Otieno v Safaricom Investment Co-operative Society Limited & another; National Environment Management Authority (Interested Party) (Environment & Land Petition E015 of 2022) [2022] KEELC 15072 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15072 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E015 OF 2022

EK WABWOTO, J

NOVEMBER 21, 2022

BETWEEN

JACOB OCHIENG OTIENO ..... PETITIONER

AND

SAFARICOM INVESTMENT CO-OPERATIVE SOCIETY LIMITED .... 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU ..... 2ND RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY

RULING

1. This ruling is in respect to the 1st respondent's preliminary objection dated May 9, 2022. The objection was raised on the following terms:

    i. That at the outset, the petition and the application are anticipatory. Premature, defective and does not disclose the cause of action against 1st respondent. The petition contravenes the provisions of *Physical and Land Use Planning Act* (No 13 of 2019)

    ii. That this honourable court does not have jurisdiction to hear and determine this petition at this stage. The petition and the application are contrary to section 61(3) of the *Physical and Land Use Planning Act* which section provides for the Physical and Land Use Liaison Committee as a dispute resolution mechanism

iii. That the petition and the application is fatally defective and in blatant disregard of section 125 of the *Environmental Management and Co-ordination Act* 1999 which section provides for the National Environment Tribunal as a dispute resolution mechanism.

iv. That the petition and the application are vexatious, malicious and incompetent and does not disclose a cause of action against the 1st respondent. The petition is in utter disregard of section 60(1) of the *Physical and Land Use Planning Act* (No 13 of 2019). The 1st respondent does not have the *locus standi* to be sued for an action that lies against the 2nd respondent.

2. Pursuant to the directions of this court issued on May 10, 2022 and July 7, 2022, the court directed the preliminary objection to be canvassed through written submissions.

3. The 1st respondent filed submisisons dated June 29, 2022 in which they argued that the petition related to planning, use, regulation and development of land and therefore contravened section 61(3) of the *Physical & Land Use Planning Act*, 2019. Secondly, it was argued that the issues raised could also be dealt with by the National Environment Tribunal.

4. The 2nd respondents in a replying affidavit dated September 22, 2022 sworn by Oscar Adede confirmed that it followed all the laid down procedures in issuing approvals to the 1st respondent. It was further averred that the petitioner had failed to object to the change of user and also did not channel his grievances to the respective statutory bodies.

5. In submissions dated August 1, 2022 the petitioner averred that the issues raised are about a non-existent application for development permission which would be outside the jurisdiction of the County Physical Liaison Committee and further that the issued raised in the petition would be exempted from to the doctrine of exhaustion of remedies.

6. Having perused the written submissions and evidence, it is evident that the issue for determination before this court is whether the court has jurisdiction to hear and determine the petition.

7. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

> " ...A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

8. This statement of the law has been echoed time and again by the courts: see for example, *Oraro v Mbaja* [2007] KLR 141.

9. In *Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others* SCK petition No 10 of 2013 [2014] eKLR the Supreme Court stated that;-

> " .... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".[emphasis added]

10. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR.

> " The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits." [emphasis added].

11. The Supreme Court Kenya in *Communications Commission of Kenya and 5 Others Vs Royal Medical Services & 5 Others* held that the principle of constitutional avoidance ensures that a court will not determine a constitutional issue when a matter may properly be determined on another basis.

12. Paragraph 7 of the petition enumerates the crux of the matter as follows:

> "... that the 1st respondent has in violation of the land use guidelines subdivided the said land and offered it for sale for residential purposes while the same was not available for the said purpose owing to the fact that the subject land cannot be:
>
> a. Sub divided
>
> b. No NEMA applications and approvals were acquired to establish the scheme
>
> c. No change of use was done
>
> d. No sewage lines in the area
>
> e. No water supply in the area
>
> f. No development plan was approved..."

13. The 1st respondent also objected to the petition on the grounds that the petition was filed without exhausting all the existing alternative statutory dispute resolution mechanism. While the respondent submitted that the same was not applicable in the instant petition for the reasons that no country approvals had been granted and no Environmental Impact Assessment Licence was in existence.

14. The exhaustion doctrine has indeed been the subject of deliberation among many Courts. Recently, in the case of *Jeremiah Memba Ocharo vs Evangeline Njoka & 3 Others* [2022] eKLR the court, in reference to various decisions, discussed the subject in the following manner: -

> " The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional petition No 159 of 2018 consolidated with Constitutional petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others*; *Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:
>
> The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring

that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution* and was aptly elucidated by the High Court in *R vs Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:

This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is *Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

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

15. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R Vs Independent Electoral and Boundaries Commission (IEBC) & Others ex parte The National Super Alliance Kenya* [2017] eKLR, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the exceptions as follows: -

> "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also M*offat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others*.)

As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR."

16. Section 75 of the *Physical and Land Use Planning Act* (No 13 of 2019) establishes a County Liaison Committees whose functions under section 78 includes: -

    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.

17. Section 129 (1) of the *Environmental Management and Co-ordination Act* provides that: -

    Appeals to the Tribunal

    1. Any person who is aggrieved by—

        (a) a refusal to grant a licence or to the transfer of his licence under this *Act* or regulations made thereunder;

        (b) the imposition of any condition, limitation or restriction on his licence under this *Act* or regulations made thereunder

        (c) the revocation, suspension or variation of his licence under this *Act* or regulations made thereunder;

        (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

        (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this *Act* or regulations made thereunder,

        may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

18. The aforementioned provisions set out the jurisdiction of both the County Physical Liaison Committee and the National Environment Tribunal. A careful perusal of the same shows clearly that the two bodies exercise a limited jurisdiction as set out in their respective statures.

19. In the present circumstances the respondents alludes to fact that the petitioner has failed to exhaust the dispute resolution mechanism under the Physical Planning Act and the National Environment Management Authority which is the main point of contention in this petition. However, the said respondents have not furnished this court with any Environmental Impact Assessment Licence or Approval Plans that were issued by the National Environment Management Authority (NEMA) and the County Government respectively for perusal by the court. In the circumstances these remains to be contested facts that cannot be determined summarily. Such a scenario could lead to matters of fact being contested in the future and it would not be prudent for the court to pronounce itself summarily at this moment. As has been rightly stated in the Oraro vs Mbaja Case (*supra*), a preliminary objection must not be blurred with factual details liable to be contested. It is therefore not tenable for the court to proceed on the assumption that all the facts pleaded by the parties are correct. As a result, this court finds that the contention that the petition is filed contrary the doctrine of exhaustion fails.

20. It should be noted that the jurisdiction of this court extends to the hearing of claims of violation of Constitutional rights and fundamental freedoms relating to the environment and land.

21. For the foregoing reasons I arrive at the conclusion that the preliminary objection dated May 9, 2022 is not merited and the same is dismissed with no orders as to costs.

22. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mkan for the petitioner

Mr. Weru for the 1st respondent

N/A for the 2nd respondent

N/A for the Interested Party

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE