



Kings Millennium Management Ltd v OI, Benson Njoroge, Wycliff Mirina & Inviolata Nyakundi (Being sued on behalf of members of the Imara Daima Youthago & others (Being sued on behalf of members of the Imara Daima Youth Hustlers Shopping Centre) & 2 others (Constitutional Petition E007 of 2023) [2023] KEELC 22491 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CONSTITUTIONAL PETITION E007 OF 2023**

**JO MBOYA, J
DECEMBER 13, 2023**

BETWEEN

KINGS MILLENNIUM MANAGEMENT LTD PETITIONER

AND

**GEORGE OLAGO, BENSON NJOROGE, WYCLIFF MIRINA & INVOLATA
NYAKUNDI (BEING SUED ON BEHALF OF MEMBERS OF THE IMARA
DAIMA YOUTH HUSTLERS SHOPPING CENTRE) 1ST RESPONDENT**

KENYA URBAN ROADS AUTHORITY 2ND RESPONDENT

THE NAIROBI CITY COUNTY 3RD RESPONDENT

RULING

Introduction and Background

1. The Petitioner herein has approached the Honourable court vide Petition dated the 10th August 2023; and wherein same has sought for the following reliefs; [verbatim]:
 - i. A declaratory order do issue to the effect that the 1st Respondent structures and all structures erected along the road reserve along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Roads are illegal having been constructed without the requisite permits and approvals under the *Kenya Roads Act*, 2007; and the *Physical Planning & Land Use Act*, 2019.
 - ii. A declaratory order do issue to the effect that the Petitioners right to a clean, healthy and safe environment as well as the right to reasonable standards of sanitation continues to be violated by the erection of illegal permanent structures on the drainage system and sewer line along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Road.



- iii. An order compelling the 2nd and 3rd Respondents to demolish all the illegal structures developed on the road reserve along along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Road.
 - iv. Permanent injunctive order against from the Respondents from issuing Business permits to any member of the Public intending to conduct a business on the road reserve or the pedestrian walkway along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Road.
 - v. Permanent injunctive order against the members of the 1st Respondent or any other member of the public from erecting, developing or putting up any illegal structure on the road reserve or the pedestrian walkway along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Road.
 - vi. This Honorable Court be pleased to issue such other or further orders as it may deem just and expedient for the ends of Justice.
2. Contemporaneous with the Petition, the Petitioner herein filed an Application for conservatory orders seeking a plethora of reliefs, which substantially mirror the reliefs sought at the foot of the Petition.
 3. Nevertheless, despite having been served with (sic) the Petition and the Application beforehand, the Respondents herein have neither entered appearance nor filed any pleadings in response to the Petition.
 4. Be that as it may, when the instant matter came up for mention on the 20th November 2023, the court discerned aspects of the Petition that appear to touch on and/or concern the mandate of the County Government of Nairobi, which is the Planning authority charged and chargeable with the issues of Planning and issuance of Development approvals.
 5. On the other hand, it also transpired that there appears to be another suit, which was filed in the Chief Magistrate's Court by members of the 1st Respondent and wherein same had sued the City County Government of Nairobi, on matters pertaining to, inter-alia, the illegal structures erected on the Road reserve, which also anchors the subject suit.
 6. Arising from the foregoing, the Honourable court sought to be addressed substantively on the question of the Doctrine of exhaustion and *Res-sub-judice*, given that there is a likelihood that the issues beforehand ought to have been canvassed elsewhere, before the invocation of the Jurisdiction of the court.
 7. Pursuant to and in compliance with the directions of the Honourable court, Learned counsel for the Petitioner proceeded to and filed written submissions dated the 4th December 2023; and wherein same has addressed the twin issues touching on the doctrine of Exhaustion and *Res-sub-judice*.
 8. Suffice it to point out that the submissions under reference forms part of the record of the court.

Parties' Submissions:

a. Petitioner's Submissions:

9. Learned counsel for the Petitioner has filed written submissions dated the 4th December 2023; and in respect of which same has raised, highlighted and amplified two [2] salient issues for consideration by the Honourable court.
10. Firstly, Learned counsel for the Petitioner has submitted that the issues complained of at the foot of the current Petition touch on and concern the erection of illegal structures on the Road reserve and the walkway along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Road, which have thereby hindered and/or restricted the free movements along the named/designated roads.



11. Furthermore, Learned counsel for the Petitioner has also submitted that owing to the illegal structures, which have been erected by members of the 1st Respondent, with the connivance of the 2nd and 3rd Respondents, the Petitioner herein and the members of the Estate being managed by the Petitioner, have been subjected to various instances of sewerage blockage and flooding, caused by the illegal structures undertaken by members of the 1st Respondent on the Road reserve, wherein the sewerage line passes through.
12. Furthermore, Learned counsel has contended that the Petitioner herein has raised the issue of the illegal structures on the Road reserve with both the 2nd and 3rd Respondents, but it appears that the 2nd and 3rd Respondents, are neither keen nor willing to intervene.
13. Consequently and in the premise, Learned counsel for the Petitioner has submitted that the issues in dispute squarely falls within the Jurisdiction of this Honourable court and not otherwise. In any event, Learned counsel for the Petitioner has submitted that previous efforts to persuade the 2nd and 3rd Respondents to act in accordance with their mandate has not birthed any fruit.
14. In a nutshell, Learned counsel has therefore submitted that the Doctrine of exhaustion does not therefore apply in respect of the instant matter and thus the Honorable court ought to assume Jurisdiction and proceed with the hearing and effective disposal of the Petition .
15. Secondly, Learned counsel has submitted that though there is in existence another suit namely, Milimani CMELC No. E046 of 2023, the said suit has been filed by members of the 1st Respondent as against the Nairobi City County and Honourable Evans Nyangicha.
16. Furthermore, Learned counsel has pointed out that the Petitioner herein is not a Party to the said suit or at all. Nevertheless, Learned counsel added that given the interests of the Petitioner herein in respect of the subject matter, same (Petitioner) made an Application to be joined in the said suit as an Interested Party.
17. Be that as it may, Learned counsel for the Petitioner has submitted that the Application that was mounted by the Petitioner to be joined as an Interested Party in Milimani CMELC No. E046 of 2023, has neither been heard nor determined to date.
18. Owing to the foregoing, Learned counsel for the Petitioner has therefore submitted that effectively, the Petitioner herein is not a Party to the existing suit, namely, Milimani CMCELN No. E046 of 2023 or at all.
19. Further and in any event, Learned counsel for the Petitioner has also contended that to the extent that the Petitioner is not a Party to the existing suit, the Doctrine of *Res-sub-judice* and by extension the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya; do therefore apply to the instant matter.
20. In support of the submissions touching on and/or concerning the relevance of the Doctrine of *Res-sub-judice*, Learned counsel for the Petitioner has cited and relied on the decision in the case of [Kenya National Commission on Human Rights v The Attorney General; IEBC & 16 others \(Interested Parties\)](#) (2020)eKLR.
21. Based on the foregoing submissions, Learned counsel for the Petitioner has therefore invited the Honourable court to find and hold that the Petition is properly before the court and same be heard and disposed of on merit.



Issues For Determination:

22. Having reviewed the Petition dated the 10th August 2023, as well as the supporting affidavit thereto and upon taking into account the elaborate submissions filed on behalf of the Petitioner herein, the following issues do emerge and are thus worthy of determination;
 - i. Whether the Honorable court ought to assume and exercise Jurisdiction over and in respect of the claims at the foot of the subject Petition.
 - ii. Whether the subject Petition is barred and/or prohibited by the doctrine of Res-sub-judice or otherwise.

Analysis And Determination

Issue Number 1

Whether the honorable court ought to assume and exercise jurisdiction over and in respect of the claims at the foot of the subject Petition.

23. The Petitioner herein contends that same is the management company managing an Estate known as Kings Millennium Estate Ltd, comprising of many residents. Besides, the Petitioner contend that her residents access the Estate from Mombasa Road, along Moses Tanui Road, off Tecla Lorupe/Catherine Ndereba Road.
24. Nevertheless, the Petitioner has also contended that members of the 1st Respondent herein have since encroached onto the Road reserve which comprises of the sewerage lines serving the area and thereafter erected various structures thereon.
25. In this respect, the Petitioner has averred that the actions of erecting the illegal structures on the Road reserve which comprises of sewerage lines has culminated into the frequent blockage of the sewer line, thus occasioning a backflow into the Petitioner's Estate.
26. Other than the foregoing, the Petitioner has contended that as a result of the illegal encroachment onto the Road reserve, the storm discharge system, meant to facilitate the discharge of storm water, has been blocked and thereby leading to overflow and flooding of the neighboring area, including the Petitioner's Estate.
27. Additionally, the Petitioner herein has also contended that the illegal structures that have been erected by members of the 1st Respondent have also blocked the walkways and have thus necessitated the pedestrian to walk on the main road, which exposes same to various risks, inter-alia, accidents.
28. Be that as it may, the Petitioner has contended that their efforts to address the issues beforehand with both the 2nd and 3rd Respondents have borne no fruits and hence same have found it fit and appropriate to approach the Jurisdiction of the court towards and with a view to vindicating her rights to a Clean and Healthy Environment, as espoused *vide* Article 42 of the [Constitution](#) 2010.
29. Having enumerated the nature of the complaints and grievances raised by and on behalf of the Petitioner, I beg to state that the issues beforehand ought and should have been addressed by the Nairobi City County Government, which is the Planning authority by invoking and applying, inter-alia, the Provisions of Section 80 of the [Physical and Land Use Planning Act](#), 2019.
30. Simply put, the 3rd Respondent herein ought to have discerned whether the structures complained of, attracted Development approvals; and if not, to issue and serve the requisite Enforcement notice.



31. Nevertheless, the Petitioner has contended that despite raising the issue with the 3rd Respondent, same [3rd Respondent], has remained mute and thereby left the illegal structures to flourish, to the detriment of the Petitioner, and by extension, the Members of the Petitioner's Estate.
32. Arising from the foregoing, what comes to the fore is that the invocation and application of the alternative dispute resolution mechanism, which anchors the Doctrine of Exhaustion, has been invoked, but to no avail.
33. Owing to the foregoing, it is therefore the considered opinion of the Honourable court that despite the existence of the alternative mechanism to address the grievances beforehand, the said existing mechanism as it stands, is [sic] inappropriate and less effective.
34. Consequently and in this regard, it behooves the Honourable court to assume Jurisdiction and to entertain the subject dispute in accordance with the provisions of Section 3(3) of the *Environment Management and Coordination Act*, 1999; and Section 13(2) and (7) of The *Environment And Land Court Act*, 2011.
35. Pertinently, I therefore come to the conclusion that this Honorable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the dispute, insofar as the Doctrine of Exhaustion is neither efficacious nor effective, to remedy the grievances beforehand.
36. Further and in any event, the issues alluded to at the foot of the Petition also fit within the known and statutory exemptions to the Doctrine of Exhaustion and hence the provisions of Article 70 of the *Constitution*, 2010; suffice.
37. To this end, it is appropriate to adopt and reiterate the holding in the case of *William Odhiambo Ramogi & 2 others versus Attorney General & 6 others* [2018] eKLR, where the court held as hereunder;
 30. In the IEBC Case (*Supra*), the Court, after extensive analysis of case law, announced the outer limits of the doctrine of exhaustion. First, the Court held that the doctrine does not apply where its effect would be to defeat important constitutional values especially when the party seeking to approach the Court has pleaded issues verging on constitutional interpretation. The Court stated the exception thus:
 46. As the Court of Appeal acknowledged in the *Shikara Limited Case*, 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.
 47. 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. ...
 31. Second, the Court held that the doctrine of exhaustion does not apply where the party seeking the Court's intervention does not have audience before the alternative forum created by statute:
 50. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, 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. This situation arises where, as here, the right to approach the statutory forum created (in



this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.

Issue Number 2

Whether the subject Petition is barred and/or prohibited by the doctrine of Res-sub-judice or otherwise.

38. As concerns whether or not the Doctrine of *Res-sub-judice* applies to and affect the instant Petition, this court has had occasion to examine and consider the pleadings filed *vide* Milimani CMELC No. E046 of 2023.
39. Having examined the said proceedings, I have come to the conclusion that the Petitioner herein is not a Party thereto and thus same was at liberty to file and/or commence the instant Petition towards vindicating her constitutional rights to a Clean and Healthy Environment. [See the Provisions of Article 42 of the *Constitution*. 2010]
40. On the other hand, there is also no gainsaying that even though the Petitioner have sought to be joined as an Interested Party in the suit pending before the Chief Magistrate’s court, there is no gainsaying that the Petitioner is yet to be admitted and hence same is not a Party thereto.
41. Nevertheless, it is also not lost on this Honourable court that even if the Petitioner was to be admitted in the suit pending before the Chief Magistrate court as an Interested Party, which has not accrued, same will still not be at liberty to ventilate her grievances in the said suit, given the limited scope available to an Interested Party. [See the dictum in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR, para 32,37 and 42, thereof] See also *Communications Commission of Kenya and others versus Royal Media Services and 7 others*[2014]eKLR, para 12 thereof]
42. Finally, I have also come to the conclusion that the ingredients that underpin the invocation and application of the Doctrine of *Res-sub-judice*, are not available in respect of the instant matter.
43. Suffice it to point out, that insofar as the Petitioner herein is not Party to the suit in the Chief Magistrate’s court, then it cannot be said that there is a similar suit raising substantially and directly the same issues like the ones pending (sic) at the foot of the Instant Petition or at all.
44. As pertains to the ingredients that must be established and proven before the invocation and application of the Doctrine of Res-sub-judice, it suffices to adopt and highlight the holding of the Supreme Court of Kenya in the case of *Kenya National Commission on Human Rights vs The Attorney General; IEBC & 16 others (Interested Parties)* (2020)eKLR, where the court stated and held thus;
 - (67) The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending



before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

45. Owing to the foregoing, it is therefore evident and apparent that the subject Petition does not therefore fall within the parameters and/or purview envisaged vide the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya; which underpins the Doctrine of Res Sub-judice.

Final Disposition:

46. Having appraised and considered the twin issues which had hitherto been highlighted, it is evident and apparent that the dispute beforehand squarely falls within the Jurisdiction of the Honourable court and hence the court ought to assume Jurisdiction and venture forward and adjudicate upon the grievances raised.
47. Consequently and in the premises, I accept the submissions by and on behalf of the Petitioner and hereby decree that the Petition shall proceed for hearing and determination before the Honorable court and not otherwise.
48. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Katana for the Petitioner.

N/A for the 1st, 2nd and 3rd Respondents.

