



Karen Ngong View Estate Association v Odeck & 7 others (Environment & Land Case E183 of 2022) [2022] KEELC 14461 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E183 OF 2022
LN MBUGUA, J
OCTOBER 27, 2022**

BETWEEN

KAREN NGONG VIEW ESTATE ASSOCIATION PLAINTIFF

AND

DENNIS ARINGO ODECK 1ST DEFENDANT

NAIROBI METROPOLITAN SERVICES 2ND DEFENDANT

**DIRECTOR GENERAL OF NAIROBI METROPOLITAN SERVICES 3RD
DEFENDANT**

NAIROBI CITY COUNTY 4TH DEFENDANT

**DIRECTOR GENERAL PHYSICAL PLANNING AND DEVELOPMENT OF
COUNTY GOVERNMENT OF NAIROBI 5TH DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 6TH
DEFENDANT**

THE ATTORNEY GENERAL 7TH DEFENDANT

NATIONAL CONSTRUCTION AUTHORITY 8TH DEFENDANT

RULING

1. By a notice of motion dated May 24, 2022, brought under articles 10,22,23,42,43,47,69 and 70 the *Constitution* of Kenya 2010, section 3 of the *Environmental Management and Co-ordination Act* of 1999 and all other enabling provisions of the law, the applicant is seeking a conservatory order in the form of an injunction barring the 1st defendant from undertaking any further construction, excavations, renovations, demolitions or any works on Plot No 12882/109 Ngong Road, Karen,



- Lang'ata Sub-County. The applicants are also seeking a mandatory injunction to compel the 1st defendant to pull down the illegal fence facing Ngong road and restore the same to its position ante.
2. The application is premised on the grounds on the face of it and on the supporting affidavit of one Francis Muturi Kariuki, vice chairman of the plaintiff.
 3. The applicant's case is that the 1st defendant purchased the suit property and became part of the plaintiff's association. That on April 21, 2022, the 1st defendant obtained authority from the 2nd defendant specifically to undertake painting works, floor/wall tiling, ceiling, electrical and welding, carbo, driveway and roof repairs on Plot No 12882/109 but he mischievously deviated from the authorization and commenced illegal excavations, demolitions and illegal construction of a public entertainment joint on the suit land without informing other residents and without considering that the estate is a gated low density residential area.
 4. The applicants further contend that the estate has a common gate and barrier for security services, yet the 1st defendant has opened up an illegal gate opening towards Ngong road thus exposing the residents to serious insecurity issues.
 5. In opposition to the application dated May 24, 2022, the 1st defendant filed the preliminary objection dated July 20, 2022 stating that this court lacks jurisdiction to hear and determine this matter until the plaintiff follows and exhausts the mechanism provided for under section 61(3) and 78(b) of the [Physical and Land Use Planning Act](#) as a pre-condition to filing this suit.
 6. The 1st defendant also filed a replying affidavit sworn on June 8, 2022 where he denies subscribing to the membership of the plaintiff in accordance with its by-laws and deponed that the plaintiff is an illegal society under section 4 of the [Societies Act](#) having failed to comply with section 9 of the said Act.
 7. He avers that he has not deviated from the renovation and repair permit dated April 21, 2022 granted by the 2nd defendant as alleged and contends that he was authorized to lay carbro and the authorized works are now complete. He further avers that he was compelled to seek alternative access to the suit property since the plaintiff and its members had blocked access to the lorries delivering carbro to the suit premises.
 8. He also filed another replying affidavit sworn on September 30, 2022 averring that he has legally and validly opened a restaurant on the suit property, of which he disclosed everything he did on the suit land to the plaintiff. He further avers the Kenya Roads Authority *vide* approval dated April 25, 2022 granted him permission to have access to the suit premises from Ngong road.
 9. He deposes that he has not exposed members of the plaintiff to insecurity as his approved gate is in his own compound in his outer boundary facing Ngong Road and there is no access to and from his compound to the rest of the neighborhood which is a similar access to two other properties on each side of the suit property which include Shell petrol station, java and other businesses.
 10. In response to the application dated May 24, 2022, the 7th defendant filed a replying affidavit sworn on July 5, 2022 by Stephen Mwilu, its Manager, compliance. He avers that in line with the National Construction Authority Regulations 2014, a construction project is required to make an application to the 7th defendant for registration within 30 days of an award of tender of construction to a contractor registered under the Act, then the 7th defendant issues a certificate of compliance within 30 days.
 11. He further avers that the approval process of any construction project is undertaken by the county government, with the 7th respondent registering the construction works once a construction project has been approved by the relevant county government.



12. He avers that the case against the 7th defendant should be dismissed since it received a complaint letter dated May 16, 2022 from the plaintiff through its advocates on May 19, 2022 averring that a sudden construction had commenced on their estate on the property on Plot No 12882/109. That notwithstanding the said letter's proximity with the date of filing of this suit, they visited the site on June 29, 2022 to conduct a site inspection in line with section 23(5) of the [National Construction Authority Act](#).
13. He contends that investigations carried out revealed that the subject site was non-compliant for lack of NCA registered contractor on site, lack of sign board showing all approvals and the professional engaged, lack of personal protective equipment, lack of NCA compliance certificate and lack of accredited skilled workers and site supervisors.
14. He deposes that the 7th defendant was only provided with a renovation/repair permit from the Nairobi Metropolitan services as proof of a construction permit but the project is not registered with the 7th respondent and is therefore illegal. He added that the subject project was suspended under section 23 (3) (c) of the [National Construction Authority Act](#) for non-compliance.
15. In reply to the 1st defendant's preliminary objection, the plaintiff filed grounds of opposition dated July 27, 2022 stating that section 61(3) and 78(b) of the [Physical and Land Use Planning Act](#) would only apply to the 1st defendant who applied for a development permission if at all the permission was denied. The plaintiff further stated that he is not challenging the repairs permit issued to the 1st defendant but rather the deviation by the 1st defendant of the permit issued to him.
16. The plaintiffs have filed a further affidavit sworn on July 4, 2022 by Francis Muturi Kariuki in reply to the 1st defendant's replying affidavit sworn on June 8, 2022. He reiterates that the 1st defendant is indeed a member of the plaintiff as is evident from payment of the service charges and the levy imposed on his trucks. The plaintiffs emphasize that the 1st defendant's actions have changed the use of the property on the ground without the necessary approvals.
17. The plaintiffs also filed a further further affidavit sworn on July 27, 2022 by the same deponent where it is contended that the plaintiffs were not aware that the 7th defendant was conducting investigations until that time when their lawyer was served with the replying affidavit of the 7th defendant.
18. The plaintiffs have filed another application dated September 23, 2022 seeking orders to restrain the 1st defendant from operating a hotel known as 109 Tavern together with a car wash and barbershop already in operation and to pull down the illegal gate that faces Ngong road. The plaintiffs also seek leave to amend their pleadings.
19. The 4th and 5th defendants are not opposing the applications filed by the plaintiff, while the 2nd, 3rd and 8th defendants who were represented in court did not state their stand regarding the applications and the preliminary objection filed herein. As for the 6th defendant, they have not made any appearance in these proceedings.
20. In their written submissions dated July 4, 2022 and July 27, 2022, the plaintiffs contend that the 1st defendant's preliminary objection does not meet the threshold of a preliminary objection as enunciated in the case of *Mukbisa Biscuit Manufacturers Ltd v West End Distributors Ltd* [1969] E A 696. That this is a case where the court will have to interrogate as to who applied for a development permit in the context of section 61(3) and 78(b) and that is purely evidential.



21. It is also submitted that the plaintiffs have satisfied the three requirements for grant of the injunctions sought as held in *Giella v Cassman Brown* 91973) EA 358 and adopted in *Kenya Electricity Transmission Company Limited v Kibotu Limited* [2019] eKLR.
22. For the 1st defendant, their submissions are dated July 22, 2022 and October 10, 2022. Relying on the decision in *Angela Mbugua & 4 Others v KO Holdings Limited & 2 others* [2020] eKLR, the 1st defendant submitted that his preliminary objection is based on pure points of law since it challenges this court's jurisdiction to entertain this suit.
23. He further submitted that from the wording of section 61(3) of the *Physical & Land Use Planning Act*, the plaintiff herein is qualified as an interested party to have exhausted the appeal mechanism under section 78(a) and (b) of the said Act.
24. He also submitted that there is no evidence that the 1st defendant has deviated from the renovation and repair permit dated April 21, 2022 since if it had deviated, the 4th and 5th defendants would have issued him with an enforcement notice under section 72(1) and (2) of the *Physical and Land Use Planning Act*.
25. It was his submission that the 7th defendant had no role in the issuance of the notification of approval development permission dated December 14, 2021. He further argued that the plaintiff appears to have failed to appreciate and understand that notification of approval of development permission dated December 14, 2021 is the document that granted him the change of user permission to use his suit property as a restaurant and it is separate and distinct from the renovation and repair permit dated April 21, 2022.
26. Relying on the Court of Appeal's decision in *The Speaker of the National Assembly v James Njenga Karume*[1992] eKLR, the 1st defendant submitted that the doctrine of exhaustion of statutory remedies requires that the plaintiff pursues its grievance vide the statutorily provided mechanisms. He pointed out that the plaintiff lodged a complaint against him at the 7th defendant and obtained a suspension order. He added that if there's truth that he has disobeyed the suspension order, the 7th defendant has power under the provisions of section 25 of the *National Construction Authority Act* to enforce by reporting the matter to the nearest police station but it failed to do so.
27. He further submitted that none of the grounds listed in the 7th defendant's suspension of work notice dated June 29, 2022 are provided by the *National Construction Authority Act* as grounds upon which the 7th defendant can issue a suspension notice and that it would imply that the notice was *prima facie ultra vires* the provisions of the said Act.
28. He pointed out that his evidence that Kenya Urban Roads Authority approved access to his property from Ngong road was not rebutted. He also submitted that the plaintiff has failed to meet the threshold for grant of an interlocutory injunction, adding that though the plaintiff also sought an order of mandatory injunction, it failed to show the special circumstances entitling it to such orders.

Determination

29. On October 3, 2022, this court gave directions that a ruling shall be delivered on October 27, 2022 in respect of the pending applications and the preliminary objection. I find that the issues falling for determination are;
 - a. Whether the doctrine of exhaustion of remedies is applicable in this case.



- b. Whether the orders of injunction (including the mandatory injunction) sought by the plaintiffs as against the 1st defendant are merited.
- c. Whether, the plaintiffs should be granted leave to amend their pleadings.
30. The plaintiffs seeks a conservatory order in the form of an injunction barring the 1st defendant from undertaking any further construction, excavations, renovations, demolitions or any works on Plot No 12882/109. They also seek a mandatory injunction to have the structures built by 1st defendant pulled down. The 1st defendant on the other hand contends that he duly obtained the relevant permits to carry out the construction on the suit land and that he has already completed the project. He also raised a preliminary objection stating that this court has no jurisdiction to determine issues herein as the plaintiff has not exhausted the appeal mechanism laid out in the [Physical Land use Planning Act, 2019](#).
31. A perusal of the pleadings of the plaintiffs (see paragraph 12, 13, 16 and 26 of the plaint) indicate that their bone of contention is that the 1st defendant went beyond what had been approved “ painting works, floor /wall tiling, ceiling , electrical and welding, plumbing, carbo, driveway and roof repairs” and that no environmental impact assessment (EIA) license had been obtained.
32. Going by the averments made by the 1st defendant, his project is complete. Indeed, in the plaintiff’s application dated September 23, 2022, they recognize that the 1st defendant is running various businesses on the suit land including operating a hotel. It is also quite apparent that the 1st defendant’s project was carried out on the strength of the renovation and repair permits and approvals dated December 2, 2021 captured in a notification dated December 16, 2021 and the one of April 25, 2022, (1st defendants annexures “DAO4” and “DAO7”).
33. I find that the crux of the matter relates to the aforementioned permits and approvals despite the assertion by the plaintiffs that their concern is plaintiff’s deviation from the said approvals and permits. I therefore hold the view that the issues raised concern construction of a permanent building and an access road which is a form of land use /development which falls under the ambit of the [Physical and Land Use Planning Act](#).
34. The plaintiff is aggrieved by the 2nd defendant’s decision to approve the 1st defendant’s project. However, a scrutiny of the “notification of approval of development” bearing the stamp of the 2nd defendant dated December 16, 2021 (“DAO7”) reads in part:

“Your application, PPA-CU-AAE962, submitted on November 15, 2021 seeking permission for change of use (new) from residential to restaurant on L R/Plot no 12882/109 Situated in Karen, Road Ngong Road Was approved by the County Planning Committee held on December 2, 2021.”

It is clear beyond peradventure that the aforementioned document is simply what it is, a notification. The approvals by the County Planning Committee had apparently been given earlier on December 2, 2021. The document availed by the 1st defendant as “DAO6” is the advertisement for the change of user carried out under the [Physical Land Use and Planning Act of 2019](#). This far, I discern that the approvals for the project of the 1st defendant had been conducted by the County Planning Committee.

35. Section 61(3) of the [Physical and Land Use Planning Act](#) provides an elaborate mechanism for relief for persons aggrieved by a decision to grant a development permission. The same provides that.

“An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal



against that decision to the county physical and land use planning liaison committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”

36. Section 78 (b) of the Act further provides that functions of the County Physical and Land Use Planning Liaison Committee shall be to hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county.
37. The plaintiffs contend that sections 61 (3) and 78 (b) of the *Physical and Land Use Planning Act* are not applicable herein as the said sections only relate to the persons who have applied for a development permission. However, the wording of the said sections are not specifically directed to such persons who have applied for a development permission.
38. In the case of *Eaton Towers Kenya Limited v Kasing'a & 5 others* (Civil Appeal No 49 of 2016) (2022) 861 (KLR) (28 April 2022), a developer (Eaton Towers) had embarked on the construction of a communication mast on a certain property. The adjacent land owner, one Ken Kasinger was peeved by this move and challenged the development on the basis that the construction was illegal and that there was no adherence to EIA guidelines and sought orders restraining the developer from construction of the mast. He succeeded. However, the dispute spilled over to the Court of Appeal which held that;

“we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.....

We state categorically and without equivocation that the multifaceted nature of any petition, or suit for that matter is no basis to and for a court to arrogate jurisdiction to itself. This court already made a finding on this issue and castigated such reasoning in *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* (2020) eKLR”.

39. It is worthy to note that when the *Kibos case* was presented at the Supreme Court of Kenya, the court held that;

“Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism”.

40. Further, in the *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR (supra) it was held that,

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an act of parliament, that procedure should be strictly followed...”

41. And in *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR the Court of Appeal stated:

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke



the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

42. Further in *James Mungai Munene (Chairman) & another v Joseph Gitthinji Kamau & 3 others* [2022] eKLR, the court held,

“...The primary dispute adjudication body mandated to adjudicate physical, land use, and development approval and permission disputes under the *Physical and Land Use Planning Act* 2019 is the County Physical and Land Use Planning Liaison Committee. This court is vested with appellate jurisdiction in those disputes..”

43. This far, it is quite clear that the nature and extent of the developments and land use undertaken by the 1st defendant are issues within the province of the physical and land use planning liaison committees.

44. The plaintiffs appear to be buoyed by the averments of the 7th respondent, the National Construction Authority who had apparently issued a suspension notice upon the 1st defendant. However, the said notice is dated June 29, 2022 and cannot have formed the basis of filing the suit or the application of May 24, 2022! In any event, there is no evidence that the 7th respondent pursued the process envisaged under section 23 (3)A of the aforementioned Act to prosecute the 1st defendant for defiance of the notice.

45. On the issue of EIA, it is worthy to note that not each and every project requires an EIA. The legal framework on matters EIA is the *Environmental Management and Co-ordination Act* with particular reference to the amendment to the second schedule via legal notice No 31 of April 30, 2019. Again there is no evidence to indicate that the plaintiffs explored the complaint mechanisms provided for under the aforementioned Act; for instance, writing a complaint to the Director General, or raising a complaint with the National Environmental Department whose functions include; to investigate any allegations or complaints against any person or against the authority in relation to the condition of the environment in Kenya.

46. I believe I have said enough; that the doctrine of exhaustion of remedies is applicable herein and this court must exercise judicial restraint in adjudication of issues which ought to be tabled before the relevant adjudication bodies/ committees. I therefore find that the notice of preliminary objection lodged by the 1st defendant dated July 20, 2022 is merited and the same is hereby allowed. Thus the suit herein as well as the applications of the plaintiffs dated May 24, 2022 and September 23, 2022 are hereby struck out for want of jurisdiction. Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Dr. Kanyariri for the Plaintiffs

Thuo for 1st Defendant

Lamanya for 4th and 5th Defendants

M/s Getugi for 7th Defendant

Court assistant: Eddel

