



**Sikali (Chair) Suing on behalf of Karen Langata District Association
v Nairobi City County Government & 2 others (Petition
E004 of 2022) [2023] KEELC 925 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

PETITION E004 OF 2022

J OMANGE, J

FEBRUARY 2, 2023

BETWEEN

**SAMORA MACHEL SIKALI (CHAIR) SUING ON BEHALF OF KAREN
LANGATA DISTRICT ASSOCIATION PETITIONER**

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

DIRECTOR GENERAL NEMA 2ND RESPONDENT

POWER CHINA INTERNATIONAL GROUP 3RD RESPONDENT

RULING

1. The petitioners filed an application dated 12th October, 2022 in which conservatory orders were sought restraining the 3rd Respondent, its agents, servants and or employees from constructing the development and or undertaking any construction howsoever on the suit property known as LR No. 1008/219 situated at the junction of Warai South road and Dagoretti Road in the Miotoni area of Karen. On the 10th November, 2022 the petitioners filed an application requesting the court to bring the hearing date of the application forward and also seeking conservatory orders pending the hearing and determination of the application. This application is essentially spent. So I will deal with the application dated 12th October, 2022.
2. The application is brought on the grounds that the petitioner has a recognition agreement with the 1st Respondent which obligated the 1st Respondent to provide the petitioner with all the information and documents regarding all development applications within the Petitioners Local Physical development zone of Karen and Langata districts. The petitioner contends that the authorized and approved commercial development is within Zone 1 A Miotoni reserved for low density single dwelling



- residential areas and is therefore in breach of the local Development plan (LPDP) of Karen Langata area.
3. The application is supported by the affidavit of the petitioner who is the chairman of the association. He depones that the 3rd Respondent who is the registered owner of LR NO. 1008/219 has been granted a change of user by the 1st Respondent. The petitioner avers that the change of user is in contravention of the Recognition agreement which the petitioner has with the 1st Respondent. He further alleges that the development does not comply with the Karengata Local physical development plan.
 4. The petitioner states that their requests for the Environmental Impact Assessment licence, the building plans and the procedure used for change of user have not been successful.
 5. The 1st Respondent outlined the procedure that was followed in granting the change of user. The Respondent contended that the court has no jurisdiction to hear this matter.
 6. The 2nd Respondent filed submissions in which they cited several authorities in support of the doctrine of exhaustion of remedies.
 7. The 3rd Respondent on its part raised a preliminary objection on the jurisdiction of the court to hear this matter. The 3rd Respondent contended that the ELC Court has an appellate jurisdiction hence is not clothed with original jurisdiction to hear matters relating to change of user, physical planning and environmental impact license.
 8. The matter came up in court on the 26th October, 2022 during which counsel for the Respondents indicated that they wished to raise a preliminary objection on the jurisdiction of the court.
 9. The court directed that the issue of jurisdiction be canvassed as a preliminary point together with the application. Parties were directed to file written submissions. All parties have filed written submissions and quoted numerous authorities which I have carefully considered.
 10. From the submissions the following issues arise for the courts determination;
 - a. Does the court have jurisdiction to hear this petition?
 - b. If yes is the Petitioner entitled to the injunctive orders?
 11. In determining the question of jurisdiction, it is important to appreciate the prayers sought by the petitioner. Save for conservatory orders sought, the reliefs sought in the petition relate to change of user, approval of building plans, development permission, E.I.A license and E.I. A report. Is the Environment and Land Court the appropriate forum?
 12. Section 129 of the *Environmental Management and Co-ordination Act* provides that:-
 - (1) Any person who is aggrieved by—
 - (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
 - (d) the amount of money required to paid as a fee under this Act or its regulations;



- (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations,
- may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.”
13. It is evident that the National Environmental Tribunal is the body that is clothed with jurisdiction to determine at first instance the any appeals against a grant of a licence. The jurisdiction of the Environment and Land Court is appellate as provided by Section 130 of the Environmental Management and Coordination Act.
14. Section 63 (3) and (4) of the County *Physical and Land Use Planning Act* provides;
- “(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”
15. It is evident from a plain reading of the two sections that the Liaison Committee is the body that has been given the responsibility at first instance to hear appeals against decisions of the County Executive Committee member. This court has been given an appellate jurisdiction.
16. It is evident that the National Environmental Tribunal and the Liaison Committee are the two bodies mandated by the law to hear the grievances that the petitioners had. This courts jurisdiction is appellate. While the matter is framed as a Constitutional petition the reliefs make it clear that the dispute relates to issues falling within the ambit of the two bodies which were created by parliament to resolve such disputes.
17. The petitioners herein argue that having failed to get information on the decisions of the bodies, this court was the appropriate forum to hear the dispute. A look at Rule 2 of the National Environmental Tribunal Rules defines a disputed decision to include a failure by the authority, or its officer or committee to make a decision. In my view this Rule, envisages a situation where the Tribunal can still hear a matter even without a decision.
18. In enacting the new constitution, the people of Kenya tried to address the problems of efficiency, accessibility and complexity that have perennially besieged the courts. Article 169 (1) of *the Constitution* therefore has created the superior courts and the subordinate courts which include the magistrates’ courts, the Kadhis courts and Tribunals. Article 169 (1) (d) of *the constitution*, mandates parliament to enact legislation conferring jurisdiction, functions and powers on the courts established under clause 1 above. Each level of court has its role.
19. In cases where the lower courts or administrative bodies fail to properly exercise their powers they must be corrected either by exercise of an appellate jurisdiction clearly defined by law or by the Judicial Review mechanism which our law elaborately provides. It is noteworthy that in exercise of its Judicial Review powers this court has wide powers to inquire into the procedural propriety of exercise of



authority by courts and other administrative bodies and correct any errors. In this way, the rule of law is strengthened.

20. If the superior courts choose to exercise jurisdiction clearly assigned to other bodies that are alleged to have erred in one way or another not only will there be confusion in the practice of law but the courts will be undermining *the Constitution* and the aspirations of the Kenyan people to have an efficient legal system in which disputes are resolved by different courts and bodies playing their roles as assigned by *the Constitution* and the law.
21. The people of Kenya through *the Constitution* of Kenya 2010 were unequivocal that the Courts should promote Alternative Dispute Resolution mechanisms. One of the ways of doing this is by exercising restraint in conferring jurisdiction in instances where it is clear that the jurisdiction to determine a dispute lies elsewhere. The courts have had occasion to speak loudly and clearly on this issue.
22. In the case of *Prof. Albert Mumma vs Director General NEMA & 2 Others* Tribunal Appeal No. NET/005/2018 as cited in *David Awori & 2 Others on behalf of Gigiri Village Association vs Director General (NEMA) & 2 Others* [2018] eKLR, it was held that:-

“Any appeal that seeks to challenge or touch on matters surrounding inter alia, the grant or refusal to grant a licence falls within the ambit of Section 129 (1) section 129 (2) covers appeals against acts of omissions of the Director General or the committee of the authority or its agents or matters outside the issue of licence”.

23. Similarly, in the case of *Patrick Musumba vs NLC & 4 Others* [2016] eKLR the court relied on the Court of Appeal decision in *Republic vs NEMA Experte Sound Equipment Ltd* [2011] eKLR where the court was categorical that:-

“challenges to Environmental Impact Assessment study report and/or Environmental Impact Assessment Licences shall be made to the National Environment Tribunal established under section 125 of Environment Management and Coordination Act. The tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment study report as well as the licences”.

24. In the case of *Kibos Distillers Ltd & 4 Others vs Benson Ambuti Adega & 3 Others* [2020] eKLR the Court of Appeal observed in part:-

“.....As aptly stated by the Supreme Court in Samuel Kamau Macharia and Another-vs-Kenya Commercial Bank Ltd and 2 Others (Supra), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by *the Constitution* or statute.....”.

The court went further to state:

“.....Further, I observe that the jurisdiction of the ELC is appellate under Section 130 *EMCA*. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”



25. The Supreme Court had the last word on this issue. In the case of *Benard Ambuti Andega & 2 Others Vs Kibos Distillers Ltd and 5 others* (2020) eKLR the Court restated the importance of a court exercising jurisdiction strictly in accordance to the law:-

“This principle has been replicated in a plethora of determinations by this Court, of common cause being that, a Court, even this Court, cannot arrogate itself jurisdiction through crafts of interpretation (see *Interim Independent Electoral Commission Constitutional (Advisory Opinion) Application No. 2 of 2011*) and a Court ought to exercise its powers strictly within the jurisdictional limits (*Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* (supra)).”

26. The Petitioners had pleaded violation of certain constitutional rights. While noting that the court has jurisdiction to determine constitutional issues, the court grappled with the possibility of proceeding with the petition strictly on the basis of the constitutional issues. However, upon considering the petition as drawn I found that the constitutional issues that were raised were so intertwined with the issues that fall outside the jurisdiction of the court that there was no clear delineation between the two.

27. Having considered the foregoing, I find that this court has no jurisdiction to hear this matter. I will therefore not make any determination on the application.

28. The upshot of the foregoing is that the Preliminary Objection succeeds. The petition is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF FEBRUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Kamau for Petitioner

Mr. Aluoch for 1st Respondent

Mr. Mwinyi for the 3rd Respondent

Steve - Court Assistant

