REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CONSTITUTIONAL PETITION NO. E08 OF 2020

IN THE MATTER OF: ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED THREATS TO AND CONTRAVENTION OF RIGHTS

UNDER ARTICLES 24, 25, 27, 28, 29, 30, 31, 35, 40, 42, 43, 47, 48 ,

49 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 159, 176 AND 186 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PHYSICAL AND LAND USE PLANNING ACT, 2019

AND

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999

BETWEEN

GALOT INDUSTRIES LIMITED.....1ST PETITIONER

KING WOOLEN MILLS LIMITED.....2ND PETITIONER

LONDON DISTILLERS (K) LIMITED.....3RD PETITIONER

VERSUS

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

ERDEMANN PROPERTY LIMITED.....1ST INTERESTED PARTY

KATARINA AGENCIES LIMITED.....2ND INTERESTED PARTY

DENVIC PROPERTY MANAGERS LTD.....3RD INTERESTED PARTY

EXPORT PROCESSING ZONES AUTHORITY.....4TH INTERESTED PARTY

MAVOKO WATER & SEWERAGE COMPANY.....5TH INTERESTED PARTY

RULING

What is before Court for determination is the 1st Interested Party's Notice of Motion Application dated the 5th March, 2021 where it sought the following orders;

a. Spent.

b. That the Honourable Court be pleased to forthwith strike out and/or dismiss the Petitioner's Application dated 22nd January, 2021.

c. That the Honourable Court be pleased to forthwith strike out and/or dismiss the Petitioner's Petition dated 6th November, 2020.

d. That costs of this Application be provided for.

The 1st Interested Party consequently filed a Notice of Preliminary Objection dated 22nd March, 2021 challenging the jurisdiction of this Honourable Court, claiming that the Petitioners' Petition and Notice of Motion Application were *res judicata* and some prayers sought therein were *res sub judice.* The court directed that both the Notice of Motion Application dated 5th March, 2021 and the Preliminary Objection dated 22nd March, 2021 be determined jointly since they were filed by the same party and sought similar orders.

The 1st Interested Party's case

The Notice of Motion Application was premised on the grounds on the face of it and supported by the Affidavit of ZEYUN YANG, its Managing Director. He contended that the 1st Petitioner had filed Applications seeking conservatory orders staying the proceedings in the following suits:

1. NET Tribunal Appeal No. 21 of 2019, Erdemann Property Limited vs NEMA and Others
2. Machakos ELC No. 104 of 2019; London Distillers (K) Ltd vs Mavoko Water & Sewerage Company & Others
3. Tribunal Appeal No.NET 002 of 2020: Denvic Property Limited vs NEMA & Others
4. Machakos JR No.2 of 2020; Erdemann Property Ltd vs EPZA & Others
5. Nairobi ELC Civil Appeal No. E039 of 2020; Erdemann Property Ltd vs London Distillers (K) Ltd & NEMA
6. Machakos ELC Civil Appeal No. Eoo7 of 2020: London Distillers (K) Ltd vs Erdemann Property Ltd & NEMA
7. Tribunal Appeal No.NET 44 of 2020: Erdemann Property Ltd vs NEMA & 2 Others
8. Tribunal Appeal No.NET 26 of 2020: London Distillers Ltd vs NEMA & 2 Others
9. Tribunal Appeal No.NET 27 of 2020: London Distillers Ltd vs NEMA & 2 Others
10. Tribunal Appeal No.NET 47 of 2020: London Distillers Ltd vs NEMA & 2 Others
11. Machakos HC PET No.27 of 2019: Erdemann Property Ltd Vs NEMA & Others.

He averred that the Petitioners had sought conservatory orders restraining NEMA and all other adverse parties in the above cited cases from interfering with the operations of London Distillers (K) Ltd and also orders restraining the parties from filing any Applications in the National Environment Tribunal or the High court except with the leave of this court.

He explained that the Petitioners had sought declaratory orders for zonation as industrial and residential for the suit properties. He claimed that they also sought orders of mandamus compelling the Respondents to carry out investigations into the circumstances surrounding the

change of user and orders for zonation as industrial and residential for the identified areas.

It was the deponent's contention that the Petitioners had frustrated several of their projects by filing myriad of suits and abusing the court process in a bid to stall the said projects. He insisted that this Court lacks jurisdiction to entertain the Petition and Application by the Petitioners and particularly that the matters which they sought to stay had in some instances been determined on merit, some dismissed, some withdrawn while some were pending appeal. He opined that the orders sought would amount to usurping the jurisdiction of the other courts and tribunals.

He insisted that the Petitioners had violated the doctrine of exhaustion which requires that where a specific and clear procedure for redress of grievance is provided, then that procedure should strictly be followed. He argued that some of the suits that the Petitioners sought to stay were before National Environmental Tribunal, which is the right tribunal with jurisdiction to entertain such suits. He added that some of the issues raised in the challenged Petition/Application touched on change of land user, which ought to have first been raised with the Machakos County Liaison Committee. He reiterated that the issues(s) and the parties in a majority of the aforementioned suits were similar. He reaffirmed that the challenged Petition/Application were *res judicata* to a number of previously determined suits while others were *sub judice* since they were pending before other fora with competent jurisdiction. Further, that the orders sought in the Petitioners' Application were bad in law, misconceived and an abuse of the court process.

The Petitioners' case

The Petitioners' opposed the instant application by filing a replying affidavit sworn by one PUSHPINDER SINGH MANN, its General Manager, Administration who averred that the 1st Interested Party is the principal player in all the disputes pitting them with the 2nd Respondent and other government entities for the simple reason that the Petitioners had challenged the irregular change of user of the suit parcels of land without their involvement. Further, no evidence was presented to the contrary to controvert the fact that the Petitioners, as the project's most affected persons, were ever informed of or were aware of the process precipitating the change of user of the parcels of land in the instant proceedings. They explained that the 1st Interested Party had not denied the fact that they only became aware of the change of user when it commenced the construction of residential houses in the said area being Great Wall Gardens Estate, pursuant to the approval of the said change of user without their involvement.

It was the Petitioners' contention that contrary to their legitimate expectation and Section 41(2) of the Physical Planning Act *(repealed)*, they were not involved in the process of granting change of user for the afore-mentioned parcels of land by the 1st Respondent. They alleged that the 1st Interested Party ought to have served upon them with copies of the Applications for change of user, as the project's most affected persons in view of the fact that they are owners and occupiers of the properties adjacent to the disputed land.

The deponent argued that the 1st Interested Party did not publish or advertise the notice of Application for change of user, hence they had no way of knowing the pendency and or grant of change of user for L.R No. 12867/11, L.R No. 27317/2 and LR Nos. 12581/13 & 14, to the 1st Interested Party from industrial development to residential use. Further, that this failure amounted to violation of their right to fair administrative action, contrary to Article 47 of the Constitution of Kenya including the Fair Administrative Act No. 4 of 2015. He reiterated that the failure to serve them with the notice denied the Petitioners' their rightful opportunity to object to the change of user before the 1st Respondent and by extension, audience before the Liaison Committee, a fact which has not been controverted by any evidence.

He explained that the fourteen days within which to Appeal against the decision of the 1st Respondent lapsed without the knowledge of the Petitioners. Further, that the time within which to appeal to the County Physical and Land Use Planning Liaison Committee lapsed without their knowledge hence they could not seek redress to the tribunal. The Petitioners' challenged the allegation that this court lacked jurisdiction to hear the issues raised in the instant Petition. They reaffirmed that this court had jurisdiction to hear and determine the issues raised in the Petition by virtue of Article 162 (2) (b) of the Constitution and section 13 (2) (a) and (e) of the Environment and Land Court Act which confers jurisdiction upon it to hear any matter related to the environment and land. They stated that contrary to the averments by the 1st Interested Party, National Environment Tribunal (NET) has no jurisdiction to determine the issue of change of user or constitutional questions raised in the Petition. Further, that it is only this court and not the other tribunals that has the jurisdiction to hear and determine constitutional questions for grant of the orders sought in the Petition and Application, being orders of mandamus, declaratory orders as well as interim conservatory orders.

The 5th Interested Party's case

The 5th interested party, filed a Replying Affidavit dated 1st October, 2021 in which they confirmed to be in support of the instant Application by the 1st Interested Party in its entirety. They were also opposed to the Petitioners' Application dated 22nd January, 2021.

The Application and Preliminary Objection were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated 5th March, 2021 including the Notice of Preliminary Objection dated 22nd March, 2021, respective affidavits, annexures and rivalling submissions, the only issue for determination is whether this Honourable Court should strike out the Petition dated 6th November, 2020 and Petitioners' Notice of Motion Application dated the 22nd January, 2021, with costs.

The 1st Interested Party in its submissions reiterated its averments as per the affidavits and contended that this court is legally divested of jurisdiction to entertain the impugned Application and Petition. It insisted that the proceedings herein run afoul of the exhaustion doctrine and the doctrine of avoidance. It emphasized that complaints touching on zonation, planning development approvals as well as change of

user should first be lodged with the County Physical and Land use Planning Liaison Committee. It averred that that this was a dispute suited for the statutory tribunals disguised as a constitutional Petition. Further, that the proceedings in the Petition were res sub-judice and res judicata by virtue of proceedings in NET 21 of 2019; NET Appeal 27 of 2019 and NET Appeal 02 of 2020 in respect of the Application dated 19th June 2020 and filed on 22nd June, 2020; and those in Machakos ELC No. 104 of 2020; **including** ELC PET NO. 20 of 2018 Mohan Galot vs Mavoko Sub-County and the Hon Attorney General. It further submitted that the issues in these matters are materially the same and either ongoing or determined and on appeal in other tribunals. To buttress their arguments, they relied on various relevant decisions including: ***Owner of motor vessel "Lilian S" vs Caltex Oil (Kenya) Limited; Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR; Gabriel Mutava & 2 Others Vs Managing Director Kenya Ports Authority & Another, Civil Appeal N0.67 of 2015 (2016) eKLR; IEBC V Maina Kiai & 5 Others (2017) eKLR; Speaker of the National Assembly Vs Karume (1992) eKLR; Taib Investments Limited V Fahim Said & Others (2016) eKLR; COD & Another V Nairobi City Water & Sewerage Company Limited (2015) eKLR; R v Speaker of National Assembly and 4 Others Exparte Edward R. O. Ouko (2017) eKLR; Lashad Mohamed Mubarak V County Government of Mombasa (2020) eKLR*** and ***IEBC V Maina Kiai & 5 Others (2017) eKLR.***

The Petitioners in their submission reiterated the contents of their affidavit and laid emphasis on the fact that the 1st Interested Party never involved them in their projects as the project's most affected user. As to the alleged violation of the doctrine of exhaustion, they submitted that alternative fora must be approached within statutory timelines created by the legal framework. Further, that there were exemptions to this doctrine in instances where the issue involved is a pure point of law, when the due process is clearly violated, when the administrative action is patently illegal amounting to lack of or excess jurisdiction and when there is urgent need for judicial intervention. They insisted that the 1st Respondent violated provisions of Section 41(3) of the Physical Planning Act *(repealed)* which requires the local authority to publish and serve copies of the application to every owner or occupier of the property adjacent to the land to which the application relates and to such other person as the local authority may deem fit. They argued that failure to issue the said notice violated their constitutional right to fair administrative action as provided by Article 47 of the constitution. Further, that the time within which to appeal to the County Liaison Committee is 14 days from the making of the impugned decision, for which they did not have an opportunity, since they were unaware of the decision. To support their arguments, they relied on the various relevant decisions including: ***Republic v Nairobi City County & Another Exparte Mugumo villas Limited (2014) eKLR; Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012 (2014) eKLR; Njoya & Others V Attorney General & Others (2004) LLR 4788 (HCK); Njogu V Attorney General (2005) eKLR; Gedion Kibindu & 20 Others V Kenya Ports Authority & 3 Others (2020) eKLR and Richard Kiplangat Sigei V Grace Sang (2020) eKLR***.

The 1st Interested Party seeks to have the Petition and the aforementioned Notice of Motion Application herein struck out with costs for being res judicata and *sub judice* which application was only opposed by the Petitioners.

On perusal of the Petition herein, I note the fulcrum of the dispute revolves around fair administrative action as the Petitioners' allegations that they were not involved when the 1st Interested Party obtained the Change of User from industrial to residential use culminating in its constructing residential houses in the area. It is the Petitioners' argument that as the project most affected person, it was not consulted when the 1st Interested Party was granted a Change of User in accordance with Section 58 of EMCA and the repealed Physical Planning Act. Further, they were unable to lodge an appeal to the County Liaison Committee as envisaged under the said repealed Physical Planning Act. In the Petition, the Petitioners sought for orders of Mandamus, Declaration that certain plots named therein were either Residential as well as Industrial; and issue of ownership of certain roads. In the impugned application, the Petitioners sought for conservatory orders and stay of proceedings in the aforementioned suits including claims in NET, pending the determination of the Petition.

The 1st Interested Party insists the issues had been dealt with in other fora, with some disputes already decided. Further, that there are no constitutional issues raised in the Petition. It reiterated that the Petition was hence res judicata as well as sub judice. Further, that the Petitioners have continued to abuse the court process by the myriad of applications and suits they have filed relating to the same issue.

The doctrine of *res judicata* is stipulated in the Civil Procedure Act at Section 7 as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

The Civil Procedure Act provides explanations with respect to the Application of the *res judicata* rule. Explanations 1-6 states thus:

> ***"Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
>
> ***Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***
>
> ***Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***
>
> ***Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***
>
> ***Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.''

In the case of ***Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996*** the Court of Appeal stated that:

> ***"In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit."***

Further, in case of ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR***, it was held that:

> ***"or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms; a) The suit or issue was directly and substantially in issue in the former suit. b) That former suit was between the same parties or parties under whom they or any of them claim. c) Those parties were litigating under the same title. d) The issue was heard and finally determined in the former suit. e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

From the legal provisions cited above as well as the authorities quoted, it is pertinent that for a party to rely on the doctrine of *res judicata*, the decisions must emanate from the same court with competent jurisdiction, and parties must litigate under same titles. In this instance, the 1st Interested Party has not furnished court with any decision that determined the issue raised in the Petition concerning the process it adhered to, to obtain change of user. Further, some of the determined decisions furnished are from NET which is a Tribunal and cannot be equated to the Environment and Land Court. I have had a chance to peruse the proceedings availed to this court in support of the instant application and Preliminary Objection and I note some of the cases have not been determined. Further, they touch on a range of issues which include environmental pollution, dispute on sewer line and zoning. However, none of them has actually touched clearly on the fulcrum of the Petition which is on lack of participation of the project most affected person before a Change of User was granted by the relevant body. I note in ELC No. 104 of 2020 and filed on 4th June, 2020 and ELC PET No. 20 of 2018 Mohan Galot vs Mavoko Sub-County and the Hon. Attorney General, even though related, the parties therein were not litigating under the same title. It is my considered view that the Petition has raised other issues that need to be considered on merit. Since the Petition has raised serious constitutional issues touching on fair administrative action, I opine that for the doctrine of *res judicata* to apply, in this instance, there should be demonstration that the same issues have been heard and determined by a court of competent jurisdiction, same parties litigated under the same title and issues have been raised once more in this Petition, which is not the case herein. Further, on the issue of *sub judice,* based on my analysis above, since I note there are other orders sought in the Petition, which are not in the other suits/claims presented, I opine that this court is expected to deal with them and I will disallow this prayer. In the circumstance, I decline to strike out the Petition and instant application on these two grounds.

Further in making reference to the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** in respect to role of an Interested Party, where it held that;

> **"We wish to restate our finding in an earlier ruling dated 28th January 2016, in *Francis Karioki Muruatetu & another v. Republic & 5 others* Petition No. 6 of 2016; [2016] eKLR where the Court limited the role and function of the *amici curiae* as follows:**
>
> > ***[43] … Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed."***

Further in case of ***Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] Petition 12 of 2013 eKLR***, when the LSK sought to be enjoined as an Interested Party, the Supreme Court was also very particular on the extent that an Interested Party can intervene in a case *(paragraph 24)* and held that:

> ***"A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."***

Based on the fact that the instant application and Preliminary Objection had been brought forth by the 1st Interested Party and while relying on the two decisions I have cited above, I find that the 1st Interested Party herein Lacked locus to move this court to strike out the Petition and instant application. Insofar as I concur with the 1st Interested Party that the doctrine of exhaustion as established in the case of ***Krystalline Salt Kenya Ltd Vs Kenya Revenue Authority (2019) eKLR***, needs to be exhausted, I hold that no tribunal has the jurisdiction to deal with constitutional issues raised in the Petition as this is the preserve of the Environment and Land Court as envisaged in Section 13 of the Environment and Land Court Act. Further, since it has not been controverted that the Petitioners were unaware of the process of change of user, then they could not proceed under Section 41 of the Physical Planning Act *(repealed)* to Appeal against the decision of the Mavoko County Council to the Liaison Committee within the requisite time ***(****See the case of* ***Republic v Nairobi City County & Another Exparte Mugumo villas Limited (2014) eKLR)***.

It is my considered view that the Petition ought to be expeditiously set down for hearing on its merits.

It is against the foregoing that I find the Notice of Motion Application dated the 5th March 2021 and Notice of Preliminary Objection dated the 22nd March, 2021 unmerited and will disallow them.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE