



Munyua & others v Murigi & another (Environment and Planning Petition E003 of 2023) [2023] KEELC 22534 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E003 OF 2023**

AA OMOLLO, J

DECEMBER 7, 2023

BETWEEN

KENNEDY KARIUKI MUNYUA & OTHERS PETITIONER

AND

FRANCIS MURIGI 1ST RESPONDENT

NEMA 2ND RESPONDENT

RULING

1. The 1st and 2nd Respondents have each taken out a preliminary objection against the application and the Petition dated 22nd September 2023 and 9th November 2023 respectively. They both plead that this Court lacks jurisdiction to entertain the application and the Petition as lodged by the Petitioners.
2. The parties submitted orally in support of and against the preliminary objection as summarised hereunder. Mr Kibet, learned counsel for the 1st Respondent submitted that this Court lacks jurisdiction under the provisions of section 78(b) of PLUPA. That the development approved was proposed five (5) bedroom maisonette and servant quarter on L.R No 2259/450. The Petition is challenging the development without taking into consideration the drainage aspect. In support of their argument, they cited *Issa Mohamed and 15 Others v Mohamed Al Sawwe* (2021) eKLR.
3. The 1st Respondent also argued that the Petition ought to have been filed before the NET by dint of section 129 of *EMCA*. In support of this argument, this Respondent cited the case of *Kibos Distillers Ltd v Benson Ambuti Adega and others* (2020)eKLR. That there are no exceptional circumstances that warranted the filing of this petition before this court.
4. For the 2nd Respondent, Ms Muyai learned counsel submitted that the Petition offends the provisions of section 125 and 129 of *EMCA* because under the reliefs in ground (c) and (f), they sought cancellation of the NEMA license. Counsel urged the Court to uphold the P.O.



5. Mr Munyeri, learned counsel for the Petitioner submitted that the preliminary objection is addressing the admissibility of the Petition and not the jurisdiction of this Court. That the Liaison Committee only deals with issues of licensing and in the Petition, the dispute concerns the unblocking of a blocked drainage system and on the various rights under article 22, 40 and 43 of which are matters that the Liaison Committee cannot deal with. According to Counsel, disputes to be dealt with under section 129 are administrative issues and if they moved the two institutions, they are likely would not deal with the substantive issues raised. He cited the IEBC case stating that the doctrine of exhaustion has certain exceptions.
6. This Court's duty is to determine whether this Petition is for hearing before this court or it breaches what is now commonly referred to as the doctrine of exhaustion. Section 78(b) of the *Physical Land Use and Planning Act* of 2019 (PLUPA) states as follows:

The functions of the County Physical and Land Use Planning Liaison Committee shall be to;

 - (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
7. Section 125 of EMCA refers to the establishment and composition of the National Environment Tribunal (NET) while section 129 provides its functions and powers as recited below;
 - (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. In determining the first limb of the P.O as concerns the provisions of section 78(b) of *Physical and Land Use Planning Act*, it is my considered opinion that the objection is misplaced because the Petition have not directly sought for orders stopping the 1st Respondent from carrying out the construction of the approved buildings. Instead, the dispute partially relates to the competing property and environmental rights of the parties on right to wayleaves for storm water.



9. The second limb of the objection relates to application of the the provisions of section 129 of EMCA. At paragraph 8 of the Petition, the Petitioners pleaded that on 12th June 2023 they wrote to NEMA objecting to the approval until the question of storm water drainage was addressed. In paragraph 9, they pleaded that their letter of 12th June 2023 was not responded to. Section 129(2) provides for appeals to the NET from the decisions of the Director General, the Authority and or the Committee of the Authority. However, in this instance, there was no decision made on the complaint hence there was no decision to be appealed against.
10. Further, there are exceptions to the doctrine of exhaustion as was set forth in the case of In *R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (*supra*) where after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), 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. 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. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*) (underline mine for emphasis).

11. Are there exceptions in this case? I would answer yes on account of the pleadings contained in paragraphs 17 to 31 of the Petition that has discussed the likelihood of breach of the Petitioners' rights to property under article 40, right to human dignity under article 43 and the right to a clean and healthy environment under article 70 of the *Constitution*. These are weighty constitutional rights and which the court should not close the door of justice on the Petitioners.
12. I am alive to the doctrine of stare decisis and in particular the Court of Appeal decision in the case of *Kibos Distillers Ltd v Benson Ambuti Adega and Others* (2020) eKLR which proposed severing the case before the Court to send a limb to NET as it stayed the rest of the complaint falling under its mandate. In this instant, the impact of the blockage of the drain is so intertwined to the other tortious consequences pleaded that it would not be an easy assignment on what is to be stayed and what is to be sent to NET. Worse still, the Courts superior to this Court in the Kibos Distillers case *supra* did not provide principles to be considered while severing a claim brought under one suit and I shall be glad to learn.
13. In light of the foregoing analysis, I conclude that there is no merit in the preliminary objections brought both by the 1st and 2nd Respondents. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER 2023

A. OMOLLO

JUDGE

SENT TO ADVOCATES ON RECORD VIA EMAIL AT NAIROBI THIS 7TH DAY OF DECEMBER, 2023



Deputy Registrar, ELC

Nairobi

