



REPUBLIC OF KENYA



Toshike Construction Co Ltd & 2 others v Sokhi & 12 others (Environment & Land Case E058 of 2023) [2023] KEELC 18637 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E058 OF 2023**

MD MWANGI, J

JULY 4, 2023

BETWEEN

**TOSHIKE CONSTRUCTION CO LTD 1ST PLAINTIFF
DANNS JUNGLE INVESTMENTS LTD 2ND PLAINTIFF
WOKABI MWAGO 3RD PLAINTIFF**

AND

**KAKU SINGH ALIAS SOKHI 1ST DEFENDANT
NAIROBI CITY COUNTY GOVERNMENT 2ND DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
DEFENDANT
NATIONAL CONSTRUCTION AUTHORITY 4TH DEFENDANT
MANSAAT HOLDINGS LIMITED 5TH DEFENDANT
FUAD HUSEEIN 6TH DEFENDANT
STEPHEN GATHUITA MWANGI 7TH DEFENDANT
PATRICK ANALO AKIVAGA 8TH DEFENDANT
MAMO BORU MAMO 9TH DEFENDANT
DANIEL WANJIRU 10TH DEFENDANT
MAURICE AKETCH MBS 11TH DEFENDANT
KANDA BOWEN 12TH DEFENDANT
SILAS JOHN SANYA OGENGO 13TH DEFENDANT**



(In respect of the Preliminary Objection dated 20th April 2023, on the basis that the Plaintiffs' have not exhausted the dispute resolution mechanisms provided by the statutes before filing the case before the court)

RULING

Background

1. The Plaintiffs' suit herein is as framed in the amended plaint, amended on 6th April 2023. In the said amended plaint, the Plaintiffs aver that they are residents, occupiers and beneficial owners of Maisonnetes I, H, & G respectively on L.R. No. 209/7546 City Park Drive off Limuru Road at Parklands Nairobi, which neighbors parcel of land known as L.R. No. 209/5665/2 (Nairobi Block 37/3 along parklands).
2. The Plaintiffs' case is that the 1st Defendant and or his servants, agents, developers, proponents including the 5th & 6th Defendants have started developing on L.R. No. 209/5665/2 (hereinafter referred to as the suit premises), commercial (shops) cum multi –dwelling residential apartments thereby demolishing the single dwelling house and other structures therein as well as trees and other vegetation that existed thereon and further excavating the grounds without having obtained the requisite development permissions/permits and licenses from the 2nd Defendant & 3rd Defendant) as well as the 4th Defendant prior to or at the time of embarking on the said development.
3. The Plaintiffs aver that despite bringing it to the attention of the concerned persons/authorities, no action has been taken. The development is being carried out without any project sign board on site as required.
4. The Plaintiffs aver that the development on the suit premises violates articles 42 & 70 of *the Constitution* of Kenya 2010, the *Physical and Land Use Act*, 2019, the *National Construction Authority Act*, *Environmental Management and Co-ordination Act* and other rules and regulations. The particulars of breach are enumerated at paragraph 15 of the amended plaint. Though the National Construction Authority had ordered a stoppage of the development on 16th January 2023, the development has continued with no action taken against the developers.
5. The Plaintiffs aver that the developers have disregarded an order to stop the development by the National Environment Management Authority, the 3rd defendant.
6. The Plaintiffs allege violation of their rights as a consequence whereof they have suffered injuries, losses, annoyances, nuisances and inconveniences. Consequently, the Plaintiffs seek a variety of orders including an order of permanent injunction, a declaration that the development on L.R. No. 209/5665/2 is in breach of *the Constitution* and the Law, a Restoration Order, an Order of Mandatory Injunction, General and Aggravated damages.
7. Pending the hearing and determination of their main suit, the Plaintiffs filed a Notice of Motion application seeking interim reliefs in form of orders of temporary injunction restraining any further development activities on the suit premises.
8. The 5th Defendant in addition to the reply to the application by the Plaintiffs filed a Notice of Preliminary Objection challenging the jurisdiction of this court to hear both the main suit and the application. The Preliminary Objection amongst other issues asserts: -



- a. That the Plaintiffs have not exhausted the dispute resolution mechanisms provided for by statute.
- b. That the court lacks jurisdiction to entertain the suit since the Plaintiffs have not sought an enforcement notice in accordance with section 72(1)(a) of the [Physical and Land Use Planning Act](#).
- c. The Plaintiffs failed to lodge an appeal with the County physical and Land Use Planning Liason Committee under Section 78 of the of the [Physical and Land Use Planning Act](#).
- d. The Plaintiffs failed and/or refused to move the National Environment Management Authority under section 108 of the [Environment Management and Co-ordination Act](#).
- e. The Plaintiffs failed to lodge a formal complaint with the Complaint's committee as provided under section 31 of the [Environmental Management and Co-ordination Act](#).
- f. That the Plaintiffs/Applicants case is an abuse of the court process and the Plaintiffs are engaging in forum shopping.
- g. The remedies sought in the plaint are in the nature of judicial review remedies.
- h. By reason of the above grounds, this Honourable Court is divested of the requisite jurisdiction to determine the suit.

Court's directions.

9. The court's directions were that the Preliminary Objection by the 5th Defendant be heard first and by way of written submissions. I have read the submissions filed by the 5th Defendant, the 2nd, 7th and 8th Defendants and the Plaintiffs.

Issues for determination.

10. The main issue for determination is whether the Preliminary Objection is merited; in essence whether the Plaintiff's suit violates the doctrine of exhaustion.

Analysis and determination.

11. The Court of Appeal in the case of [Geoffrey Muthiga Kabiru & 2 others -Vs- Samuel Munga Henry & 1756 others \(2015\)](#) eKLR, while upholding the doctrine of exhaustion as sound law in Kenya stated that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of courts is invoked.”

12. The court was emphatic that court's ought not to be the first ports of call whenever a dispute arises rather courts ought to be ports of last call.
13. The doctrine of exhaustion is in agreement with the provisions of Article 159(2)(c) of [the Constitution](#) of Kenya, 2010 that enjoins courts in exercising their judicial authority to amongst other issues promote alternative dispute resolution mechanisms. Article 169(d) of [the Constitution](#) on its part empowers parliament to create tribunals which once created form part of the system of courts of this country.
14. The 5th Defendant in its submissions asserted that section 72 of the Physical Planning and Land Use Act empowers the County Executive Committee member to serve the owner, occupier, agent and



- or developer of property with an enforcement notice if the development is commenced without the required permissions. The 5th Defendant submits that no such notice has been served in this matter nor have the Plaintiffs demonstrated that they moved the County Executive under the said section.
15. The 5th Defendant reiterated that the Plaintiffs ought to have approached the Nairobi County Physical Planning and Land Use Liaison Committee as provided for under Section 78 for reliefs. Further that the Plaintiffs should have under the EMCA approached NEMA for the restoration order which they have not done. Their argument therefore is that the suit is premature, frivolous, debarred by statute and amounts to an abuse of the process of court.
 16. I have keenly perused at the Plaintiffs' submissions and those of the 2nd, 7th and 8th Defendants, whose upshot is that the court has the jurisdiction to determine the case by the Plaintiffs.
 17. The 2nd Defendant is categorical that it has not received applications for development from the 1st Respondent. Even if it has, it has not rendered a decision on the same. Similarly, the 2nd Defendant argues that NEMA has not rendered any decision in respect of the development in the suit premises.
 18. I fully agree with the submissions by the Plaintiffs and the 2nd, 7th and 8th Defendants. Under Section 129 of EMCA, it is only, when a party is aggrieved by a decision made by the authority that he/she can move to the National Environment Tribunal (NET). That too applies to the County Physical Planning & Land Use Liaison Committee. Until and unless a decision is made by the above mentioned bodies, what would the Plaintiffs be appealing from?
 19. Accordingly, and in the circumstances of this case, the court finds that the Plaintiffs have properly invoked the jurisdiction of this court. The court, as the matter stands now has the jurisdiction to entertain and determine the matter.
 20. I am deliberately avoiding going into the fine details of the matter in view of the fact of the pending application and the main suit in order not to prejudice their hearing.
 21. The upshot is that the Preliminary Objection by the 5th Defendant is disallowed. It is dismissed with costs to the Plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mavisi holding brief for Thongori for the Plaintiffs/Applicants.

Mr. Kuria for the 2nd, 7th and 8th Defendants/Respondents.

Mr. Adano for the 5th Defendant.

No appearance for the 3rd, 4th and 6th Defendants.

Mr. Haji for the 1st Defendant.

Court Assistant –Yvette.

M.D. MWANGI

JUDGE

