



Sikalie (Suing as the Chairperson of KLDA) v De La Salle Brothers & 5 others (Environment & Land Petition E071 of 2024) [2025] KEELC 425 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E071 OF 2024
AA OMOLLO, J
FEBRUARY 6, 2025**

BETWEEN

**SAMORA SIKALIE PETITIONER
SUING AS THE CHAIRPERSON OF KLDA**

AND

**DE LA SALLE BROTHERS 1ST RESPONDENT
NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT
THE CEC MEMBER PHYSICAL PLANNING AND LAND USE, NBI CITY
COUNTY 3RD RESPONDENT
THE CS MINISTRY OF LANDS & PHYSICAL PLANNING .. 4TH RESPONDENT
THE CHIEF LAND REGISTRAR 5TH RESPONDENT
THE ATTORNEY GENERAL 6TH RESPONDENT**

RULING

The Application

1. The 1st Respondent filed a Motion dated 15th October 2024 supported by an Affidavit sworn by Brother Prof. Paulos W Mesmer. The said application was given a hearing as it had the effect of determining the entire Petition at a preliminary stage. The 1st Respondent prays that the Petition be struck out together with the Motion dated 30th August 2024 and that costs be provided for. According to the 1st Respondent, “this court did not have jurisdiction to hear the case and receive the prayers it sought; as the suit was similar to previous suits.”
2. The application is opposed by the Petitioner through the replying affidavit of Mr Samora Sikalieh sworn on 12th November 2024. Briefly, it is deponed that the issues in this petition were not raised in



the previous petition E027 of 2022. He also deposed that this Petition raises substantial constitutional and legal questions inter alia violation of article 10 of *the Constitution* and section 61 of the Physical Planning and Land Use Act.

Background Facts:

3. This Petition follows two other determinations; first is in Nairobi ELC Petition E027 of 2022, Samora Sikalie suing on behalf of KLDA versus various government offices. In this former petition, The Petitioner prayed that; (1) a declaration issue that the approval of the planning application by the Nairobi City County Government was void; the committee ignored the Recognition Agreement; (2) a declaration issue that the approval of the planning application by the Nairobi City County Government violated the Petitioner’s rights and fundamental freedoms; and (3) a permanent injunction against Public Service Commission to not commence the development or arrest the development.
4. On 21st November 2023, Lucy N Mbugua J determined that “the Petitioner hadn’t exhausted all the Committees and County Government’s Disputes’ Resolution Mechanisms deducible from a copy of the judgement in E027 of 2022 annexed to the affidavit in support of the application under review where. There is no mention made by either of the parties if a review and or an appeal was lodged to vary this judgement.
5. The second determination relates to a complaint filed at the Nairobi City County Physical and Land Use Planning Liaison Committee vide Complaint/Claim/Appeal No. E017 of 2024; KLDA versus Nairobi City County Government and De La Salle Brothers. In response, a preliminary objection was filed stating the appeal had been declared filed out of time and therefore the committee lacked jurisdiction. The complaint also touched on matters development; size of the suit property, application for change of user, public participation.
6. On 20th August 2024 the Chair of Nairobi City County Physical and Land Use Planning Liaison Committee gave its Notice of Determination striking out the appeal. The determination also stated that “because there had never been a register for complaints and a register for applications and development permissions, parties never got their decisions in time. The Chair therefore ordered that the Planning Committee maintain registers for; applications, decision of the committee; and make them available to the public for scrutiny.”
7. The current Petition commenced with the description of the 1st Respondent’s/Applicant’s proprietorship of LR Number 7943 situated along Marula Lane, Karen [hereinafter referred to as ‘the suit property’]. Because of the development proposal, the Petitioner and the Residents’ Association raised objections which receipt was acknowledged by the 3rd Respondent. Despite the objections, the 2nd and 3rd Respondents proceeded to approve the impugned change of user and the proposed development and issued a permit to the Applicant to proceed with the proposed development.
8. The Reliefs now sought are:
 - (1) declaration against the application process, approval of change of user; a failure by the relevant bodies and the law on the subject and the contravention of Constitutional rights thereof;
 - (2) Orders of mandamus that the 3rd Respondent prepare and maintain a register within 30 days and following that, within 90 days, the 4th Respondent draft guidelines on creation of the register;



- (3) the impediment permanent injunction for the 1st Respondent to hold off commencement of the development and cancellation of the approved change of user and the Certificate of Title from residential to tertiary education.

Submissions:

9. The 1st Respondent/Applicant did not file any submissions in support of the application. The 2nd and 3rd Respondents submissions are in respect to the Petitioner's application dated 30th August, 2024 and the Petition.
10. The Petitioner's Advocates filed Submissions dated 17th December 2024. The Petitioner raises the following issues for determination; [a] whether the 1st Respondent's application dated 15th October is meritorious or suffers from gross mala fides; and [b] the provision on costs of the application.
11. According to the Petitioner, the issues in this current Petition were not litigated in ELC Petition No. E027 of 2022; the parties in both cases were dissimilar and that the subject matter in question was unidentical. The present claim raises issues inter alia; the contravention of constitutional dictates and statutory breaches in the process leading up to the approval of change of user; and issuance of developmental permission by the 2nd and 3rd Respondents without considering the Zonal Policy and the Local Physical Development Plan [LPDP]; breach of the mandatory public participation; the unconstitutionality of various sections of the PLUPA that contradict *the Constitution*; and an order to set aside of the decision of the Nairobi City County Physical and Land Use Planning Liaison Committee in Complaint/Claim/Appeal No. E017 of 2024 delivered on 20th August 2024 in its entirety.
12. It is the Petitioner's reasoning, that since it filed one Petition, it did not mean that they couldn't file another suit in a court of similar jurisdiction.

Analysis and determination:

13. Having considered the 1st Respondent's application dated 15th October 2024 and the Petitioner's submissions, this court's only duty is to determine the merit of the said application.
14. The Petitioner submitted that the objection raised should fail because a point of law should not require adduction of evidence and in this case the 1st Respondent's objection amount to sourcing of evidence to prove their point. That is the holding in *Mukisa Biscuit Manufacturing Co Ltd -vs. - West End Distributors (1969) EA 696*. However, the 1st Respondent has moved the court by way of application which gives them a window to annex evidence and in this case, copies of the Judgement in the previous suits which they posit makes the present suit res judicata.
15. It is the court's duty under section 1B of the *Civil Procedure Act* to determine cases efficiently. Part II of the same Act also elaborates on the principle of res judicata. Section 5 and 6 of the Act states that "courts must try all civil suits unless barred. Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature; except suits of which its cognizance is expressly or impliedly barred."
16. Section 7 of the Act highlights the instances in which a court is barred from hearing a suit, to wit, "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."



17. There are six characteristics to determine whether the court is barred from entertaining a suit but we shall only consider 5. The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it. The current Petitioner had filed Nairobi ELC Petition E027 of 2022 and Nairobi City County Physical and Land Use Planning Liaison Committee Complaint/Claim/Appeal No. E017 of 2024 where two matters in question were answered in both suits;
18. For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. For the determination by the Liaison Committee, the aggrieved party ought to approach this court by way of appeal. However, it does directly bar the filing of a petition relating to matters not before the Committee.
19. The matters referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. On the face of the documents annexed by the 1st Respondent, in Nairobi ELC Petition E027 of 2022, the Petitioner challenged the approval of the planning application by the Nairobi City County Government (sued here as the 2nd and 3rd Respondents), the fact that the Committee had ignored the Recognition Agreement, that the approval of the planning application by the 2nd & 3rd Respondents violated the Petitioner's rights and fundamental freedoms; and there had been a lack of public participation. The opposite party refuted the claims stating that it had jumped all the hoops to get the various approvals.
20. Section 7 CPA provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. In the previous suits, all matters were dealt with so there was nothing to be further prayed or defended in the present Petition. Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
21. The Petitioner's prayers in the current Petition are against the application process, approval of change of user; a failure by the relevant bodies and the law on the subject and the contravention of Constitutional rights thereof, that the 3rd Respondent prepare and maintain a register within 30 days and following that, within 90 days, the 4th Respondent draft guidelines on creation of the register, that the 1st Respondent hold off on commencement of the development and cancellation of the approved change of user and the Certificate of Title.
22. The prayers on the operationalising of the Registers for applications and approvals were already granted by the Liaison Committee and if there is non-compliance, the enforcement can be dealt with by the Liaison Committee first instead of the filing of a fresh suit. Secondly, as outlined hereinabove, the issues pleaded in this Petition are similar to what was in contention in the former suit E027 of 2022. If I proceed to entertain the current suit, it would appear that I am reviewing the decision in Pet E027 of 2022 made by a court of concurrent jurisdiction through the back door (through another suit).
23. Therefore, I am persuaded by the 1st Respondent that this court lacks authority to hear and determine this petition for being res judicata Nairobi ELC Petition E027 of 2022 which was between the same parties, same subject matter and heard by a court of competent jurisdiction.
24. Awarding of costs are subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge (section 27 of *Civil Procedure Act*). In many Constitutional Petitions, courts have been hesitant to award costs against the Petitioner. However, in this instance, I shall award half costs to the first Respondent because the Petitioner has unnecessarily caused them to incur legal



cost by filing this petition instead of taking other steps to challenge the decision reached in the previous determinations.

25. Consequently, this court gives the following disposal orders:
- i. ELC Petition E071 of 2024 is dismissed for being res judicata.
 - ii. Half Costs of this application and the Petition to the 1st Respondent

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

A.OMOLLO

JUDGE

