



**Nairobi West Hospital Limited v Mohamed & another; Nairobi City County (Interested Party) (Environment & Land Petition E005 of 2023) [2024] KEELC 552 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 552 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E005 OF 2023  
AA OMOLLO, J  
FEBRUARY 1, 2024**

**BETWEEN**

**THE NAIROBI WEST HOSPITAL LIMITED ..... PETITIONER**

**AND**

**YUSUF MOHAMED ..... 1<sup>ST</sup> RESPONDENT**

**AMINA ADEN ALI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NAIROBI CITY COUNTY ..... INTERESTED PARTY**

**RULING**

1. For determination is the notice of motion application dated 2<sup>nd</sup> November 2023 premised on the provisions of article 23, 42, 70, 165 and 258 of the Constitution. The petitioner sought orders that:
  - a. Spent.
  - b. A conservatory order be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves, agents, principals, servants, employees or otherwise howsoever from selling, advertising for sale, constructing and or carrying on with the illegal construction of the 14 floor level, Avicena Towers Apartment comprising studio and single bedroomed apartments on the property known as Plot LR No 37/238/4 situated on Gandhi Avenue and neighbouring Nairobi West Hospital within Nairobi West Area in the Nairobi City County, pending the hearing and determination of this Application.
  - c. In the alternative and without prejudice to the above, this Honourable Court be pleased to maintain the status quo (no further construction) on the subject property known as Plot



LR No 37/238/4 situated on Gandhi Avenue within Nairobi West Area in the Nairobi City County, pending the hearing and determination of this Application and the Petition.

- d. A conservatory order be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves, agents, principles, servants, employees or otherwise howsoever from selling, advertising for sale, constructing and or carrying on with the illegal construction of the 14 floor Level, Avicena Towers Apartment comprising studio and single bedroomed apartments on the property known as Plot LR No 37/238/4 situated on Gandhi Avenue and neighbouring Nairobi West Hospital within Nairobi West Estate in the Nairobi City County, pending the hearing and determination of this Petition.
  - e. The costs of this application be in favour of the Petitioner.
2. The application is supported by several grounds listed on its face inter alia;
1. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents have without an EIA licence, unlawfully and irregularly commenced construction of an environmentally High Risk Project being the construction of 14 Floor Level Block of Apartment comprised of studio and one bedroomed apartments units on the parcel of land known as Plot No 37/238/4 along Gandhi Avenue in Nairobi West area of Nairobi County. The construction neighbours the petitioner's Hospital and shares a wall with the Petitioners.
  2. The Petitioner is a level 6B Multi-specialty Tertiary Care Centre founded in the early 1980s and operates the Category D helipad at the rooftop of the Nairobi West Hospital at an elevation of 1705.1 meters and with ARP coordinates; S1<sup>0</sup>18'24.01', E36<sup>0</sup>49'31.29" as licensed by the 2<sup>nd</sup> Respondent under the Civil Aviation Act.
  3. The development is out of character with the permitted construction in a restricted airspace area and same is being carried out contrary to the Civil Aviation Act No 21 of 2013 and the Kenya Airports Authority Act, Cap 395 Laws of Kenya together with the regulations thereunder.
  4. The development is being carried out without any approval from the relevant state agencies being the Kenya Civil Aviation Authority as well as the Kenya Airports Authority and is therefore a direct threat to the lawful and legitimate operations of the Petitioners Helipad.
  5. The construction equally contravenes the Constitution by: denying patients access to emergency medical care and treatment through obstruction and blocking access to the Petitioner's medical facility; altering the environment of a restricted area; jeopardizing the use of private property; and posing security threat to helicopters and passengers of the Nairobi West Hospital helipad as well as the Wilson Airport Airspace.
  6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated the provisions of the Environment Management and Coordination Act by failing to obtain a valid EIA License from the 3<sup>rd</sup> Interested Party, NEMA prior to commencing the construction of the 14 level apartments.
3. In the affidavit sworn in support of the motion, Arjinder Singh Bhachu deposed that;



- a. The petitioner operates the Category D helipad atop the Nairobi West Hospital at an elevation of 1705.1 meters and with ARP coordinates: S1<sup>o</sup>18'24.01', E36<sup>o</sup>49'31.29. A copy of the petitioner's Helipad License is annexed hereto and marked NWH-1.
  - b. The Petitioner further has an obligation as a medical service provider to ensure that no person is denied emergency medical care and treatment through obstruction and blocking access to the medical facility as provided for under Article 43(2) of the Constitution of Kenya.
4. The Petitioner avers that it became aware of the public notice on change of user of the Respondent's land in April 2022. That the user was to construct 14 levels apartment with a proposed height of 33.6m which mandated the petitioner to notify the Respondents of possible obstruction of the operation of the helipad and Wilson airspace. That they received a response to their objections stating that no development permit had been issued (annex NWH-3).
  5. Mr. Arjinder deposed that matters went quiet until sometimes in June 2023 when construction commenced on the subject parcel without the requisite licenses. They aver that the development is out of character with construction permitted in a restricted airspace area and is being undertaken contrary to section 56 of the Civil Aviation Act (see Annex NWH-8). The petitioner deposed that their constitutional rights to a clean and healthy environment; right of access to information; and reasonable and procedural fair administrative action has been breached by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  6. The 1<sup>st</sup> respondent filed a replying affidavit opposing the application. He annexed documents in support of the averments. He deposed that firstly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent duly obtained development permission from Nairobi City County, Nema License issued by the National Environmental Management Authority, Kenya Airports Authority Height Approval of Avicena Towers, No objection letter from the Kenya Aviation Authority, and a letter approving resumption of work from the Nairobi City County dated 9<sup>th</sup> October 2023.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that they sought approval vide their letters dated 2/12/2022 and 9/8/2023 from Kenya Civil Aviation Authority (KCAA). The KCAA responded that the Kenya Civil Aviation Authority informed us that the proposed development was in the vicinity of aerodromes and requires assessment and approval by the Authority. KCAA further stated that the assessment process was ongoing in consultation with other government agencies, and that the determination of our application will be communicated once the process is concluded.
  8. They deposed to receiving approval from KCAA vide a letter dated 3<sup>rd</sup> October 2023 which attached seven conditions to be complied with. Mr. Yusuf deposed that the approvals were given after physically inspecting LR No 37/238/4 and assessment of the building plans and also consideration of the petitioner's concerns were addressed.
  9. It is averred for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the EIA license was obtained on 19<sup>th</sup> October 2023. They oppose the granting of the injunctive orders due to:
    - i. The petitioner is guilty of material non-disclosure for failing to disclose to the court that KAA and KCAA have approved the proposed development vide the approvals dated 3<sup>rd</sup> October 2023, and 13<sup>th</sup> October 2023, respectively.
    - ii. Experts (at KAA and KCAA) have approved the proposed development and height, subject to conditions that are meant to ensure the construction, and the building, will not interfere with the Petitioner's operation of the Helipad.



- iii. At the behest of the Petitioner, through an enforcement notice, the construction of the proposed development was already delayed. This has been financially detrimental to the owners and stakeholders of the development.
  - iv. The petitioner's property on which is located the helipad is 16 floors tall, while the proposed development would only be 12 floors tall hence, the Petitioner's allegations that it would possibly obstruct the operation of the helipad operated by ...
10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents asserts that section 61(3) and (4) of the [Physical and Land Use Planning Act](#) (2019) provides that a party aggrieved by the decision of the Director of County Urban Planning to appeal the development plans before the County Physical and Land Use Planning Liaison Committee within 14 days of the decision by the county executive member. They stated that section 69 of the [Civil Aviation Act](#) provides that the National Civil Aviation Administrative Review Tribunal shall have jurisdiction to hear and determine complaints and appeals from decisions of the Director-General or Authority.
11. Both the Petitioner and 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed supplementary affidavits reiterating the contents of previous affidavits. The petitioner annexed an expert report as ASB-1 stating that any height above 10 floors will render their helipad useless.
12. The application was prosecuted vide oral submissions presented. Mr. Agwara learned counsel for the petition submitted that the contested development started in June 2023. He referred the court to several letters such as the one from NEMA which confirmed that as at 8/8/2023 they had not issued any approvals to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He submitted that they contest the development exceeding 10 floors which would hinder their right to use the helipad. They placed reliance on the provisions of articles 40, 42, 43 and 70 of the [Constitution](#) urging that unless the orders are granted, their right to use the helipad will be breached yet their facility serves over 500,000 Kenyans every month.
13. On the question of jurisdiction, Mr Agwara submitted that they could not approach the NET because there was no license and that the remedy of the Tribunal would not be efficacious. He cited the case of [BOM Uburu Secondary School v County Director of Education](#) (2015) eKLR.
14. Mr. Ibrahim Adan learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the test for granting injunctions is settled in the case of [Giella v Cassman Brown](#) and [Nguruman Limited v Jan Bonde Nielsen](#) (2020) eKLR. It is their argument that all the approvals were obtained which means no prima facie case has been laid. Mr. Adan admitted the approval were obtained from sectoral agencies but stated that section 61 of [Physical Land Use and Planning Act](#) provides that an aggrieved party to submit their complaint to County Executive Committee lands within 14 days and lodge a complaint to the Liaison within 60 days hereof.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the application is usurping the powers of the statutory bodies to determine the complaint and referred to the provisions of section 69 of the [Civil Aviation Act](#) and section 129 of EMCA. Counsel submitted that permission granted by KCAA was for 33.6m and makes no mention of floors. That the construction is at 10 meters so the Petitioner will not suffer any harm. Consequently, granting the orders will cause them more harm.
16. I have considered the pleadings, documents annexed in support and the submissions rendered. I frame two issues for determination of the application:
  - i. Whether this court's jurisdiction is ousted.
  - ii. Whether the applicant have demonstrated grounds to warrant the grant of the orders sought.



17. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirmed that each of the sectoral agencies which issued them have committees to deal with any disputes relating to the licences. For instance, the National Environment Tribunal (NET), the County Physical Land Use Planning Liaison Committee and the KCAA. The petitioner in contesting the doctrine of exhaustion stated that the alternative avenues were not efficacious and cited the case of *BOM Uhuru Secondary School v County Director of Education supra*.
18. The principles of the doctrine of exhaustion does require parties to approach first level mechanisms for the resolution of disputes. However there are exemptions to the rule of the doctrine. This was stated in the case *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others (Interested Parties)* (2020) eKLR.
19. In the recent case of *Abidha Nicholus v the Attorney General and 7 others* (Respondents) and Interested Parties, Pet No E007 of 2023, the Supreme Court of Kenya held thus;

“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:

“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.” [Emphasis ours].

20. Guided by the above decision and on the basis that this matter involved three sectoral agencies which then excluded the doctrine of exhaustion, the argument that this court lacks jurisdiction is without merit.
21. The second issue is whether or not the application is merited. In protesting that the orders should not be granted, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that they had applied and obtained all the requisite approvals. They annexed copies of the respective licenses to the Replying Affidavit. The petitioner on its part argued that the licenses were obtained after the construction began and in breach of their Fair Administrative Actions Act.
22. I have perused the licenses and the correspondences exchanged. The Petitioner annexed a copy of the enforcement notice issued by the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirmed receipt. The said Respondents were allowed to continue with the constructions vide the 3<sup>rd</sup> respondents letter dated 8<sup>th</sup> October 2023. The petitioner pleaded that construction works began in June 2023 which averment has not been denied.
23. All the requisite licenses and copies of which have been annexed show they were issued on 13/10/2023 for KCAA and 19/10/2023 for NEMA. It is noted that the Petitioner had lodged a complaint against



the proposed change of user vide the annexed letters dating back to March 2022 and April 2023 before the issuance of the impugned licenses. No evidence has been presented to show they were given a hearing before the licences were issued.

24. Consequently, I find a prima facie case has been established by virtue of the evidence that the licenses were procured after the works began. Secondly, the prima facie case lies on the fact that the petitioner having raised objection was not afforded an opportunity to make representation.
25. Whether the petitioner will suffer harm unless the orders sought are granted. The petitioner has pleaded it runs a helipad in its premises which is not denied. They also plead that the approval granted to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent refers to 12 levels or 14 levels. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that their approvals refer to 33.6 meters and not floors.
26. To the extent that it is not determinable at this preliminary stage whether or not the 33.6m building will interfere with the operations of the helipad which serves the interest of the patients of the petitioner, it is safer to preserve use of the helipad pending determination of the dispute. At the hearing of the application, the petitioner stated no objection to construction of 10 floors. Consequently, I will grant the conservatory orders but with a rider that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall continue with the construction works until the 10<sup>th</sup> floor (inclusive of the ground floor) only pending hearing and determination of this petition.
27. In conclusion, the application succeeds in terms of prayers that:-
  - i. A conservatory order be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves, agents, principles, servants, employees or otherwise howsoever from selling, advertising for sale, constructing and or carrying on construction beyond 10 floors (inclusive of the ground floor) of the Avicena Towers Apartment comprising studio and single bedroomed apartments on the property known as Plot LR No 37/238/4 situated on Gandhi Avenue and neighbouring Nairobi West Hospital within Nairobi West Estate in the Nairobi City County, pending the hearing and determination of this Petition.
  - ii. Costs of the application to the Petitioner

**RULING DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024.**

**A. OMOLLO**  
**JUDGE**

