Riunga v County Planning Committee, Nairobi City County & 2 others (Appeal E053 of 2022) [2022] KEELC 13604 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13604 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

APPEAL E053 OF 2022

JO MBOYA, J

OCTOBER 13, 2022

BETWEEN

SUSAN WANJIKU RIUNGA ..... APPELLANT

AND

COUNTY PLANNING COMMITTEE, NAIROBI CITY COUNTY .... 1ST RESPONDENT

SUTTON HOLDINGS LIMITED ..... 2ND RESPONDENT

DAVID ZINNY WEYUSIA ..... 3RD RESPONDENT

JUDGMENT

1. The Appellant herein is the registered owner and proprietor of all that parcel of land known as L.R No. 1159/131, situate within Karen Area, in the city of Nairobi.

2. On the other hand, the Appellant's parcel of land, (details in terms of the preceding paragraph), is located in the neighborhood of L.R No. 1159/323 (hereinafter referred to as the suit property) wherein the 2nd Respondent sought to erect and construct inter-alia a Petrol filling and Gas station.

3. Arising from the intended erection and construction of the Petrol and Gas filling station, the Appellant herein felt aggrieved and dissatisfied. Consequently, the Appellant filed an appeal before Nairobi County Physical and Land Use Planning Liaison Committee, challenging the Approval of the Application for Change of User over and in respect of the Suit Property.

4. Pursuant to the lodgment of the appeal before Nairobi County Physical and Land Use Planning Liaison Committee, the said appeal was heard and disposed of vide a Decision rendered and delivered on the 4th July 2022. For clarity, the Nairobi County Physical and Land Use Planning Liaison Committee found and held that the impugned appeal was filed out of time without Leave.

5. Premised on the foregoing, the Liaison Committee proceeded to and indeed dismissed the appeal, albeit with no orders as to costs.

6. It is imperative to note that the Decision of the Liaison committee has aggrieved the Appellant herein. Consequently, the Appellant proceeded to and filed the subject appeal.

7. For coherence, the subject appeal was filed vide Memorandum of appeal dated the 7th July 2022 and in respect of which the Appellant has raised various Grounds of Appeal.

8. For completeness, the Memorandum of Appeal has alluded to and enumerated the following grounds;

    i. Thatthe Committee erred in law in importing the doctrine of constructive notice under section 61 of the *Physical and Land Use Planning Act*,2019;

    ii. Thatthe Committee erred in failing to apply itself rightly in the face of the mandatory fair administrative processes which are governed by Article 47 of *the Constitution*, 2010 and the Fair Administrative Act, 2015;

    iii. Thatthe Committee erred in finding that the Appeal lodged before it was filed out of time contrary to the provisions of section 61(3) of the *Physical and Land Use Planning Act*, 2019 in spite;

        (a) The Local Committee NOT tabling any evidence that as an Administrator, it invited, heard and communicated its decision to the Appellant in accordance with sections 4 and 5 of the Fair Administrative Act,2015;

        (b) The Appellant having specifically denied having been notified of the processes for a change of user application; and

        (c) The Appellant having placed before the Committee unrebutted evidence that she had expressly objected to the change of user.

    iv. Thatthe Committee erred in making a conclusive finding on matters of facts which had been disputed in the Affidavits before it without summoning the necessary parties that would have enable it to reach a just decision thereon as it was required to under the *Physical and Land Use Planning Act*,2019;

    v. Thatthe Committee erred in validating an otherwise fraudulent and illegal process that led to the issuance of a Development Plan based on an application filed by an unqualified person and anchored on repealed statutes;

    vi. Thatthe Committee erred in validating a Development Plan which was in conflict with the very statute that created it;

    vii. Thatthe Committee erred in NOT rendering a decision on the substantive Appeal in spite having issued directions and proceeded to hear parties on the same;

    viii. Thatthe Committee erred in dismissing the Appeal without rendering a decision on the substance thereof; and

    ix. Such other grounds to be adduced at the hearing hereof.

9. The matter herein came up for hearing of an Application seeking for Conservatory Orders on the 27th July 2022. For clarity, the Application under reference was dealt with and disposed of on terms.

10. On the other hand, the court also proceeded to and issued directions pertaining to the hearing and determination of the Appeal. In this regard, the court directed that the Appeal be canvased and disposed of by way of written submissions.

Submissions By The Parties:

a. Appellant's Submissions:

11. The Appellant herein filed written submissions dated the 3rd August 2022 and in respect of which the Appellant itemized five issues for determination.

12. First and foremost, Learned Counsel for the Appellant submitted that the Liaison Committee erred in law in failing to apply itself to the mandatory provisions of Article 47 of *the Constitution* 2010 as well as the provisions of the Fair Administration Act, 2015.

13. In this regard, counsel for the Appellant contended that it was incumbent upon the First Respondent to ensure that same complied with the terms and stipulations provided for under *the Constitution* and in particular, that same failed to afford the Appellant herein the requisite notice of an opportunity to be heard on the issue in dispute.

14. In the premises, counsel for the Appellant contended that a failure to comply with the mandatory provisions of Article 47 of *the Constitution*, as read together with the provisions of the Fair Administration Act, negated the legality of the impugned decision.

15. Owing to the foregoing, the counsel for the Appellant has submitted that the impugned decision was therefore illegal, unlawful and unconstitutional. Consequently, counsel for the Appellant has implored the court to find and hold as much.

16. In support of the submissions pertaining to compliance with Article 47 of *the Constitution* 2010, the counsel for the Appellant has cited and relied on various decisions of inter-alia Judicial Service Commission v Mbalu Mutava & Another [2015]eKLR, Republic v Kenyatta University Ex-parte Martha Huihini Ndungu [2019]eKLR.

17. Secondly, the Appellant has contended that the committee erred by applying and adopting the Doctrine of constructive Notice as pertains to the subject matter.

18. It is further submitted that having not been notified of the intended change of user and having not participated in the meetings relating to the change of user, it was incumbent upon the 2nd and 3rd Respondents to tender and table credible evidence to show that indeed the Appellant was privy and party to the information pertaining to the impugned decision.

19. On the other hand, counsel for the Appellant also pointed out that it was incumbent upon the 1st Respondent, to ensure that the Appellant was duly notified and informed of the impugned decision, insofar as same was bound to affect the Rights of the Appellant.

20. Nevertheless, counsel for the Appellant added that despite there being no evidence of notification to the Appellant, the 1st Respondent herein resorted to and applied the Doctrine of Constructive notice and thereby arrived at an erroneous conclusion that indeed the Appellant was deemed to have been duly notified of the impugned decision by virtue of attendance at the meeting allegedly held on the 8th February 2022.

21. Be that as it may, counsel for the Appellant added that the Doctrine of constructive Notice, was/is inapplicable in respect of the subject matter.

22. In support of the contention that the Doctrine of Constructive notice does not apply to the subject matter, which is clearly, governed by the Provisions of an Act of Parliament, the Counsel for the Appellant cited and relied on the decision in the case of David Sironga Ole Tukai v Francis Arap Muge & Others [2014]eKLR and Nyali Ltd v The Attorney General [1956] 1Q B 1.

23. Thirdly, Learned Counsel for the Appellant submitted that the committee also erred by making a determination of facts on contested issues, albeit based on affidavit evidence.

24. In particular, the Appellant has contended that the committee erred in finding and holding that the Appellant herein had attended a meeting held on the 8th February 2022 at the site, whereas the Appellant herself has denied having attended such a meeting.

25. Premised on the foregoing, counsel for the Appellant has contended that there being a contest on the veracity of the averments, it was incumbent upon the Liasson Committee to allow the witnesses to tender oral evidence and to be cross examined.

26. Be that as it may, the Appellant has added that the deponents of the various affidavits having not been cross examined, the finding and holding by the 1st Respondent, including the holding that the Appellant attended the meeting held on the 8th February 2022 was therefore neither safe nor sound.

27. To emphasize the necessity that it was important to afford the witnesses an opportunity to testify and to be cross examined, counsel for the Appellant has quoted and relied on the decision in the case of Peter M Karanja & Company Advocates v Sukhwinder Sighn Chatthe [2019]eKLR, Ahad v CJE [2019]eKLR, Jetlinks Express Ltd versus East Africa Safari Air Express [2015]eKLR and Chief Land Registrar & 4 Others versus Nathan Tirop Koech & 4 Others [2018]eKLR.

28. The fourth issue that has been raised and canvassed on behalf of the Appellant is that the Committee herein abdicated her Statutory Jurisdiction to substantively deal with and determine the appeal that was lodged before it.

29. Essentially, the Appellant has contended that pursuant to and by dint of Section 78 of the Physical Planning and Land Use Act, 2019, it behooved the Committee to suitably address and deal with the substantive appeal, which was not the case.

30. At any rate, the Appellant further submitted that the 1st Respondent herein also erred in failing to find and hold that the Planning application, which premised and/or predicated the application for the change of user was indeed prepared and processed by a person who was neither qualified nor licensed.

31. To the extent that the Planning application was prepared by a person who was neither qualified nor licensed, counsel for the Appellant has submitted that the entire application was therefore null and void.

32. On the other hand, Learned Counsel for the Appellant has also submitted that the 1st Respondent herein also failed to take cognizance of the zoning requirements of the particular area. Consequently, it has been stated that failure to take into account the zoning requirements therefore vitiate the impugned decision.

33. Finally, counsel for the Appellant has therefore submitted that the impugned application which was filed and lodged by the Appellant, was indeed a repackaged application for development plan, which had previously been submitted by Petrol city Limited.

34. In the premises, counsel for the Appellant has contended that the previous application for Petro City Limited having been duly objected to and same having been aborted, it was not open for the 2nd Respondent to repackage the same application and to seek the approval of the 1st Respondent.

35. At any rate, counsel for the Appellant has also added that the Respondent herein shall not suffer any prejudice, if the subject appeal was allowed. For clarity, counsel for the Appellant has pointed out that the purpose of the subject appeal is to challenge the manner in which approval for Change of User was procured and obtained and by extension the necessity to protect the Appellant's Fundamental Rights as enshrined under *the Constitution* 2010.

b. Submissions By The 1St Respondent

36. The 1st Respondent herein did not file any written submissions.

c. 2nd And 3nd Respondents' Written SubmissionS

37. Vide written submission dated the 1st September 2022, the 2nd and 3rd Respondents have isolated and addressed six pertinent issues for determination.

38. Firstly, the 2nd and 3rd Respondents have submitted that the First Respondent indeed complied with and adhered to the requirements of Article 47 of *the Constitution* 2010, as read together with the provisions of the Fair Administrative Actions Act, 2015.

39. In particular, it was submitted that the impugned decision by the 1st Respondent was made within the four corners of the law and hence the contention that the 1st Respondent breached the provisions of *the Constitution* is misleading and erroneous.

40. Secondly, the 2nd and 3rd Respondents have also submitted that the liaison committee was within the law to hear and determine the appeal on the basis of the affidavit evidence tendered by and on behalf of the Parties..

41. In any event, counsel for the 2nd and 3rd Respondent have added that if the Appellant was keen and desirous to summon any witness for purposes of cross examination, then it was incumbent upon the Appellant to issue the requisite notices and lay a basis for the intended cross examination.

42. However, to the extent that the Appellant neither sought to cross examine nor did same lay a basis for such cross examination, the Appellant herein cannot now be heard to contend that a determination was made on the basis of contested affidavits.

43. Thirdly, counsel for the 2nd and 3rd Respondents have submitted that having attended the meetings held on the 4th February 2022 as well as the 8th February 2022, where the issue of the change of user was addressed and deliberated upon, it was deemed that the Appellant herein became aware of the issuance of the Approval for change of user at the very latest on the 8th February 2022.

44. Premised on the foregoing, counsel for the 2nd and 3rd Respondents have thus submitted that the appeal before the liaison committee which was filed on the 7th June 2022, was therefore filed out of time without leave.

45. In the premises, counsel for the 2nd and 3rd Respondents has submitted that the appeal was therefore lodged out of time and thus same was barred by the Provisions of Section 61(3) of the *Physical and Land Use Planning Act*, 2019.

46. Other than the foregoing, counsel for the 2nd and 3rd Respondents have further submitted that liaison committee was within her mandate and jurisdiction to adopt and apply the Principle of Constructive Notice and by extension to hold that indeed the Appellant herein became aware and knowledgeable of the fact of the issuance of the change of user.

47. On the other hand, counsel for the 2nd and 3rd Respondents have submitted that the Recognition Agreement between the County Government of Nairobi and Karen Lang'ata District Association was not binding on the Respondents and in particular on the 2nd and 3rd Respondents.

48. Besides, it was pointed out that even the decision that was rendered vide Milimani ELC Petition No. 40 of 2018, was similarly not binding on the 2nd and 3rd Respondents, insofar as same were not Parties thereto.

49. In any event, Learned counsel for the 2nd and 3rd Respondents has added that the said decisions was also rendered long after the decision on change of user had been issued and approved. For clarity, it was pointed out that the decision in the said Petition was rendered on the 21st October 2021, whereas the change of user approval was issued on the 6th September 2021.

50. Finally, counsel for the 2nd and 3rd Respondents has also submitted that the application for change of user was not a repackaged application. In this regard, counsel for the 2nd and 3rd Respondents has added that the 2nd Respondent herein is a separate and distinct limited liability company from Petro City Company Ltd.

51. Premised on the foregoing, counsel for the 2nd and 3rd Respondents has therefore implored the court to find and hold that the appeal before the liaison committee was indeed filed out of time, albeit without Leave.

52. In support of the foregoing submissions, counsel for the 2nd and 3rd Respondents has cited and referred to the case of Maasai Mara Sopa v Narok County Government, Nairobi HCC Petition No 336 of 2015, Judicial Service Commission of Kenya v Mbalu Mutava & Another [2015]eKLR, Republic v Law Society of Kenya Disciplinary Tribunal & Another Ex-parte Muema Kitulu [2018]eKLR and Republic versus Kenya Revenue Authority Ex-parte Althaus Management & Consultant Ltd [2015]eKLR, Khen Kharis Mburu & Rachael Wanjiku Kharis versus James Karong Ng'ang'a, Antony Kaburi Kario & 2 Others v Ragati Tea Factory Company Ltd & 10 others [2014]eKLR and Samuel Kamau Macharia v Kenya Commercial Bank Ltd [2012]eKLR.

Issues For Determination:

53. Having evaluated the Memorandum of Appeal, the Record of Appeal and the various Documents filed therewith and having similarly considered the written submissions filed by the Parties, the following issues are critical and thus appropriate for determination;

    i. Whether the Appeal filed before the Liaison Committee, was timeously filed in accordance with the Provisions of Section 61 (3) of the *Physical and Land Use Planning Act*, 2019.

    ii. Whether the Liaison Committee was within her mandate and Jurisdiction to determine the subject Appeal on the basis of Affidavit Evidence.

    iii. Whether the Decision of the 1st Respondent and by extension that of the Liaison Committee complied with the Provisions of Article 47 of *the Constitution*,2010.

iv. Whether the Application for Change of User was indeed a repackaged Application for Development Plan by Petro city Enterprises Limited.

Analysis And Determination

Issue Number 1

Whether the Appeal filed before the Liaison Committee, was timeously filed in accordance with the Provisions of Section 61 (3) of the *Physical and Land Use Planning Act*, 2019.

54. It is common ground that the 2nd Respondent herein indeed filed or lodged an application for change of user pertaining to and concerning the use of the suit property. For clarity, the application for change of user was to convert the use of the suit property from single dwelling to commercial/business purpose.

55. There is also no gainsaying that the application by and or on behalf of the 2nd Respondent was dealt with and determined by the 1st Respondent herein vide decision rendered on the 17th September 2021, whereby the 1st Respondent approved and authorized the change of user over and in respect of the suit property.

56. Suffice it to point out that the decision of the 1st Respondent herein, which was rendered on the 17th September 2021, was the one that provoked or precipitated the filing of an appeal before Nairobi County Physical and Planning Liaison Committee, by the Appellant.

57. Be that as it may, it is common ground that the appeal by the Appellant herein which was lodged before Nairobi County Physical and Planning Liaison Committee , was heard and disposed of vide a decision rendered on the 4th July 2022, albeit published on the 7th July 2022.

58. For completeness, Nairobi County Physical and Planning Liaison Committee found and held that the appeal by the Appellant, which essentially challenged the decision of the 1st Respondent herein, was filed and lodged outside the statutory timelines provided for by dint of Section 61(3) of the *Physical and Land Use Planning Act*, 2019.

59. Premised on the foregoing decision, the Nairobi County Physical and Planning Liaison Committee proceeded to and Dismissed the appeal.

60. It is the decision of Nairobi County Physical and Planning Liaison Committee , which dismissed the appeal by the Appellant which has precipitated and provoked the lodgment of the current appeal.

61. Suffice it to point out that the Appellant has contended that the committee erred in finding and holding that the appeal was filed out of time and therefore the decision to that effect was illegal, unlawful and invalid.

62. Be that as it may, it is imperative to observe that if the appeal before the committee was indeed filed or lodged out of time, then the committee would not have been seized of the requisite Jurisdiction to entertain and adjudicate upon the appeal.

63. For coherence, it is important to note and recall that where an appeal is filed out of time, albeit without leave of the court, then such an appeal is invalid and a nullity.

64. To this end, it is appropriate to take cognizance of the holding in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013]eKLR, where the Supreme Court of Kenya observed as hereunder:

> "To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out."

65. Nourished by the foregoing observation, it is now appropriate to interrogate and discern whether the Appeal that was lodged before the Committee was filed within the established and stipulated timeline or otherwise.

66. First and foremost, to be able to determine whether the appeal was filed within time or otherwise, it is appropriate to determine when the Appellant was informed of the outcome of the impugned decision or better still when the Appellant became knowledgeable and aware of the existence of the impugned decision.

67. To start with, there is no dispute that the impugned decision was never directly/ personally disseminated nor communicated to the Appellant. Consequently, the determination of when time to appeal commenced to run is not premised on the date of communication, dissemination or service of the impugned order upon the Appellant.

68. To the contrary, the determination of when time to file the appeal commenced is dependent on when the Appellant discovered, established or became aware of the existence of the impugned decision.

69. To this extent, it is imperative to take cognizance of two critical events, which are said to have been attended by the Appellants and wherein the information pertaining to and concerning the issuance of the change of user was disseminated.

70. Firstly, it was contended that there was convened and held a meeting on the 4th February 2022 wherein the issue of the proposal to construct a petrol station on the suit property was discussed and deliberated upon. For clarity, the minutes relating to the convention of the said meeting are contained at pages 208 to 211 of the Record of Appeal.

71. Other than the minutes, there is also a list of the attendees, being the persons who attended and participated in the said meetings. For clarity, the list of attendees shows and reflect that the Appellant herein indeed attended and affixed her name and signature to confirm that same was in attendance.

72. Suffice it to point out that the impugned meeting that was held on the 4th February 2022 touched on and concerned development control regarding the proposal to construct a petrol station on the suit property.

73. Secondly, there was another meeting which was held on the 8th February 2022 at the site (locus in quo). For clarity, the meeting herein was attended by various persons including members of Karen Lang'ata District Association as well as by the current Appellant.

74. As concerns the meeting held on the 8th of February 2022, the minutes thereof have been variously alluded to in the Record of Appeal. However, the Schedule of attendees is contained at pages 222 to 223 of the Record of appeal.

75. For completeness, the Schedule of attendees shows that the current Appellant was indeed present and her name is reflected as number 14 in the said list of attendees. For clarity, the schedule against the name of the Appellant is duly signed and same contains the cell phone number of the Appellant.

76. It is important to state that the minutes relating to the meeting of the 8th February 2022 are contained at pages 213 to 214 and it is evident that during the meeting of 8th February 2012, the issue as to whether or not a change of user had been granted was disclosed and disseminated to all the persons who were in attendance.

77. From the minutes, which have been produced and contained in the Record of Appeal, it is evident and apparent that the information relating to the change of user was divulged to all and sundry. Consequently, if the Appellant herein had previously not been aware of the approval of the change of user, then same must be deemed to have been made aware and informed of the said approval during the impugned meeting.

78. To my mind, the information contained in the minutes of the meetings held on the 8th February 2022, constitutes sufficient basis upon which this honorable court can and do find that indeed the Appellant was made aware or better still, became aware of the approval of the change of user.

79. Premised on the foregoing, if the Appellant herein was aggrieved and dissatisfied with the approval for change of user, then same had the information and the notice of the approval and such information was therefore sufficient to enable the Appellant to lodge, propagate and mount the intended appeal, if same was keen so to do.

80. From my end, I find and hold that the Appellant herein was made aware, became aware and conversant with the grant of the approval for the change of user during the two meetings, which same attended, resting with the meeting of the 8th February 2022.

81. Perhaps, it is also important to underscore that despite the minutes of the two meetings having been presented before the committee, the Appellant herein neither discredited nor controverted same.

82. In any event, it is worthy to mention that the only meeting that the Appellant contested and averred that she was unaware of was the meeting held on the 4th February 2021. However, it is imperative to underscore that the minutes which have been availed and produced before the court speaks to the meeting of 4th February 2022 and not otherwise.

83. Having made the foregoing observation, it is now appropriate to interrogate whether the appeal that was lodged before the Committee was indeed filed timeously and with accordance with the provisions of Section 61(3) of The Physical & Land Use Planning Act, 2019.

84. To start with, it is desirable to take note of the contents of the said Section (Supra). Consequently, the Section is reproduced as hereunder;

> 61 Decision making and communication
>
> (1) When considering an application for development permission, acounty executive committee member—
>
> (a) shall be bound by the relevant approved national, county,local, city, urban, town and special areas plans;

(b) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought;

(c) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought;

(d) shall take into consideration thecomments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area;and

(e) in the case of a leasehold property, shall take intoconsideration any special conditions stipulated in the lease.

(2 With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may—

(a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; or

(b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing.

(3) 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.

85. From the foregoing provision, it is evident that any person or Interested Party who is aggrieved by the decision of the Planning authority is obligated to file and commence the intended appeal within 14 days of the impugned decision.

86. In my considered view, the time for computing the duration for lodgment of the intended appeal, if any, runs from when the aggrieved person or Interested party becomes knowledgeable and aware of the impugned decision.

87. To my mind, knowledge of the impugned decision can arise by the terms of the decision being directly communicated to the person or aggrieved party, by way of service or otherwise by the person/aggrieved party becoming aware of the impugned decision, including in this case, by attending a meeting where the terms of the impugned decision are disseminated/propagated to those who were in attendance.

88. Having found and held that the Appellant herein duly attended and participated in the meetings which were called, convened and held on the 4th February 2022 and 8th February 2022, respectively, it was therefore incumbent upon the Appellant herein to file and or mount the Appeal within 14 days from 8th February 2022, at the very latest.

89. Premised on the foregoing, I come to the conclusion that indeed by the time the Appellant filed and or lodged the impugned appeal on the 7th June 2022, the timeline for the lodgment of the said appeal had long lapsed and extinguished.

90. To the extent that the appeal before the committee was lodged outside the prescribed timeline, the question that now arises is whether the said appeal was competent and capable of being adjudicated upon and determined on merits.

91. In my considered view, an appeal that is lodged outside time raises a jurisdictional question to the extent that a court or tribunal confronted with an appeal filed out of time, albeit without leave would not be seized of jurisdiction to entertain the said appeal.

92. Suffice it to point out, that jurisdiction of a court is critical, essential and paramount in the determination of any dispute that may arise or be placed before the court for adjudication, the Appeal before the Liasson Committee, not excepted.

93. For clarity, without the requisite jurisdiction, a court of law or a quasi-tribunal would be called upon to summarily strike out the impugned application and in this case the impugned appeal.

94. To buttress the importance of Jurisdiction, it is appropriate to take cognizance of the holding of the Supreme Court of Kenya Samuel Kamau Macharia v Kenya Commercial Bank & Another [2012]eKLR, paragraph 68 where the Supreme Court of Kenya held as hereunder;

> (68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*.
>
> Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

95. Consequently and in the absence of Jurisdiction, the court is therefore called upon to down its tools. Indeed the answer herein, has been underscored, ratified and upheld in various decisions.

96. Be that as it may, I beg to adopt the dictum of the Court of Appeal in the case of Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989]Eklr, Where the Court expressed himself as follows on the issue of Jurisdiction: -

> 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...

97. In view of the foregoing observation, I come to the conclusion that indeed the Committee correctly found and held that the appeal before same was filed out of time and without leave.

98. Similarly, I also come to the conclusion that having found and held that the impugned appeal was filed out of time, the committee was legally bound to strike out the appeal (not dismiss) on the basis of same being incompetent and contrary to the stipulation vide Section 61(3) of The Physical & Land Use Planning Act, 2019.

99. On the other hand, it is also appropriate to state that the Appellant herein has also raised other contentions as to when same got to know of or became aware of the impugned Decision of the Planning authority.

100. Despite having found and held that the Appellant became knowledgeable and aware of the Decision of the Planning authority at the very latest on the 8th February 2022, it is still appropriate to consider the claims by the Appellant as pertains to when same alleges to have known of the existence of the impugned decision of the Planning authority.

101. Firstly, at page 9 of the Record of Appeal, the Appellant herein at the foot of the Memorandum of appeal filed before the Liaison Committee stipulated that same became aware of the impugned decision on the 28th May 2022.

102. Notwithstanding the said averments, the same Appellant herein at clause 2.1 of the same Memorandum of Appeal, alleges that the impugned decision of the Planning authority was made known to her on the 27th May 2021. See page 11 of the Record of Appeal.

103. Similarly, at clause 2.3 of the same Memorandum of Appeal filed before the committee, the Appellant again changes tune and now states that the impugned decision of the Planning authority was made known to her on the 27th May 2022. See page 11 of the Record of Appeal.

104. It is also appropriate to take cognizance of the Relief that was sought by the Appellant at the foot of the Memorandum of Appeal filed before the committee. For clarity, prayer 7 (a) underscores the Appellant's position that the impugned decision of the Planning authority which was issued on the 17th September 2021, was however made known to her on (sic) the 27th May 2021.

105. How it was possible for the impugned decision to be made known to the Appellant on the 27th May 2021, yet the impugned Decision by the 1ST Respondent was made on the 17TH September 2021, is not only debatable but prophetic.

106. Nevertheless, the contradictions as to the date and timeline when the Appellant was made aware of the impugned decision of the Planning authority, is important in determining the honesty and forthrightness of the Appellant in the subject dispute.

107. Other than what I have alluded to in the preceding paragraphs, it is also important to take cognizance of paragraphs 10 and 13 of the Verifying affidavit that was attached to the Memorandum of Appeal, which was lodged before the Liaison Committee.

108. For coherence, at paragraph 10 of the Verifying affidavit, the Appellant contends that same only became aware of the impugned decision of the Planning authority on the 28th May 2022, when same came back to the country.

109. On the other hand, the selfsame Appellant contends at paragraph 13 that the impugned decision relating to approval of the development permission/change of user was made known to her on the 28th May 2021.

110. Curiously though, the contradiction which I have isolated and highlighted in the preceding paragraphs, depict a picture of someone who is keen to manipulate, distort and or misrepresent true state of facts, pertaining to and as concerns, when same became aware of the impugned decision.

111. Be that as it may, it is important to point out that the contradictions that I have alluded to are mostly contained in an affidavit, which is Evidence on Oath and hence same are binding on the Appellant.

112. Finally, it is also important to observe that the Appellant herein did not challenge the veracity of the minutes relating to the meeting held on the 4th February 2022 and 8th February 2022, respectively. In this regard, the Honourable Court is left with option, but to believe the contents of the Minutes arising from the said meetings.

113. For the avoidance of doubt, the best that was stated by the Appellants was a denial of a meeting held on 4th February 2021. See paragraph 15 of the supplementary affidavit sworn on the 29th June 2022. Page 247 of the Record of Appeal.

114. In a nutshell, I come to the conclusion that despite the endeavors by the Appellant to distort the obtaining facts and essentially the date when same became aware of the impugned decision, it is crystal clear that the Appellant herein was indeed made aware and became knowledgeable of the impugned decision as at the 8th February 2022.

115. Consequently and in answer to issue number one, I therefore come to the conclusion that the committee reached and came to the correct conclusion in finding and holding that the impugned appeal was filed outside the stipulated timeline.

116. Premised on the foregoing, the committee was within the law to terminate the appeal, without venturing to deal with and address the merits of the appeal.

117. In any event, once the Court or Quasi Judicial Body comes to the conclusion that same is bereft of Jurisdiction to entertain a particular matter, same becomes incapacitated to venture forward and entertain the merits of the impugned Dispute.

118. Certainly, the committee cannot be faulted for having terminated the appeal without venturing into the merits, because without jurisdiction, one cannot arrogate unto himself the mandate to deal with the merits of a Dispute.

Issue Number 2

Whether the Liaison Committee was within her mandate and Jurisdiction to determine the subject Appeal on the basis of Affidavit Evidence.

119. Before venturing to address the issue herein, it is appropriate to observe that the appeal before the committee was lodged on the basis of a Memorandum of appeal and which was supported by the verifying affidavit sworn by the Appellant. See pages 9 to 23 of the record of appeal.

120. Subsequently, the Respondents herein were obliged to and indeed filed their responses to the appeal and the verifying affidavit that had hitherto been lodged by the Appellant. For clarity, the 2nd Respondent relied on the Replying affidavit sworn on the 20th June 2022 whereas the 1st Respondent relied on the Replying affidavit sworn on the 27th June 2022.

121. Suffice it to point out that after the filing of the replying affidavit by the Respondents, the Appellant herein filed a Supplementary affidavit sworn on the 27th June 2022, whose purport was to clarify certain issues and also to respond to the averments contained in the responses by the Respondents.

122. Subsequently, the appeal before the committee was ripe for hearing and same was indeed listed for such hearing before the committee.

123. It is appropriate to point out that the parties before the committee were at liberty to make or mount suitable application (whether formal or informal) seeking whatever directions that same deemed appropriate and necessary.

124. To my mind, one of the Applications that the Appellant was at liberty to make or mount was an application to cross examine the deponent of the Replying affidavits, both on the contents of the said affidavits and the annextures thereto.

125. On the other hand, the Appellant herein was also at liberty to make an application and demand to be afforded an opportunity to tender viva voce evidence, in respect to her appeal.

126. It is common ground that the appeal before the committee was prosecuted by the Appellant without same seeking directions of the committee on production of oral evidence by the Appellant. Simply put, the Appellant was content with the prosecution of the appeal on the basis of affidavit evidence.

127. Having not sought for or procured an order from the committee to tender oral evidence, the committee was not legally enjoined to compel or better still direct the Appellant to adduce oral evidence.

128. Certainly, the appeal before the committee belonged to the Appellant and it was therefore incumbent upon the Appellant to discern the best way forward towards the prosecution of the appeal and vindication of her rights.

129. In the premises, the Appellant herein cannot now turn back and castigate the committee for having heard and determine the appeal on the basis of affidavit evidence, yet the committee was not invited by the Appellant to allow same to adduce oral evidence.

130. To my mind, the committee was not obligated to become the legal advisers and counsel for the Appellant and therefore seek to advise the Appellant on the best way forward. Simply put, the Appellant was bound by the wise counsel/advise of her nominated advocates.

131. To underscore the importance of the foregoing observation, it is appropriate to borrow the wise words of Madan J A, in the case of Butt versus Rent Restriction Tribunal[1979] eKLR, where the court stated as hereunder;

> A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch

> bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

132. Finally, I also beg to add that where a litigant proposes to cross examine a deponent over an affidavit or to adduce oral evidence in a case where the law provides that a matter can proceed on the basis of affidavit evidence, it is incumbent upon the Party seeking to cross examine the deponent or to adduce oral evidence, to lay before the court sufficient basis to warrant the issuance of directions for the cross examination or production of oral evidence.

133. Once appropriate basis is laid and established, then the court/tribunal shall be obliged to consider the circumstances of the case and thereafter make appropriate directions.

134. In this regard, I can do no better than to adopt and reiterate the words of the Court in the case of Republic v Kenya Revenue Authority Ex-parte Althaus Management and Consulting Ltd [2015]eKLR, where the court observed as hereunder;

> 14. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by Ochieng, J. in the case of Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limtied (2) [2006] 2 EA 6.

135. Having not sought to attend the committee and tender oral evidence, the Appellant herein cannot now be heard to castigate the committee for hearing and determining the impugned appeal on the basis of affidavit evidence.

136. In any event, it is worthy to state that indeed the committee granted latitude and liberty for cross examination of the physical planner and a representative of the 2nd Respondent.

137. In short, I find and hold that the complaint pertaining to the hearing and determination of the Appeal before the Committee on the basis of affidavit evidence, is a red herring and a belated attempt to clutch unto Straw to impeach the Decision in question.

Issue Number 3

Whether the Decision of the 1st Respondent and by extension that of the Liaison Committee complied with the Provisions of Article 47 of *the Constitution*, 2010.

138. The Appellant herein has also impugned the decision of the planning authority on the basis of non - compliance with or violation of the provisions of Article 47 of *the Constitution* 2010.

139. According to the Appellant, the Planning authority neither issued unto her the notice relating to the intended application for change of user nor did the planning authority invite her to make representation/objections to the impugned application.

140. On the other hand, the Appellant has also complained that having not been duly notified of the application nor invited to make representation, the planning authority also failed to avail unto her the reasons/determination culminating into the making of the impugned decision.

141. First and foremost, I beg to affirm that indeed the planning authority was bound by the provisions of Article 47 of *the Constitution* 2010. Consequently, the planning authority was obliged to ensure that the administrative action, if any is fair, reasonable, just, efficient and proportionate.

142. Other than the foregoing, it is also common ground that the planning authority was also obligated to comply with and adhere to the provisions of Article 10 of *the Constitution* 2010 and more particularly, the aspect thereof relating to Public Participation and Sustainable Development.

143. Having made the foregoing observation, it is now appropriate to state that the application for change of user in respect of the subject project was indeed advertised vide one of the local daily Newspaper with wide circulation within the Republic of Kenya. See page 131 of the record of appeal.

144. On the other hand, evidence was also placed before the committee that the application for change of user was similarly mounted and displayed at the locus in quo being the site where the intended project was to be held.

145. Thirdly, evidence was also placed before the committee that other than the advertisement for the application for change of user in the local daily Newspaper and the placement of the notice at the locus in quo, the proponent of the project also engaged various neighbors/residents within the vicinity of the suit property.

146. Indeed various neighbors/residents thereafter filed letters of no objection to the proposed project. For clarity, the letters of no objection were also placed before the committee. Notably, one of the Letters of No Objection was filed by the immediate Neighbour of the Suit Property, namely, Nyumbani Children home.

147. To my mind, the planning authority, endeavored to and ensured that the processes leading to the impugned decision, were lawful, procedural and administratively fair.

148. Consequently, I come to the conclusion that the impugned decision was administratively fair, lawful and reasonable insofar as all the necessary efforts were made by both the proponent of the project and the planning authority to ensure that the interest of the neighboring community were indeed sought for, considered and taken into account prior to the rendition of the impugned decision.

149. Similarly, I come to the conclusion that the planning authority, namely the 1st Respondent did not breach, violate and or infringe on the fundamental freedom of the Appellant, either as alleged or at all.

150. As concerns the complaint that the planning authority did not supply or avail reasons to the Appellant and that because of such failure, the impugned decision was illegal, unlawful and thus void, it is appropriate to underscore the import of Section 6 (3) of the Fair Administrative Actions Act, 2015, which provides as hereunder;

6. Request for reasons for administrative action

(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review inaccordance with section 5.

(2) The information referred to in subsection (1), may include–

(a) the reasons for which the action wastaken; and

(b) any relevant documents relating to thematter.

(3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant,in writing, the reasons for the administrative action.

(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

(5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.

151. My reading of the foregoing provision leads me to the conclusion that even though any person adversely affected by the decision of the administrator is entitled to be availed and supplied with reasons, it behooves the person/claimant to make the requisite application to be provided with such reasons.

152. Certainly, the administrator cannot be called upon to disseminate and avail the reasons for the decision to each and every one/all and sundry, irrespective of whether same are adversely affected in one way or the other.

153. To my mind, the administrator would certainly be called upon to act and supply the reasons primarily to the Principal Parties, Interested Parties to the impugned proceedings and such other persons, albeit on application.

154. Be that as it may, in respect of the impugned decision, there is no evidence by the Appellant that upon being made aware of the impugned decision same applied to be availed reasons for the decision or at all.

155. Notwithstanding the foregoing, it is my finding and holding that the impugned decision was made in compliance with and adherence to the provisions of Article 47 of *the Constitution* 2010 as read together with the provision of the Fair Administrative Actions Act, 2015.

Issue Number 4

i. Whether the Application for Change of User was indeed a repackaged Application for Development Plan by Petro City Enterprises Limited.

156. In respect of the issue herein, it is imperative to note that the Application for change of user in respect of the subject matter was mounted and lodged by the 2nd Respondent, which is a limited liability company.

157. By virtue of being a limited liability company, the 2nd Respondent herein is a separate and independent legal entity and hence capable of commencing and originating actions independent of any third party.

158. On the other hand, it is common knowledge that Petro city Ltd is similarly a separate and distinct legal entity with a capacity of her own to also take independent decisions without the influence or prompting of any third party.

159. The bottom line in this matter is that the 2nd Respondent and Petro city Ltd, are two separate and distinct legal persons and therefore the actions and/or omissions of the latter, cannot be used to judge the application mounted by the former.

160. To underscore the distinction between the 2nd Respondent and Petrocity Ltd, it is appropriate to take cognizance of the established and time-honored dictum in the case Salmond v Salmond & Co. Ltd [1897] A.C in which it was stated inter alia as follows:

> "The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the shareholders of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act."

161. Premised on the foregoing, the contention that the application for change of user which culminated into the rendition of the impugned decision was a repackage of a previous application made by Petro city Ltd is certainly, diversionary and in any event, without merit.

162. Finally, it is important to observe that the 2nd Respondent herein is entitled to the benefit and protection of the law without any discrimination, irrespective of who her Directors, Promoters and Shareholders are.

163. To underscore the importance of the foregoing observation it is important to reproduce the provision of Article 27 (1) and (2). Of *the Constitution*, 2010.

164. For convenience same are reproduces as hereunder;

> 27 Equality and freedom from discrimination:
>
> (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> SUBPARA (2)
>
> Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

165. Consequently and in answer to issue number four, I find and hold that the 1st Respondent was legally bound to receive, appraise, consider and ultimately to determine the application mounted by the 2nd Respondent, subject to the established procedure and without any bias or prejudice whatsoever.

Final Disposition

166. Having reviewed the issues for determination which were outlined hereinbefore, it must have become clear and evident that the Appeal before me is devoid of merits.

167. In the premises, I find and hold that the Liasson Committee arrived at and reached the correct Decision, save for the wording thereof. For clarity, having found that the Appeal was filed out of time, same could only be struck out as opposed to being Dismissed.

168. Save for the Misnomer where the Committee Dismissed the Appeal in lieu of striking out same for being incompetent, the appeal is without basis. Consequently, same be and is hereby dismissed with costs to the Respondents.

169. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms Bhoke Iminah h/b for Mr. Luseno for the Appellant.

N/A for the Respondents.