Maanzoni Owners Association v Machakos County Physical Land Use Planning Liaison Committee & 2 others (Environment and Land Appeal E026 of 2022) [2024] KEELC 3305 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3305 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E026 OF 2022

CA OCHIENG, J

APRIL 4, 2024

BETWEEN

MAANZONI OWNERS ASSOCIATION ..... APPELLANT

AND

MACHAKOS COUNTY PHYSICAL LAND USE PLANNING LIAISON COMMITTEE ..... 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER ..... 2ND RESPONDENT

COSMOS GAS LIMITED ..... 3RD RESPONDENT

(Being an Appeal from the whole Decision of the Committee by the Machakos County Physical Land Use Planning Liaison Committee dated and delivered on the 8th July, 2022 over the Appellant's Appeal against the decision of the County Director of Physical and Land Use Planning dated 3rd March, 2022 and delivered on the 16th May, 2022 vide a Letter backdated to 11th March, 2022)

JUDGMENT

1. By a Memorandum of Appeal dated the 15th July, 2022, the Appellant being dissatisfied with the whole of the decision of the Machakos County Physical Land Use Planning Liaison Committee dated and delivered on the 8th July, 2022, over the Appellant's Appeal against the decision of the County Director of Physical and Land Use Planning dated the 3rd March, 2022 appeals against the said decision on the following grounds:-

    1. The Committee erred in law and in fact in making the finding that the decision of the 2nd Respondent communicated on 16th May, 2022 vide letter dated 11th March, 2022 and attaching development permission dated 3rd March, 2022 for the change of use from residential to

light industrial use (LPG storage and filling plant) was issued within the required statutory timelines.

2. The Committee erred in law and in fact in not finding that the decision by the 2nd Respondent granting the development permission to the 3rd Respondent was made contrary to Section 61(2) of the Physical Planning and Land Use Planning Act.

3. The Committee erred in law and in fact in not finding that the decision of the 2nd Respondent was made outside the statutory 30 days of receiving an application.

4. The Committee erred in law and in fact in not finding that the fact that the 2nd Respondent did not give to the Appellant a copy of the decision when the Appellant wrote letter dated 9th March, 2022 and visited the offices of the 2nd Respondent corroborates the Appellant's averment that the decision purportedly made on 3rd March, 2022 was in fact backdated.

5. The Committee erred in law and in fact in not making a finding that if indeed the 2nd Respondent had made its decision on 3rd March, 2022, given the 2nd Respondent's failure and or refusal to disclose this to the Appellant on 9th March, 2022 when the Appellant went to inquire, time is deemed to run from the 16th May, 2022 when the information of the decision was communicated to the Appellant.

6. The Committee erred in law and fact as the 2nd Respondent did not oppose the appeal as stipulated by regulation 41 (2) of the Physical and Land Use Planning (Liaison Committees) Regulations 2021 and as such did not tender any evidence to show that the approval of the development permission was made on the 3rd March, 2022.

7. The Committee erred in law and in fact by disregarding the Mavoko Integrated Strategic Urban Development Plan (IUSDP) 2020 – 2030 Gazetted on 24th September, 2020 contrary to Section 61(1) of the Physical Planning and Land Use Planning Act which categorizes the Maanzoni Area as a low-density residential area and prohibits hazardous and inflammable goods in residential areas.

8. The Committee erred in law and fact by not taking account of and giving effect to on the Mavoko Integrated Strategic Urban Development Plan (IUSDP) 2020 – 2023 on the alleged ground that the said plan was a draft, when the 2nd Respondent had not in fact adduced evidence to show that its decision had been based on the factor.

9. The Committee erred in law and compromised the Appellant's right to fair hearing under Article 47 and 50 of *the Constitution* when it allowed the Physical Planning Officer who had made the decision being challenged to sit together with the members of the Committee at its hearing.

10. The Committee's erred in law by nit finding that its failure to issue the Appellant in writing with the date, time and place of the hearing to the respective parties within seven days of receipt of the complaint as stipulated by Regulation 42(2) of the Physical and Land Use Planning (Liaison Committees) Regulations 2021 made the hearing procedurally flawed.

11. The Committee erred in law and acted unprocedurally by failing to hold a vote on the decision of the Committee to dismiss the Appeal of the Appellant contrary to Regulation 51 of the Physical and Land Use Planning (Liaison Committees) Regulations 2021.

12. The Committee erred in law and fact by making a decision which does not address the issue raised by the Appellant that the 2nd Respondent disregarded the comments made by the

public including the Appellant herein in an application for development permission which is inconsistent with Section 6(1) (d) of the *Physical and Land Use Planning Act* and Section 5 of the *Fair Administrative Action Act*.

13. The Committee erred in law and in fact by making a decision not supported by evidence to show that Appellant was allowed an opportunity to meaningfully participate in the proposed change of user process which is evident from the failure by the 2nd Respondent to furnish the Appellants with the Plan and details on the mitigation measures proposed by the developer on Parcel No. 19745 following the meeting of 16th December, 2021.

14. The Committee erred in law and in fact by taking into consideration extraneous matters not before it for consideration and ended up misdirecting himself and ultimately made the wrong conclusion based on the facts and the law as presented and unjustifiably dismissed the Appellant's Appeal.

15. The Committee wholly erred in law and fact in arriving at the said decision.

Reasons Wherefore: The Appellant prays that:-

a. The Appeal herein be allowed.

b. The Decision dated 8th July, 2022 by the 1st Respondent be set aside and or quashed.

c. The Approval by the 2nd Respondent dated 3rd March, 2022 and delivered on the 16th May, 2022 be set aside and/or quashed.

d. The 3rd Respondent be ordered to restore Parcel No. 19745 to the condition it was prior to the developments arising from the approval dated 3rd March, 2022 and delivered on the 16th May, 2022.

e. Costs of the Appeal be awarded to the Appellant.

2. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

3. The Appellant in its submissions provides a factual background of the dispute herein and insisted that the approval for Change of User was done outside the prescribed timeline hence should be set aside or cancelled. It submits that the Developer wants to use the property for LPG Storage and refueling which qualifies as hazardous and inflammable goods that is prohibited in a land use residential area. Further, the alleged approval issued on 3rd March, 2022 is inconsistent with Section 61(1) (a) of the *Physical and Land Use Planning Act* as read together with the Mavoko Integrated Strategic Urban Development Plan. It further submits that the approval did not address the concerns raised by the Appellant and does not capture environmental concerns. It contends that the Respondent did not give any feedback to it, following the meeting of 16th December, 2021. It claims that development was commenced before requisite development permissions were issued. It reaffirms that the Appeal is not time barred and filed contrary to Section 61(3) of the *Physical and Land Use Planning Act*. It avers that the Approval seemed to have been backdated. Further, that no evidence was placed before court by the 2nd and 3rd Respondents to confirm that the development approval was done prior to the 16th May, 2022 when the decision was communicated to it. It explains that it lodged the Appeal on the 27th May, 2022 which was within the 11th day after the decision was made and given to the parties that was within

the fourteen (14) days prescribed under Section 61(3) of the *Physical and Land Use Planning Act*. To support its averments, it relied on the following decisions: John Kabukuru Kibicho & Another v County Government of Nakuru & 2 Others (2016) eKLR and Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another (2017) eKLR.

Respondents' Submissions

4. The 1st and 2nd Respondents' in their submissions provides a background of the dispute herein and contends that the Appeal is not merited since the Appellant had not proved that the approval for change of user was backdated. They insist that it was false for the Appellant to allege that the Physical and Land Use Planning Committee did not consider its impugned Application. They argue that the Appellant filed the instant Appeal with dirty hands knowing very well that due process was done when lodging the complaint at the Physical and Land Use Planning Committee, who made their Ruling. Further, that the Appellant was involved in the entire process of establishment of the said LPG Plant which was in line with the Mavoko Integrated Strategic Plan 2020 to 2030. To buttress their averments, they have relied on the following decisions: Nesco Services Limited v City Council of Nairobi (2017) eKLR and Maanzoni Owners Association (suing through its officials) v Pamela Tutui & 2 Others (2021) eKLR.

5. The 3rd Respondent in its submissions provides a background of the dispute herein and contends that it had obtained a Change of User over land parcel number LR No. 19745 situated at Maanzoni Machakos County. It explains how it applied for Change of User and the documents it presented and argue that the grant of development permission conformed with Section 61(1) and (2) of the Physical Planning and Land Use Act as it was in line with the Mavoko Integrated Strategic Urban Development Plan (2020 – 2030). It further submits that sufficient public participation was carried out prior to the issuance of Change of User and Grant of Development permission over LR No. 19745. Further, that the 1st and 2nd Respondents' did not lock out any members of the public including the Appellant from giving their views as duly filled in questionnaires were returned to the 1st and 2nd Respondents. It further submits that appropriate advertisements were placed at the property LR No. 19745 inviting the public to air their views on Change of User. It reiterates that there has been adequate public participation in respect to the initial stage of Change of User to the final stage of issuance of development approval and all licenses including certifications thereto. It sought for costs. To support its averments, it relied on the following decisions: Doctors for Life International v Speaker of National Assembly (2006) 12; Commission of the Implementation of *the Constitution* v Parliament of Kenya & Another (2013) eKLR; Mui Coal Basin Local Community & 15 Others v Permanent Secretary, Ministry of Energy & 17 Others (2015) eKLR and Jasbir Singh Rai & Others v Tarlochan Rai & Others (2014) eKLR.

Analysis and Determination

6. I have considered the Memorandum of Appeal, Record of Appeal and rivalling submissions and the following are the issues for determination:-Whether the process for impugned development approval and application for Change of User in respect to property LR No. 19745 was properly undertaken.Whether the Appeal is merited.

7. As to whether the process for impugned development approval and application for Change of User in respect to property LR No. 19745 was properly undertaken.

8. This Appeal emanates from a Development Approval and Change of User granted to the 3rd Respondent by the 1st and 2nd Respondents. The Appellant being aggrieved by the said Development Approval and Application for Change of User, filed an Appeal which was disallowed on 8th July, 2022, hence the second Appeal to this Court. The Appellant claims the Development Approval and

Application for Change of User was backdated as it was done after the expiry of the requisite thirty (30) days.

9. The legal provisions governing development approval including application for Change of User are contained in the *Physical and Land Use Planning Act* hereinafter referred to as 'PLUPA'. Section 61 of the PLUPA provides that:-

(1) When considering an application for development permission, a county executive committee member—

a. shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans; (b) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought; (c) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought; (d) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and (e) in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease. (2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may — (a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; (b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing. (3) 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. (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court."

10. In this instance, the Appellant in its Appeal claims that the 1st and 2nd Respondents granted development permission to the 3rd Respondent contrary to PLUPA and Mavoko Integrated Strategic Urban Development Plan (2020 – 2030). It further claims that the 1st and 2nd Respondents granted the Notification of Approval for Development Permission vide their letter dated the 3rd March, 2022 which was delivered on 16th May, 2022 but backdated it to 11th March, 2022. Further, that the alleged approval issued on 3rd March, 2022 is inconsistent with Section 61(1) (a) of PLUPA as read together with the Mavoko Integrated Strategic Urban Development Plan. The Appellant further contends that the approval did not address the concerns it raised and neither did it capture environmental concerns. It insists that the Respondents did not give any feedback to it, following the meeting of 16th December, 2021. The Respondents aver that the Appeal is not merited since the Appellant had not proved that the approval for Change of User was backdated. They argue that the Appellant's allegations that the Physical and Land Use Planning Committee did not consider its impugned application is false as due process was adhered to, when lodging the complaint at the Physical and Land Use Planning Committee who made their Ruling. They contend that the Appellant was involved in the entire process

of establishment of the said LPG Plant which was in line with the Mavoko Integrated Strategic Plan 2020 to 2030.

11. The first issue this Court needs to deal with is whether the letter dated the 3rd March, 2022 which was delivered on 11th March, 2022 was backdated or not. From a perusal of the Record of Appeal, I note the letter granting notification of approval is dated the 3rd March, 2022. Further, I note the said letter is stamped 16th May, 2022 by the Appellant's Advocates. On the allegation of backdating the aforementioned letter, I opine that the burden of proof was upon the Appellant's Advocates to prove this averment, but from the materials presented before court, I am unable to decipher this, as there is no previous correspondence between the parties to confirm this position. On the issue whether the approval was contrary to the Mavoko Integrated Strategic Plan 2020 -2030, I note at page 207 of the said Plan, it indicates that land use for Maanzoni is conservancy with low density residential. Further, that an intervention within these spaces should be subjected to an Environmental Impact Assessment and can only be limited to the absolutely indispensable. This brings in the question whether the Environmental Impact Assessment was undertaken and if public participation was adhered to, at the point of conducting the said assessment. I note the 3rd Respondent had presented an application dated the 3rd February, 2022 for Development Permission on LR No. 19745 which was accompanied by an application for Change of User from residential to light industrial. Further, the County Director for Physical Planning granted approval for the Change of User on 3rd March, 2022, which forms the fulcrum of this Appeal. I note the 3rd Respondent was granted an Environmental Impact Assessment (EIA) License by NEMA dated 18th November, 2021 – which is at page 355 of the Record of Appeal. Further, the 3rd Respondent addressed all the concerns raised by the Appellant in the meeting held on 16th December, 2021 and took measures addressed in the EIA Report which it highlighted at paragraph 8 in the Replying Affidavit of Muhiyadin Jibril dated the 1st November, 2022.

13. On the claim that the Notification of Approval Permission was granted more than thirty (30) days later, contrary to the provisions of PLUPA, I beg to disagree, as the Application was dated the 3rd February, 2022 and approval granted on 3rd March, 2022. I note there is an EIA Report at Page 357 wherein they explain the topography of the disputed area, mode of public participation and mitigation measures to be put in place. I further note that the Appellant did not provide proof or documentation that, it severally sought for the decision prior to the 9th March, 2022. From the Record of Appeal, there is only a letter from the Appellant's Advocates dated the 9th March, 2022 which was responded to on the 11th March, 2022. From the documents presented in the Record of Appeal, it is evident that the Appellant was well aware of the process of grant of development permission from 2021 and even participated therein, but it has not explained why it only sought to know the outcome of the approval on 9th March, 2022. Further, I note at page 446 of the Judgment from the Appeal, the Mavoko Strategic Urban Development Plan 2020 - 2030 which the Appellant seeks to wholly rely on was actually approved on 31st May, 2022 after the 3rd Respondent had already been granted development permission.

14. In the foregoing, I find that the impugned development approval and application for Change of User in respect property LR No. 19745 was properly undertaken and in accordance to Section 61 of PLUPA. In the circumstances, I will decline to set aside or quash the decision dated the 8th July, 2022 by the 1st Respondent as well as the approval by the 2nd Respondent dated the 3rd March, 2022.

15. I hence find the Appeal unmerited and will dismiss but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF APRIL, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Kimathi holding brief for Prof. Mumma for Appellant

Lutukai holding brief for Madan for 3rd Defendant

No appearance for 1st and 2nd Respondents

Court Assistant – Simon/Ashley