London Distillers (K) Limited v National Environment Management Authority & another (Environment and Land Appeal E007 of 2020) [2023] KEELC 16266 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16266 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E007 OF 2020

A NYUKURI, J

MARCH 13, 2023

BETWEEN

LONDON DISTILLERS (K) LIMITED ..... APPELLANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

ERDERMANN PROPERTIES LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgment/Order of the National Environment Tribunal at Nairobi dated 30th September 2020 in Nairobi Net No. 21 of 2019; London Distillers Limited versus National Environment Management Authority and Erdermann properties Limited)

RULING

Introduction

1. Before court is a notice of motion dated January 13, 2023 filed by the 2nd respondent/applicant seeking the following orders;

    a. Spent

    b. Spent

    c. That the Honourable Court be pleased to forthwith strike out and/or dismiss the instant appeal, Civil Appeal No E007 of 2020; London Distillers (K) Limited v National Environment Management Authority and another preferred against the decision of the National Environmental Tribunal.

    d. That costs of this application be provided for.

2. The application is predicated upon the grounds on the face of the application as well as the supporting affidavit sworn by the Applicant's director, Zeiyun Yang on January 13, 2023. The Applicant's case is that being registered proprietors of LR No 12581/13 situated at Athi River, they obtained all requisite statutory approvals including EIA Licence for construction of residential units, namely Greatwall Gardens Housing Phase 3.

3. It was further their case that on August 14, 2019, the Appellant filed NET Appeal No 21 of 2019 before the National Environmental Tribunal (NET) challenging among other matters, the Environmental Impact Assessment (EIA) Licence issued by the National Environment Management Authority (NEMA) the 1st Respondent herein to the 2nd Respondent. Further that upon consideration of the appeal, NET dismissed the appeal on September 30, 2020 having found that there was no requirement for Strategic Environmental Assessment (SEA) to have been conducted before issuance of the impugned EIA licence, as the project was by a private entity for the construction of residential apartments. Secondly, that NET found that the Appellant's challenge of change of user, was a matter that NET had no jurisdiction to determine, as it was a matter under the Physical Planning Act.

4. The Applicant also stated that the Appellant herein being dissatisfied with the decision of NET filed a Memorandum of Appeal dated October 21, 2020 challenging NET's decision stated hereinabove.

5. According to the Applicant, NET's decision dismissing the appeal was a negative order and NET did not direct the Appellant or the Respondents to do anything or refrain from doing anything and that therefore the decision of NET was incapable of execution, hence no order of stay could issue as against NET's judgment.

6. The Applicant stated that after the delivery of the judgment by NET on September 30, 2020, they proceeded with the construction of their project in accordance with the conditions imposed by NEMA and the law. They stated further that they have since completed the project, Greatwall Gardens Housing Phase 3 and the project has been subdivided into units which have been sold to individual owners who have been issued with their respective individual titles. That the second Respondent is no longer the sole owner of the property and that the other new owners are not party to these proceedings. Further that issuing orders against them will amount to condemning them unheard, when they were merely innocent purchasers.

7. The Applicant took the view that the appeal herein has been overtaken by events because its substratum was to challenge and prevent construction of Greatwall Gardens Housing Phase 3 and that as the construction is done and dusted there is nothing to appeal against. Their position was that if the court proceeds to hear the appeal, the Appellants victory will be purely academic.

8. The application was opposed. Pushpinder Singh Mann, the General Manager of Administration of the Appellant/Respondent filed a replying affidavit sworn on January 26, 2023. It was the Respondent's case that the Applicant has come to court with unclean hands by attempting to abuse the judicial process, misrepresenting facts, bringing confusion in the judicial process, insulting and intimidating judicial officers so as to delay or try to shut out the Appellant from prosecuting their proceedings and stifling their right to appeal through unnecessary preliminary objections and frivolous applications with intentions to sanitize its illegal actions.

9. They pointed out that by their previous application dated November 4, 2020, the Appellant sought to strike out the instant appeal on grounds that it was *sub judice* to Nairobi Civil Appeal No EE039 of 2020 Erdemann Distillers (K) Ltd which it had instituted against the same decision of NET, and that, that application was dismissed. That the said Appeal Nairobi No EE039 of 2020 was transferred to this court now being Civil Appeal No EE002 of 2020.

10. The Respondent averred that the Applicant continued with the impugned construction of their project despite pendency of proceedings in respect thereof before NET which was in gross contempt of the orders of NET. They stated further that the Applicant filed an application before NET seeking to review with the aim of setting aside the automatic status quo orders that stopped the impugned construction and managed to obtain exparte stay orders to enable them proceed with construction, but that they withdrew that application on 27th November 2019.

11. According to the Respondent, the Applicant herein with intent to forum shop for purposes of obtaining favourable orders to enable them continue with the impugned construction, filed several cases in Nairobi, Machakos and Makueni, namely; Machakos JR No 41 of 2019 Erdermann Property Limited v NEMA & London Distillers (K) Ltd, Nrb ELC Civil Pet No 437 of 2019, Erdermann Property Limited v NEMA & London Distillers (K) Ltd and JR No 75 of 2019 Erdermann Property Limited v NEMA & London Distillers (K) Ltd.

12. The Respondent also stated that the Applicant's director Zeyun Yang, his employee Kennedy Rajwayi and Advocate insulted members of NET through advertisement in the press, emails and letters publicly criticizing and disparaging the latter, and that upon contempt proceedings brought against them, they admitted their offences and were fined Kshs 1 Million each and the advocate a sum of Kshs 50,000/-.

13. Further, that Petition No 27 of 2019 was previously filed in the Constitutional Division of the High Court, which had no jurisdiction and that the same was transferred to the ELC Division and *exparte* orders in favour of the application were set aside. In addition, they stated that in JR. No 41 of 2021, the court found that the Applicant concealed material facts and set aside the exparte orders which had been issued in favour of the Applicant.

14. The Respondent averred that in a bid to blackmail the Respondent, the Applicant sought for recusal of Hon Mr Justice Angote and Hon Mr Justice Mbogo due to their decisions in refusing to set aside the decision of NET that stopped the impugned construction. That the Applicant bankrolled the destruction of the Respondent's sewer line to the EPZA main Trunk Sewerline leading to the closure of the Respondent's distillery with a resultant loss of revenue amounting to over Kshs 600 Million.

15. It was the Respondent's position that the application herein was *res judicata* and contrary to Section 7 of the *Civil Procedure Act* as the Applicant ought to have raised these matters in their preliminary objection dated November 4, 2020. They took the view that it was mischievous for the Applicant to seek to argue the merits of the appeal when they have failed to avail proceedings in their own appeal which is mentioned together with the appeal herein. Further that the evidence before the tribunal is reflected in the proceedings which ought to be availed before the appeal herein is heard.

16. The Respondent also contended that the instant appeal is not merely intended to stop the impugned construction of Greatwall Gardens Development Phase 3 but also sought for the revocation of the EIA licence which is still live. They maintained that should this court find that the issuance of the EIA licence was illegal due to disregard of the law and the decision of NET set aside, then the mere fact of construction cannot be sanitized as it would have been premised on an illegality. They added that their prayer No (d) in NET No 21 of 2019 for demolition of the impugned development was a specific relief sought and that this court has power to grant those orders.

17. It was observed by the Respondent that the Applicants are misguided in wrongly arguing that the decision by NET is not capable of being litigated. They argued that this appeal is in respect of important questions of law and fact including the interpretation of Sections 58, 59 and 60 of the *Environmental Management and Coordination Act* (EMCA) and its regulations, which are all still live for determination. Further that the Respondent has in the appeal faulted the findings of NET

on issuance of EIA licence based on an unproceduaral change of user of the properties owned by the Applicant.

18. The Respondent argued that the Applicant is mischievously seeking to stop the determination of this appeal by seeking orders in favour of alleged innocent purchasers whose identity they have failed to disclose and who are strangers to the appeal. That this court cannot grant orders in favour of unknown persons not parties to the suit unless they seek to be joined to this suit. Further that the Applicant has not demonstrated in the application that there was disclosure to the alleged innocent purchasers that their properties are subject to live proceedings before this court, which information ought to have been disclosed before the alleged purchase. And that if disclosure was made, then the purchasers cannot be innocent as they purchased with consideration that there is a possibility of adverse decision against them.

19. The position taken by the Respondent was that dismissing the appeal herein will heavily prejudice the Appellant and will not only occasion a miscarriage of justice as against the Appellant but will also constitute a violation of their constitutional right to access to justice and a fair hearing guaranteed under Articles 48 and 50 of the *Constitution of Kenya, 2010*. Further, that the same would be a disregard for the principles of judicial authority to administer justice to all as enshrined in Article 159 (2) (a) of the *Constitution*.

20. Counsel for the 1st Respondent, NEMA, informed court on January 31, 2023 that the 1st Respondent was in support of the application dated January 13, 2023 and did not wish to file any submissions or make any oral submissions.

21. The application was disposed by way of oral submissions made in court on February 13, 2023 and written submission filed by 2nd Respondent/Applicant and the Appellant/Respondent. On record are the Applicant's submission dated January 16, 2023 and the Respondent's submissions dated January 27, 2023.

Applicant's Submissions

22. Counsel for the Applicant submitted that this application to strike out the appeal was based on the fact that the appeal was overtaken by events. In placing reliance on the decision in *Nadeem A. Kana v Lucy Wambui Mwangi* [2021] eKLR, counsel argued that courts of law should not adjudicate on a matter that has been overtaken by events because such matter cannot be tenable anymore and if one party proceeds to succeed, the victory will be purely academic and that the abstract exposition of the law is the province of academics and not courts of justice. Counsel also referred the court to the cases of *Ernice Campbell and Company Limited v National Housing Corporation* [2019] eKLR, *Julius Mutiga & 16 Others v Ministry of Agriculture & 3 others* [2020] eKLR and *John Aguga & 3 others v Chairman Selection Panel for Recruitment of Chair and Members of Migori County Service Board & 2 Others* [2020] eKLR, which the court has considered.

23. Counsel regurgitated the averments in the supporting affidavit of the Applicant and pointed out that NET made a negative order dismissing the appeal as opposed to a positive order and therefore the order was incapable of execution and no order of stay could issue relating to that judgment. Counsel maintained that after the decision of NET on September 30, 2020, the Applicant lawfully proceeded to resume developing its property in accordance with conditions imposed by NEMA and the law and that the construction was completed, as demonstrated by issuance of certificate of practical completion dated June 15, 2021 and a certificate of completion/occupation dated June 30, 2021 by the County Government of Machakos. That the project was subdivided into units which were sold to individual owners who are not parties to these proceedings.

24. Counsel contended that as the substratum of the appeal was to challenge and prevent the construction of Greatwall Gardens Housing Phase 3, and since the project has been completed and sold, the appeal does not have a substratum anymore and it's therefore overtaken by events.

25. On whether the court can make adverse orders against non-parties, and in this case the alleged innocent purchasers of the individual units, counsel argued that Articles 48, 25 and 50 of the *Constitution of Kenya 2010*, embody fundamental principles of natural justice and the right to be heard. It was contended for the Applicant that the right to a fair hearing is sacred, sacrosanct and fundamental and must be accorded to both sides in a dispute. The court was referred to the case of *Zenith Plastics Industries Ltd v Samotech Ltd* [2018] LPELR -44056 (SC), for the proposition that fair hearing means that justice is done to all the parties at all costs. Further reference was made to the case of *Sangram Singh v Election Tribunal*, Koteh AIR 1955 SC 664 at 711 and *Pam & another v Mohammed* [2008] 16 NWLR (Pt 1112), for the proposition that a fair hearing demands inter alia that all parties are granted opportunity to present their cases before the court makes a determination.

26. Counsel further argued in his oral submissions that an EIA licence under Section 67 of *EMCA* can only be challenged in a period not exceeding 24 months, and therefore that the appeal has expired and untenable. It was further contended that Section 68 of *EMCA* provided that if a party has any question of an environmental nature they can initiate a new process and not an appeal.

27. Counsel conceded that the Applicant may have come to court with unclean hands but that Section 67 of *EMCA* ties the hands of the court and that the remedy for the Respondent lay in seeking an audit.

Respondent's Submissions

28. Counsel for the Respondent submitted that the Applicant had moved the court with soiled hands and that the application was incompetent and an abuse of the due process. While restating the averments in the Respondent's replying affidavit herein, counsel argued that the application herein was one of the many attempts by the Applicant to abuse the judicial process, by misrepresentation of facts, insult and intimidate judicial officers, cause confusion in the judicial process by attempting to delay or shut out the Appellant from prosecuting their proceedings through unwarranted preliminary objections or incompetent and frivolous applications. Counsel took the position that the Applicant sought to steal a match against the Respondent and sanitize its illegal actions by stifling the Appellant from pursuing their Constitutional rights to a fair trial.

29. It was argued for the Respondent that the Applicant concealed material facts by failing to disclose that in the application dated November 4, 2020, it sought to strike out the appeal on grounds that the same was sub judice to Nairobi Civil Appeal No EE039 of 2020, which application was dismissed. Counsel maintained that the construction of the impugned project by the Applicant, was done in gross contempt of the orders of NET with the intention to render subsequent orders against the Applicant null and void. Counsel observed that although the Applicant sought to set aside the automatic orders of status quo that stopped the impugned construction, they withdrew their application on November 27, 2019. Counsel further observed that the Applicant further sought to steal a match on the Respondent by forum shopping and filing suits at Machakos, Nairobi and Makueni but that in all those matters, the courts made orders against the Applicant which led to the applications for recusal against Hon. Justice Angote and Hon. Justice Mbogo. Further that in an attempt to arm twist and blackmail the Respondent from proceeding with NET No 21 of 2019, the Applicant with others bankrolled the destruction of the Respondent's sewerlines blocking its connection to the EPZA main Trunk Sewerline leading to the closure of the Respondent's distillery and a great loss of revenue of over Kshs 600 Million

culminating in institution of ELC No 104 of 2019 London Distillers (K) Ltd v Machakos Water and Sewerage Co. Ltd & others.

30. Counsel observed that the above events clearly demonstrate the Applicants as having approached the court with unclean hands to frustrate the Respondent's quest to be heard and to obtain justice. It was further pointed out on behalf of the Respondent that while the Applicant has sought for the dismissal of this suit, they remain quiet about their own Appeal No EE002 of 2020 Erdermann Property Ltd v NEMA & London Distillers (K) Ltd, which conduct amounts to stealing a match against the Respondent.

31. Reliance was placed on the cases of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* [2022] eKLR, *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 [2009] eKLR 229 and *Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others* [2018] eKLR, for the proposition that an abuse of the court process in seen in the intention, purpose and aim of the person exercising their right to annoy the other party and interfere with the administration of justice.

32. On whether the application was *res judicata*, counsel relied on Section 7 of the *Civil Procedure Act* and argued that the grounds upon which the instant application is premised were well within the knowledge of their advocates when they filed the application dated November 4, 2020 to strike out the instant appeal, which application was dismissed. Counsel cited the cases of *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] eKLR and *Yat Tung Investment Co. Ltd v Dao Hery Bank Ltd & another* [1975] AC 381, to buttress their contention that a party cannot raise new matters which ought to have been raised in previous proceedings.

33. Counsel observed that the Applicant had confirmed that typed proceedings are material for purposes of determining this appeal on merits and that since the said proceedings are yet to be availed, they are estopped from arguing the merits of the appeal without the said proceedings. It was contended for the Respondent that the proceedings which captured the evidence are necessary in this Appeal as NET did not take into account the evidence adduced.

34. It was the position held by the Respondent's counsel that the Applicant was attempting to divert the courts attention by a concocted cause of action on behalf of alleged undisclosed innocent purchasers who are strangers to the appeal and who have allegedly benefitted from the Applicant's illegal actions meant to steal a match on the Respondent. Counsel contended that the court cannot make orders in favour of unknown persons not parties to the appeal. Reference was made to the case of *Ephraim Godeka Lugalia v Johnstone Onyino & 5 others; Benard Askari Godeka (Interested Party/Applicant)* [2021] eKLR, to buttress that argument. Further reliance was placed on the case of *Bundari Investment & Co. Ltd v Martin Chiponda* [2022] eKLR for the proposition that courts should maintain sanity especially where one party takes up a process meant to steal a match as against the other.

35. It was submitted for the Respondent that the instant appeal raises important issues of law and fact for determination of this court. Counsel argued that the Applicant was under wrong and mistaken belief that the issue before this court as to whether or not the Tribunal was wrong, was not capable of being litigated on. Counsel argued that the Appellant had raised the issues including the interpretation of sections 58, 59 and 60 of *EMCA* and its Regulations which are all still live for determination. That the court ought to administer justice to all persons by allowing parties to present their cases and the appeal to be determined on merit as is provided for in Article 50 of the *Constitution*.

36. In their oral submissions, counsel observed that the Applicant's position was that they had managed to steal a match on the Respondent and they sought for a crown for that from the court arguing that

the court was now useless. Counsel observed that the Applicant who had approached the court with unclean hands was seeking an equitable remedy.

37. Counsel maintained that the Respondent cannot be condemned unheard just because the court did not hear the appeal in two years. Further, counsel argued that the Applicant is trying to facilitate a stranger to benefit from proceedings as a result of their contemptuous conduct.

Analysis and Determination

38. I have carefully considered the application; the supporting affidavits and annexures thereto; parties filed written submissions and counsel's oral submissions. In my considered view, the issues that arise for consideration are;

    a. Whether the application dated January 13, 2023 is *res judicata* in view of the determination of the Applicant's application dated November 4, 2019; and

    b. Whether the appeal should be struck out for being overtaken by events.

39. Section 7 of the *Civil Procedure Act* provides for the doctrine of *res judicata* and bars a court from trying an issue or suit in which the matter which is directly and substantially in issue was directly and substantially in issue in a former suit or proceeding between the same parties or their representatives, in a court of competent jurisdiction where the matter was heard and conclusively decided.

40. The *Black's Law Dictionary*, 11th Edition defines *res judicata* as;

> Latin "a thing adjudicated". An issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are
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> (1) an earlier decision on the issue,
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> (2) a final judgment on the merits, and
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> (3) the involvement of the same parties, or parties in privity with the original parties.

41. Essentially, to demonstrate *res judicata*, the Applicant must show;

    a. That the issue in the current suit was directly and substantially in issue in the former suit, or proceeding;

    b. That the parties in the former suit are the same parties or their representatives in the current suit;

    c. That the court that determined the former suit, was competent to determine the issues in the current suit; and

    d. That the decision in the former suit was final.

42. In the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the Court of Appeal in discussing the doctrine of *res judicata*, stated as follows;

> " For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. The former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

43. In that case, the court went further to state the purpose of the doctrine of *res judicata* as follows;

> " The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice."

44. Basically, the doctrine of *res judicata* is meant to prevent indefinite litigation and or any horizontal escalation of litigation as opposed to vertical escalation where a dissatisfied party ought to appeal to a higher court on a decision they are not satisfied with, instead of filing a similar suit or issue within the same court expecting a different decision.

45. In the instant application, the Respondent argued that vide an application dated November 4, 2020, the Applicant herein sought to strike out the instant appeal on grounds that it was sub judice to Nairobi Civil Appeal No EE039 of 2020, Erdermann Property Ltd v NEMA & London Distillers (K) Ltd, which application was dismissed. I have considered the ruling delivered by this court in respect of the application dated November 4, 2020 and I note that the Applicant moved the court to strike out or dismiss the appeal on grounds that the same was sub judice in view of the pendency of Civil Appeal No E039 of 2020. The alternative prayer was for the instant appeal to be stayed pending hearing and determination of Civil Appeal No E039 of 2020. That application was heard on merit and dismissed.

46. Counsel for the Respondent has argued that the grounds raised in the instant application ought to have been raised in the application of November 4, 2020, as the counsel for the Applicant was well aware of the facts raised in the instant application.

47. Looking at the instant application, it is clear that the Applicant seeks to have this appeal struck out or dismissed on the basis that the appeal has been overtaken by events due to the fact that the impugned construction was completed and individual units sold out to innocent purchasers. The Applicant presented a certificate of practical completion dated June 15, 2021 and certificate of completion/ occupation issued by the County Government of Machakos dated June 30, 2021. Considering the issues raised by the Applicant in the instant application and the response in the replying affidavit, I note that the issues in the instant application are not the same as the issues in the former application dated November 4, 2020. In the former application, the issue was whether this appeal was sub judice, but in the instant appeal, the issue is whether the appeal has been overtaken by events on account

of alleged completion of the impugned construction. It is therefore my finding that the issues in the former application were not the same as the issues in the current application.

48. On whether those issues in the instant application ought to have been included or litigated in the previous application, I note that while both applications sought to have the appeal struck out and or dismissed, the basis for the applications have no nexus. In any event the documents relied upon to demonstrate that the appeal has been overtaken were acquired several months after the determination of the former application which was on 21st May 2021. It is therefore my finding that the issues in the instant application could not have been raised in the former application.

49. Under Order 2 Rule 15 of the *Civil Procedure Rules, 2010*, the court may order the striking out or amendment of any pleading where it is shown that it does not disclose a reasonable cause of action or defence in law; or it is scandalous, frivolous or vexations; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. It is therefore my view that if a ground for striking out a pleading arises, that may not have existed during a previous application, nothing stops a party from raising such ground as long as the same is done in good faith.

50. In the premises, I find and hold that the instant application is not *res judicata*.

51. On whether the application is merited, I understood the Applicant to be stating that on September 30, 2020, NET dismissed the Respondent's appeal and that a dismissal order is unenforceable and therefore with unclean hands, they resumed the impugned construction of their project, finished the construction, and sold individual units to members of public who now hold individual titles and that as the Respondents sought to prevent the said construction, there is nothing pending and hence the appeal has no substratum. On the other hand, I understood the Respondent to be stating that the Applicant proceeded with the impugned construction in contempt of the orders of NET and that the Respondent's prayer in the appeal go beyond preventing the impugned construction and include a prayer for demolition of the Applicant's project, if it is found that the EIA licence relied on was invalid. I also understood them to be arguing that just because NET dismissed their appeal, that was not the end of litigation and they did not lose the right to pursue an appeal before this court and ought to be given a right to have their appeal determined on merit.

52. In essence, the Applicant's contention is that the appeal is now moot and academic and that this court does not need to determine it. In the case of *Evans Kidero v Speaker of Nairobi City County Assembly & another* [2018] eKLR, the court held as follows;

> A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises where there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual impact...
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> No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose....
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> A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the Plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of a human nature and humanity.
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> A case or issue is considered moot and academic when it ceases to present a justifiable controversy by virtue of supervening events, so that an adjudication of the case of a declaration on the issue would be of no practical value or use. In such instance, there is

no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness."

53. To determine whether the appeal herein has been overtaken by events, I must interrogate the issues raised in the appeal and more particularly the Appellant's grievances. Among their grievances are that NET failed to properly interpret Section 58 of *EMCA* as read with regulations 7, 8, 9 and 10 of the *Environmental (Impact Assessment and Audit) Regulations 2003*. They also complained that NET erred in failing to find that NEMA and the Applicant failed to comply with Sections 59 and 60 of *EMCA* and Regulations 20 and 21 (2) of the above Regulations. According to the Respondent/ Appellant, mandatory steps in the publication of an EIA study report were not undertaken and neither was there proof that the letter seeking comments from lead agencies on the EIA study was actually served on them. Besides, the Respondent faulted the decision of NET for failure to make a finding that the EIA study Report in favour of the Applicant was inadequate, for want of the Noise Baseline Study and Ambient Air Quality Study, and that therefore the EIA licence issued by NEMA to the Applicant was null and void for contravening Section 63 of *EMCA* as read with the Environmental Management and Coordination (Noise and Excessive Vibration) (Control) Regulations 2009 and the Environment Management and Coordination (Air Quality) Regulations, 2014.

54. I have also considered the complaints and reliefs sought before NET in Nairobi NET No 21 of 2019 and before this court. Among them are prayers for revocation of the EIA licence, and demolition of the impugned development.

55. That being the position, therefore this court must consider whether the completion of the impugned construction renders the appeal herein moot and merely academic. In answering that question, I must consider when and what led to the events alluded to by the Applicant. From the record, it is clear that the appeal herein was filed on October 21, 2020, just about three weeks from the date of delivery of judgment by NET, which was delivered September 30, 2020. The Applicant alleges that because the judgment by NET was not capable of being enforced as it was a negative order of dismissal, therefore on that basis they resumed construction, went ahead to sell and transfer the individual units to individuals who are not parties to this suit and that therefore the Applicant invites this court to rank the alleged rights created in favour of third parties above the Respondent's right to be heard on their appeal on merit. Counsel for the Applicant is on record having conceded that the Applicants came to court with unclean hands, but argues that by dint of Section 67 of *EMCA*, this court is helpless and its hands are tied.

56. As the complaints raised by the Respondent in their appeal touch on the legality and validity of the EIA licence issued by NEMA which was relied upon for the construction of the impugned project, it is evident that the issues raised in this appeal are still live and did not become moot merely because the impugned construction was completed. This is because, in the exercise of its appellate jurisdiction under Section 130 (1) of *EMCA*, this court must be guided by the principles of sustainable development, equity and equality as espoused and demanded under Article 10 (2) of the *Constitution*, Section 3 (5) of *EMCA* and Section 18 of the *Environment and Land Court Act*. It is the view of this court that regardless of whether or not the impugned construction is complete, the same must be tested against the principle of sustainable development, which is the threshold in environmental law, as matters of environmental rights have a direct bearing on the right to life (See *Peter K. Waweru v Republic* [2006] eKLR). I therefore find and hold that the appeal has not been overtaken by events.

57. Both parties passionately submitted on the right to a fair hearing and access to justice and implored the court to reflect on the nature of injustice that is meted on a person who is not given an opportunity to be heard. On the one hand, the Applicant herein argued that they continued with the construction

and proceeded to sell and transfer the constructed individual units to individual innocent purchasers who are not parties to this appeal and therefore proceeding to determine the appeal on merit would be condemning these innocent purchasers unheard. On the other hand, the Respondent argued that the identity of these alleged innocent purchasers had not been disclosed, and they were not parties to the appeal and the construction and alleged sale and transfer was done during the pendency of the appeal which the Appellant knew that there was a possibility of adverse orders against them, that therefore they cannot be denied the right to have their appeal heard on merit and their right to fair trial taken away on those grounds.

58. In balancing the two rival rights to a fair trial, I must point out that the Applicant did not provide any shred of evidence of sale or transfer of the alleged individual titles to third parties. Even the existence of individual unit titles was not provided by the Applicant. The alleged innocent purchasers are not parties to this appeal. On the other hand, the Respondent is a party to this suit whose right to a fair hearing is guaranteed under Article 50 (k) of the *Constitution of Kenya*, which includes the right to have their appeal heard on merit.

59. The right of appeal is a right that is protected in law. Under Section 130 (1) of *EMCA*, a person dissatisfied with the decision of NET has a right to appeal against such decision to this court within 30 days. Therefore this court cannot deny the Respondent the opportunity to have their appeal heard on merit for purposes of upholding purported rights of alleged innocent purchasers whose identity has not been disclosed to this court and whose existence has not been proved.

60. The Applicant contended that the construction, sale and transfer of the individual units of the project were based on their interpretation that NET dismissed the Respondent's appeal and that therefore that there was no positive order capable of being stayed. Section 130 (2) of *EMCA* provides as follows;

> No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.

61. I understand the Applicant to be arguing that an order of dismissal cannot be enforced and therefore cannot be stayed and that is why they proceeded with the impugned construction. They have not denied the fact that one of the reliefs sought by the Respondent was to stop the construction, and therefore they concede that they embarked on taking an action which was disputed and which the Respondent sought to reverse by an order of demolition.

62. Counsel for the Applicant contended that under Section 67 of *EMCA*, the courts hands were tied so that the court could not hear this appeal as an EIA report can only be challenged within two years. He also argued that the Respondent's recourse only lay in Section 68 of *EMCA* so that they can only file a fresh suit. Section 67 of *EMCA* provides as follows;

> 67. Revocation, suspension or cancellation of Environmental Impact Assessment licence.
>
> (1) The Authority may, after the issuance of an environmental impact Assessment licence –
>
> a. cancel or revoke such licence; or
>
> b. suspend such licence, for such time, not more than twenty four months where the licensee contravenes the provisions of the licence.

63. The import of Section 67 of *EMCA* is that NEMA has power to suspend an EIA licence for not more than two years in the event a licensee does not comply with the terms of the licence. This provision has

no bearing or nexus in this matter as the issue herein is not non compliance with the EIA licence, but the validity and legality of the licence.

64. Reverting to the issue at hand, I hold the view that as the Applicant was aware of the appeal herein which was filed in October 2020 and was also aware of the import of Section 130 (4) of EMCA, which provision allows the court to exercise *inter alia* the powers of NET but as they conceded, with unclean hands, they proceeded with the impugned construction, with the sole aim of destroying, the substratum of the appeal to render the appeal moot and merely academic, this court cannot rubberstamp and endorse the unlawful and malafide actions of the Applicant by striking out the appeal.

65. Under Article 159 of the *Constitution of Kenya*, it is the core business of the court to do justice to all. This means that all parties to a dispute are entitled to both procedural and substantive justice and the court cannot allow one party to steal a match on the opposing party by using shortcuts and or illegalities to put justice out of reach of their opponent. By Article 159 of the *Constitution*, this court is freed of all the shackles in so far as facilitation of substantive justice is concerned. In the premises, this court declines the invitation from the Applicant calling upon the court to sit with crossed arms and watch helplessly as the Applicant steals a match on the Respondent as that would amount to a scorn on Article 159 of the *Constitution*.

66. The upshot is that the notice of motion dated January 13, 2023 lacks merit and the same is dismissed with costs to the respondent/appellant.

67. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Wanjira holding brief for Tiego for Appellant

Prof. Ojienda for 2nd Respondent

No appearance for 1st Respondent

Court Assistant – Josephine