



**Ustawi Limited v Municipal Manager, Kapsabet Municipality & 4 others (Environment and Land
Judicial Review Case E001 of 2023) [2023] KEELC 22160 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023
MN MWANYALE, J
DECEMBER 14, 2023**

BETWEEN

USTAWI LIMITED EXPARTE APPLICANT

AND

MUNICIPAL MANAGER, KAPSABET MUNICIPALITY 1ST RESPONDENT

COUNTY PHYSICAL PLANNER, NANDI 2ND RESPONDENT

COUNTY GOVERNMENT OF NANDI 3RD RESPONDENT

THE COUNTY ATTORNEY, NANDI 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection filed by the 1st to 4th respondents through their Counsel Mr Kogo. The grounds of the Preliminary Objection being that;
 - i the Court lacks jurisdiction to entertain the Judicial Review application in the first instance.
 - ii that the Courts lacks jurisdiction to hear and determine the Judicial Review application as the *ex-parte* applicant has failed to exhaust the available dispute resolution mechanism established under section 61(3) and (4) of the [Physical and Land Use Planning Act \[2019\]](#).
 - iii that the honourable Court lacks jurisdiction to hear and determine this Judicial Review application to hear and determine this Judicial Review application since the same was violated provisions of section 9 (2) of the [Fair Administrative Actions Act](#).
2. On its part the 5th respondent filed grounds of opposition to the Judicial Review Application.



3. In view of the fact that there is a preliminary objection, the Court directed parties to canvass the said Preliminary Objection, *vide* Written Submissions, and oral highlighting of the same.
4. The 5th respondent did not file Submissions but during the oral highlighting associated with the Submissions of the 1st to 4th respondents.

1st to 4th Respondents Submissions:

5. The 1st to 4th respondent in their submission in support of the Notice of Preliminary Objection, frames two issues of determination and submitted on the same.
 - i whether the preliminary objection raises a pure point of law capable of being determined without calling evidence.
 - ii whether the Court lacks jurisdiction to hear and determine the application.
6. In support of issues number 1 submit that under the provisions of 61(3) and (4) of the [Physical and Land Use Planning Act](#), County Physical and Land Use Planning Liaison Committee is established so as to hear an appeal from applicant or an interested party that is aggrieved by a decision of a county executive committee member regarding an application for development permission. While section 61 (4) provides appeal from the decision of the County Liaison Committee to the Environment and Land Court on matters of law only.
7. The 1st to 4th respondents submit that under section 9 (2) of the [Fair Administration Act](#), prohibits the Environment and Land Court from conducting a review in an administrative action unless the internal mechanisms for Appeal or review are first exhausted.
8. The 1st to 4th respondent place reliance on the decision in the case of [Hassan Ali Jobo v Suleiman Shabbal](#) on the definition of a preliminary objection.
9. On the 2nd issue as to whether the Court has jurisdiction to hear the Judicial Review, the 1st to 4th respondents submit that the jurisdiction of the Environment and Land Court is conferred on appeals only from the County Liaison Committee and place reliance on section 78 of the [PPLUA](#) as well as the decision in Republic vs National Environmental Authority, [Geoffrey Muthinja Kabiru and 2 others, Samuel Munga Henry and 175](#) (eKLR).
10. Ms Odeyo Learned Counsel for the 5th respondent equally submits that under section 61 (3) and (4) has an inbuilt dispute resolution mechanism, which provides the Environment and Land Court an appellate jurisdiction.
11. Thus since there is a clear procedure for dispute resolution the same must be strictly followed and she places reliance on the decision of [Speaker of National Assembly vs Njenga Karume](#) as well as [Samson Chembe Vuko v Nelson Kilumo & 2 others](#).
12. In opposition, Mr Nyekwei, submits that the Preliminary Objection does not raise pure point of law, as it needs ascertainment of facts, including whether the public officer who made the decision acted *ultra-vires*, that an appeal on ownership could not go to the Liaison Committee.
13. The ex-parte applicants Advocate Mr Nyekwei submits that the Court has to be ascertain some correspondences thus establish some facts before which cannot be done at a preliminary stage.
14. The ex-parte applicant submitted that his case was an exception to section 9 (2) of the [Fair Administrative Action](#) and should be dealt with under section 14 (2) of the [Fair Administrative Action](#) which is by way of order 53 and that he is properly before Court.



15. The cardinal prayer is not on ownership and it is manner in which the 2nd respondent dealt with an application for fencing permit.
16. The *ex-parte* applicant submits that there is no proof that the Liaison Committee exists, and distinguished the authorities cited in by the respondents.
17. In a rejoinder Ms. Odeyo for the 5th respondent submits that the Preliminary Objection raises pure points of law on the *ex-parte* applicants failure to invoke the internal dispute resolution; that the Court has only Appellate jurisdiction.
18. While Mr Kogo learned counsel for 1st to 4th respondents in his joinder submits that the County Director of Physical Planning has under section 20 (i) authority to issue development permits which have been defined under section 2 (a) and (b) and that order 53 restricts the Judicial Review to the 3 realms.
19. Upon conclusion of the submission the Court reserved the ruling on the Preliminary Objection and the rival submissions and the Court frames two issues for determination;
 - i) whether as drafted the Preliminary Objection meets the threshold of a Preliminary Objection
 - ii) whether the grounds in supports of the preliminary objection are merited
20. A Preliminary Objection was defined in the case of *Mukisa Biscuit Manufacturer Limited v West End Distributors*,

“so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded or which arises clear implications out of pleadings and which if argued as a preliminary objection is in the nature of what used to be a demurer.....it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of Judicial discretion.”
21. In *Omondi v National Bank of Kenya Limited & 2 others* which decision was quoted in *J. N. & 5 others vs Board of Management of St. G. School Nairobi & another* where the Court observed,

“a preliminary objection consists of a point of law, which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit, where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from actual information which stands to be tested by normal rules of evidence.”
22. Both Mr Kogo and Ms. Odeyo have submitted that the Preliminary Objection herein raises pure points of law. Mr Nyekwei for the *ex-parte* applicant has submitted that the Court has to ascertain certain facts including going through the correspondences so as to establish whether the public officer acted *ultra- vires* or not.
23. The Court agrees that at this stage it needs to ascertain certain facts, including whether the public officer who made the impugned decision *ultravires*, which makes the Preliminary Objection not met the threshold of a Preliminary Objection in view of the decision cited above.
24. The Court notes that the Preliminary Objection has raised issues of existences of an internal dispute mechanism as well as jurisdiction of this Court which issues shall be dealt with as grounds of opposition



to the Judicial Review which the 5th respondent has actually raised the same in its grounds of opposition. Hence the merits or otherwise of the grounds raised in the Preliminary Objection shall be addressed at this point but shall not be addressed together in the substantive hearing of the Judicial Review application.

25. Since the Preliminary Objection needs ascertainment of facts the same is disallowed with costs in the cause.

RULING, DELIVERED AND DATED AT KAPSABET THIS 14TH DAY OF DECEMBER, 2023.

Hon. M. N. MWANYALE,

JUDGE.

In the presence of;

- 1. Mr. Nyekwei for Ex-parte Applicant**
- 2. Ms. Odeyo for the 5th Respondent**
- 3. Mr. Kogo for 1st to 4th Respondent**

