



**Republic v County Executive Committee Member, Physical and Land Use Planning,
Nairobi City County & another; Kitsuru Estate Limited (Exparte); Witaly Food
and Beverage Limited & another (Interested Parties) (Judicial Review Miscellaneous
Application E007 of 2022) [2022] KEELC 15630 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E007 OF 2022**

LN MBUGUA, J

DECEMBER 8, 2022

**IN THE MATTER OF: AN APPLICATION BY KITISURU ESTATE LIMITED
TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION & MANDAMUS**

**IN THE MATTER OF: THE ONGOING AND ILLEGAL CONSTRUCTION
OF A RESTAURANT ON A ZONED RESIDENTIAL AREA ON LR**

NO. 7741/382 IN KITISURU, NAIROBI CITY COUNTY

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER, PHYSICAL AND LAND USE
PLANNING, NAIROBI CITY COUNTY 1ST RESPONDENT**

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES 2ND
RESPONDENT**

AND

KITISURU ESTATE LIMITED EXPARTE

AND

WITALY FOOD AND BEVERAGE LIMITED INTERESTED PARTY

**DIRECTOR GENERAL, NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY (NEMA) INTERESTED PARTY**



RULING

1. *Vide* a chamber summon application dated 6.6.2022 the applicant, a Resident association initiated these proceedings seeking leave to apply for various Judicial Review orders including an order of *Mandamus* directing the 1st Respondent to issue an enforcement notice or stop any further development/construction on parcel number 7741/382 and another order of mandamus requiring the 1st Respondent to issue an enforcement notice to the 1st Interested Party to demolish all structures on the suit land and not to operate the restaurant thereon.
2. The Applicant also sought orders of *Certiorari* to quash the decision of the 1st Respondent relating to the approvals of developments given to the 1st Interested Party, particularly the conversion from residential house to a restaurant on the suit property.
3. The Applicant further sought Declaratory orders to the effect that the 1st Interested Party has not fulfilled the conditions set out in the conditional development plan approval dated 28.4.2022, declaratory orders that the construction of the restaurant on the suit premises is illegal for want permits licences and approvals, and Declaratory orders that the Respondent's failure to issue enforcement notice amounts to violation of the Applicants rights as residents of the area.
4. The Applicant also sought an order of prohibition preventing the 1st Interested Party from continuing with any further construction on the suit land.
5. Finally, the Applicant sought orders that leave so granted do operate as a stay, restraining the 1st Interested Party, by itself, its lessors, agents, or anyone whosoever claiming under title under, with or above them from carrying on the construction/development on the Property known as Plot LR No 7741/382 situated in Kitisuru Area or from opening up and/or operating such restaurant or other commercial establishment on the Property known as Plot LR No 7741/382 situated in Kitisuru Area pending the hearing and determination of the judicial review proceedings.”
6. The applicant also seek costs of the application.
7. When the file was presented before me on 8th June 2022 in the digital platform, the court granted *ex parte* orders at the leave stage for the commencement of the Judicial Review proceedings in terms of prayer No. 1-9. In essence, only the prayer for leave to operate as a STAY was not granted, of which the court gave directions that the said issue be heard *inter-partes*. Costs too were not granted.
8. In response thereof, the 2nd Respondent field a Preliminary Objection dated 8th July 2022, with the 1st Respondent and the 1st Interested Party filing their own respective Preliminary Objections both dated 19th July 2022. All the three Preliminary Objections are anchored on the doctrine of exhaustion of remedies.
9. This ruling therefore relates to the question of stay as set out in paragraph 10 of the Chamber Summons application dated 6th June 2022 as well as the question of jurisdiction set forth in the aforementioned Preliminary Objections. The parties advanced their arguments via written as well as oral Submissions.

Case for the Applicant

10. The documents relied upon by the Applicant to buttress its case are; Applications dated 6th June 2022, 9th June 2022 and 27th June 2022, Written Submissions dated 8th July 2022 and 18th July 2022.



11. The gist of the applicant's case is captured at paragraph 6 of their statutory statement as follows:

“The Applicant initiates these proceedings on its behalf, and on behalf of, and in the interest the residents of Kitisuru Area, to challenge 1st Respondent's Conditional Development plan approval dated 8 April 2022 (the Decision), and the 1st Interested Party's action to commence and /or proceed with the developments/construction of a restaurant on the Property known as Plot LR No 7741/382 situated in Kitisuru Area, Nairobi without the requisite approvals, permits and / or licenses. Further, to challenge the 1st Respondent's failure to issue any remedy with respect to the unsanctioned developments on the suit property.”

12. It was submitted for the Applicant that no decision was made capable of being appealed against to the County Physical and Land Use Liaison Committee and that the gist of their case is the reluctance and or refusal of the executive committee to issue an enforcement notice pursuant to Section 72 of the *Physical and Land Use Planning Act*. To this end, the applicants contend that the jurisdiction of the liaison committee has not crystallized.

13. On matters Environment Impact Assessment (EIA), it was argued that the relevant statute, that is the Environmental Management and Coordination Act (EMCA) limits appeals to the tribunal only to persons who had applied for a licence. Thus a person who did not participate in the Environmental Impact Assessment process for the development in question cannot be said to have been aggrieved by the process which led to the issuance of the licence. And in this particular case the Applicant did not participate in any approvals issued by the 2nd Interested Party.

14. In support of their case the Applicants have relied on the following cases; *Phenom Limited vs National Environment Management Authority & Another [2015]* eKLR, *Republic vs The National Environmental Tribunal & 2 others [2010]* eKLR, *Republic vs Director of Immigration Services & 2 others Ex parte Zarko Knezevic [2021]* eKLR, and *Hosea Kiplagat & 6 others vs National Environment Management Authority (NEMA) & 2 others [2018]* eKLR.

Case for the Respondents and the Interested Parties

15. I have deemed it fit to deal with the issues of the Respondents and the interested parties together as they seem to be speaking in one voice. In particular, it is pertinent to note that the 2nd Interested Party has stated that they are supporting all the three Preliminary Objections (see the proceedings of 22nd September 2022).

16. At this juncture it is important to identify the documents filed by the aforementioned parties. The documents filed by the 1st Respondent are the Notice of Preliminary Objection dated 19th July 2022, Written Submissions dated 13th September 2022 as well as a list of authorities. For the 2nd Respondent the only document found in the digital platform is the Preliminary Objections dated 8th July 2022. For the 1st Interested Party their documents are the Notice of Preliminary Objection dated 19th July 2022, Replying Affidavit dated 12th July 2022, two sets of authorities to be relied on but no submissions were found. For the 2nd Interested Party the documents filed are Written Submissions in relation to the Preliminary Objections, as well as cited authorities.

17. Seeing that all the Preliminary Objections are raising similar issues, this court will only capture the grounds raised in the earliest of the preliminary objections, the one dated 8.7.2022 brought forth by the 2nd Respondent. The issues raised are;



- i. That this Honourable Court is divested of jurisdiction to hear and determine the suit and the application by dint of the mandatory provisions of Section 129 (1) (a) of the [Environmental Management & Coordination Act](#), 1999 as read together with regulation 46 (1) (f) of the Environmental (impact assessment and audit) regulation, 2003.
 - ii. That this Honourable Court’s jurisdiction to hear and determine the suit and the application is further ousted by dint of the mandatory provisions of Section 78 (b) of the [Physical and Land Use Planning Act](#), 2019.
 - iii. That the Petitioners have not exhausted the existing dispute resolution mechanisms before invoking the jurisdiction of the Honourable Court.
 - iv. That the suit offends the doctrine of Constitutional avoidance.
18. It was submitted by the 1st Respondent that a development permission may either be allowed, allowed with conditions or rejected entirely. Consequently, any person aggrieved by any of such outcomes may appeal to the County Physical and Land use Planning Liaison Committees as provided under Section 61 (3) of the [Physical and Land Use Planning Act](#) of 2019.
 19. The 1st Respondent avers that on 10th February 2022 the county planning committee conditionally approved permission for change of user from residential to a restaurant on the suit property. Further, approvals for the development thereof were given on 12.2.2022 and 8.4.2022. The 1st Respondent therefore contends that the applicant ought to have used the dispute resolutions mechanisms available under the Physical Planning Act of 2019. Thus the applicant has bleached the doctrine of exhaustion of remedies in filing the current case.
 20. The 1st Respondent has added that this is a Judicial Review application whose main concern is the decision making process and not the merits of the decision.
 21. In support of its case, the 1st respondent has relied on the following authorities: [Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others \[2015\]](#) eKLR, [United Millers Limited v Kenya Bureau Standard & 5 others \[2021\]](#) eKLR, [Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another \[2015\]](#) eKLR, and Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR.
 22. The submissions of the 2nd Interested party are in tandem with those of the 1st Respondent.
 23. The question falling for determination is; whether the Exparte Applicant has violated the doctrine of exhaustion of remedies in terms of the provisions set out under the [Physical and Land Use Planning Act](#) of 2019 and the [Environmental Management and Coordination Act](#) (EMCA) and whether leave granted herein to file the Judicial Review proceedings should operate as a STAY.
 24. In the case of [Geoffrey Muthinja and another vs Samuel Miguna Henry and 1756 others \[2015\]](#) eKLR it was held that:

“ it is imperative that where a dispute resolution mechanism exist outside the court, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be the fora of last result and not the first port of call”.



25. On matters planning I find that the document mentioned in paragraph 6 in the statutory statement of the applicant has been availed as annexure (JOO3) and is dated 8th April 2022. The same is a conditional approval of the conversion of a residential house into a restaurant issued by the 1st Respondent. A reading of the reliefs sought in the statutory statement listed as No. 19 up to 28 clearly indicates that the applicant was aggrieved by the approvals issued by the 1st Respondent to the 1st Interested Party, as the same were apparently not in tandem with the zoning regulations and usage for low density residential uses.

26. The provisions of 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.”

27. 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.

28. In the case of *Eaton Towers Kenya Limited vs. 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 vs. Benson Ambuti Adega & 3 Others (2020)* eKLR (Kibos Case).”

29. 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”.



30. In the case of *James Mungai Munene (Chairman) & another v Joseph Gitinji Kamau & 3 others [2022]* eKLR, the court had this to say on matters “approval of developments”;

“...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..”

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

32. This court has already made a pronouncement that the applicant is challenging the approvals of developments issued to the 1st Interested party particularly on the change of user. However, it cannot be gainsaid that in Judicial Review proceedings the court is concerned with the decision making process and not the merits of the decision. In that regard this is not the forum for the applicant to challenge the approvals given by the 1st Respondent. It is apparent that the dispute resolution mechanisms provided for under the *Physical Land Use Planning Act* ought to have been invoked.

33. On matters of Environmental Impact Assessment License, the issue is captured at prayer no. 6 in the chamber summons application dated 6.6.2022. The applicant is challenging the conditional development plan for want of Environmental Impact Assessment approvals. However, the document availed by the Applicant at page 155 of their bundle, a letter dated 19.5 2022 indicates that the 2nd interested party eventually approved the project of the 1st interested party.

34. It is clear that the approvals given by 2nd Interested party are governed by the EMCA at Section 129 there of where it is provided that:

“(1) Any person who is aggrieved by –

- a. the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

.....

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

- 2) Unless otherwise expressly provided in this Act, where this Act empowers the Director – General, the Authority or Committees or the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.”

35. It is quite clear that the applicants were actively following up on the issue of issuance of the EIA license as is evident from various correspondence (see document on page 113 of applicants’ bundle). The Applicant was aggrieved by the eventual approvals made by NEMA, thus they ought to have invoked the Dispute Resolution Mechanisms available under the established legal framework which is EMCA.



36. The net effect of the analysis herein is that the three Preliminary Objections raised by the respondents and the 1st Interested Party are merited. In that regard, the issue of stay raised in the application of 6th June 2022 has fallen by the way side.
37. I must point out that the Exparte Applicant has convoluted the proceedings by filing various applications and duplicating orders sought therein; for instance the applicant filed the application dated 9th June 2022, when the court was already dealing with the issue of stay in the application of 6th June 2022.
38. In the final analysis, the application dated 6th June 2022 as well as all the subsequent applications filed by the Exparte Applicant including the entire suit are hereby struck out for violating the doctrine of exhaustion of remedies. Each party to bear their own costs of the suit, applications and preliminary objections.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2022
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Owour Thather holding brief for James Singh for the Exparte Applicant

Victor Swanya for 1st Respondent

A. Kamau for 2nd Respondent

Rita Joyce holding brief for Asley for 1st Interested Party

M/s Muyai for 2nd Interested Party

Court Assistant: Eddel/Vanilla

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