Dagoretti District Land Owners Welfare Association v Nairobi County Government & 3 others (Environment & Land Petition E028 of 2021) [2022] KEELC 2404 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2404 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E028 OF 2021

OA ANGOTE, J

MAY 19, 2022

BETWEEN

DAGORETTI DISTRICT LAND OWNERS WELFARE ASSOCIATION ..... PETITIONER

AND

NAIROBI COUNTY GOVERNMENT ..... 1ST RESPONDENT

NAIROBI METROPOLITAN SERVICES ..... 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY ..... 3RD RESPONDENT

KENYA REVENUE AUTHORITY ..... 4TH RESPONDENT

RULING

Background

1. In the Notice of Motion application dated 23rd July, 2021, the Petitioner /Applicant is seeking for the following orders;

    i. That in the interim and pending the hearing and determination of this Application and/ or Petition, this Honourable Court be and is hereby pleased to issue a conservatory order temporarily directing the 1st, 2nd and 3rd Respondents herein from engaging in any discussion, debate and implementation and/or any other activity in relation to the Draft Valuation Roll, 2019.

    ii. That in the interim and pending the hearing and determination of this Application and or Petition, this Honourable Court be and is hereby pleased to issue a mandatory order compelling the 1st, 2nd & 3rd Respondents to produce, publicize and avail the Draft Valuation Roll, 2019 to both the Petitioner and this Honourable Court.

iii. That the Honourable Court herein be pleased to grant the Petitioner leave to physically file electronic evidence recording which is about five minutes long and the same has been mentioned in the Petitioners Supporting Affidavit herein to be marked DDLWA-4 in the form of a flash disk. That in the alternative the Honourable Court herein be pleased to issue directions to filing of the Petitioners electronic evidence.

iv. That a declaration that the Draft Valuation Roll, 2019 which was not subjected to public participation as per the provisions of Article 185(2),196 as read with the 4th Schedule part 2(14), Article 209(3)(5) and 260 of *the Constitution* of Kenya 2010 be deemed as null and void.

v. That the Honourable Court herein be pleased to issue a declaratory order against the 1st, 2nd and 3rd Respondents for infringement of the freedom of expression of the Petitioner as per the provisions of Article 33 of *the Constitution* of Kenya, 2010.

vi. That the Honourable Court be pleased to issue a declaratory order against the 1st, 2nd & 3rd Respondents for infringement of the Petitioners' rights to information as per the provisions of Article 35 of *the Constitution* of Kenya, 2010 and Section 3,4,5, *Access to Information Act* No. 31 of 2016.

vii. That this Honourable Court be pleased to grant a permanent injunction restraining the 1st, 2nd and 3rd Respondents by themselves, agents, employees, staff servants or otherwise whatsoever from pursuing any further discussion debate and implementation of the Draft Valuation Roll, 2019.

viii. Any other order and directions as may appear to this Honourable Court just and convenient to grant.

ix. Costs of this Petition be provided for.

2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit jointly sworn by Pius John Njogu Nguo and Jackson Gichere Kariuki, the Secretary General and the Organizing Secretary of the Petitioner.

3. The Deponents averred that the Petitioner is an organization duly registered pursuant to Section 10 of the *Societies Act* comprised of landowners with common interests situate within Dagoretti area and its environs and that the Draft Valuation Roll was first introduced by the 1st and 3rd Respondents vide Gazette Notice Number 9314 of 2016 dated 4th November, 2016 which mutated into the Draft Valuation Roll, 2019.

4. It was deponed by the Petitioners' officials that sometime in May, 2021, the Petitioners became aware of the Draft Valuation Roll, 2019 through brochures distributed by the 1st -3rd Respondents; that sometime in June, 2021, its' members were called to a meeting at Waithaka Social hall whose agenda was unknown; that while there, they were bombarded with the proposed Draft Valuation Roll, 2019 by the 1st-3rd Defendants officials and that the meeting was camouflaged as public participation.

5. According to the Deponents, on or about 15th June, 2021, the Petitioner hurriedly drafted its objections and forwarded the same to the Respondents but thereafter learned that the objections were to be forwarded via electronic mail which most of its membership were unable to access and that on the same date, Pius John Njogu expressed his displeasure at the high valuation rates in an interview with Mtaani Radio Mashinani.

6. It was deponed that the 1st and 2nd Respondents deliberately failed to carry out a physical land valuation and relied on Geospatial Information System(GIS) which method is susceptible to manipulation and

that the Draft Valuation Roll, 2019 is pending before the 3rd Respondents' chambers during the 5th session having been introduced for discussion and or debate vide sessional paper number 1 of 2021 on the New Draft Valuation Roll dated 15th January, 2021.

7. It is the Petitioner's case that taking into account the pivotal role of the Draft Valuation Roll, 2019, it was necessary for the 1st -3rd Respondents to subject it to adequate public participation pursuant to Article 196 of *the Constitution*; that as further advised by counsel, the 1st -3rd Respondents have failed to comply with Section 9(4) of the *Rating Act*; that the proposed percentage of the Unimproved Site Value(USV) as per the Draft Valuation Roll, 2019 is extremely high and that this court is empowered to protect the Petitioner's constitutional rights.

8. In response to the application, the 1st Respondent filed a Notice of Preliminary Objection as well as a Replying Affidavit. The Preliminary Objection dated 20th September, 2021 was premised on the grounds that;

   i. That the Petitioners herein have not exhausted the dispute mechanism provided under the *Valuation for Rating Act*, Cap 266.

   ii. That the Petitioner has failed to comply with Section 10 & 16 of the *Valuation for Rating Act*, Cap 266 on raising objections before the Valuation Court.

   iii. That this Court lacks jurisdiction to hear and determine this matter as it is premature before this Court.

9. The 1st Respondent through its Director Abwao Eric Odhiambo, swore a Replying Affidavit in which he deponed that the Petitioners have failed to demonstrate a prima facie case; that a reading of Section 10(2), 16 and 19 of the *Valuation for Rating Act* clearly requires the Petitioner to have first lodged its notice of objection with the Valuation court before proceeding to argue it herein and that this court only has Judicial Review jurisdiction to scrutinize the lawfulness, procedural propriety, and rationality of an impugned action or omission of the Valuation Court on appeal.

10. The 1st Respondent deponed that the Valuation Court is in the process of being set up pursuant to Section 12 of the *Valuation for Rating Act*, its membership having been nominated on or about 26th May, 2021 and a communication made on 30th July, 2021 notifying the Solicitor General of the 1st Respondent's application to constitute a Valuation Court and that the 1st Respondent is yet to start dealing with objections to the Draft Valuation Roll, 2019 as the Valuation Court is yet to be made functional.

11. It is the 1st Respondent's case that the Petitioner having subjected themselves to the rating process should give the 1st Respondent the opportunity to deal with its objections at the Valuation Court as prescribed under Section 16 of the *Valuation for Rating Act*, and upon dissatisfaction then its appeal would lie with this court and that the Petitioner in seeking conservatory orders has failed to demonstrate the manner in which its members rights will be infringed upon if such a discussion, debate, implementation and/or any other activity in relation to the Draft Valuation Roll, 2019 takes place.

12. It was deponed that the mandatory order sought to compel the 1st Respondent to produce the Draft Valuation Roll, 2019 is self-defeating as the same was published on 21st May, 2021 in widely circulated daily newspapers and the Kenyan Gazette as Notice No. 4849 thus making the roll available for public inspection and objection as required under section 26(1) of the *Rating Act* and section 30 (1) of the *Valuation for Rating Act*.

13. It was further deponed that the mandatory injunction should not be granted unless an applicant shows a clear and exceptional case which has not been demonstrated herein; that permanent injunctions cannot be granted at an interlocutory stage; that the orders sought in the application are final orders disguised as interlocutory orders and that the 1st Respondent's invitations for public participation gave those wishing to participate sufficient time to prepare as the advertisement was published on 21st May, 2021 for meetings that were held from 16th June, 2021.

14. The 2nd Respondent, through its Chief Valuer, deponed that the process of preparing a new Valuation Roll for Nairobi County was approved by the County Government vide a County Executive Committee Meeting Memorandum No. 31 of 2016 and that on 11th November, 2016, the County Government gazzetted among others a notice to prepare the Valuation Roll vide Gazette Notice No. 9314 B.

15. It was deponed by the 2nd Respondent Chief Valuer that on 28th November, 2016, the Nairobi County Government placed a public notice in the Daily Nation to notify members of the public that the County Government had begun the process of preparing a new Valuation Roll as provided in Section 30 of the *Valuation for Rating Act* and Sections 26 of the *Rating Act*.

16. It was deponed that the preparation of the said Draft Valuation Roll was undertaken by Consultants procured through NamSIP funded by the World Bank after which the roll was forwarded to the county and signed by the Chief Valuer on 27th May, 2019 and that on 14th January, 2021 the County Secretary transmitted the Draft Valuation Roll to the County Assembly for laying before the meeting of the County Assembly pursuant to Section 9 (2) of the *Valuation for Rating Act*.

17. It was the deposition of the 1st Respondent's Valuer that the Draft Valuation was tabled before the County Assembly on 15th January, 2021 and on 20th May, 2021 and that the members of the public were notified that the Draft Valuation Roll had been laid before the County Assembly and was available for Public inspection and objections vide a Gazette Notice dated 21st May, 2021.

18. According to the 1st Respondent, a public notice was also placed in the Standard and Star Newspapers on 21st May, 2021, and a re- run of the same was placed in the Daily Nation on 31st May, 2021; that on 21st May, 2021, the County Government also placed a public notice in the Daily Nation and Taifa leo newspapers notifying the members of the public of the participation fora and call for memorandum in all the seventeen sub- counties and that on 16th June, 2021, individual notices were sent to each and every ratable owner of ratable property comprised in the Draft Valuation Roll pursuant to Section (9) (4) of the *Valuation for Rating Act* through the postal office corporation.

19. It was averred that the establishment of a Valuation Court whose purpose shall be to hear and determine objections received during inspection and objection window is ongoing; that key stakeholders have been involved in various consultations and a list of twenty registered members have been forwarded for appointment to the court; that comparable data was collected from the Ministry of Lands and Physical Planning and the values are a true reflection of the property market and that the Applicants have contravened the provisions of Section 19 of the *Valuation for Rating Act* as they have failed to approach the court with the proper jurisdiction.

20. The 4th Respondent, through its officer, deponed that on 25th February, 2020, the 1st Respondent gazetted a deed transferring its functions to the National Government and that vide a Gazette Notice No. 1967 dated 6th March, 2020, the 4th Respondent was appointed by the 1st Respondent as the principal agent for overall revenue collection for all county revenue.

21. According to the 4th Respondent's officer, he is a stranger to the allegations in the Supporting Affidavit as its functions are limited to revenue assessment, revenue accounting, reconciliation & reporting, compliance monitoring, enforcement of compliance and debt enforcement.

22. Vide a second Further Affidavit filed on 29th November, 2021, it was the Petitioners' disposition that the 1st Respondent, with full knowledge of the present suit, have advertised new land rates on 26th November, 2021 vide Kenya Gazette Notice No 12938, which advert was in the standard newspaper and that the 1st Respondent's actions aforesaid are contemptuous and pose a danger to the Petitioners' members unless injunctive orders are issued.

Submissions

23. The Petitioner submitted that the 1st-3rd Respondents did not comply with the provisions of the *Valuation for Rating Act* and the *Rating Act*, while varying and imposing the new land rates as per the Draft Valuation Roll, 2019; that no notices were sent out to every rateable owners pursuant to Section 30(1) and (2) of the *Valuation for Rating Act* and that they were unaware of the procedure for objections.

24. It was submitted that the objections are to be made to the Valuation Court which is yet to be appointed; that the 1st and 2nd Respondents never facilitated any meaningful public participation and that the consultative meetings were a sham.

25. Counsel referred to a multitude of cases including *Kenya Human Rights Commission vs Attorney General & Another* [2018]eKLR, *Robert N Gakuru & Others vs Governor Kiambu County & 3 Others* [2014]eKLR which cited South African decision in *Doctors for Life International vs Speaker of the National Assembly & Others* (CCT12/05)[2006] ZACC 11: 2006(12)bclr 1399 2006(6) SA 416(CC) and Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others.

26. It was submitted that the proposed percentage of the USV is punitive and implausible and that its enactment went contrary to Article 10 of *the Constitution*. Reliance was placed on the cases of *William Odhiambi Ramogi & 3 Ors vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others(Interested Parties)*[2020]eKLR and the Court of Appeal case of *Independent Electoral and Boundaries Commission(IEBC) vs National Super Alliance(NASA) Kenya & 6 Others*, [2017] eKLR.

27. The Petitioner submitted that the Nairobi Draft Valuation Roll is defective by virtue of not having a Finance Act to anchor it in law as a source of revenue to the Nairobi County Government and that the same proposes highly punitive rates which are likely to cause irreparable adverse effects.

28. Vide supplementary submissions filed in opposition to the 1st Respondent's Preliminary Objection, it was submitted that the Nairobi Valuation Court is not in existence and consequently the Petitioner cannot raise its objections thereto; that the failure to establish the court contravenes Section 8 of the *County Governments Act* and that the 1st Respondent being fully aware of the present suit advertised new land rates on 26th November, 2021 to take effect from January,2022 a clear manifestation of the 1st Respondent's contempt for the court.

29. The 1st Respondent's counsel submitted that Section 10 (2), 16 and 19 of the Valuation and *Rating Act* clearly requires of the Petitioner to have first lodged its notice of objection with the Valuation Court before proceeding to argue its case herein and that the Petitioner has contravened sections 6, 7 and 9 of the *Fair Administrative Action Act* by failing to exhaust the available remedies before filing its suit.

30. Reliance was placed on the case of Trinidad & Tobago Court of Appeal case of Damian Delfonte vs The Attorney General of Trinidad and Tobago CA 84 of 2004 and the Court of Appeal case of Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425 and *Republic vs Benjamin Torno Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others* [2018]eKLR and that the doctrine of judicial abstention prevents this court from usurping the powers of statutory tribunals as held by the court in the Supreme Court in Benson Ambuti Adega & 2 others vs Kibos Distillers Limited & 5 others [2020] eKLR.

31. It was counsel's submissions that this court has no jurisdiction to entertain this matter, the same having been ousted by the Petitioner's failure to direct their objection to the first port of call being the Valuation Court. Counsel cited the cases of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [989] KLR 1 and *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Application No. 2 of 2011 which dealt with the concept of jurisdiction and that the matter can only be brought to this court on appeal after a determination by the Valuation Court.

32. The 2nd Respondent submitted that the principles of public participation as set out *in the matter of the Mui Coal Basin Local Community* [2015] eKLR were duly followed by the 1st Respondent which included fashioning a programme for public participation that accords with the nature of the subject matter and offering a reasonable opportunity to members of the public and all interested parties to know about the issues and to have an adequate say.

33. It was submitted that the members of the public and all rateable land owners were notified through the Kenya Gazette that the Draft Roll was available for inspection and objections vide Gazette Notice No. 4849 dated 21st May, 2021; that public notices were placed in several dailies and that individual notices in relation to the 2019 Draft Valuation Roll were sent to every ratable property owner through Postal Corporation of Kenya.

Analysis & Determination

34. Upon considering the Motion, the Preliminary Objection, the various Affidavits and submissions, the issues that arise for determination are;

    i. Whether this Court has jurisdiction to entertain this matter and if so,

    ii. Whether the Petitioners are entitled to the orders sought?

35. The threshold of a preliminary objection was set out by the Court of Appeal in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that as follows:

> " ...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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

36. The issue raised by the 1st Respondent herein meets the above noted criteria being a pure point of law as it challenges the jurisdiction of this Court to entertain the application and the Petition herein.

37. It is trite that jurisdiction is everything. The significance of jurisdiction was succinctly captured by Nyarangi, J.A. in Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

38. Similarly, the Court of Appeal in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others* [2013] eKLR had the following to say on the centrality of the issue of jurisdiction: -

> " So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

39. The preliminary objection by the 1st Respondent is founded on the doctrine of exhaustion which requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the courts. Indeed, it is now generally accepted that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. To this end, the Court of Appeal in the case of *Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others*[2015]eKLR observed as follows:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

40. The question of what invokes the doctrine of exhaustion before embarking on the Court process was aptly discussed in the case of William Odhiambo Ramogi & 3 others vs Attorney General & 4 others: Muslims for Human Rights & 2 others(Interested parties) [2020]eKLR by a five judge bench as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

41. The Court went on to outline the exceptions to the rule as follows:

> "As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to 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.
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> 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.
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> In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

42. Turning to the facts of this case, the Petitioner vide the present Petition seeks, inter-alia, for a declaration that the Draft Valuation Bill, 2019 be deemed null and void primarily for not having been subjected to public participation; that the 1st -3rd Respondents infringed on the Petitioners' rights to freedom of expression and right to information as well as permanent injunctive orders. Filed contemporaneously with the Petition was the present application seeking, inter-alia, for conservatory orders.

43. In response, the 1st Respondent asserts that Sections 10, 16 and 19 of the Valuation Act leave no doubt as to the procedure to be followed when objecting to the Valuation Roll. It was submitted that the Petitioner ought to have first lodged its objection with the Valuation Court.

44. In this regard, it is imperative to appreciate the relevant provisions of the law. Section 10 of the Valuation Act provides as follows:

> "(1) Any person (including the local authority or any person generally or specially authorized in that behalf by the local authority) who is aggrieved-
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> (a) by the inclusion of any rateable property in, or by the omission of any rateable property from, any draft valuation roll or draft supplementary valuation roll; or
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> (b) by any value ascribed in any draft valuation roll or draft supplementary valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property, may, on the payment of a non-refundable fee of five hundred shillings and on the prescribed form, lodge an objection with the town clerk at any time before

the expiration of twenty-eight days from the date of publication of the notice referred to in section 9(3).

(2) No person shall be entitled to urge an objection before a valuation court unless he has first lodged the notice of objection; but it shall be competent for a valuation court to agree to consider an objection although notice thereof has not been given in accordance with this section."

45. Section 16 of the Act deals with determination of objections by the Valuation Court. Section 19 of the Act provides that any person who has appeared before a Valuation Court on the consideration of an objection made before that court or who has submitted an objection in writing to the Valuation Court, and is aggrieved by its decision on the objection, may appeal to the High Court.

46. Indeed, a reading of the aforementioned sections provides a clear procedure that should be followed where a person is objecting to the inclusion or exclusion from any rateable property in the draft valuation roll or draft supplementary valuation roll, by any value ascribed in any draft valuation roll or draft supplementary valuation roll to any rateable property, or by any other statement made or omitted to be made in the same with respect to any rateable property.

47. Whereas in the Petitioner asserts that the value ascribed for the USV is punitive, it also alleges infringement and/or threatened infringement of its fundamental rights and freedoms with respect to the process leading up to the determination of the rates in the Draft Valuation, Roll, 2019.

48. Where the predominant issue relates to the violation or breach of the rights or fundamental freedoms in the Bill of Rights, alternative dispute resolution mechanisms cannot oust the jurisdiction of this court to entertain this Petition. This is because the enforcement of fundamental rights and freedoms falls squarely within the jurisdiction of this court.

49. Even if the court were to interpret the dispute within the strict parameters alleged by the 1st Respondent, it is admitted that the Valuation Court is currently not constituted. It is not lost on this court that it is necessary for the court to look carefully at the suitability of the dispute mechanism in the context of each particular case in making its determination.

50. Where the adequacy and availability of the mechanism is deemed wanting, like in this case, it creates an exception that allows the Court to intervene. This was well captured in the case of *Krystalline Salt Limited vs Kenya Revenue Authority* (2019) eKLR where it was held that:

> "What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.
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> ...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

51. Regarding the adequacy of a remedy, the African Commission of People and Human Rights in the case of *Dawda K. Jawara vs Gambia* ACmHPR 147/95-149/96 stated as follows:

> " A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

52. In the present case, it is apparent that the exhaustion doctrine cannot be used against a party who ought to have gone to the Valuation Court to resolve a dispute because whereas indeed the Valuation Court has been statutorily established, factually, the tribunal is not in existence, the same not having been constituted.

53. One of the core pillars of *the Constitution* is the right to access to justice which is ingrained in Article 48 of *the Constitution* as well Article 50 (1) which provides for the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

54. These rights are the basis of the right to a fair trial, a right that cannot be impinged by reason of Article 25 of *the Constitution*. The court is further guided by the principle Ubi Jus Ibi Remedium which was expressed by the Court of Appeal in the case of *Lemita Ole Lemein vs Attorney General & 2 others* [2020] eKLR as follows:

> " The time honoured maxim of equity "ubi Jus Ibi Remedium" pronounces that there cannot be a wrong without a remedy, or in other words, where there is a right there is a remedy. The 3rd respondent established that his land was taken away from him illegally. All other avenues he could have used to recover it save through the constitutional petition appeared blocked or less expedient and inefficacious. I cannot fault the learned Judge for arriving at the decision appealed from."

55. The nature of the dispute before this court relates to breaches of fundamental rights associated with land rate issues, which is a dispute that this court has jurisdiction to hear and determine pursuant to Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, 2011. To this end, the court finds that it is properly seized of jurisdiction to determine the present matter.

56. The Petitioner vide the present application seeks, among orders, conservatory and declaratory injunctive orders. With respect to the declaratory orders as well as the permanent injunctive orders, the court is inclined to agree with the 1st Respondent that the same cannot be granted at this stage.

57. Indeed, declaratory and permanent injunctive orders are final in nature and cannot be granted in the interim unless special circumstances arise warranting their grant. The court is in this respect guided by the Court of Appeal case of *Olive Mwihaki Mugenda & another vs Okiya Omtata Okoiti & 4 others* [2016] eKLR where the learned justices quoted with approval the case of *Ashok Kumar Bajpai vs Dr. (Smt) Ranjama Baipai*, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 where it was held as follows:

> " ...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant

the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."

58. No special circumstances have been pleaded warranting the grant of the declaratory and permanent injunctive orders. That being the case, prayers 5, 6, 7 & 8 of the application fail.

59. As to the prayer seeking to adduce electronic evidence, the court is of the opinion that the same will be best addressed when directions are given regarding the manner the hearing will be conducted. The prayer for the production of the Draft Valuation Roll, 2019 is a question of discovery which can only be dealt with at trial.

60. The court will address itself to the conservatory orders sought. The grounds for the grant of conservatory orders was discussed by the Supreme Court in Civil Application No. 5 of 2014 *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, as follows:

> " Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate orderly functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay."

61. In the *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others* [2015] eKLR it was stated that:-

> " Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
>
> It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....
>
> Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....
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> Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....
>
> The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.
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> Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and

deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

62. In determining whether or not to grant conservatory orders, the court is alive to the fact that it must be careful not to make a final determination as expressed by Ibrahim, J (as he then was) in *Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* (2011) eKLR.

63. The starting point is to determine whether the Applicant has established a prima facie case with a likelihood of success. The parameters of what constitutes a prima facie case were aptly expressed by the court in the case of Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others (supra) where the Court posited that:

> "It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis..."

64. The Petitioner asserts that the Respondents did not facilitate public participation in respect of the Draft Valuation Roll, 2019 and further, that no notices were sent out to rateable members contrary to Section 30(1) & (2) of the *Valuation for Rating Act*.

65. In response, the Respondents assert that public participation was carried out. The Respondents have in this regard adduced copies of the advertisement of 21st May, 2021 in the Standard and Star Newspaper under the heading "Public Notice on Inspection and Objections on Nairobi City County new Draft Valuation, Roll."

66. The Respondents have also produced in evidence a swahili notice in Taifa Leo newspaper dated 21st May, 2021 and a notice in the Daily Nation newspaper of 31st May, 2021 calling for public participation. Indeed, the Petitioner, through its official, has stated that they became aware of the Valuation Roll through brochures distributed by the Respondents.

67. The Petitioner has also confirmed having been called to a meeting with respect to the Valuation Roll, which meeting was advertised vide the notices of 21st May, 2021. The Respondents also adduced in evidence a letter sent to the postmaster general enclosing individual notices to be sent to all rateable owners.

68. It appears, prima facie, that the public was granted adequate opportunity to duly participate and offer input with respect to the Draft Valuation, Roll, 2019. The issue of whether the said public participation was sufficient or not will have to await the final determination of the Petition.

69. Will the Petitioners therefore suffer any damage or detriment if the conservatory orders are not granted? It is common ground that whether or not the failure to grant conservatory orders will cause prejudice is a matter of fact and it behooves the Applicant to sufficiently demonstrate the alleged damage and/or prejudice. As expressed by the Court in *Okiya Omtatah Okoiti vs Parliamentary Service Commission; National Assembly & 4 others (Interested Parties)* [2021] eKLR;

> "It is trite therefore, the damage or threat thereof to the rights and fundamental freedoms or to *the Constitution* must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent."

70. The Petitioner strongly asserts that its members will suffer irreparable harm should the court decline to grant the conservatory orders sought. They aver that the rates set out in the Draft Valuation Roll are

punitive and unreasonable. However, other than this general allegation, no evidence of any prejudice has been shown.

71. It has not for instance been averred that the Petitioner's members are unable to pay the aforesaid rates and the consequences thereon. That being the case, it is the court's opinion that the Petitioner has failed to show, leave alone prove, that they face imminent, evident, true and actual danger or that that they will suffer prejudice as a result of the alleged violation or threatened violation of *the Constitution*.

72. Further, no argument has been put forward that the substratum of the Petition will be rendered nugatory if the conservatory orders are not granted. In any event, if the court eventually finds in favour of the Petitioner, nothing prevents this court from invaliding and reversing the implementation of the Draft Valuation Roll, 2019, or declaring the Valuation Roll a nullity.

73. Having regard to the facts of the case and having found that the Petitioner has failed to establish a prima facie case, this court finds that public interest militates against suspending the activities related to the Draft Valuation, Roll, 2019 at this juncture. As aforesaid, should the Petitioner ultimately succeed, the Respondents may be directed to refund any amounts that may be due.

74. The upshot of the foregoing is that the Application dated 23rd July, 2021 is unmerited and the same is dismissed.

75. Costs shall be in the main cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF MAY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ochieng for the Respondent

Ms. Njau for the Petitioners

Mr. Allan Kamau for 2nd Respondent

Court Assistant – John Okumu