Mwawasi v County Executive Committee Member, Lands, Physical Planning, Mining & Energy Taita Taveta County & 4 others (Judicial Review Application E002 of 2024) [2025] KEELC 1056 (KLR) (Environment and Land) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1056 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

JUDICIAL REVIEW APPLICATION E002 OF 2024

EK WABWOTO, J

MARCH 6, 2025

IN THE MATTER OF: AN APPLICATION BY THE GIBSON MNYIKA MWAWASI FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS ANDIN THE MATTER OF: THE CONSTITUIONAL RIGHTS PURSUANT TO ARTICLES 21(1), 23(3)(F), 25(C), 27(1), 47(1), 40(2), 50(1) & 165(6) OF THE CONSTITUTION OF KENYA 2010 ANDIN THE MATTER OF: THE PHYSICAL AND LAND USE PLANNING ACT AND THE PHYSICAL AND LAND USE PLANNING (DEVELOPMENT CONTROL ENFORCMENT) REGULATIONS, 2021 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

GIBSON MNYIKA MWAWASI ..... EXPARTE APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER, LANDS, PHYSICAL PLANNING, MINING & ENERGY TAITA TAVETA COUNTY .... 1ST RESPONDENT

COUNTY DIRECTOR OF PHYSICAL AND LAND USE PLANNING, TAITA TAVETA COUNTY ..... 2ND RESPONDENT

THE COUNTY SECRETARY, TAITA TAVETA COUNTY ..... 3RD RESPONDENT

THE NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 5TH RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 17th September 2024, the Exparte Applicant herein seeks the following reliefs:

    1. An order of prohibition to prohibit the 4th and 5th Respondents herein from interfering and encroaching onto the suit property.

    2. An order of Certiorari to quash the decision of the County Director Physical and Land Planning, Taita Taveta of 28th April 2023 dismissing the Exparte Applicant's application for Building Plans Approval for Title No. CR. 46572.

    3. An order of Mandamus directed at the 1st and 2nd Respondents to discharge their statutory obligation as spelt out in the *Physical and Land Use Planning Act* Cap No. 13 of 2019 and the Physical and Land Use Planning (Development Control Enforcement) Regulations, 2021 by approving the Applicant Building Plans for Title No. CR 46572.

    4. Costs of the application be borne by the Respondents.

2. The Application is based on the grounds set out in the statement of facts, the affidavit of the Exparte Applicant both dated 17th September 2024

3. The Application was opposed by the 5th Respondent vide a Replying Affidavit dated 18th November 2024.

4. The application was canvassed by way of written submissions. The Exparte Applicant filed his written submissions dated 10th February 2024. The 5th Respondent filed its written submission dated 20th January 2025 and supplementary submissions 18th February 2025.

5. It was the Exparte Applicant case that he made an application for building plans for property title No. CR 46572 on 28th April 2023 and on the same day it was dismissed without any justifiable cause and or legal reasons in writing by the County Director of Physical and Land Use Planning Taita Taveta.

6. It was averred that in a bid to prejudice the Applicant herein, the 1st and 2nd Respondents have failed and or refused to consider the application for building plans approval and issue the Applicant with the approval for property Title No. CR 46572.

7. It was stated that one Mr. Kennedy Ochieng representing the 1st and 2nd Respondents blatantly and without any due regard to proper procedures, laws and regulations called the Applicant and after introducing himself as the Chairperson of the Committee on Approval of Building Plans in Taita Taveta County, informed the Applicant that the Committee will not approve his building plans for the reasons that the Title No. CR 46572 being held by him belongs to a public utility.

8. It was further stated that the Applicant has learnt that the 5th Respondent intends to encroach on the property with the approval of the 4th Respondent claiming the land as a public utility despite the applicant holding a valid title following the confirmation of Municipal Council of Voi that the property was outside the road reserve.

9. It was contended that the Applicant has suffered and continues to suffer colossal financial loss having obtained a loan facility to finance the proposed developments on the property

10. In his written submissions, the Exparte Applicant submitted on the following issues; whether the Applicant case demonstrates grounds to warrant the grant of judicial review remedies sought and who should bear the costs.

11. Citing the cases of Suchan Investments Limited vs Ministry of National Heritage & Culture & 3 Others [2016] eKLR, Krystalline Salt Limited vs Kenya Revenue Authority [2019] eKLR and Dande & 3 Others vs Inspector General, National Police Service & 5 Others [2023] KESC 40 (KLR), it was argued that Article 47 of *the Constitution* provides for the right to fair administrative action upon which the court can inquire on some merit administrative action and this court has original jurisdiction to inquire on the same and grant appropriate remedies as stipulated under Article 22(3) of *the Constitution*.

12. It was submitted that the 5th Respondent ought to have engaged an independent surveyor to verify the boundaries of his property with a view of establishing whether or not the same falls on a road reserve considering that the Applicant had a title to the same property which title was issued in the year 1998.

13. It was argued that the actions of the Respondents were ultra vires, no written response was ever issued to the Applicant and the said actions warrants the intervention of this court.

14. The court was urged to allow the application with costs.

15. The 5th Respondent in opposing the application averred that the property was never available for allocation since it fell on a road reserve zone and further that the decision of the 1st and 2nd Respondents was properly communicated and made in good faith to the Applicant by Eric Kennedy Ochieng.

16. In its submissions, Counsel submitted on the following issues; whether the applicant had demonstrated any grounds for grant of the judicial review orders sought, whether the application is procedurally mature, whether the Applicant's constitutional rights were violated, whether this court has jurisdiction to determine the classification of land as a road reserve and whether the Applicant is entitled to the reliefs sought.

17. It was submitted that the Applicant has not met the test for grant of the judicial review orders sought. The has not demonstrated how the impugned decision is illegal, irrational and or unfair.

18. Citing the cases of Republic vs Ministry for Agriculture, Livestock, Fisheries and Irrigation; Agriculture and Food Authority & Another Exparte Susan Wanjiku & 80 others [2021] eKLR, Republic vs Public Procurement and Administrative Review Board & 2 Others [2018] eKLR among others, it was argued that the role of this court in relation to administrative decisions is supervisory and the same is limited to reviewing the procedure through which the impugned decision was arrived at.

19. It was further submitted that Sections 57 to 63 of the *Physical and Land Use Planning Act*, Cap 303 outlines the procedures for obtaining development permission, the responsibilities of the county planning authority, the county director's duty to consider building plans and the grounds for approving or denying such plans and as such the 1st and 2nd Respondents acted within their powers when they made their decision to reject the Exparte Applicant's building plans.

20. On whether the decision was tainted with any procedural impropriety, Counsel submitted that the 1st and 2nd Respondents' decision to reject the building plans was due to concerns that the land is on a public road reserve and as such it is not suitable for private development.

21. It was argued that the Exparte Applicant has not demonstrated how the 1st and 2nd Respondents acted unfairly, failed to observe natural justice and or failed to observe procedural rules expressly laid down in statute and they must prove irrationality on the party of the decision maker.

22. On whether the 1st and 2nd Respondents acted with biasness, irrationality and or unreasonably, Counsel argued that they were transparent and followed due process in their administrative action.

23. On whether the application dated 17th September 2024 is premature, it was argued that the same contravenes Section 9 of the *Fair Administrative Action Act* and Section 61 of the *Physical and Land Use Planning Act* which requires exhaustion of internal review mechanisms. It was further submitted that the Applicant was at liberty to appeal within 14 days but failed to do so and further that no exceptional circumstances were presented to justify reasons for failure to exhaust the available mechanisms.

24. On whether the Applicant's constitutional rights were violated, it was argued that the Applicant has not satisfied the ingredients by not setting out with a degree of precision the manner in which the decision to reject the building plans were arbitrary or contrary to the law since the Applicant's parcel was never available for private use being on a road reserve. Reliance was placed on the case of Anarita Karimi Njeru vs Republic (1979) eKLR.

25. On whether the Applicant is entitled to the reliefs sought, it was argued that the Applicant has failed to meet the threshold for granting of the judicial review remedies sought.

26. The court has considered the application and submissions flied by the parties and is of the view that the following are the salient issues for determination herein:-

    I. Whether this Court has jurisdiction to hear and determine the application.

    II. Whether the Exparte applicant has made a case for grant of the judicial review remedies sought.

    III. What orders should issue as to costs

27. The 5th Respondent objected to the jurisdiction of this court for the reasons that the Exparte Applicant had not exhausted the existing alternative dispute resolution mechanism as provided for under Section 9 of the *Fair Administrative Action Act* and Section 61 of the *Physical and Land Use Planning Act*, 2019.

28. The Exparte Applicant on the other hand maintained that this court had jurisdiction to hear and determine this matter for the reasons that Article 22(3) of *the Constitution* provides that any person aggrieved by an administrative action may apply to the High Court or Subordinate Court upon which original jurisdiction is conferred and further that the Applicant had brought this application while invoking Articles 21(1), 23(i) (f), 25(c), 27 (1) , 40, 47(1) and 165(6) of *the Constitution* and as such there being a constitutional breach, the said application was properly before this court.

29. The issue of jurisdiction having been raised by a party should be determined at the earliest possible opportunity. This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See Owners of the Motor Vessel "Lillian SS" vs Caltex Oil Kenya Limited (1989) KLR 1. A Court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court in The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 discussed the issue of jurisdiction in the following manner:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity.

In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by *the Constitution*".

30. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:

> "(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;
>
> (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land."

31. While the court's jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples' Rights it was held that:

> "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

32. Parliament enacted the Environment and *Land Act* 2011, (No. 19 of 2011) and by Section 4 thereof established the ELC. Its jurisdiction is as provided for in Section 13 with Section 13 (1) specifically outlining that the court 'shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution*'. Section 13(2) then grants express and original jurisdiction in matters;

(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

It further provides; "Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of *the Constitution*."

33. There is no gainsaying that the Environment and Land Court is seized of and clothed with the requisite Jurisdiction to entertain and adjudicate upon all matters concerning land use and planning, land administration and management as well as title to land. [See the Provisions of Article 162[2][b] of *the Constitution* 2010; as read together with the provisions of Section 13[2] of the *Environment and Land Court Act*, 2011].

34. On the other hand, it is also important to point out that even though the Environment and Land Court is vested with the requisite jurisdiction and mandate to entertain the various disputes, in terms of the various provisions alluded to herein before, it is important to observe that the Doctrine of exhaustion, has been found and held to be a sound Doctrine and principle of the law. [See Republic vs NEMA Ex-party Sound Equipment Ltd [2011]eKLR; Geoffrey Gathenji & Others vs Stanley Munga Henry & Others [2015]eKLR and Bethwel Allon Omondi Okal vs Telcom Kenya Ltd [2017]eKLR], respectively.

35. On the other hand, it is not lost on this court that even though the Doctrine of exhaustion is a sound doctrine and has variously been adopted and relied on by the court, there are instances where the court has found that a party, the Ex-parte Applicant herein not excepted, can access the Jurisdiction of the court, without recourse to the existing dispute resolution mechanism provided for under an Act of Parliament. To my mind, the existence of an alternative dispute resolution mechanism, including an appeal to the County Physical and Planning Liaison Committee, does not deprive the court of the requisite Jurisdiction. In this regard, the submissions by learned counsel for the Respondent that this court has no Jurisdiction to entertain the subject proceedings is erroneous and misleading. To the contrary, the correct legal position is that the existence of alternative dispute resolution mechanism under statute only postpones the invocation of the Jurisdiction of the court, but does not deprive the court of the requisite Jurisdiction. For good measure, the existence of an alternative dispute resolution mechanism makes the court a port of last resort and not the port of first call. [See Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR].

36. The Supreme Court in the case of Nicholus 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) stated that there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

37. In the case of R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya [2017]eKLR after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:-

> "(46) 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, 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.
>
> [47]. 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."

38. In the instant case, the Exparte Applicant also has also averred a violation of his several rights as set out in Constitution upon which he seeks

39. In considering the foregoing, this Court agrees with the reasoning of the the Supreme Court of Kenya in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (supra) where it was held that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

40. In view of the foregoing, it is the finding of this Court that the Exparte Applicant's application is properly before this Court and this Court has jurisdiction to hear and determine the same.

41. On the applicability of the provisions to fair administrative action and the Exparte Applicant's right to be heard.

Article 47 of *the Constitution* stipulates as follows: -

> Article 47
>
> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

42. Fair administrative action, as per Article 47 of *the Constitution* of Kenya, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of *the Constitution* codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. Equally a right to a fair hearing and due process of the law is enshrined in our Constitution under Article 50.

43. In the instant case the applicant was not granted any opportunity to be heard before the Committee declined to approve his building plans and no written reasons were given for the said rejection save for the oral communication from Eric Kennedy Ochieng representing the No evidence was adduced to the contrary and as such her right to fair administrative action was violated.

44. On whether or not the Exparte Applicant is entitled to the reliefs sought, the scope of such orders was discussed by the Court of Appeal in the case of Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR as follows:

> "... only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.
>
> PROHIBITION looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...

45. . In respect to the judicial review remedy of mandamus, it was stated in the Court of Appeal case of Commission on Administrative Justice vs Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR. Wherein the court stated as follows:

> "As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (supra) namely:
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> "The order of mandamus is of most extensive remedial nature and is in the form of a command issuing from the High Court of Justice directed to any person, corporation or

inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is of the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right, and it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual."

46. This position was reiterated in the English case of R vs Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741 where it was stated as follows:

> " It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it."

47. In the instant case the Applicant has sought for an order of mandamus seeking to compel the 1st and 2nd Respondents to discharge their statutory duty and approve his building plans. The said relief cannot be granted as framed since this court will be usurping the statutory powers of the 1st and 2nd Respondents given by statute and further this court cannot preempt its outcome once the said application is submitted for their consideration. See the case of HC Misc. Application No. 1535 of 2005 Peter Bogonko –vs- NEMA [2006] eKLR.

48. In respect to the orders of prohibition sought seeking to prohibit the 4th and 5th Respondents from interfering and encroaching on his land, It is only vide a suit and after tendering documentary and viva voce evidence that the court will be able to establish the proprietary or otherwise of the suit property vis-a-viz the Respondents claim that the suit property falls on a road reserve and or was reserved for public purpose. Equally the same cannot be granted in the manner sought since the said entities are established by statutes and have specific mandates and further the Applicant has not laid a basis on why the same ought to be granted. In the circumstances the said relief he said relief.

49. In view of the foregoing the only relief that this court can grant is in respect to the judicial review remedy of certiorari that has been sought by the Exparte Applicant. This court having found that the Respondents violated the Exparte Applicant's right to be heard and right to fair administrative action, this court is satisfied that the Exparte Applicant has made out a case for grant of the orders of certiorari that has been sought herein.

50. In respect to costs of the although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event. A successful party should ordinarily be awarded costs of an action unless the court directs otherwise. Considering that the Exparte Applicant has partially succeed, this court directs each party to bear own costs of the application.

51. In the end the application dated 17th September 2024 is hereby determined in the following terms;

    a. An Order of Certiorari is hereby issued to call the decision of the County Director of Physical and Land Use Planning Taita Taveta of 28th April, 2023 dismissing the Exparte Applicant's Application for building plans approval for title No. CR. 46572 into this Honorable Court for purpose of it being quashed, and the same is hereby quashed.

    b. Each party to bear own costs of the application.

    c. Any other relief not expressly granted is deemed as declined.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI ON THIS 6TH DAY OF MARCH 2025.

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Mokua from for the Exparte Applicant.

Mr. Randiek for the 5th Respondents.

Mr. Kiilu for the 4th Respondent.

N/A for the 1st to 3rd Respondents.

Court Assistant; Mary Ngoira.