



REPUBLIC OF KENYA



**Seli & 10 others v Nairobi County Government & 8 others (Environment & Land
Petition E019 of 2024) [2024] KEELC 5998 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E019 OF 2024
AA OMOLLO, J
SEPTEMBER 16, 2024**

BETWEEN

**JEROTICH SELI 1ST PETITIONER
NJOMO KAMAU 2ND PETITIONER
MAUREEN MUGURE 3RD PETITIONER
FLORENCE ILOVI 4TH PETITIONER
MARGARET KAMAU 5TH PETITIONER
CHARLES KIGOTHO 6TH PETITIONER
ATIENO OCHOLLA 7TH PETITIONER
EUNICE NYAWIRA 8TH PETITIONER
MARGARET ORAIRO 9TH PETITIONER
JANET MAWIYOO 10TH PETITIONER
BROWNHILL MANAGEMENT LIMITED 11TH PETITIONER**

AND

**NAIROBI COUNTY GOVERNMENT 1ST RESPONDENT
PATRICK ANALO AKIVAGA 2ND RESPONDENT
STEPHEN GATHUITA MWANGI 3RD RESPONDENT
TOM ACHAR 4TH RESPONDENT
GEOFFREY MUTURI MURUMIA 5TH RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 6TH
RESPONDENT**



MAMO B MAMO 7TH RESPONDENT
CATHERINE THAITHI 8TH RESPONDENT
BLISSFUL RESIDENCE INVESTMENT LIMITED 9TH RESPONDENT

RULING

1. For determination is the Notice of Motion dated 13th June, 2024 brought under the provisions of Rules 3, 4, 13 and 23 of *the Constitution* of Kenya Practice & Procedure Rules 2013; Section 3 of EMCA and Section 3 and 10 of the Enut & Land Court Act. The Petitioners/Applicants sought to be granted the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. That Conservatory Order of temporary injunction be, and is hereby given stopping, halting and discontinuing the 9th Respondent, their servants/proponents, or any other person from undertaking any further development and construction activities on the property known as Nairobi/Block 17/392 – Kilimani Area, Nairobi pending the hearing and determination of the Petition.
 5. That Conservatory Order of temporary injunction be and is hereby given compelling the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents, jointly and/or severally, to take immediate measures to stop, prevent or discontinue any development, or any omission deleterious to the environment on the property known as Nairobi/Block 17/392-Ndemi Road, Kilimani Area, Nairobi pending the hearing and determination of the Petition.
 6. That this Honourable court do give any further orders and/or directions deemed just, fair and necessary.
 7. That the costs of the application be provided for.
2. The application is supported by the grounds listed on its face inter alia;
 - i. The Applicants are owners/occupiers/residents of houses and properties erected and developed along Ndemi Road, Kilimani Area, Nairobi which properties are near and/or next to the property known as Nairobi/Block 17/393 (the subject property).
 - ii. The owner/developer of the subject property who has been identified as the 9th Respondent has commenced development on the said property by inter alia, felling and cutting down all the trees and fauna and demolishing the existing buildings before and without first obtaining legal, regular and/or procedural approvals from the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th Respondents.
 - iii. The felled and cut trees and other fauna has, and will continue environmental loss and damage to the area, and will continue being deleterious to the environment.
 - iv. No plans or arrangements have been made to re-plant or replace the trees felled, and there is no indication that the 9th Respondent is desirous of re-planting and replacing trees and other fauna on the subject property.



- v. That the 9th Respondent is now continuing with the development activities to erect and construct 18 storey, 4-Block residential apartments totaling 394 Units of 2, 3 and 4 bedrooms with other associated amenities and approvals.
 - vi. The current development control policy of the 1st Respondent does not allow or permit development of high-rise buildings and apartments next to or along Ndemi Road, and indeed the entire Kilimani Area, Nairobi.
 - vii. Development and construction on the subject property is in breach, and in violation of inter alia, Articles 42 and 70 of *the Constitution* of Kenya 2010. Section 57 of the *Physical and Land Use Planning Act*, and Section 3 of the *Environmental Management and Co-ordination Act*.
3. The application was also supported by the affidavit of Jerotich Seii sworn on 13th June, 2024 and further affidavit sworn on 26th July, 2024. She deposes that her property is right opposite the property Nairobi/Block/17/392. She avers that the area along Ndemi Road and the entire Kilimani area falls under Zone 4 of the 1st Respondents by-laws & regulations on land use and planning. To the best of her knowledge, there are no new regulations to amend the zoning which have been passed.
 4. She stated that construction on the suit property started on 27th May, 2024 and that she was informed by the 5th Respondent that the felling of the trees was to facilitate construction of an 18-storey 4 blocks residential apartment. That the cutting of the trees have affected the general environment of the area along Ndemi road yet the 9th Respondent has not shown desire to replant or replace the cut trees. The Applicants aver that the Respondent development control policy does not permit development of high-rise buildings and apartments next to or along Ndemi road and the entire Kilimani area.
 5. They added that the construction and development activities on the subject property is in breach of article 42 of *the Constitution*, Section 3 of EMCA and Section 57 of the Physical Land Use and Planning Act. The Petitioners deposed they have tried all they can to have the illegal developments discontinued by the 1st – 8th Respondents but their efforts have been in futility with indication that the said Respondents are aiding the illegal and irregular development. Hence the need to issue conservatory orders otherwise they will continue with their acts and omissions that are deleterious to the environment.
 6. In the further affidavit the Applicants aver that the activities intended to be undertaken on the subject property will greatly prejudice them if allowed to continue. They aver to being advised that the 1st – 3rd Respondents ought to and must give notice to the 9th Respondent requiring them to restore the subject property to the conditions it was in as at 27th May, 2024. They reiterated that there is no by-law or regulation allowing construction and development of 15- level building between Argwings Kodhe and Ngong Road in Nairobi City County.
 7. That annexure BR-1 in the 9th Respondent Replying Affidavit is of no legal effect as it remains a proposal yet to be subjected to the legislative processes. The Applicants added that the 9th Respondent is not the owner of the subject property. They affirmed that they have constitutional rights as citizens of Kenya to bring the complaint against the 9th Respondent's developing and that they have demonstrated that their rights under article 42 of being infringed.
 8. It is the Applicants' contention that the copies of notification of approvals dated 26th January, 2024 and 19th December, 2023 found at pages 66 – 68 of the replying affidavit by the 9th Respondent are not approval permission allowing commencement of development. That the 9th Respondent has not shown evidence that it paid for the approvals. They also point to the irregularity of granting development approval before the change of user.



9. The Applicants further stated that the EIA license was also irregular as no environmental study or report was undertaken and or reviewed by the 6 – 8th Respondents before the issuance of the license. They reiterated that the development will contravene the provisions of Section 57 and 62 of PLUPA and the third schedule thereof. They urged the court to grant the orders sought.
10. In opposition to the application, the 9th Respondent filed a replying affidavit sworn by Jing Jing Qu on 26th June, 2024. He deposes that 1st petitioner has no right to claim against the 9th Respondent because she owns no property adjacent to the subject property. He deposed that the 1st Petitioner is ignorant of the current regulations of the Nairobi City County Control Development Policy 2021 which provides for allowance of 15 – levels for buildings constructed between Argwings Kodhek and Ngong Road.
11. The 9th Respondent avers that it obtained all the requisite approvals for its development. That the subject property is not a historical site hence the claim of cutting old-age trees affecting the environment is misplaced and unfounded. Jingjung asserted that the 9th Respondent has a right to utilize the subject property in line with the land use ordinances of Nairobi. Furthermore, that the license for cutting trees was conditional to replanting of trees post construction.
12. That claims by the Applicants are speculative and no loss or damage has been suffered or is likely to be suffered by the Petitioners if the development is allowed to go on. They posit that they have applied environmental principles that are in tandem with articles 42, 69 and 70 of [the Constitution](#) and Section 3 of EMCA. The 9th Respondent stated that the Petitioners have no locus to institute this petition and application accusing the 1st petitioner of being a serial perennial petitioner and her motive and propaganda against the 9th Respondent is questionable. It added that the 11th Petitioner has not displayed a letter of authority from its board of directors to lodge the petition.
13. Further, it is deponed for the 9th Respondent that no geotechnical evidence has been produced to support the allegations regarding the safety and environmental impact of the proposed development to its surrounding. The 9th Respondent avers that the Petitioners are in violation of the right to privacy contrary to article 31 of the court.
14. That the 9th Respondent is a foreign investor who should enjoy protection from discrimination and insecurity. That it is also bound to adhere to environmental standards on enhancing and developing properties. He further pledged to safeguard property owner’s rights, promising co-operation with regulatory bodies to uphold industry standards. They deposed to obtaining all the relevant approvals and asset that the Applicants have not demonstrated how the licenses are violating their rights. They relied on annexures to the replying affidavit and urged the court to dismiss the application.
15. The 6th – 8th Respondents filed a preliminary objection dated 16th July, 2024 stating thus;
 - a. That the Petitioners are seeking determination of the question of Environmental Impact Assessment (EIA) license and related issues at the wrong forum since under section 129(1) (a) of the [Environmental Management and Co-Ordination Act](#), 1999 (“EMCA”), the Applicants ought to have first approached the National Environment Tribunal (NET) by way of appeal challenging the alleged irregular grant and/or violation of the conditions of the EIA License, following the 9th Respondent’s submissions of the application of EIA and approval, and the issue is, therefore, not ripe for determination by this court while exercising its original jurisdiction on environmental matters.
 - b. That the Petitioners ought to have first litigated the issue of issuance of EIA License before the NET before approaching this Honourable Court or any other as way of ensuring that internal mechanisms for appeal and/or review and all remedies available under and any written law are



first exhausted. The instant petition and application should thus be struck out for violation of the provisions of section 9 (2) (3) of the Fair Administrative [Act, No. 4 of 2015](#).

- c. That this Petition has been brought to this court in clear disregard of the above statutory provisions and is thus an abuse of the due process of court.
16. The 1st – 5th Respondents filed a replying affidavit sworn by Patrick Analo Akivaga the 2nd Respondent on 26th July, 2024. He deposed that the 9th Respondent made an application for change of user in November, 2023 and exhausted all the procedures required under PLUPA [Act No. 13 of 2019](#). That after scrutiny, the application was granted on 26th January, 2024 while the building plans were approved on 19th January, 2024.
 17. Mr. Akivaga deposes that the 2nd – 5th Respondents are employees of the 1st Respondent and therefore enjoy indemnity as public officers under Section 89 of PLUPA. That the application lack merit because all the due procedures were followed before the approvals were granted to the 9th Respondent. They annexed:
 - a. Copy of Notice dated 13th November, 2023 placed on site inviting the public for comments.
 - b. Notification of approval for application for development dated 19th December, 2023.
 - c. Notification of approval of application for development dated 26th January, 2024.
 - d. Certificate of Structural design dated 12th January, 2024.
 18. Directions were issued on 18th July, 2024 for hearing of the application together with the preliminary objection. Directions were also given for filing of written submissions. The petitioner's submissions are dated 5th and 23rd August, 2024. The 1st – 5th Submissions are dated 23rd August and the 9th Respondents are dated 21st August, 2024. I have perused the said submissions. Besides submitting that they have established a prima facie case, the Petitioners gave a detailed analysis on why they hold that the notification of development approvals were irregular and illegal. For the preliminary objection, the Petitioners argued on what constitutes a pure point of law adding that the Tribunal had no jurisdiction to make lawful orders in respect of violation, infringement of rights and fundamental freedoms.
 19. I have considered all the issues raised in the pleadings and the submissions and therefore, frame three questions for determination of the issues arising:
 - i. Whether the petitioners have locus to bring this application and petition.
 - ii. Whether this court has jurisdiction.
 - iii. Whether the application is merited.
 20. On the question of locus, the 9th Respondent avers the 1st Petitioner does not own any property near the subject, property and described her as a serial petitioner. It also said that 11th petitioner did not present any evidence from the board of directors. I wish to begin by stating that we are no longer in the era when the case of Wangari Maathai vs Kenya Times Trust was decided. Article 22 (2) of [the Constitution](#), 2010 provides that;
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--
 - (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a



person acting in the public interest; or (d) an association acting in the interest of one or more of its members.

21. Section 3(1) of EMCA also states thus:

(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.

22. Thus, both *the Constitution* and Statute allows any person to bring a claim where the environment is likely to be damaged. Trees have no mouth to speak for themselves but they have rights to be protected. The present generation must also stand in the gap for the future. Even the Bible in the book of Proverbs 13:22 requires of a good man to leave some inheritance for our children's children (our futures) who currently have no one to speak for them. The issues of environmental rights are thus not specific in certain instances and so I find the argument of lack of locus in bringing environmental claims as rusty and without merit. In any event, the 9th Respondent's objection touches on the 1st and 11th Petitioners and said nothing about the locus of the remaining 9 Petitioners.

23. The 6th, 7th and 8th Respondents argued that the applicants ought to have litigated the issuance of EIA Licence before the National Environment Tribunal before approaching this court. That the application/petition violates the provisions of Section 9(2)(3) of the Fair Administrative Actions *Act no. 4 of 2015*. They invoked the provisions of section 129 of the *Environmental Management and Co-ordination Act* together with cases cited inter alia, the Supreme Court of Kenya in Benson Ambuti Adegwa & 2 Others versus Kibos Distillers Ltd and 5 Others (2020)eKLR in support of the P.O.

24. Under paragraphs 88 and 89 of the Petition, there are allegations of violations and acts that exposes the petitioners and the public to environmental damage and injury of immeasurable and deleterious to the environment. Under the reliefs, paragraph (d) reads:

“a declaration that the ongoing development activities on the property known as Nairobi/ Block 17/392 Ndemi Road, Nairobi has breached, violated, and infringed upon and or threatens to deny, breach and violate the Petitioners' and the general public's right to life and to a clean and healthy environment.”

25. Where a pleading raises Constitutional issues that are beyond challenging of the EIA licenses and or development approval licenses, then the jurisdiction of this court cannot be ousted. It is not possible at the interlocutory stage to determine with finality that the rights alleged in the Petition to have been breached to be without merit. The Supreme court in the case of Abidha Nicholus & Others vs. Attorney General (2023) resolved the issue of jurisdiction between the Tribunals and this Court. At paragraph 104, The SCOK stated 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.”

26. In light of the legal position taken in the cited case and the petition as filed, this court is not persuaded that the issues raised inter alia in paragraphs 87 – 89 of the Petition can be determined by the National Environment Tribunal nor can it grant the reliefs sought in paragraphs a, b and d thereof.
27. The third question is on the merit of the application and the applicants have raised several issues with the development approvals given to the 9th Respondent and cited breaches of several sections of the physical land use and planning act no. 13 of 2019. For purposes of this interlocutory application, all that the applicants have to show is a prima facie case with a probability of success.
28. For instance, the Petitioners have complained that the area where the subject matter is located does not allow buildings going upto 15-levels. The Respondents aver on the contrary with the 9th Respondent contending that it seems the applicants are not aware of the existence of the Nairobi City County Control Development Policy 2021 which allows for the 15 levels of building in Kilimani area. The 9th Respondent annexure BR-1 is said to be an excerpt of some developmental policy.
29. The Applicants argue that it is misleading and false for the 9th Respondent to state that there is a County Policy permitting the development of 15 level buildings. They placed reliance on the provisions of Sections 36 and 46 of PLUPA. The said sections provide that:

“ 36.

- (1) Once in every ten years, a county government shall prepare a county physical and land use development plan for that county. (2) Each county physical and land use development plan shall be in conformity with the National Physical and Land Use Development Plan and any relevant Inter-County Physical and Land Use Development Plan (3) The county executive committee member shall ensure the county physical and land use development plan is prepared and published within a period of eighteen months from the time notice of intention to prepare the plan is published.
46. A county government shall prepare a local physical and land use development plan for —
- (a) zoning, urban renewal, or redevelopment;
 - (b) guiding and co-ordinating the development of infrastructure;
 - (c) regulating the land use and land development;
 - (d) providing a framework for coordinating various sectoral agencies; and
 - (e) providing a framework and guidelines on building and works development in the city, municipality, urban area, or other



smaller urban centres including local centres, and market centres.”

30. They contended that no local physical and land use development plan has been prepared and published by the 1st Respondent for the Kilimani area of Nairobi as required under Sections 45 – 48 and 50 of PLUPA. The 1st – 5th Respondents did not annex copies of the physical land use plan for the area in question. Therefore, the presence or absence of the land use and plan which forms the basis for approval of the 9th Respondent raises an important question of law which by itself creates a prima facie case by the applicants.
31. The applicants also took issue with the felling of trees to pave way for development. The license granted to the 9th Respondent required to plant 60 seedlings as a replacement. The 9th Respondent has in the replying affidavit of JingJing Qu undertaken to plant the trees. However, it fell short of explaining where the 60 seedlings would be planted taking into consideration that the nature of developments being undertaken is massive. Therefore, the concerns raised by the applicants that the development would be deleterious to the environment is not farfetched. The license to cut the trees did not provide when the trees would be replanted and like I said the 9th Respondent does not disclose under oath where the 60 trees would be planted. This also makes a good reason for the filing of the petitions.
32. It is now established that a party need not demonstrate the existence of several triable issues to merit the granting of conservatory orders. The issues raised by the Applicants is sufficient to allow this petition to proceed on trial and thus merits the grant of some form of preservative orders. The next question is what orders ought to be granted in the circumstances while balancing the interests of both parties based on the documents placed before the court.
33. I ask the said question because the 9th Respondent has annexed copies of notification of approvals granted to it by the relevant bodies (the 1st and 6th Respondents). Whether those approvals were granted procedurally or otherwise forms part of the issues for determination during the hearing. Secondly, the Applicants complaints relates at this stage to the number of levels permitted in the subject area and when the cut trees shall be replaced and which in my view does not constitute irreparable damage. The purpose of the orders sought is to ensure the Petitioners’ rights and those of the environment are preserved pending the hearing and determination of the Petition.
34. Consequently, the balance of convenience tilts in allowing the application in terms of prayer 4 of the motion but with a variation that the 9th Respondent’s development and construction activities shall not go beyond 4-level floors pending hearing and determination of the Petition and subject to their displaying the Site board on subject property as required by the National Construction Authority (NCA) Act.
35. Costs of the application in the cause.
36. The parties shall ensure they fast-track the hearing and determination of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2024.

A. OMOLLO

JUDGE

