



**Shah v Gigiri Mart Limited & another (Environment and Land Appeal E032 of 2023) [2023] KEELC 21765 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21765 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E032 OF 2023  
MD MWANGI, J  
NOVEMBER 23, 2023**

**BETWEEN**

**VIMAL SHAH ..... APPELLANT**

**AND**

**GIGIRI MART LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE PLANNING ..... 2<sup>ND</sup> RESPONDENT**

*(In respect of the oral application by the Appellant to prosecute the appeal by way of oral evidence)*

**RULING**

**Background**

1. This ruling is in respect of the oral application by the Appellant to prosecute the appeal by way of oral evidence. The appeal before me is an appeal from the decision of the Nairobi City County Physical and Land Use Planning Liaison Committee dated March 2, 2023. The Appellant filed the appeal by way of a Memorandum of Appeal dated March 31, 2023 raising 3 grounds, namely:
  - i. The preliminary objection subject of the Committee's determination was grounded on fact and not law.
  - ii. The Committee lacked the requisite quorum to hear the matter contrary to the expectation of section 79(2) of the *Physical and Land Use Planning Act* and regulation 45 of the *Physical Land Use and Planning Regulations, 2021*.
  - iii. There is no committee properly constituted in compliance with the Provisions of the *Physical and Land Use Planning Act*.



2. The appellant therefore prays that his appeal be allowed and the decision of the Nairobi City County Physical and Land Use Planning Liaison Committee be set aside and further that it be directed that its Complaint be heard before a properly constituted Committee within 30 days of this Court's decision.
3. When this matter came up for directions on the hearing of the appeal (upon confirmation of the filing of the record of appeal), the Appellant reiterated the request to proceed by way of *viva voce* evidence insisting that the issue of quorum of the Nairobi City County Physical and Land Use Planning Liaison Committee and the correctness of the record are central to the appeal. The Appellant had earlier on filed a Notice of Motion Application dated July 4, 2023 in which he had sought orders, that:
  - a. That Summons be issued to Mr Kihara Njuguna, who sat as the Chairman, and Architect Stephen Mwihu, to appear before the Court for oral examination on the issue of quorum and proceedings of the meeting.
  - b. That the Application be heard *viva voce* to allow a thorough examination of the sensitive issues at hand, particularly the issue of quorum and the integrity of the proceedings.
4. The said application was marked as dispensed with on August 21, 2023 when the Court also gave directions on the filing of the record of the appeal.
5. The request by the Appellant was strenuously opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who insisted that the jurisdiction of this court was limited to matters of Law only and there was no basis for the request by the appellant.
6. The appellant's response was that the issue of quorum of the Liaison Committee was a matter of law.

#### **Issues for Determination:**

7. The issue for determination is whether the Appellant should be allowed to prosecute this appeal by way of *viva voce* evidence and to summon the chairperson and member of the Liaison Committee for oral examination.

#### **Analysis and Determination:**

8. This appeal was placed before this Court for the first time on July 10, 2023 for purposes of consideration of the Appellant's Notice of Motion Application dated July 4, 2023. As I stated earlier, the said application was later marked as dispensed with.

#### **Legal basis for the functions of the Physical and land Use Planning Committee.**

9. The County Physical and Land Use Planning Committee is established under section 76 of the [\*Physical and Land Use Planning Act\*](#) of 2019. The section provides for such a Committee in every County. Its Composition is provided for under section 77 of the Act whereas its functions are stipulated under section 78, namely:
  - a. To hear and determine complaints and claims made in respect of applications submitted to the Planning Authority.
  - b. To hear appeals against decisions made by the Planning Authority with respect to Physical and Land Use Development Plans in the County.
  - c. To advise the county executive members on broad Physical and Land Use Planning Policies, Strategies and Standards; and



- d. To hear appeals with respect to enforcement notices.
10. The Liaison Committee is mandated to determine its own procedure, subject to the Law. The quorum is stipulated as half of the members of the Liaison Committee.
  11. The decision of the Committee is by a majority vote of the members present and voting. In case of a tie, the Chairperson has a casting vote.
  12. Appeals to the Committee are in the prescribed form. The Committee is obligated to hear and determine an appeal within 30 days of the appeal being filed. The Committee is further enjoined under section 80 of the Act to inform the Appellant of its decision within 14 days of making the determination.
  13. The chairperson of the Liaison Committee is required to cause the determination of the Committee to be filed in the Environment and Land Court to be recorded as a judgment of the Court and further to publish the decision in the gazette or at least in one newspaper of nationwide circulation.
  14. Of interest to the matter before me is section 87 of the Act whose provisions require the Committee to maintain a register of each appeal filed, minutes of the meetings of the Committee and the decisions of the Committee. Each of those registers shall be available to the Public for scrutiny and to make copies or take extracts on payment of the prescribed fee. Section 83(5) further requires every Committee to maintain written records of all its proceedings.
  15. Section 72(4) makes provision for an appeal to this court limited to matters of law. This Court is required to hear and determine the appeal within 30 days of the appeal being filed.
  16. Appeals to this Court are governed by section 78 of the [Civil Procedure Act](#) (CPA) and the provisions of order 42 of the [Civil Procedure Rules](#) (CPR). section 16A of the [Environment and Land Court Act](#) too makes provision for appeals to this Court from subordinate courts and local tribunals.
  17. The powers of an appellate court are defined under section 78 of the [Civil Procedure Act](#) as:
    - a. to determine a case finally;
    - b. to remand a case;
    - c. to frame issues and refer them for trial;
    - d. to take additional evidence or to require the evidence to be taken;
    - e. to order a new trial.
  18. The import, from the clear reading of section 78 of the [CPA](#) is that it is only where the appellate Court opts for the taking of additional evidence that *viva voce* hearing of an appeal may be allowed.
  19. Rule 27 of order 42 of the [CPR](#) explains the circumstances under which the appellate Court may allow additional evidence. It is only allowable if the appellate Court requires it, to enable it to pronounce judgment or for any other substantial cause. The Supreme Court of Kenya in the case of [Mohammed Abdi Mohammed vs Ahmed Abdullahi Mohammed and 3 others](#) [2018] eKLR laid down the guidelines on admission of additional evidence before an Appellate Court with a caution that it must be allowed sparingly and with abundant caution.
  20. What the Appellant seeks before this Court is not an opportunity to adduce additional evidence, rather an opportunity to grill the members of the Liaison Committee regarding the quorum during



the hearing that took place before them and on the integrity of the proceedings. This is clearly beyond the provisions of section 78 of the CPA. I find no legal basis for this request.

21. Secondly, it is not in doubt that members of the Liaison Committee were sitting as a ‘Tribunal’ when they made the decision appealed from by the Appellant. In that regard, the *Constitution* considers them part of the system of courts of this country under article 162 of the *Constitution*. They are part of the subordinate courts for purposes of article 169 of the *Constitution*. They therefore, by extension, enjoy the immunity accorded to judicial officers under article 60(5) of the *Constitution* in the lawful performance of their ‘judicial functions’.
22. The objective and rationale of the principle of judicial immunity as stated by the Supreme Court of Kenya in the case of *Bellevue Development Company Ltd -vs- Francis Gikonyo and 3 others* [2020] eKLR, is:

“..... the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts is thus necessary so that judicial officers can make the sometimes controversial decisions that are their judicial obligation and mandate to make; independent of personal considerations, including fear of personal liability.”
23. The Supreme Court cited with approval the pronouncement by the High Court in the case of *Moses Wamalwa Mukamari vs John Makali & another* to the effect that the protection offered to judicial officers in article 60(5) of the *Constitution* is inherent in the independence of the Judiciary as a state organ within the doctrine of separation of powers.
24. The consequences of allowing the summoning of members of a local tribunal to Court any time their decision or quasi-judicial acts are challenged would definitely impact adversely on their independent decision-making capabilities.
25. The concept of judicial immunity is as expounded by the US Supreme Court, in the case of ‘Stump’, also referred to by the Supreme Court in the above cited case is,

“a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vented in him (should) be free to act upon his own convictions, without apprehension of personal consequences to himself.”
26. Therefore, and for the aforesaid reasons, I disallow the request by the Appellant to proceed by way of *viva voce* evidence and to summon the chairperson or any other member of the Liaison Committee for purposes of their oral examination.
27. The appellant, chose to challenge the decision of the Liaison Committee by way of an appeal. He must then operate within the limited scope of an appeal. Unlike a Judicial Review, or a Constitutional Petition, neither oral nor Affidavit evidence is allowable in an appeal.
28. The Court hereby directs that the appeal be canvassed by way of Written Submissions.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**M. D. MWANGI**

**JUDGE**

**In the virtual presence of:**



Ms Ngui holding brief for Mr. Onsare for the Appellant/Applicant

Ms Kwamboka for the 2<sup>nd</sup> Respondent

No appearance for the 1st Respondent

Court Assistant: Yvette.

**M. D. MWANGI**

**JUDGE**

