



**Mac Gardens Limited & another v County Secretary, Nairobi City
County Government & 3 others (Environment & Land Petition
E012 of 2020) [2023] KEELC 22447 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E012 OF 2020**

AA OMOLLO, J

DECEMBER 20, 2023

IN THE MATTER OF: ARTICLE 20(3) & (4), 21(1) & (3), 22(1), 23(1) & (3), 50(1), 159(2) (A) & (E), 162(2) (B) & (3) AND 258 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: INFRINGEMENT AND VIOLATION OF ARTICLES 1(3) & (4), 2(1), (2), & (4), 3(1), 10(1) & (2), 24(1) & (2), 33, 35, 39, 40, 42, 43, 47, 48, 60, 66, 69, 70, 73(2), 184 AND 232(1)(B), (C), (D), (E), (I) & 232(2) OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF SECTIONS 4, 5, 21, 55, 57, 60, 61, AND SCHEDULE 3 OF THE PHYSICAL PLANNING AND LAND USE PLANNING ACT NO. 13 OF 2019 AND IN THE MATTER OF: SECTIONS 4, 13(1), (2), (3) & (7), 18 AND 24 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011 AND IN THE MATTER OF: ILLEGAL CONSTRUCTION OF TEMPORARY SHOPS ON L.R. NO. 3734/407 ON OTHAYA ROAD, KILELESHA AND IN THE MATTER OF CHANGE OF USER OF L.R. NO. 3734/407 ON OTHAYA ROAD, KILELESHA FROM RESIDENTIAL TO RESTAURANT, TEMPORARY SHOPS AND CAR WASH WITHOUT PUBLIC PARTICIPATION

BETWEEN

**MAC GARDENS LIMITED 1ST PETITIONER
BUSY BEE INVESTMENTS LIMITED 2ND PETITIONER**

AND

**THE COUNTY SECRETARY, NAIROBI CITY COUNTY
GOVERNMENT 1ST RESPONDENT
NAIROBI METROPOLITAN SERVICES 2ND RESPONDENT
NEMA 3RD RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT**



JUDGMENT

1. This Petition is dated 17th September, 2020 seeking for:
 - a. A declaration that the 1st Respondent's failure to provide information sought under Article 35(1) on the basis of the Petitioners' request dated 2nd July, 2020 is a violation of the right to access information contrary to Article 35(1) of *the Constitution* of Kenya, 2010.
 - b. A declaration that the ongoing construction on L.R. No. 3734/407 is illegal and constitutes infringement of the right to a clean and healthy environment for the residents of Othaya Road, Kileleshwa contrary to Article 42 & 70 of *the Constitution* of Kenya, 2010.
 - c. An order restraining the Respondents either by themselves or any other person from allowing the constructions on L.R. No. 3734/407 to continue.
 - d. A mandatory order directing the Respondents to exercise their legal mandate to ensure that the developer of L.R. No. 3734/407 restores the land to its previous condition failing which the Petitioners be at liberty to restore the land to its previous condition at the expense of the Respondents.
 - e. This Honourable Court do issue such orders and give such directions as it may deem just and appropriate in the circumstances of this matter.
 - f. The costs of the Petition be awarded to the Petitioners.
2. The Petitioners are comprised of tenants and landlords of properties known as L.R. No. 3734/379 and 3734/378 located on Othaya Road, Kileleshwa. The facts and background of the Petition are that sometime in April, 2020 the 1st Respondent affixed an undated public notice on the property known as 3734/407 on Othaya Road, Kileleshwa (the suit property) communicating an intended change of user for the suit property from residential to a restaurant, temporary shops and carwash. The said notice invited comments and objections to the intended change of user within 14 days. On 21st April, 2020 both the 1st and 2nd Petitioners independently wrote to the Respondents lodging its objections thereto, which letters were received on the same date but no response was given.
3. It is the Petitioners' case that despite this, the construction of the temporary shops started shortly after publication of the undated Notice, despite the Petitioners further writing to the Respondents on 2nd July, 2020 on the illegal construction and objections raised by the Petitioners and other neighbouring entities. In addition, the construction is being done without the necessary permits and approvals from the relevant authorities, or whether they were at all obtained before commencement. The Petitioners aver that the said construction will have a negative impact on the area socially, financially and environmentally and they are already experiencing the adverse effects of the impugned construction even though it is not yet complete. They urge that despite demands to the Respondent to halt the impugned construction and address the objections raised by the Petitioners, nothing has been done.
4. The Petitioners averred that the aforementioned actions are devoid of any legal or constitutional basis resulting in an infringement of their constitutional rights. The Petitioners averred that the Respondents failed to abide by the National Values and Principles of Governance under Article 10(2)(b) in allowing the construction to commence despite the objections raised, without public participation. There is also no site board on the property, which creates a presumption that the construction commenced before the necessary permits and approvals were obtained, and further



- that the project lacks transparency and accountability, and the aforesaid acts are prejudicial to the Petitioners.
5. It is their case that the Respondents infringed on their right to access information under Article 35(1) by failing to respond to their objections in outright disregard thereof, instead they allowed the impugned construction to commence. The Petitioners also alleged a violation of their right to a clean and healthy environment under Article 42 and 70(1), (2) and (3) in terms of capacity of the said construction to properly process the effluence and the building material deposited on the site. In addition, the proposed car wash would affect the Petitioners' right to clean water, and that there was no sufficient sewage system to operate the mandatory public toilet required to be on the construction site.
 6. In addition, the Petitioners alleged that their right to economic and social rights under Article 43(1) was infringed. Some of the key aspects of the right to accessible and adequate housing is good infrastructure as well as security. They averred that the proposed construction would bring increased traffic, congestion, uncontrolled parking and insecurity. The Petitioners also alleged that their rights to public participation under Article 184(1) was breached because the construction was commenced despite objections raised concerning the change of user of the suit property.
 7. The Petitioners claimed that the Respondents had violated various statutory provisions including section 4 and 5 of the *Physical and Land Use Planning Act*, No. 13 of 2019. The Petitioners averred that the principles of physical and land use planning incorporate economic, social and environmental needs of the present and future generations, which the Respondents did not consider in determining the change of user. The Petitioners urged that the court had a mandate to safeguard and enforce the rights of all citizens, and had power to grant remedies to ensure enjoyment of rights.
 8. The Petition was supported by an Affidavit sworn on 14th September, 2020 by Nazmin Karmali the Chairman of the 1st Petitioner's Landlords Management Committee, reiterating all the facts as set out in the Petition. In addition, he deponed that the Petitioners had good reason to believe that the requisite approvals and permits from the relevant institutions and authorities were not obtained before construction on the suit property was commenced. He deponed that the Respondents are abdicating their responsibilities by allowing an unknown persons to continue constructing illegal structures despite being notified by the Petitioners.
 9. In response to the Petition, the Interested Party filed a Replying Affidavit sworn on 8th December, 2022 by its Director, one Charles Nyabuti. He deponed that the Interested Party entered into a Tenancy Agreement dated 21st march, 2020 with the registered proprietors of the suit property with the intention of developing shops and a restaurant. Pursuant to this, a notice was put up by the Nairobi City County Government (the 1st Respondent herein) for change of user of the property from residential to a restaurant, temporary shops and a car wash.
 10. He deponed that he learnt of the letters of objection dated 21st April, 2020 sent by the Petitioners to the 1st Respondent through the pleadings filed. He avers that his intended development is adjacent to several properties used for commercial purposes such as a tours & travel office, Gertrude's clinic, a car wash, a restaurant and a kindergarten.
 11. He averred that a bill of KShs. 121,000 was issued on 2nd June, 2020 with respect to the Interested Party's application No. PPA-AAD-204 for change of user made on 19th May, 2020 which he paid it. That the 2nd Respondent's Planning Department issued form PPA-2 confirming the change of user was approved on 24th June, 2020 subject to specific conditions one being availability of site parking and another being that there would be no loud music/music. The Interested Party claims that it further



obtained development approval from the 2nd Respondent's Planning Department on 30th July, 2020 a signed and stamped copy was annexed.

12. Further, the Interested Party deposed that the 4th Respondent visited the site for inspection on 7th October, 2020 and established that it failed 6 out of 7 compliance checks and issued a suspension notice. That the Interested Party has since resolved the highlighted issue and was issued with a Certificate of Compliance dated 6th April, 2021. They averred that Interested Party complied with Environmental Impact Assessment requirements and was issued with a license for the project on 13th October, 2020. He set out in the Affidavit the measures taken to address the concerns raised in the Petitioners' objections including traffic snarl-ups, parking, security, sewage draining as well as engaging a waste management company to deal with refuse and waste from the property. They added that Interested Party has set its operating hours in consideration of the private residences.
13. The Interested Party stated that the construction works were being done legally, with the requisite permits and approvals from the relevant authorities issued before issuance of the conservatory orders in this suit. Further, that under the doctrine of exhaustion, there are dispute resolution mechanisms that the Petitioners ought to have exhausted before coming to court. That the Petitioners should have complied with the appellate avenues under the relevant Acts such as the County Physical and Land Use Planning Liaison Committee, the National Construction Authority Board, the National Environment Tribunal. Hence having failed to comply with these appellate avenues, the Petitioners had not demonstrated that this Petition falls within the exception of the doctrine of exhaustion.
14. He opposed the contention that the Respondents breached the provisions of Article 35(1), since the letters of 21st April, 2020 only raised grounds of objection and a request for consideration of the said grounds, but did not apply for information under Article 35(1) and Section 8 of the [Access to Information Act](#). That since the said letters were not an application for information, the 1st Respondent could not process the letters and respond within 21 days as required under the Act. He contended that the complaint on access to information ought to have been raised with the Commission on Administrative Justice, which had powers to grant prayer 1. In addition, the lack of a site board is not an indication that the Interested Party had no Environmental Impact Assessment License.
15. Mr. Nyabuti added that sewerage and water supply concerns were to be brought to the attention of the Nairobi City Water and Sewerage Company and/or Athi Water Works Agency, it is their case that the [Water Act](#) has a dispute resolution mechanism under part VI thereof. In addition, issues of increase in traffic are to be raised with the Kenya Police Traffic Department. He deposed that consequently, the Petitioners had not demonstrated the alleged violations of rights and further that the petition is barred by the doctrine of exhaustion. In any event, prayer 2, 3 & 4 of the Petition are overtaken by events as the construction was completed in 2020 after all necessary approvals and permits were obtained.
16. The 1st Respondent filed Grounds of Opposition to the Petition indicating that it would oppose the Petition on grounds that:- the court is barred from adjudicating the matter since a dispute resolution mechanism exists outside the court to resolve the dispute under Section 61(3) and (4) of the [Physical and Land Use Planning Act](#). That the Petitioners did not lodge a complaint or appeal under the said mechanism and instead chose to prosecute the matter in court. Secondly, the Petition thus offends the doctrine of exhaustion and further does not meet the threshold set out in *Anarita Karimi Njeru vs Republic (1976-1980) KLR 1272*. Thirdly, the Petition further offends the doctrine of constitutional avoidance as the dispute can be adjudicated in the above-mentioned forum without necessitating the determination of whether there are rights which have been infringed.



Submissions

17. The parties having taken the court round in circles with regards to the hearing of the Application herein and dangling an alleged consent that never saw the light of day, on 29th September, 2021 court issued a Notice to Show Cause why the Petition should not be dismissed. On 27th November, 2022 court found that no reason had been given why the Petition should stay alive. The court however decided to give the Petitioners one last chance to settle the matter. The parties failed to settle and on 13th July, 2022 the court gave extensive directions on the hearing of the Petition herein and ordered that:
 - a. The Petition be disposed by way of written submissions.
 - b. The Respondents and interested Party who have not responded to the Petition shall do so within 30 days from the date hereof.
 - c. The Petitioner shall be at liberty to file a further affidavit if necessary within 30 days from the date of service together with submissions.
 - d. The Respondents and the Interested Party shall file their submissions within 30 days of service of the Petitioners' Submissions.
 - e. The matter shall be mentioned on 13th December, 2022 for a judgment date.

Petitioners' Submissions

18. Pursuant to the said orders, the Petitioners filed their written submissions dated 23rd November, 2022 reiterating the facts in the Petition. Counsel submitted that Article 10(2) of *the Constitution* lists the national values and principles one of which is participation of the people. One of the Objectives of development control given at Section 55(1)(f) of the *Physical and Land Use Planning Act* is to promote public participation in physical and land use development decision-making. The Act at Section 61(1) (d) provides that the liaison Committee shall take into consideration the comments made by members of the public when considering an application for development, which requirement is coached in mandatory terms (Republic vs Non-Governmental Organization Ex-Parte Linda Bonyo & 4 Others (2020) eKLR). It was submitted that the Respondents were therefore mandated and obligated to hear and consider the Petitioners' objections on the change of user.
19. The Petitioners instead placed an undated notice on the site requiring comments be given within 14 days, yet the Respondents blatantly ignored the objections raised thereon thus denying them a response or an opportunity to be heard. That the Respondent authorised the change of user and impugned construction with full knowledge of the adverse effects it would have on the Petitioners and other residents. Counsel relied on Republic vs County Government of Kiambu ex parte Robert Gakuru (2016) eKLR where it was held that public participation was necessary to give the end product the seal of public approval. Further that the invitation to give comments was made to appear that they complied with the public participation requirement, yet change of user is a legal process requiring compliance with procedure, public participation being one of them. That the entire process is thus marred by illegality and non-conformity to the law, it is illegal, null and void and cannot stand.
20. Counsel submitted that the letter dated 2nd July, 2020 requested for information on the approvals and permits issued to allow the construction but did not receive a response within 21 days as required under the *access to information Act* (Nairobi law Monthly vs Kenya Electricity Generating Company & 2 Others (2013) eKLR). Relying on Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission & Ano. (2016) eKLR, he submitted that the Respondents as public bodies were obligated to under Article 35(1)(a) unconditionally to supply the Petitioners with the information



sought. That the Respondents thus abdicated their obligations by failing to provide information sought by the Petitioners in violation of their right to information.

21. On the issue of right to clean and healthy environment, Counsel submitted that in their objections the Petitioners raised concerns on threats to their right to a clean and healthy environment. This includes concerns on the level of hygiene, improper processing of effluence, the right to clean water, inefficient sewage disposal and effects on water supply, which would hinder their right to clean water. That Article 42 and 70 of *the Constitution* guarantees the right to a clean and healthy environment and the Petitioners need not demonstrate loss or injury as the mere likelihood of infringement is sufficient. He submitted that in failing to allow the petitioners participate in the change of use process, as well as failing to provided documents as requested, the Respondents had clearly infringed on the Petitioners' rights, and he relied on *Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others* (2015) eKLR.
22. Counsel thus urged that the court ought to issue an order directing the Respondents exercise their mandate as provided for under Section 57(3) of the *Physical and Land Use Planning Act*. Further that the developer ought to restore the land to its previous condition or that the Petitioners do it at the Respondents' expense. He further submitted that since the Petitioners had demonstrated violation of their rights by the Respondents, then the court should direct the Respondents to bear the costs of this petition.

Interested party's Submissions

23. The Interested Party's submissions are dated 27th February, 2023 and Counsel also reiterated the facts of their case. Counsel submitted that under the doctrine of Constitutional avoidance, also referred to as the doctrine of exhaustion a court will decline to deal with a matter because there exists another remedy in law that the aggrieved party is yet to utilise, he relied on *Akusala Borniface & Another vs Law Society of Kenya & 12 others; Law Society of Kenya Nairobi Branch (Interested Party)* (2021) eKLR, *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR as well as *William Odhiambo Ramogi & 3 Others vs Attorney-General & 4 Others; Muslim for Human Rights & 2 Others (Interested Parties)* (2020) eKLR). Counsel submitted that the Petitioners could not avoid the review mechanisms provided for under the relevant Acts by alleging violation of constitutional rights.
24. Counsel submitted that the Respondents' failure to respond to the Petitioners' objection is an administrative action under the Fair Administrative Actions Act. That this means they ought to have sought judicial review of the decision and not a constitutional petition, however even this would have required exhaustion of internal remedies first. He submitted further that where the jurisdiction of the Court under *the Constitution* and that of other specialised tribunals under legislation overlap, the Court's jurisdiction is not ousted, but it should exercise restraint and allow the specialized tribunals to do their work. Counsel relied on *Evans Ladtema Muswahili vs Vihiga County Public Service Board & 2others; Marley Ezekiel Ayiego (Interested Party)* (2021) eKLR.
25. It was submitted that the Petition does not raise purely constitutional issues, some belong to other competent tribunals and should have been raised, respectively, before the County Physical and Land Use Planning Committee, the Board of the 4th Respondent and/or the National Environment Management Authority. The Petition has not raised an invaluable constitutional question worthy of consideration. Reliance was placed on *Kapa Oil Refineries vs Kenya Revenue Authority & 2 Others*, *Orange Democratic Movement vs Yusuf Ali Mohamed & 5 others* (2018) eKLR, *Speaker of the National Assembly vs James Njenga Karume* [1992] eKLR.
26. It was further submitted that the Petitioners have failed to prove that there was inadequate or no public participation. The Petitioners provided their views on the change of user process pursuant to a



Public Notice posted on the suit Property. The lack of responses or that the change of user was granted despite the objections does not mean that there was no meaningful public participation or that their views were not considered. The denial of the change of user is not the only outcome that would mean that public participation was done. Further that the Approval of Development Permission was given subject to certain strict conditions that reflect the objections raised by the Petitioners in their letters to the 1st Respondent. The Interested Party submitted that the Petitioners had a duty to prove that public participation was not done and have failed to do so. Counsel was of the opinion that being involved does not mean that one's views must necessarily prevail, or that the views expressed by the public are binding on public entities as long as the views are sought and considered. He relied on *Abe Semi Bvere vs County Assembly of Tana River & another; Speaker of the National Assembly & Another (Interested Parties)* [2021] eKLR.

27. Counsel argued that the internal remedies would have offered timeous relief, however the Orders sought herein have been overtaken by events following issuance of all necessary approvals/permits to the Interested Party, fulfilment of the conditions in the approvals and completion of the construction (*Republic vs National Environment Management Authority Ex parte Sound Equipment Ltd*, (2011) eKLR). He further argued that public interest is not in favour of the grant of the orders sought, that the general public stands to suffer irreparably if it is ordered to restore the property to its previous condition, as this would mean demolition of the temporary shops and disruption in service delivery.

1st Respondent's Submissions

28. The 1st Respondent's submissions are dated 13th June, 2023. Counsel submitted that the dispute arose from failure to consider the Petitioners' objections thus the first recourse should have been the Physical Planning and Control Board. That in any event, the alleged inaction did not occasion any infringement of constitutional rights (*Anthony Mwangi Ngigge t/a Tiindah Online Shop vs Safaricom Shop Limited* (2021) eKLR). Further that the doctrine of Constitutional avoidance is applicable in this case as the case can be decided as a civil matter without considering the alleged constitutional issues, he relied on *Communications Commission of Kenya & 5 Others vs Royal Media Services & 5 Others*.
29. On whether the Petition was properly before this court, the 1st Respondent submitted that for failure to exhaust internal remedies in addressing their grievances, the Petition herein offends the doctrine of exhaustion and constitutional avoidance. In support of this submission, the 1st Respondent relied on *Geoffrey Muthinja & Another vs Samuel Muguna Henry & 176 Others* (2015) eKLR. Counsel submitted that the Petitioners have not demonstrated any attempt to redress their grievances under the dispute resolution mechanism under Section 61(3) and (4) of the [*Physical and Land Use Planning Act*](#), thus the Petition is premature.
30. The 1st Respondent's counsel also argued that the Petitioners are not entitled to the reliefs sought. Further that the Interested Party was issued with the relevant development approvals and permits and completed the Development, which is now occupied by various businesses; hence the orders are not enforceable as they have been overtaken by events. He relied on *KalyaSoi Farmers Cooperative Society vs Paul Kirui & Another* (2013) eKLR where it was held that courts will not make orders which cannot be enforced.



Analysis and Determination

31. Having carefully considered the Petition, the Affidavits filed in support of and against the it and the Parties' submissions as well as authorities relied on, this court is of the view that the issues that rise for determination are:
- i. Whether the Petition offends the doctrine on constitutional avoidance/exhaustion?
 - ii. Whether the Petition is properly before court?
 - iii. Whether the Respondents violated the Petitioners' right to access information?
 - iv. Whether the Petitioners' right to a clean and healthy environment was violated?
 - v. Whether the construction commenced without prior approvals and/or permits and licences can stand?
32. The Respondents claim that the Petition is not merited for reason that it offends the doctrine of constitutional avoidance also referred to as the doctrine of exhaustion. Under the doctrine of Constitutional avoidance, courts will not normally consider a constitutional question unless the existence of a remedy depends upon it. This means that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine the question of breach of Rights.
33. With regards to the doctrine of Constitutional avoidance, the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR observed thus: -
- “(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed’.”
34. The Black's Law Dictionary 9th Edition at page 654 says this about the doctrine of exhaustion as:
- “Exhaustion of remedies: the doctrine that if an administrative remedy is provided by a statute a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the court and administrative agencies to ensure that courts will not be burdened by cases in which judicial relief is unnecessary.”



35. In the case of Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, [2011] eKLR, again the Court of Appeal observed that: -

“Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it”

36. From a reading of the Respondents’ submissions, there are 6 avenues listed through which the Petitioners were supposed to run their grievances through. One of such avenues is the dispute mechanism under the *Physical and Land Use Planning Act*. That the Petitioners ought to have approached the County Physical and Land Use Planning Liaison Committee established under Section 76 of the Act whose functions are set out at Section 78 thereof.

37. The Respondents also listed the National Environment Tribunal under the Environment Management and Coordination Act, the Commission on Administrative Justice, the Kenya Police Traffic Department as well as the National Construction Appeals Board established at Section 27 of the *National Construction Authority Act*. The Respondents have also mentioned the Tribunal established under Section 119 of the *Water Act* with regards to concerns over the water supply. There is no question that any of the mechanisms listed herein could have been approached to deliberate on the Petitioners’ grievances before approaching Courts.

38. The Court would 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. In Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR making reference to the R. vs Independent Electoral and Boundaries Commission (supra) set out elaborately the exceptions to the doctrine of exhaustion. The Court stated as follows: -

61. 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.

39. If the Petitioners were to approach all these bodies it would mean that they would have to institute a multiplicity of appeals and/or claims for determination, and there would be a danger of them issuing conflicting decisions over the same subject matter. Moreover, there is no known procedure for these quasi-judicial bodies to work together or synchronise their operations even where it is clear that two parallel appeals have been filed over the same transaction, which then means that it would be impossible to balance the outcomes therefrom to ensure a uniform and just outcome.

40. Suffice it to say that the filing of multiple claims also is contrary to the Overriding Objectives at Section 1A(1) and 1B(c) & (d) of the *Civil Procedure Act*, which aim at facilitating resolution of the disputes



at a cost affordable to the parties as well as the efficient use of the available judicial and administrative resources.

41. Under Article 22, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23 (1) of the Constitution gives the High Court jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 162(2) thereof empowered the constitution to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. It is pursuant to this provision that this Court was established under the Environment and Land Court Act, No. 19 of 2011, which at Section 13(3) provides that:-

“Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

42. The Petitioners also accused the Respondents of abdicating their constitutional and/or statutory mandates. They have therefore set out the alleged grievances as well as alleged injuries which have been linked to particular provisions of the Constitution. They have explained the manner in which their rights are purported to have been violated. The Petitioners therefore have a solid claim that needs to be interrogated using the tools for determining constitutional disputes.
43. The Access to Information Act at Section 4 provides that subject to the provisions of the Act and any other written law, every citizen has the right of access to information. The right to access information is not affected by any reason the person gives for seeking access or the public entity's belief as to what are the person's reasons for seeking access. Additionally, access to information held by a public entity or a private body is to be provided expeditiously at a reasonable cost.
44. Under Section 5 public entities are mandated to facilitate access to the information it holds which information may include at Section 5(1)(c) & (d):-

“(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles;

(d) provide to any person the reasons for any decision taken by it in relation to that person;”

45. Section 9 provides for the time limit for responding to a request for information. This court has seen the two letters dated 21st April, 2020 by the Petitioners, and indeed there was no request for information in



them. However, the second last paragraph of the letter dated 2nd July 2020 written by the Petitioners' advocates to the 1st, 2nd and 3rd Respondents read:-

“On behalf of our client, we are asking your esteemed offices to furnish us with the approvals and permits, if any, that were issued to allow the construction. Further, we request a response to the objection letter sent with respect to the Change of User.”

46. This was certainly a request for information, and the Respondent have not denied that they did not provide the information sought, even though both the Respondents and the Interested Party deposed that the said permits and approvals were issued. Going by the timelines provided under the Act, the information should have been provided by latest 23rd of July, 2020 yet to date, there is no indication they were supplied. For this reason, prayer 1 of the Petition is merited.
47. The petitioners referred the court to the provisions of Article 42 of *the Constitution* of Kenya, 2010 which provides that every person has the right to a clean and healthy environment.
48. Under Article 2(5) and (6) of *the Constitution*, the general rules of international law as well as treaties or conventions ratified by Kenya form part of the law of Kenya. In that regard, in Communication No. 155/96: The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria the African Commission on Human and People's Rights stated as follows:

“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, ‘an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health’. The right to a general satisfactory environment, as guaranteed under Article 24 of the Africa Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources...”
49. Article 69(1) of *the Constitution* imposes on both the State and every person a duty to protect the environment for the benefit of present and future generations. Among other things, this requires that the state ensures sustainable use of the environment and to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under Article 69(2) every person (be they natural, juridical, association or other group of persons whether incorporated or not) has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
50. Under Article 70 (3), it is not necessary for one to demonstrate that they have suffered loss or injury, for them to move the court when claiming that the right to a clean and healthy environment has been violated or is under threat of violation. The Petitioners therefore were not required to show that they had personally suffered or that the presence of the impugned development had directly caused them any harm. It is sufficient for the petitioners to point out, that there is an ongoing or imminent threat of harm, to the environment.
51. To this end, the Petitioners averred that the impugned development was not equipped with the proper mechanisms to handle waste and/or effluence therefrom. It needs no science to discern that a car



wash would be emitting a significant volume of waste water. Section 74 of the EMCA provides that every owner of a trade or industrial undertaking must ensure that effluents are discharged only into a sewerage system. At Section 74(2), the owner of a trade or an industrial undertaking is required, prior to being granted a licence to discharge effluents into the environment, to install an appropriate plant for the treatment of such effluents before they are discharged into the environment. Although the Interested Party has averred that it obtained approval to open a highway for purposes of a sewer connection from the Nairobi Metropolitan Services, there is no proof that this was actually done. It is not clear therefore, how NEMA sued as the 3rd Respondent herein, went ahead and granted the EIA Licence before this issue was resolved to the satisfaction of the parties.

52. The legal regime for the issuance of EIA Licenses is anchored in *the Constitution* of Kenya under Article 69(1) (f) which requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. Section 58 (1) of the Environment Management and Coordination Act provides as follows:

“Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.”

53. In addition, Regulation 4 of the Environment (Impact Assessment and Audit) Regulations, 2003 provides that:-

“No proponent shall implement a project -

- a. likely to have a negative environmental impact; or
- b. for which an environmental impact assessment is required under the Act or these Regulations; unless an environmental impact assessment has been concluded and approved in accordance with these Regulations.”

54. This court is also guided by Regulation 7(1) of the Environmental (Impact Assessment & Audit) Regulations, which provides that:-

“Every proponent undertaking a project specified in the Second Schedule of the Act as being a low risk project or a medium risk project, shall submit to the Authority a summary project report of the likely environmental effect of the project.”

55. Thus, it is a statutory requirement that the EIA License was to be obtained before the construction project commenced. The Environment Impact Assessment License issued for the impugned project is however dated 13th October, 2020 way after the impugned construction had been commenced. Instead of taking action against the blatant violation of the law by the Interested Party, such as compliance with public participation, the 3rd Respondent sanctioned the project through issuance of the Licence.

56. As for prayers 4 and 5 of the Petition, what is also clear is that this Petition was filed on 18th September, 2020 and as indicated in the photographs annexed to its supporting affidavit, the construction was already ongoing. The Environment Impact Assessment License was issued for the project on 13th October, 2020 way after the impugned construction had been commenced. The initial letters of



objection were written in April, 2020 and 2nd July, 2020 which noted with concern that construction had already commenced. The notice of approval from the [Physical and Land Use Planning Act](#) however is dated 17th July, 2020.

57. Further in its Replying Affidavit to the application, sworn on 16th October, 2020 the 4th Respondent admits that when they visited the suit property on 7th October, 2020 they found that the site was not fully compliant and they issued a suspension notice. A report on the visit was prepared dated 9th October, 2020 indicating that works on the site was suspended until full compliance. Further, the Certificate of Compliance from the National Construction Authority annexed to the Interested Parties' Affidavit of 8th December, 2022 is dated 16th April, 2021. All these demonstrates that at the time the petitioners lodged their complaint and the subsequent petition, there were no requisite licenses, obtained for the Interested Parties Project/development.
58. Despite the existence of temporary conservatory orders, the Respondents as well as the Interested parties have indicated that the construction is complete. From the Photographs annexed to the Petitioners' Supporting Affidavit, it was clear that the construction on the suit property had not been completed at the time of filing of the Petition. This cannot have been achieved by the time the conservatory order suspending construction was issued. Completion despite the existence of the order was done in direct violation of the conservatory orders issued herein on 19th October, 2020 and amounts to contempt of court.
59. The Respondent's having failed to perform their statutory mandates with respect to the impugned development, it is now upto the court to issue orders that shall safeguard and protect the Petitioners' rights and the rights of the environment. The Court is entitled under Section 111 of the Environmental Management and Coordination Act) to issue an environmental restoration, and it provides that:
- “(1) Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.
- (2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this under this section to show that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed.”
60. Consequently, the construction is illegal null and void for reason that it was commenced without the requisite permits and/or approval, and it matters not that they were issued at a later date. To this end, Interested Party cannot undertake business on the impugned site until it has demonstrated to the satisfaction of the Petitioners and this court that it has taken to ensure a clean that the environment in that area is protected and preserved clean.
61. In light of the foregoing, I find merit in the petition and make the following orders:-
- a. A declaration be and is hereby issued that the 1st Respondent's failure to provide information sought under Article 35(1) of [the constitution](#) on the basis of the Petitioners' request dated 2nd July, 2020 was a violation of their right to access information.
- b. A declaration be and is hereby issued that the construction on L.R. No. 3734/407 was undertaken without compliance with the applicable law and Regulations, in particular the process of acquiring the necessary approvals was in malafides.



- c. A mandatory order be and is hereby issued directing the 1st and 3rd Respondents to exercise their legal mandate by inspecting the development put up on L.R No. 2734/407 by the Interested Party to ensure that it has complied with all the conditions contained in the licences issued and and in particular to ensure the surrounding environment is in good order. They shall file their distinct reports of such finding to the court within 60 days of this judgment.
- d. The court shall make further orders on restorations if need be upon receipt of the said reports.
- e. The costs of the petition awarded to be paid by the 1st Respondent and the Interested Party.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

A. OMOLLO

JUDGE

