the amended petition reveals that the petitioners challenge the approvals granted to the project proponent by, among other regulatory authorities, the NEMA. Under Section 129(1) and (2) of the *EMCA*, such grievances are supposed to be ventilated in the NET. Under Section 130 of the *EMCA*, this court is vested with appellate jurisdiction over decisions made by the NET.

10. Our courts have umpteen times stated that where Parliament has, through statute, established a primary dispute adjudication mechanism, that mechanism ought to be exhausted before the jurisdiction of the superior courts is invoked. Indeed in *Speaker of the National Assembly V Njenga Karume* the Court of Appeal stated as follows:

“...In our view, there is considerable merit in the submission 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. We observed without expressing a concluded view that Order 53 of the *Civil Procedure Rules* cannot oust clear constitutional and statutory provisions....”

11. The above principle was similarly outlined in *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR as follows;

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke



the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

12. For the above reasons, I find that to the extent that this petition challenges NEMA’s approval, it offends the doctrine of exhaustion of remedies.
13. The second issue is whether the petition violates the requirements of Section 78 (b) of the PLUPA. The petitioners elected not to file an affidavit in response to the motion. At this point, the court does not know if, upon operationalization of the Kiambu County Physical and Land Use Planning Liaison Committee, the petitioners opted to ventilate their grievances before the said Committee. The court does not also know whether it is the desire of the petitioners that the dispute be redirected to the Liaison Commission for adjudication.
14. Under Section 78 of the PLUPA, grievances relation to land use approvals and development approvals are supposed to be ventilated before the Liaison Committee. This court is vested with appellate jurisdiction.
15. In the absence of any evidence explaining why this court should not down its tools, the court has no option but to down its tools on the ground that the Liaison Committee is available to adjudicate the dispute. It is therefore my finding that this petition offends Section 78 (b) of the Physical and Land Use Planning Act 2019.
16. In the end, the notice of motion dated 25/4/2023 is allowed in terms of prayers 1. However, because the Kiambu County Physical and Land Use Planning Liaison Committee was not operational at the time the petition was filed, there will be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Mr Mungai for the Petitioners

Ms Musyoka for the 1st and 2nd respondent

Court Assistant: Hinga/Osodo

