Mbaazi Avenue Residents' Association v Abundant Blessing Limited; National Environment Management Authority & another (Interested Parties) (Environment and Planning Petition E006 of 2023) [2025] KEELC 399 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 399 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING PETITION E006 OF 2023

AA OMOLLO, J

FEBRUARY 6, 2025

BETWEEN

MBAAZI AVENUE RESIDENTS' ASSOCIATION ..... PETITIONER

AND

ABUNDANT BLESSING LIMITED ..... RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY

NAIROBI CITY COUNTY ..... INTERESTED PARTY

RULING

1. The Petitioners filed a Notice of motion dated 12th November 2023 seeking for the following orders;
    a. Spent
    b. Spent
    c. Pending hearing of the Petition a conservatory order does issue staying Abundant Blessing's decision, outside zoning laws and without adequate or meaningful public participation, to construct 18-floor 288 residential apartments and duplexes on Plot LR No Nairobi/Block 15/497, at the corner of Masanduku Lane/Mbaazi Avenue, Nairobi County.
2. The motion was on the grounds that Article 70(1) of *the Constitution* provides any person claiming that their right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed, or threatened, may apply to a court for redress in addition to any other legal remedies available over the same matter.

3. That the Respondent intends, outside the zoning laws and without adequate or meaningful public participation, to construct 18-floor, 288 residential apartments and duplexes on Plot LR No Nairobi/ Block 15/497, at the corner of Masanduku Lane/Mbaazi Avenue, Nairobi County, herein after referred to as "the project", which decision is illegal and threatens the Petitioner's right to a clean and healthy environment.

4. In the supplementary affidavits sworn on 17th May 2024 and 3rd June 2024 by Bernard M. Kinara, the Chairman of the Petitioner stated that the members of the Association undertook a public participation questionnaire to express their concerns as to the environmental impact that will be suffered by virtue of the proposed project such as serious strains on the existing infrastructure for example water, sewerage and roads, congestion reduced green space and playing ground space.

5. Further, he said that the members of the association wrote to the Respondent to express their woes on 2nd January 2023 and attached a signed petition to support the same, titled, "Petition against Highrise Development" and further on 26th October 2023, the MARA residents held a public demonstration against the proposed project.

6. The application is opposed by the Replying affidavit sworn on 25th September 2024 by Ying Yang, the Respondent's director. He deposes that the Petition and application are misconceived, mischievous, scandalous and an abuse of the Court process and that the averments are riddled with blatant untruths and deliberate non-disclosure of material facts, intended to mislead the Court and cloud issues.

7. He stated that this Petition and application brought under the pretext of denial of the 'right to a clean and healthy environment' is misplaced and mischievous as it raises no issues whatsoever that demonstrate the violations. The Respondent stated that it committed to undertake the project which is High End 18-story Residential Block, comprising 283 Residential housing units, (202 two-bedroom units, 36 three-bedroom units, 42 four-bedroom units, and 3 six-bedroom units, stair-cases and lifts), parking spaces, swimming pool, children playing area, and associated facilities and amenities. That it has procured all the necessary approvals from all the relevant government authorities, including the National Environmental Management Authority, (NEMA), and Nairobi City County.

8. It is asserted by the Respondent that it procured a Change of User approval from Nairobi City County, after issuing a Public Notice to that effect, carried out comprehensive public participation involving all concerned and affected parties and also carried out a comprehensive Environmental Impact Assessment Study which was submitted to NEMA. Thereafter, they were issued with an Environmental Impact Assessment Licence thus given the green light to the implementation of the project.

9. The Respondent contended that the Petitioner, as a society registered under the *Societies Act* Cap 108, Laws of Kenya, has no locus standi to institute these proceedings directly in its own name, hence these proceedings are fatally defective. Further, they plead that the Court lacks jurisdiction to entertain these proceedings, owing to the doctrine of exhaustion.

2nd Interested Party Grounds of opposition

10. In opposition, the 2nd Interested Party filed undated grounds of opposition stating that the Petitioner being a Society registered under the *Societies Act*, Chapter 108 lacks locus standi to institute a suit in their own name and as such the instant application and suit are fatally defective. It also asserted that the Court lacks jurisdiction to hear and determine the suit owing to the doctrine of exhaustion of statutory remedies. That the jurisdiction is ousted because this suit primarily raises the question of planning, use

and development of the project which matters are regulated under the *Physical and Land Use Planning Act*, 2019.

Submissions

11. Petitioners filed submissions dated 29th May 2024 in support of their motion submitting that as per the City Council of Nairobi's, A guide of Nairobi City Development Ordinances and Zones, the type of development allowed in the Lavington area are Low Density Residential One-Family Houses and in the area around Kilimani are Four Storeys max Residential Apartments. They cited the case of Phenom Limited vs. National Environment Management Authority & Another [2005] EKLR where the Appellant was commanded to conform to a maximum of four floors before re-submitting the revised plan to Nairobi City Council.

12. The Petitioner contended that the Respondent lied in the change of user that it, "intended to build massionettes" and not 18 floor, 288 apartments, a project which will subject the entire of the MARA neighbourhood to highly stressed public infrastructure including inadequate sewerage support, a high level of lack of water supply and high level of traffic on the two-lane roads within the area.

13. The Petitioners also submitted that the Respondent should be compelled to undertake and consider the findings of the public participation exercise noting that Article 10 of *the Constitution* of Kenya lists public participation as one of the national values and principles of governance.

14. They also stated that according to Principle 13 of the Rio Declaration, state parties are obligated to develop laws regarding the liability and compensation of victims of pollution and other environmental damage and the Environment and Land Court at Nairobi while dealing with a Constitutional Petition in Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre vs. National Environmental Authority & 2 others [2019] eKLR awarded the Petitioners compensation for the infringement of their environmental rights thus the Respondents are liable for damages for violation of their constitutional rights.

15. The Respondent filed submissions dated 29th November 2024 emphasizing that the court lacks jurisdiction to entertain these proceedings, owing to the Doctrine of Exhaustion of Statutory Remedies and in support cited among others Hccc Misc App. No. 167 Of 2014, Japheth Noti Charo Vs. Malindi Land and Environment Court & Ano, where the court quoted Owners of the Motor Vessel "Lilians" vs. Caltex Oil (Kenya) Limited 09891 KLR 7.

16. Further, the Respondent submitted that the the Petitioner has no locus standi to institute these proceedings directly in its own name, hence these proceedings are fatally defective. The Respondent submitted that it is unconceivable in the above circumstances, how the Petitioner has been denied its 'right to a clean and healthy environment' when the Respondent developer is committed to undertaking the above development project for the benefit of all Kenyans, and to improve the quality of life for all Kenyans, and guaranteeing a clean and healthy environment for all Kenyans, and has been granted all the necessary approvals by all the relevant government authorities, including the National Environmental Management Authority, (NEMA), and Nairobi City County.

17. The Respondent also submitted on ownership of land which is not an issue raised in the pleadings or a matter contested.

Analysis and Determination:

18. The Applicants are seeking for a conservatory order on the grounds that the Respondent decision to construct the project is outside the zoning laws and there was no adequate public participation. They

also argue that their right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed, or threatened unless the orders are granted.

19. Both the Respondent and the 1st Interested Party have raised an objection that the Applicant lacks locus standi to institute a suit in its own name and as such the instant application and Petition are fatally defective. They both posit that the Court lacks jurisdiction to hear and determine the suit owing to the doctrine of exhaustion of statutory remedies pursuant to Section 61(3) of the PLUPA as same provides that the applicant being aggrieved by the decision of a County Executive Committee ought to appeal against that decision to the County Physical and Land Use Planning Liaison Committee.

20. Consequently, the application and responses thereto raises three issues for determination;

    i. Locus standi of the Applicant,

    ii. doctrine of exhaustion of statutory remedies and if the two questions fail,

    iii. whether the application has met the threshold to grant conservatory order.

21. Section 41 of the *Societies Act* states that A society registered under the *Societies Act* is an unincorporated entity and does not have the locus standi to sue or to be sued in its own name but through its registered officials.

22. In the case of Trustees Kenya Redeemed Church & Anor v Samuel M'Obiya & 5 others [2011] eKLR it was held thus:

> " It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers."

23. Also, as was relied in the case of Francis Njuguna v Secretary, Anglican Church of Kenya & another [2021] eKLR, Justice Bosire (as he then was) held in Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992;

> " The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules."

24. It is therefore clear that a society established and existing under the *Societies Act* lacks the locus standi to sue or be sued in its own name. Consequently, without locus standi as was held by Justice B M Eboso in the persuasive authority of Mitikenda Residents Association v Njuguna & 3 others (Environment & Land Case 624 of 2017) [2023] KEELC 20221 (KLR) (19 September 2023) (Judgment), such a suit was and remains a non-starter, thus fatally incompetent.

25. Locus standi being a jurisdictional issue, it is expected that the court downs its tools in tandem with the principle in Owners of Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Ltd [1989] eKLR.

26. If the court decides otherwise, the next issue for determination is exhaustion of doctrine of exhaustion of statutory remedies.

27. The Respondent contended that because the suit herein primarily raises the question of planning, use and development of the project which matters are regulated under the *Physical and Land Use Planning Act*, 2019 and pursuant to Section 61(3) of the same provides that an applicant that is aggrieved by the

decision of a County Executive Committee regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee.

28. The doctrine of exhaustion was comprehensively discussed by the Supreme Court in the case of Nicholus Abidha v Attorney General & 7 others; National Environmental Complaints Committee *& 5 others (Interested Parties) (Petition E007 of 2023*) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) as follows;

> " 104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:
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> > "In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."
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> 110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify."

29. In guidance by the above discussion, it is my view that this court has primary jurisdiction to hear and determine this matter being a dispute that goes beyond being aggrieved with a decision by the Respondent to construct the project. That the dispute involves issues on constitutional rights which can only be dealt with in the Environment and Land Court and not County Physical and Land Use Planning Liaison Committee.

30. However, on the basis that the applicant lacks locus to bring this suit, I will not delve into the merit of the application. It is ordered struck out with no order as to costs.

31. On the last issue as to whether the application has met the threshold of issuing conservatory orders. In the case of Centre for Rights Education and Awareness (CREAW) & another – Versus - Speaker of the National Assembly & 2 others (2017) eKLR, the Court was emphatic that: -

> "A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."

32. The Petitioner has cleared pleaded how construction of the project is likely to violate their constitutional rights unless the orders sought are granted. At the interlocutory stage, it was only required to show that it has a prima facie case and the harm to be suffered may not be irreparable. However, for the reason of incompetence of the suit as filed, I will not issue any orders.

33. Consequently, the application is struck out with no order on costs.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025

A. OMOLLO

JUDGE