



**Kimani v County Executive Member – Lands, Housing, Physical
Planning and Urbanization & another (Environment & Land Petition
4 of 2019) [2022] KEELC 15197 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15197 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT & LAND PETITION 4 OF 2019

JO OLOLA, J

DECEMBER 8, 2022

IN THE MATTER OF

ARTICLES 19, 22, 23, 40, 47, 50 & 64 OF

THE CONSTITUTION OF KENYA

IN THE MATTER OF

GOVERNMENT LANDS ACTS AND THE TRUST LANDS ACT

IN THE MATTER OF

CONTRAVENTION OF RIGHTS OF REGISTERED PROPRIETOR

IN THE MATTER OF

PURPORTED SUSPENSION OF DEVELOPMENT APPROVAL

BETWEEN

NANCY WANGARI KIMANI APPLICANT

AND

**COUNTY EXECUTIVE MEMBER – LANDS, HOUSING, PHYSICAL
PLANNING AND URBANIZATION 1ST RESPONDENT**

COUNTY GOVERNMENT OF NYERI 2ND RESPONDENT



RULING

1. By a notice of preliminary objection dated April 5, 2022, the respondents object to the petition on the grounds:
 1. That the petition is a non-starter as the petitioner failed to exhaust the alternative statutory appeal mechanism provided under the *Physical and Land Use Planning Act* as the dispute is purely a matter of land planning and development which are covered under the aforesaid Act; and
 2. That the petition offends the provisions of section 32(4) and (5) of the *Physical and Land Use Planning Act* which provides an alternative mechanism that the petitioner ought to have followed and exhausted before referring the matter to the physical and land use planning liaison committee(s) as established in the aforementioned act before escalating the matter to court.
2. Following directions given herein on April 26, 2022, it was agreed that the preliminary objection be disposed of by way of written submissions. I have accordingly perused and considered both the petition and the objection as well as the submissions and authorities placed before me by the learned advocates representing the parties herein.
3. By her petition dated October 23, 2019, Nancy Wangari Kimani (the petitioner) prays for judgment against the county executive member lands housing physical planning and urbanisation (the 1st respondent) and the county government of Nyeri (the 2nd respondent) for:
 - (a) A declaration that the petitioner's right to fair administrative action under article 47 of the *Constitution* as reads together with the *Fair Administrative Action Act* 2015 as well as (her) right to a fair hearing under article 50(1) of the *Constitution* have been violated by the respondents;
 - (b) A declaration that the respondents contravened the petitioner's right to property under article 40(1), (2) and (3) of the *Constitution*;
 - (c) A declaration that the letter dated October 4, 2019 addressed to the petitioner by the 1st respondent is unconstitutional, null and void;
 - (d) A permanent injunction restraining the respondents, their servants or agents from interfering with the petitioner's quiet enjoyment of the said Nyeri/ Municipality Block 1/404;
 - (e) Special damages as specifically pleaded in (paragraph) 3 above be paid by the respondents to the petitioner;
 - (f) General and exemplary damages be paid in consideration of breach of article 47 of the *Constitution* and the delay of completion of building in 2020 as expected;
 - (g) An order that the costs of this petition be provided for; and



- (h) Any other relief or orders that the honourable court shall deem just, fit and appropriate to grant in favour of the petitioner.
4. Those prayers arise from the petitioner's contention that on October 4, 2019 the 1st respondent suspended her approved development plan for the development of the said land parcel number Nyeri/Municipality Block 1/1404 pending determination of an alleged dispute over the ownership thereof.
 5. The petitioner avers that she is the registered proprietor of the said parcel of land and that the respondents had on May 30, 2019 approved the development plan therefor. By purporting to suspend the same, the petitioner accuses the respondents of acting unreasonably on the basis of hearsay and without considering the losses the petitioner was likely to incur. The petitioner contends that the respondents have no legal power to suspend construction on extraneous reasons and that whatever the case, she had a right to be heard before any decision affecting her was made.
 6. In their grounds of opposition both to the petition and a notice of motion application dated October 23, 2019, the respondents state:
 1. That the petitioner has not exhausted the dispute resolution mechanism envisaged under sections 33(3), (4) and (5) of the *Physical Planning Act*;
 2. That the petitioner's notice of motion dated October 23, 2019 seeks final orders which can only be granted after a full hearing of the substantive petition;
 3. That the respondents' approval of the development permission on Nyeri/Municipality Block 1/1404 was subject to clearly outlined conditions *inter alia*; all conditions prescribed on the approved building plans to be observed and the land not constituting public/government land;
 4. That the respondents' suspension of the development permission aforementioned is temporary as the respondents received representation questioning the authenticity over ownership documents submitted by the petitioner during the approval stage;
 5. That the respondents have a legal duty to ensure that development permissions are mentioned to ensure due compliance and may suspend the same where certain breaches are realized;
 6. That the entire petition and the notice of motion are prematurely before court as the petitioner should await the final verdict of the respondents on the status of the approved but suspended development permission on the suit premises; and
 7. That the title held by the petitioner in Nyeri/Municipality Block 1/1404 is not conclusive evidence of ownership as the same can be impeached on grounds of illegal and fraudulent acquisition.
 7. By their preliminary objection herein the respondents now contend that the petition is a non-starter as the same offends the provisions of section 32(4) and (5) of the *Physical and Land Use Planning Act* which required the dispute to be first referred to the national physical and land use planning liaison committee from which an appeal lies to this court.



8. From a perusal of the petition and the grounds filed in opposition thereto, it was clear that this dispute was precipitated by a letter dated October 4, 2019 addressed to the petitioner by the 1st respondent. The letter signed by one Dr Kwai Wanjaria reads in the relevant portion as follows:

“Re: Temporary suspension of development approval

The above subject refers.

We are in receipt of a complaint letter Ref MTIHUD/HUD/ ED/NYI/HG/28/143 dated September 25, 2019 and a follow up letter Ref MTIHUD/HUD/ED/NYI/HG/28/144 dated October 3, 2019 (copies attached) in relation to the ownership of the plot which you are developing (Nyeri/Municipality Block/1/1404).

We hereby temporarily suspend your approved development plan number 2019/282 until the issue of the plot ownership is determined.

Please liaise with the ministry of transport, infrastructure, housing and urban development officials to obtain clearance over the matter.”

9. That the suspension indeed arose over a complaint on the authenticity of the petitioner’s documents can indeed be seen at paragraph 4 of the respondents’ grounds of opposition. That being the case, i was totally unable to comprehend the nexus between this petition and the said section 32 of the *Physical and Land Use Planning Act*. It is either that the respondents has not acquainted themselves with the said section of the law or they were bent on sending this court on a fool’s errand.
10. A simple perusal of the said section 32 of the Act reveals that it falls under part III of the Act which deals with “Types of physical and land use development plans” and that it applies to notices and physical and land use development plans. A wholistic reading of the entire section further reveals that the dispute that is envisaged to be referred to the national physical and land use planning liaison committee from which an appeal lies to this court under section 37(5) is a dispute on a plan for an area covering two or more counties and not an individual person suing the county as is the case herein.
11. That being the case the submissions by the respondents that the petitioner ought to have followed and exhausted the alternative mechanism provided under section 32(5) of the Act are as erroneous as they are false.
12. As Sir Charles Newbold P cautioned in *Mukisa Biscuits Manufacturing Limited v West End Distributors* [1969] EA 699;
- “... The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue and this improper practice should stop.”
13. In the matter herein, this was indeed the second preliminary objection being raised by the respondents after the first one was overruled on July 14, 2021 and it was clear to me that the intention is to derail the petition and to drag the matter in court. That practice ought to come to an end.
14. It follows that I find no basis for the preliminary objection dated April 5, 2022. I dismiss the same with costs to the petitioner.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 8TH DAY OF DECEMBER, 2022.**

In the presence of:



Mr. Kimondo for the Petitioner
No appearance for the Respondent
Court assistant – Kendi

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J. O. OLOLA
JUDGE

