



Owango v Voi Point Limited & 7 others; Taita Taveta County Government & 2 others (Interested Parties) (Environment and Planning Petition E002 of 2024) [2024] KEELC 5223 (KLR) (Environment and Land) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND PLANNING PETITION E002 OF 2024**

EK WABWOTO, J

JULY 11, 2024

BETWEEN

SOLOMON BENAERD OGAI OWANGO PETITIONER

AND

VOI POINT LIMITED 1ST RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, PHYSICAL
PLANNING AND URBANIZATION 2ND RESPONDENT**

DIAMOND TRUST BANK 3RD RESPONDENT

DIRECTOR OF LANDS AND ADMINISTRATION 4TH RESPONDENT

DIRECTOR OF SURVEY 5TH RESPONDENT

**CABINET SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN
DEVELOPMENT 6TH RESPONDENT**

NATIONAL LAND COMMISSION 7TH RESPONDENT

ATTORNEY GENERAL 8TH RESPONDENT

AND

TAITA TAVETA COUNTY GOVERNMENT INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

DIRECTORATE OF CRIMINAL INVESTIGATIONS INTERESTED PARTY



RULING

1. The central issue in this ruling is whether this court lacks jurisdiction to hear and determine this petition pursuant to the provisions of Section 61(3) of the *Physical and Land Use Planning Act* 2019. The 1st Respondent vide its Notice of Preliminary Objection dated 15th May 2024 contends that this court lacks jurisdiction in view of the aforementioned provision.
2. Section 61(3) of the *Physical and Land Use Planning Act* of 2019 stipulates as follows:-

“An Applicant or an Interested Party that is aggrieved by the decision of a county 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 Members and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”
3. The 1st Respondent contended that the Petition offends the doctrine of exhaustion, ripeness and avoidance and the court was urged to uphold the Preliminary Objection dated 15th May 2024.
4. The Preliminary Objection was opposed by the Petitioner and the 2nd Respondent together with the 3rd Interested Party. The Petitioner argued that pursuant to Section 93 of the *Physical and Land Use Planning Act*, the County Government of Taita Taveta has not established its physical planning and Liaison Committee. It was submitted that section 61(3) is only applicable when the Committee is in place.
5. The 2nd Respondent and 2nd Interested Party equally submitted that the ELC has jurisdiction over the matter where a County Liaison Committee has not been established. It was submitted that the alternative resolute mechanism does not exist, the petition is multi faced and even if the committee was in place the ELC would still have been the appropriate forum.
6. The cases of Nicholus =Versus= Attorney General & 7 Others; National Environmental Complaint Committee & 5 Others (Interested Parties) (Petition E007 of 2023) (2023) KESC 113 (KLR) Immaculate Gicuku Mugo =Versus= Kiambu County Government (2021) eKLR among others were cited in opposition to the 1st Respondent’s Preliminary Objection.
7. The 1st Respondent in its rejoinder argued that the Petitioner has not addressed the issue of limitation of time as set out under Section 61(3) of the Act and further that parties should not use Constitutional Petitions as a smoke screen to escape clear provisions of statute. It was also submitted that the Supreme Court case of Abidha Nicholus (Supra) does not give parties the right to circumvent clear and statutory timelines.
8. As earlier stated the main issue for determination herein is whether this court lacks jurisdiction to hear and determine the petition in view of Section 61(3) of the Physical Planning and Land Use Act.
9. The Petitioner seeks various reliefs in his petition dated 8th May 2024. The Petitioner seeks several declaratory orders in respect to the approval and change of user granted in respect to L.R. No. 28683 among other reliefs.
10. 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. 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 among others.

30. The Supreme Court in the case of Nicholus (supra) 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.
30. In considering the foregoing, this Court agrees with the reasoning of 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.
11. In the instant case, it is evident that the County Government of Taita Taveta has not established its Liaison Committee and as such the ELC remains the only available forum for the Petitioner to seek redress. In the circumstances, it is the finding of this court that the 1st Respondent’s Preliminary Objection is unmeritorious and the same is dismissed. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 11TH DAY OF JULY 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Court Assistants: Mary Ngoira and Norah Chao.

Mr. Owino for Petitioner.

Mr. Mbugua for the 1st Respondent.

Mr. Chebon h/b for Mr. Otieno for the 2nd Respondent and the 3rd Interested Party.

Mr. Kisinga for the 3rd Respondent.

N/A for the 1st and 2nd Interested Parties.

