Mahinda v County Government of Nakuru (Environment & Land Petition E011 of 2021) [2022] KEELC 3093 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3093 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND PETITION E011 OF 2021

JM MUTUNGI, J

JUNE 30, 2022

BETWEEN

MWANGI CHARLES MAHINDA ..... PETITIONER

AND

COUNTY GOVERNMENT OF NAKURU ..... RESPONDENT

JUDGMENT

1. The petitioner instituted the petition dated August 2, 2021 filed in court on August 6, 2021 seeking the following orders:-

    i. A declaration that the petitioner is the legal and lawful owner of Nakuru Municipality Block16/264.

    ii. A declaration that the petitioner has complied with the requirement and conditions set by the respondent as regards development Plan regulations

    iii. A declaration that the respondent is mandated to approve the Development Plan as presented by the petitioner as per section 56 (c) and (d) of the *Physical and Land Use Planning Act*, 2019.

    iv. The respondent be ordered to issue formal communication to the petitioner acknowledging the status approval of the building plan submitted by the petitioner on the 18th day of September 2017 and as received by the respondent on the 27th day of September 2017.

    v. In the alternative the court to make presumption that the development plan presented by the petitioner stands approved as per the provisions of section 58 (6) of *Physical and Land Use Planning Act*, 2019.

    vi. An order compelling the respondent to issue and continue issuing and/or renewing the annual trading licenses for the businesses operating in the suit premises herein Nakuru Municipality/ Block16/264.

vii. A declaration that the panting of letter X to the suit premises without abiding by statutory laws of supervision amounts to abuse of section 56(d) of the *Physical and Land Use Planning Act*, 2019

viii. An order restraining the respondent from demolishing, destroying, painting and or marking letter X on the walls of the suit premises, and in any manner interfering with the suit premises known as Nakuru/Municipality/Block 16/264.

2. The petitioner's claim was that he had been allocated by the respondent plot No. Nakuru Municipality Block 16/264 and that he had been paying rates for the same. The petitioner averred that as was the allottee of the suit property he intended to put the property into some viable use and in that regard effected various developments on the property under the auspices of his business firm Rift Valley Motors. The petitioner averred that the suit property Nakuru Municipality Block 16/264 was allocated by the respondent to him under the business name Brigmac Business Consultant Limited in 1993 for Commercial purposes.

3. The petitioner averred that after developing and improving the plot allocated to him to fit the purposes of starting car wash related services, the respondent despite various departmental recommendations and approvals has not issued to the respondent formal approval for the carwash business. The petitioner contended that the respondent had no valid reason not to issue to the petitioner the necessary and appropriate approvals. The petitioner insisted that he had satisfied all the requirements to entitle him to be issued with the necessary approvals for his development plan as required under the Physical Land Use and Planning Act, 2019. The petitioner averred that the failure by the respondent to give approval to his development Plan constituted a breach and violation of his rights under the constitutions as it amounted to denying the petitioner the right to conduct business in the suit premises.

4. The petitioner asserted that he had fulfilled all the conditions required to be met under the *Physical and Land Use Planning Act*, 2019 to entitle the respondent to approve his development Plan as envisaged under section 56 (c) and (d) of the Act and the Respondent's failure to give approval was a violation of the petitioner's fundamental rights under the *constitution* and in particular a violation of Article 47 of the *constitution*. The petitioner contended the court has jurisdiction notwithstanding the provisions of the *Physical and Land Use Planning Act*, 2019 to compel the Respondent to approve the petitioner's development plan.

5. The Respondent in opposition to the petition filed a Notice of preliminary objection dated 22nd September 2021 and a replying affidavit dated 25th October 2021 filed on the same date. The respondent interlia set out the following grounds in support of the preliminary objection: -

    1. The court has no jurisdiction to entertain the petitioner's claim as it offends the provisions of Section 78 (d) of the *Physical and Land Use Planning Act*, 2019 of the Laws of Kenya.

    2. The suit is a non-starter, offends Section 19 (a) of the *Companies Act* No. 17 of 2015 and the Petitioner has no locus standi to commence this suit.

    3. The suit violates the mandatory provisions of Order 4 Rule 1 (4) of the *Civil Procedure Rules*.

    4. The suit contravenes the mandatory procedures of Order 9 Rule 2 (c) of the Civil Procedure Rules.

    5. The suit is an abuse of the court process the petitioner having no authority to institute the suit.

6. Vide the replying affidavit sworn by Evans Otieno an officer in the department of Land Housing and Physical Planning of the respondent, the respondent averred that the petition was incompetent, frivolous and defective and raised no constitutional issue and constituted abuse of the court process. The Respondent further denied the petitioner had locus standi to institute the suit since the suit property had been allocated to a company and not to the petitioner. The respondent questioned the validity of the allotment since at the time only the commissioner of Lands had authority to issue letters of allotment respecting unsurvyed land and further the allotment letter did not annex a part development plan (PDP) for identification of the allotted plot. The respondent further averred that the petitioner had not satisfied the pre-requisite conditions for approval which prompted the respondent to issue to the petitioner an enforcement notice on the 7th December 2017 directing the petitioner to furnish ownership documents for the suit property.

7. The respondent further averred that the petitioner carried out the alleged developments in utter disregard of the law and regulations and without obtaining the requisite approvals. That in case the petitioner was aggrieved by the Enforcement Notice served upon him he should have appealed to the Physical and Land use Liason Committee established under the Act. The respondent asserted that it was the said Physical and Land use Liasion Committee that had the mandate to deal with any disputes relating to development approvals and it was premature for the petitioner to refer the dispute to this court before exhausting the dispute resolution procedure established under the Act. The respondent finally averred that the petition lacked specificity, clarity and/or precision and hence did not meet the threshold of a constitutional petition.

8. The petitioner filed what he deemed a supplementary affidavit dated December 22, 2021 in response to the replying affidavit by the respondent. However, a perusal of the supplementary affidavit indicates the supplementary affidavit is essentially not a reply to any specific facts that may have required clarification but is rather in the nature of a submission on matters of law raised both in the preliminary objection and the replying affidavit by the respondent.

9. The petition was canvassed by way of written submission. The petitioner filed his submissions and supplementary submissions on January 24, 2022 and March 11, 2022 respectively while the respondent filed their submissions on February 22, 2022.

10. The respondent through the preliminary objection and through the replying affidavit sworn in response to the petition contested this court's jurisdiction to entertain the petition on two main grounds, namely, that the petition did not satisfy the threshold of what constitutes a constitutional petition, and secondly, that the petition was precluded by the doctrine of exhaustion having regard to the dispute resolution mechanism set out under the provisions of the *Physical and Land Use Planning Act*, 2019. As these issues go to the jurisdiction of the court to entertain the petition it is essential that the same be determined as preliminary issues. It is trite law that if a court lacks jurisdiction any proceedings taken before it is null and void. Hence where a jurisdictional issue arises, it is necessary that such issue be tried and deposed of by the court at the earliest opportunity.

Whether the petition satisfied the threshold for a constitutional petition?

11. The case of Anarita Karimi Njeru (1979) eKLR established what has been described as the threshold of a constitutional petition. The court in the case held that for a constitutional petition to be competent, the petition should set out with a degree of precision the petitioner's complaint, the provisions of the *constitution* infringed and the manner in which they are alleged to be infringed.

The court in the case stated:-

> " We would however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the *constitution* it is important(if only to ensure that justice is done to his case) that he should set out with a degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed.

12. The court of appeal in the case of *Mumo Matemu -vs- Trusted Society of Human Rights & 5 others* (2013) eKLR reaffirmed the principle enunciated in the Anaita Karimi Njeru case. At paragraph 44 of the judgment the court stated:-

> (44) We wish to reaffirm the principe holding on this question in Anarita Karimi Njeru (supra). In view of this we find that the petition before the High Court did not meet the threshold established in that case. At the very list, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondent could reply. Viewed thus, the petition fell short of the very substantive test to which the high Court referred to. In view of the substantive nature of these shortcomings it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent".

13. In the case of *Grays Jepkemoi Kiplagat -vs- Zakayo Chepkonga Cheruiyot* (2021) eKLR while considering the application of the principle enunciated in the Anarita Karimi and Mumo Matemu cases (supra) this court stated thus: -

> " It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions.There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints."

14. In the present petition, the petitioner's primary complaint is that the respondent has unjustifiably failed, refused and/or neglected to approve his development plan and that has hindered his ability to fully utilize his plot Nakuru Municipality/Block16/264. In the petition the petitioner has contended that he has complied with all the necessary requirements under the Physical Land Use and Planning Act and yet the Respondent has failed to give approval to the petitioner's development plans and the petitioner avers that this constituted a violation of his constitutional rights under Article 47 of *the constitution*.

Article 47 (1) & (2) of *the constitution* provides as follows: -

> 47. Fair administrative action
>
> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

15. The respondent acknowledges that the petitioner did make an application for approval of his development plans. However, the respondent contends that the suit property was allocated to a company and argued the petitioner lacked the locus standi to institute the present suit against the respondent. The petitioner counters this assertion stating that Brigmac Business Consultants Ltd was a business name registered under the Business Names Act, Cap 499 Laws of Kenya and that he was Co-proprietor of the business. The petitioner has annexed a copy of certificate of registration as a business of Brigmac Business consultants dated 15th September 2011. Being a business name, Brigmac Business Consultants was not an incorporated Corporate body within the meaning of the *companies Act*, 2015 and thus cannot have any legal personality. It does not have any juristic personality and can only institute legal action through its proprietors.

16. There is no dispute that the suit premises Nakuru Municipality Block 16/264, was allocated by the Municipal council of Nakuru to Brigmal Business Consultants in 1993 and that within the premises various business duly licensed by the respondent have been in operation including Bridge Carwash business as per Trade License issued by the Respondent on 9th April 2019. The businesses were all being operated at the suit premises by the petitioner.The petitioner with a view of redeveloping and/or expanding his business submitted to the respondent a development plan for approval. Though it is not clear the exact date the development Plan was submitted for approval, it is evident from the correspondences exchanged between the petitioner and the respondent that the application for approval was made earlier than 2016 although the petitioner subsequently sought further approvals for additional services. This is discernable from the following correspondences:-

    i. Letter dated 25th January 2016 from the National Land Commission where they indicated they had no objection to the proposed development plan.

    ii. Letter dated 9th January 2017 from the Kenya National Highways Authority to the Respondent affirming that the suit premises did not fall within the road reserve.

    iii. Letter dated 24th January 2017 from the Respondents Director Lands & Physical Planning communicating to the petitioner that the application for approval had been deferred to await production of an official search from the Ministry of Lands and clearance from the National Land Commission.

    iv. Petitioner's letters dated 12th September 2017, 19th March 2018, 10th May 2018, 17th August 2018 and 18th March 2021 following up on the approval of the application.

17. There does not appear to have been any formal decision made by the respondent to approve and/or not to approve the petitioner's development plan. While there is indication vide the respondent's letter of 24th January 2017 that the petitioner's application for a carwash facility on the suit premises was tabled before the respondent's Town Planning Technical Committee on 18th January 2017, the application was deferred for the following reasons:-

    i. That the petitioner produces an official search from the Ministry of Lands.

    ii. That the petitioners seeks clearance from the National Land Commission.

18. The petitioner vide the letter of 10th May 2018 to the County Director Lands and Physical Planning received at the County Offices on 11th May 2018 enclosed copies of the ownership documents and a copy of the Registry Index Map (RIM) sheet for Nakuru Municipality Block 16. The petitioner did follow up letters to the respondent on 15th July 2018 and 17th August 2018 which apparently were not responded to. The petitioner contended that he had complied with all the requirements under the *physical and Land use Planning Act*, 2019 and that the Respondent had no valid reason and/or

justification not to approve his development plan. The petitioner asserted that the respondent was in breach of section 4 of the Act which interalia binds all state organs and officers to adhere to the national values and principles set out in Articles 10 and 232 of *the constitution* as well as the principles of land policy set out in Article 60 of *the constitution*.

19. Under Section 57 (1) of the Act, it is mandatory that development permission is obtained from the County executive committee member before any development is undertaken. It provides as follows:-

> 57(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.

20. The petitioner has averred that the respondent had failed and/or neglected to act in accordance with section 56 (c) and (d) of the Act which empowered the respondent to consider and approve all development plans within its jurisdiction. Section 56 (c) & (d) provides: -

> 56. Subject to the provisions of this Act, the *Urban Areas and Cities Act* 2012, the County government shall have the power within their areas of jurisdiction to: -
>
> (a) ---------
>
> (b) ----------
>
> (c) Consider and approve all development applications and grant all development permissions.
>
> (d) ensure the proper execution and implementation of approved physical and land use development plans.

21. The petitioner's complaint in the petition is that his application for development permission to the respondent had not been considered and approval granted or rejected as the case maybe. The petitioner averred that the non-action on the part of the respondent had prejudiced him in that he could execute his development plan to exploit the commercial benefit that was bound to accrue in his favour if the development plan was executed. The respondent vide the replying affidavit sworn by Evans Otieno averred that the petitioner had proceeded with construction in the premises notwithstanding that he had not obtained approval for the development. It was on account of lack of approval that the respondent issued to the petitioner the Enforcement Notices dated 31st July 2018 and 7th December 2020. The respondent vide its Enforcement Notice dated 7th December 2020 requested the petitioner to submit ownership documents for the suit premises. The petitioner had earlier vide the letter of 10th May 2018 furnished the respondent with the ownership documents that he held. The respondent had all along been licensing businesses carried on by the petitioner's business firms on the suit premises. The plot having been allocated by the Nakuru Municipal Council as an unsurveyed Commercial plot, and the title having not been processed it is clear the plot remained untitled and the respondent as the allotting authority would in any case have been expected to have been involved in the processing of the title for the plot. Essentially what the petitioner had was a Temporary Occupation Licence (TOL) until the allocation was formalized through the processing and issue of a title. The Respondent therefore had no basis to request the petitioner to avail a certificate of official search of the plot when no title had been processed and registered.

22. Under Section 58 (4) of the *Physical and Land use Planning Act* an applicant for development permission need not be the registered owner of the land but should provide written consent from the registered owner. In the instant matter the plot allotted to the petitioner was vested in the respondent and it was the respondent who would have been expected to give the consent by approving and/or rejecting to grant the approval with appropriate reasons. The applicant in my view was entitled to have

his application appraised and considered and a decision made either approving or rejecting approval of the development plans. The petitioner in my view was entitled to have expedient administrative action as envisaged under Article 47 of *the constitution*. This did not happen and the respondent therefore violated the petitioners constitutional right to fair and just administrative action. I therefore find and hold that the petition satisfied the requisite threshold for a constitution petition and the petitioner has established there was a breach and violation of his constitutional rights.

Whether the exhaustion doctrine is applicable.

23. The respondent by way of preliminary objection asserted that the petitioner's claim offended the provisions of section 78 (d) of the *Physical and Land Use Planning Act*. Section 78 of the said Act provides as follows: -

> 78. Functions of the County Physical and Land Use Planning Liaison Committee
>
> The functions of the County Physical and Land Use Planning Liaison Committee shall be to—
>
> (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
>
> (b) Hear appeals against decisions made by the Planning authority with respect to physical and Land use development plans in the County;
>
> (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
>
> (d) hear appeals with respect to enforcement notices.

24. The respondent submitted that the petitioner ought to have exhausted the dispute resolution mechanism established under the Act before resorting to the court for redress. The respondent argued it was premature for the petitioner to seek redress from the court without first exhausting the dispute resolution mechanism inbuilt in the *physical and Land use Planning Act*.

25. The respondent submitted that Article 159 (c) of *the constitution* enjoins parties and the courts to embrace alternative dispute resolution mechanisms and that in particular section 9 (2) of the *Fair Administrative Action Act* precludes the court from reviewing administrative actions and decisions unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any written law were first exhausted.

26. In support of its submission the respondent relied on the case of *Speaker of the National Assembly -vs- James Njenga Karume* (1992) eKLR where the court of Appeal held as follows:-

> "Where a dispute resolution mechanism is provided for in statute, and where there is clear procedure for the redress of any particular grievance by *the constitution* or statute that provision ought to be strictly followed."

27. The respondent further placed reliance on the case of *Umoja Innercore Tena Matatu Owners Sacco Society Ltd & Another -vs- Commissioner for Co-operative Development & 25 others* (2017) eKLR where

the court after reviewing various court decisions where the exhaustion doctrine had been considered held that:-

> "—parties ought not to invoke the jurisdiction of the High Court in Judicial Review matters where there is an alternative dispute resolution mechanism established by an Act of parliament and which is efficacious."

28. The petitioner in his submissions maintained that the court had jurisdiction to entertain the petition principally because it was the respondent who was under a duty to consider and give a decision whether to approve or not to approve the development plan by the petitioner under section 57 of the *Physical and Land use Planning Act*. The petitioner's position was that as the respondent had not considered and given a decision on his application for approval of the development plan, section 78 (d) of the Act which related to appeals in respect of enforcement notices would be inapplicable in regard to application for development approval.

29. In the present petition it is evident the respondent issued the enforcement notices when the petitioner's application for development permission was pending. The enforcement notices issued against petitioner touched on the matters in respect of which the petitioner had submitted to the respondent for development permission to be granted. Although the record shows the petitioner appealed against the enforcement Notice dated 7th December 2020 to the County Physical and Land Use Liaison Committee as required under section 78 (d) of the Act, though there is no indication whether the appeal was considered and/or determined by the committee.

30. As observed, the enforcement notices arose from the operations by the petitioner in regard to which the petitioner had sought for development permission. Though I am not sitting on appeal on any decision of the Physical and Land Use Liason Committee, I am not persuaded the enforcement notices were appropriately issued. The respondent had an application for development permission pending before them. In my view the Respondent would not be entitled to decline or refuse to perform a duty that they are required by a statute to perform and then arising from non-performance of their statutory duty seek to punish and/or penalize a party affected by their none performance of their statutory duty or obligation. I see the petitioner as falling under that category. He applied for development permission for his development plans and the respondent neither approved nor rejected the plans only for the respondent to issue an enforcement notice that basically was challenging the operations he was carrying out allegedly without any approval by the respondent.

31. The respondent was under a duty to make a decision whether or not to approve the development plans. It was only after such a decision was made that the petitioner would have invoked the provisions of section 78 (d) of the Act if he was aggrieved by the decision of the respondent.

32. It is my determination therefore that the exhaustion doctrine was inapplicable in the circumstances of this case. The court has jurisdiction and the petition was properly lodged before the court.

33. Having earlier in this judgment determined that it was the petitioner's business firms that were carrying on business on the suit premises, the objection taken by the respondent that the petitioner had no locus standi to bring the suit is unsustainable. The petitioner as one of the proprietors and being authorized by his co- proprietor had locus to file the suit. The petitioner has sought to be declared as the legal and lawful owner of LR Nakuru Municipality Block16/264. The Respondent questioned the manner through which the petitioner was allocated the land suggesting the allotment may have been fraudulently made to the petitioner. It is not clear why from 1993 when the suit property was allocated to the petitioner, no title had been processed. What however is not in dispute is that the property exists and the petitioner has been carrying on business on the property which business was duly licensed by

the respondent. Nonetheless, as fraud is alleged, this petition would not be an appropriate forum to determine ownership of the suit premises as that would require parties to adduce viva voce evidence and be subjected to cross examination in order for the issue of ownership to be ventilated and validated.

34. The right for the petitioner to carry on business at the suit premises is not contested and the petitioner has been carrying on business thereon over a considerable period of time. The allotment made to the petitioner's business firm in 1993 by the respondent which has not been revoked or withdrawn constituted the petitioner at the very least a lawful licencee/allottee who was entitled to have full enjoyment of the suit premises. He was thus entitled to have any formal request for development permission considered and a decision made either approving and/or rejecting approval. Until such determination is made, the petitioner is entitled to continue carrying on its duly licensed business at the suit premises without any interference by the respondent.

35. I find the petition has merit and allow the same on the following terms:-

    1. That the respondent violated the petitioner's constitutional rights of fair administrative action contrary to Article 47 of *the constitution* in failing to appropriately consider and determine his application for development permission in an efficacious manner.

    2. That the respondent is directed to within 60 days of the date of this judgment to consider the petitioner's application for development permission lodged by the petitioner and render its decision in accordance with the provisions of the *Physical and Land Use Planning Act*, 2019.

    3. That pending (2) above the respondent shall not in any manner interfere with the petitioner's business operations on the premises known as Nakuru Municipality/Block 16/264.

    4. That the parties will bear their own costs of the petition.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH JUNE 2022.

J M MUTUNGI

JUDGE