



**Galot Industries Limited & 2 others v Machakos County Government & 4 others;  
Erdemann Property Limited & 4 others (Interested Parties) (Environment & Land  
Petition E008 of 2020) [2023] KEELC 19947 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19947 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND PETITION E008 OF 2020**  
**CA OCHIENG, J**  
**SEPTEMBER 19, 2023**  
**IN THE MATTER OF: ARTICLES 22 AND 23 OF THE**  
**CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF: ALLEGED THREATS TO AND**  
**CONTRAVENTION OF RIGHTS UNDER**  
**ARTICLES 24, 25, 27, 28, 29, 30, 31, 35, 40,**  
**42, 43, 46, 47, 48, 49 AND 50 OF THE**  
**CONSTITUTION OF KENYA;**  
**AND**  
**IN THE MATTER OF: ARTICLES 159, 176 AND 186 OF THE**  
**CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF: PHYSICAL AND LAND USE PLANNING ACT,**  
**2019**  
**AND**  
**IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND**  
**COORDINATION ACT, 1999**

**BETWEEN**

**GALOT INDUSTRIES LIMITED ..... 1<sup>ST</sup> PETITIONER**

**KING WOOLLEN MILLS LIMITED ..... 2<sup>ND</sup> PETITIONER**



**LONDON DISTILLERS (K) LIMITED ..... 3<sup>RD</sup> PETITIONER**

**AND**

**MACHAKOS COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**ERDEMANN PROPERTY LIMITED ..... INTERESTED PARTY**

**KATARINA AGENCIES LIMITED ..... INTERESTED PARTY**

**DENVIC PROPERTY MANAGERS LTD ..... INTERESTED PARTY**

**EXPORT PROCESSING ZONE AUTHORITY ..... INTERESTED PARTY**

**MAVOKO WATER & SEWERAGE CO ..... INTERESTED PARTY**

## **JUDGMENT**

1. By a Petition dated the 6<sup>th</sup> November, 2020, the Petition prays for the following Orders against the Respondents:
  - i. The Respondents be compelled by an Order of Mandamus to carry out investigations into the circumstances surrounding the change of user of LR No. 12867/11 and on the adjoining LR No. 27317/2 being the subdivision of the parcel of land formerly designated as LR No. 12867/10 as well as on LR Nos. 125867/13 which are subdivisions of the parcel of land hitherto referred to as LR No. 1337 from Industrial development to Residential use and to table before this Honourable Court the Report on the investigations in terms of prayer within a period of 30 days for further Orders.
  - ii. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents be compelled by an Order of Mandamus to prepare and table before this Honourable Court the zoning Plan to guide development within the area situate within the Athi River locality off the Mombasa-Namanga Road Interchange, Machakos County area within 30 days.
  - iii. A declaratory Order be issued to the effect that the parcels of land comprised of the Titles referred to as LR No's 12867/1, 12867/2, 12867/3, 12867/5, 12867/6, 12867/7, 12867/8, 12867/9, 12867/10, 12867/11, 12867/12, 12867/13, 12867/14, 12867/15, 12867/16, 12867/17, 12867/18, 12867/19, 12867/20 and 12867/511 are industrial plots.
  - iv. A declaratory Order be issued to the effect that the parcels of land referred to as consequently LR Nos. 12867/21, 12867/22, 12867/23, 12867/24, 12867/25, 12867/26, 12867/27, 12867/28, 12867/29, 12867230 and 12867/31 are residential plots.



- v. A declaratory Order be issued to the effect that all the internal roads between LR Nos. 12867/1, 12867/2, 12867/3, 12867/5, 12867/6, 12867/7, 12867/8, 12867/9, 12867/10, 12867/11, 12867/12, 12867/13, 12867/14, 12867/15, 12867/16, 12867/17, 12867/18, 12867/19, 12867/20, 12867/511, 12867/21, 12867/22, 12867/23, 12867/24, 12867/25, 12867/26, 12867/27, 12867/28, 12867/29, 12867230 and 12867/31 belong to the 1<sup>st</sup> Petitioner.
  - vi. A declaratory Order be issued to the effect that the industrial use of all the aforesaid parcels of land to wit LR Nos. 12867/1, 12867/2, 12867/3, 12867/5, 12867/6, 12867/7, 12867/8, 12867/9, 12867/10, 12867/11, 12867/12, 12867/13, 12867/14, 12867/15, 12867/16, 12867/17, 12867/18, 12867/19, 12867/20, 12867/511 which includes manufacturing, processing, distilling, brewing, warehousing and storage, workshops and garages, mining and quarrying, power generation and similar industrial activities including Petroleum filling stations is incompatible with the occupation of residential dwelling houses.
  - vii. A declaratory Order be issued to the effect that the Respondents are responsible for any eventuality that may be visited on the developments of the residential houses constructed on LR No. 12867/11, LR No. 27317/2, LR No. 12581/14 and LR No. 12581/13 on account of illegality.
  - viii. Any other relief that the Honourable Court may deem fit to grant.
2. The 1<sup>st</sup> Respondent in opposition to the instant Petition filed Grounds of Opposition dated the 19<sup>th</sup> February, 2021 where it stated that the Petition is incompetent, bad in law and an abuse of the court process. It insisted that this court lacks jurisdiction to entertain the Petition or grant the orders sought in view of the provisions of the *Physical and Land Use Planning Act* No. 13 of 2019. It argued that the Petitioner has not exhausted the alternative dispute resolution mechanism put in place under the *Physical and Land Use Planning Act* No. 13 of 2019 and in particular Section 40(4) thereof. It explained that all the suit properties having been subdivided severally and the applications for change of user having been granted in absence of any objection, the Petitioners can only apply for review or appeal of the approvals but not filing this Petition. It averred that the Petitioner has no legitimate claim over the issues of zoning or the Change of User complained of and its motivated by bad faith, ulterior motives, unhealthy competition and self-entitlement attitude over other land users. It reiterated that several pieces of land are owned by other parties as stated in the Petition who have not been enjoined in this matter and the orders sought would affect them unheard contrary to the rules of natural justice. It reaffirmed that the Petition is thus premature, an afterthought, an abuse of court process devoid of any merit and prays it is dismissed with cost.
3. In response to the Petition, the 1<sup>st</sup> Interested Party filed a Replying Affidavit dated the 18<sup>th</sup> May, 2021 and Grounds of Opposition dated the 25<sup>th</sup> November, 2022. It stated that the issues raised in the Petition are by law required at first instance to be lodged before the Machakos County Physical Planning and Land Use Liaison Committee pursuant to Section 78 (a) of the *Physical and Land Use Planning Act* (as read with Section 10 & 12 of the Physical Planning Act, Cap 286 – Repealed) and Section 9(2) of the *Fair Administrative Action Act*, 2015. It contended that the Petitioners seek to irregularly circumvent the legal process of Change of User. It insists that the forum appropriate for the Petitioners grievance on Change of User is not the Court. Further, that challenging the process and propriety of the environmental impact assessments and consequent approvals at the first instance, should be lodged before the National Environment Tribunal, pursuant to Sections 129(1) and (2) and 130 of the Environmental Management and Coordination Act, 199 as read with Section 9(2) of the *Fair Administrative Action Act* No. 7 of 2015. It avers that the Petitioners irregularly seek to circumvent the regulated legal process of Environmental Impact Assessment approval. It argues that the Petition



violates the exhaustion doctrine in as far as the issues for determination contemporaneously centre on contestations about validity of Environment Impact Assessment (EIA) Licenses and validity of change of user, statutorily preserved for the National Environment Tribunal and County Physical and Land Use Planning Liaison Committee respectively established and with exclusive original jurisdiction. It made reference to the dispute pending in Machakos ELC 104 of 2019 London Distillers Limited Vs Mavoko Water & Sewerage Company & Others and contended that it rendered this Petition sub judice. Further, that the question of alleged wrongful and supposedly defamatory complaints of environmental pollution against the 3<sup>rd</sup> Petitioner, by the residents of the subject area supposedly on account of the 1<sup>st</sup> Interested Party is the cause in CMCC 70 of 2022 (formerly HCC 49 of 2018) London Distillers (K) Ltd V Erdemann Property Ltd & Another, rendering the matter sub judice. It reiterates that there have been numerous complaints against pollution by the Petitioners, which they admit and this is also indicative in a Report of the National Assembly's Departmental Committee on Environment and Natural Resources issued on 28<sup>th</sup> August, 2018. It reaffirms that there is nothing improbable about a residential development abutting a light industrial undertaking. Further, that the Petitioners run afoul the legal principle of res judicata as extended by the doctrine of estoppel by virtue of brazenly seeking to re litigate herein various issues and matters determined by the National Environment Tribunal. It further reiterates that the Petition is sub judice Machakos ELC Petition 20 of 2018 Mohan G V Mavoko Sub County & Hon. Attorney General. Further, that the 1<sup>st</sup> Interested Party's Residential Developments including Great Wall Garden Estate Phases I, II, III and IV are a continuation of its purpose to provide affordable housing to Kenyans and all these developments were preceded by all the requisite licenses, consents including approvals in accordance with the law.

4. The 4<sup>th</sup> Interested Party opposed the instant Petition by filing a Replying Affidavit sworn by Beatrice Wambui Muiruri, its Acting Assistant Manager in the Sewerage and Water Department, where she deposes that the Petition is based on the erroneous and misleading premise that the 3<sup>rd</sup> Petitioner's obligation not to pollute the environment as well as discharge industrial effluent that meets National Environmental Authority Standards is dependent on whether approved user of the Land is industrial or residential. She explains that the Agreement for sewer connection entered into between Export Processing Zones Authority (EPZA) and London Distillers Limited dated the 25<sup>th</sup> February, 2014 expressly requires the latter to discharge into EPZA Trunk Sewer only pre- treated effluent that meets National Environmental Standards for effluent discharged into Public Sewer. She insists that over the years, London Distillers Limited has not been strictly adhering to the set Environmental Standards as required by Law and as agreed in the contract dated 25<sup>th</sup> February, 2014, prompting the 4<sup>th</sup> Interested Party to among other things issue a letter of non-compliance to it. Further, that London Distillers has persisted in discharging non-compliant effluent into the EPZA Trunk Sewer as evident in the Laboratory Test report by Agric Quest published on 15<sup>th</sup> October, 2020. She avers that it is the London Distillers that failed to abide by the set Environmental Standards and Regulations that culminated in the multiplicity of complaints against it, including those of EPZA. She argues that the determination of the current Petition whose focus is regularity of the approval for Change of User would not dispose the issues pending for determination before other courts and those courts should be left to proceed and determine issues before them.
5. The 5<sup>th</sup> Interested Party filed a Replying Affidavit sworn by Michael Mangeli its Managing Director where he deposes that the Petition ab initio is an abuse of court process. He insists that the Petition violates the doctrine of exhaustion. He contends that the issues raised in the Petition ought to have been raised with the County Physical and Land Use Planning Liaison Committee and National Environmental Tribunal which have exclusive and original jurisdiction on complaints against Change of User as well as validity of Environment Impact Assessment Licenses. He explains that the issue of Change of User has been substantially raised in several suits involving the Petitioners listed in the



Petition including ELC 104 of 2019 London Distillers (K) Limited Vs Mavoko Water & Sewerage Company & 2 Others. He argues that the right forum to challenge the Change of User is the Machakos County Liaison Committee which has jurisdiction to hear and determine complaints and objections to change of user in terms of Section 61(3) of the *Physical and Land Use Planning Act*. He argues that the Petitioners' averments that the 1<sup>st</sup> Petitioner's objections to the construction of residential houses gave rise to issues of environmental pollution by the 3<sup>rd</sup> Petitioner through toxic fumes and effluent are misleading. He insists that the 5<sup>th</sup> Interested Party has a duty to ensure inter alia that factories under its area of jurisdiction and those connected to the public sewer line, treat their industrial effluent waste before discharging the same into the public sewer line so as to protect not only human life but also the environment. He avers that the 3<sup>rd</sup> Petitioner has failed to comply with the standards set out in Environmental Management and Coordination (Water Quality) Regulations 2006 and other relevant laws and the same gave rise to numerous complaints. Further, that the 3<sup>rd</sup> Petitioner is discharging effluent that is not within the required standards and consequently presents health hazards for non-drinking purposes such as irrigation, fishing and other industrial purposes.

The Petition was canvassed by way of written submissions.

## Submissions

### Petitioners' Submissions

10. The Petitioners in their submissions have provided a background of the suit lands and the dispute herein. They contend that the instant Petition challenges the regularity of the approval for Change of User of the subject parcels of land which were previously zoned for industrial development to residential use without taking into consideration its views. They argue that they are the project most affected persons as they are immediate neighbours of the subject parcels of land. Further, that their views ought to have been considered before the impugned Change of User. They insist that the 2<sup>nd</sup> Respondent acted illegally, irrationally and unprocedurally when it purported to issue an Environmental Impact Assessment (EIA) License on whose strength the 1<sup>st</sup> Respondent granted the impugned Change of User. Further, that there was absent public participation and disregard of likelihood of future conflicts as a result of mixed use. They explain that they only became aware of the irregular Change of User when the 1<sup>st</sup> Interested Party commenced construction of residential houses in the said area being Great Wall Gardens Estate. They reiterate that this was contrary to their legitimate expectation and in contravention of Section 41(2) of the Physical Planning Act 1996 (repealed). They state that the 1<sup>st</sup> Respondent could not purport to grant the Change of User without affording them an opportunity to be heard. Further, that the Rules of Natural Justice makes it mandatory for a party to be heard before any decision that is likely to affect and to vary/determine their rights is made. They further submit that the Respondents violated their right of access to information guaranteed under Article 35 of *the Constitution* by refusing to respond to the queries they raised in their letter dated the 14<sup>th</sup> November, 2016. They reaffirm that the 1<sup>st</sup> Respondent acted in breach of Section 41(3) and 52 of the Physical Planning Act, 1996 (repealed) in granting the impugned Change of User. Further, that failure to serve the Petitioners with notices as envisaged under Section 52 denied them their rightful opportunity to object to the Change of User before the 1<sup>st</sup> Respondent and by extension, audience before the Liaison Committee. They further insist that the 2<sup>nd</sup> Respondent failed to conduct the mandatory Environmental Impact Assessment study recommending the Change of User. Further, that the alleged study purported to have been conducted by the Respondents does not meet the criteria set under Regulation 17 of the EIA. They further submit that the 2<sup>nd</sup> Respondent did not rebut their averments that no environmental impact assessment study was ever conducted and that if any was conducted, the views of the project most affected persons were considered. They conclude that they



have made out a case for grant of orders as sought in the Petition. To buttress their averments, they relied on the following decisions: Republic Vs Attorney General Ex parte Dominic Mwendwa Muthui & Another (2022) eKLR which cited in approval the case of Pastoli V Kabale District Local Government Council & Others (2008) 2 EA 300; Nairobi Metropolitan PSV Sacco Union Ltd & 25 Others V County Government of Nairobi & 3 Others (2013) eKLR; R V Permanent Secretary, Ministry of Housing & Another (2014) eKLR; David Oloo Onyango V Attorney General (1987) eKLR; Katiba Institute V President's Delivery Unit & 3 Others (2017) eKLR and Republic V Principal Secretary, Ministry of Internal Security & Another Ex parte Schon Noorani & Another (2018) eKLR.

### **1<sup>st</sup> Respondent's Submissions**

11. The 1<sup>st</sup> Respondent in its submissions insists that the Petitioners have violated the doctrine of exhaustion of alternative dispute mechanism as there is no exceptional circumstance to warrant the Court's intervention. It reiterated that the Petitioners have no legitimate claim over the issues of zoning or Change of User as the relevant government institution approved the changes a long time ago. Further, that the only available option is to appear or apply for review to the said entity. It argues that the alleged violations have not been set out and proved/substantiated to the required standard. To support its arguments, it relied on the following decisions: Ndiara Enterprises Ltd V Nairobi City County Government (2018) eKLR and Owners of the Motor "Vessel S" V Caltex Oil (Kenya) Ltd (1989) eKLR; Augustino Mbugua V Inspector General of Police & Another (2020) eKLR.

### **1<sup>st</sup> Interested Party's Submissions**

12. The 1<sup>st</sup> Interested Party in its two sets of very extensive submissions contend that the Petition is not merited and seeks to conceal their violations of the constitutional rights of other land users. It contends that the 3<sup>rd</sup> Petitioner has received non-compliance dated the 25<sup>th</sup> February, 2022 from the 2<sup>nd</sup> Respondent warning them of constant pollution which affected other land users around the property. Further, that the 3<sup>rd</sup> Petitioner is hiding behind this Petition to exempt itself from complying with the conditions set by the 3<sup>rd</sup> Respondent. It insists that the prayers sought in the Petition go against the tenets of *the Constitution* and should not even be considered by the Court. Further, that the Petitioners have not provided instances where its constitutional rights have been violated. It further argues that the Court is divested of jurisdiction to handle this matter. Further, that these proceedings run afoul the exhaustion doctrine and doctrine of avoidance under Article 169(10) (d) and (2) of *the Constitution* as read together with Sections 125 and 129 of *the Constitution*. It insists that *the Constitution* cannot be used as a general substitute for normal procedures. Further, that a Constitutional Petition will not render statutory provisions inapplicable. It explains that most developments challenged by the Petitioners were erected after the enactment of the *Physical and Land Use Planning Act*, 2019. Further, that the contestations by the Petitioners on zonation, planning and development approvals and change of user are unmerited. It further submits that the Petitioners have completely misapprehended the law in as far as Article 35(1) of *the Constitution* is concerned. It reaffirms that the Court will not determine as a constitutional issue, a matter which may properly be decided on another basis or forum. It urged the Court to dismiss the instant Petition and order the Petitioners to make use of appropriate structures and strictures as per the *Physical and Land Use Planning Act*, 2019 (as read with Physical Planning Act, Cap 286 – repealed) and the Environment Management and Coordination Act, 1999. It states that the Petition is sub judice as there are other pending matters before court touching on the dispute herein. Further, that the Petition is res judicata as extended by the doctrine of estoppel as per the proceedings in the NET Tribunal (NET Appeal 15 of 2018, NET Appeal 21 of 2019 and NET Appeal 44 of 2020). To support its averments, it relied on the following decisions: Samson Otieno Bala t/a Missam Enterprises V Kenya Bureau of Standards & 4 Others (2015) eKLR; Abuya Abuya



Vs Independent Electoral and Boundaries Commission & Another (2014) eKLR; Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others (2013) eKLR; Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 Others (2015) eKLR; COD & Another V Nairobi City Water & Sewerage Company Limited (2015) eKLR; Speaker of the National Assembly Vs Karume (1992) eKLR; Mohammed Mubarak V County Government of Mombasa (2020) eKLR; Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others (2013) eKLR; Gabriel Mutava & 2 Others V Managing Director, Kenya Airports Authority & Another (2016) eKLR; Thika Min Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR; Jane Ajwang Nyangasi & Another (suing as the Legal Representatives of the Estate of Edward Nyadimo Nginja) V Wycliffe Otieno & Another (2020) eKLR and IEBC Vs Maina Kiai & 5 Others (2017) eKLR.

#### **4<sup>th</sup> Interested Party's Submissions**

13. The 4<sup>th</sup> Interested Party in its submissions insists that the Petition is not merited as it is based on erroneous and misleading premise that the 3<sup>rd</sup> Petitioner's obligation not to pollute the environment and to discharge industrial effluent that meets National Environmental Authority Standards is dependent on whether the approved user of land is industrial or residential. Further, that the 3<sup>rd</sup> Petitioner has not adhered to the set Environmental Standards as required by Law and as agreed in the contract between the parties dated the 25<sup>th</sup> February, 2014, prompting the 4<sup>th</sup> Interested Party to issue the said letter. It reiterates that the determination of the current Petition would not dispose of issues pending before other courts and which courts should be left to proceed with them.

#### **5<sup>th</sup> Interested Party's Submissions**

14. The 5<sup>th</sup> Interested Party in its submissions also contends that the instant Petition is not merited. It argues that the Petitioners had not demonstrated if they adhered to the procedures set out in the [Physical and Land Use Planning Act](#) challenging validity of the Change of User. Further, that the Petitioners failed to lodge an Appeal with the Machakos Liaison Committee which is the right forum to challenge Change of User. It further submits that the Petition herein seeks to unlawfully invoke the jurisdiction of this Honourable Court over a dispute suited for the statutory tribunal disguised as a Constitutional Petition. It sought for costs of the Petition. To support its arguments, it relied on the following decisions: Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others (2015) eKLR; Lashad Mohamed Mubarak V County Government of Mombasa (2020) eKLR; Rift Valley Enterprises Limited V District Land Registrar & 4 Others (2018) eKLR; Gabriel Mutava & 2 Others V Managing Director, Kenya Ports Authority & Another (2016) eKLR and Cecilia Karuru Ngayu V Barclays Bank of Kenya & Another (2016) eKLR.

#### **Analysis and Determination**

15. Upon consideration of the instant Petition, respective affidavits, Grounds of Opposition, annexures and rivalling submissions including the very many authorities, the following are the issues for determination:

Whether the Petitioners violate the exhaustion doctrine. Whether the process of Change of User from Industrial to Residential in respect to the subject area where the suit lands are situated was properly undertaken. Whether the Petition is merited.

16. As to whether the Petitioners have violated the doctrine of exhaustion. I note this Court in its Ruling delivered on 18<sup>th</sup> March, 2022 found that the Petitioners had not exhausted the said doctrine and



directed that this Petition be set down for hearing expeditiously. For the avoidance of doubt, I will proceed to reproduce an excerpt from the said Ruling:

“Insofar as I concur with the 1st Interested Party that the doctrine of exhaustion as established in the case of *Krystalline Salt Kenya Ltd Vs Kenya Revenue Authority* (2019) eKLR, needs to be exhausted, I hold that no tribunal has the jurisdiction to deal with constitutional issues raised in the Petition as this is the preserve of the Environment and Land Court as envisaged in section 13 of the ELC Act. Further, since it has not been controverted that the Petitioners were unaware of the process of change of user, then they could not proceed under Section 41 of the Physical Planning Act (repealed) to appeal against the decision of the Mavoko County Council to the Liaison Committee within the requisite time (see the case of *Republic v Nairobi City County & Another Exparte Mugumo villas Limited* (2014) eKLR).”

17. In the circumstance, I will adopt the findings as per the impugned Ruling which was not appealed from, and hence remains valid.
18. As to whether the process of Change of User from Industrial to Residential in respect to the subject area where the suit lands are situated was properly undertaken. The Petitioners claim that as projected affected persons, they were not involved in the process of Change of User of the subject lands from Industrial to Residential. The Respondents and Interested Parties did not dispute that the Petitioners were Projected Affected Persons but insist that the Petitioners should have appealed to the Machakos County Physical and Land Use Liaison Committee to Challenge the Change of User instead of filing the instant Petition. The 1<sup>st</sup> Interested Party confirms after obtaining approvals, it constructed various apartments on its land. I note the Petitioners also admit that there are staff houses they constructed on their land. The 1<sup>st</sup> Respondent including 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties contend that the Petitioners seek to avoid responsibility over the allegations of pollution as raised by NEMA. However, I opine that this Court will not interfere with the issues pending for determination before other courts and tribunals that touch on pollution but only deal with the fulcrum of the dispute herein which revolves around Change of User. The legal provisions governing the process of Changer of User is contained in the *Physical and Land Use Planning Act*.
19. Section 41(3), (4) and (5) of the Physical Planning Act (repealed) stipulated that:

“

- “(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit (4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the applicant of such objections or representations and shall before the application is determined by it afford the applicant an opportunity to make representations in response to such objections or representations. (5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under



subsection (1). (6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:

Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal: Provided further that the appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.”

20. While Section 61 of the [Physical and Land Use Planning Act](#), 2017 states that:

“(1)When considering an application for development permission, a county executive committee member— (a) shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans; (b) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought; (c) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought; (d) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and (e) in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease. (2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may — (a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission; or (b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing. (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.”

21. Further, Section 78 of the [Physical and Land Use Planning Act](#), 2019 stipulates as follows:

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county; (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county; (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and (d) hear appeals with respect to enforcement notices.”

22. I note the alleged Change of User was obtained before the current Physical and Land Planning Act and hence the process was governed by Section 10 and 12 of the Physical Planning Act, Cap 286 (repealed).



23. From a reading of the legal provisions cited above, it places the responsibility upon a local authority and County Government that has received an application in respect of development or change of user which has impact on contiguous land to publish the notice of the said application in the Gazette or in such other manner as it deems expedient, serve copies of the said application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.
24. In this instance, the Petitioners insist they were not aware of the process of Change of User but only saw the 1<sup>st</sup> Interested Party undertaking development of residential apartments on the neighbouring parcels of land. I note none of the Respondents nor Interested Parties presented to Court a notice of the Application for Change of User from Industrial to Residential confirming that the 1<sup>st</sup> Respondent that was the local authority/County Government mandated to grant a Change of User, adhered to the process as set out in the legal provisions cited above.
25. In the case of *Republic v Kombo and 3 Others ex-parte Waweru* [2008] 3 KLR (EP) 478 it was held that:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

See also the case of *Depar Limited v County Executive Committee Member for Lands, Physical Planning, Housing and Urbanization & another* [2021] eKLR.

26. Insofar as the 1<sup>st</sup> Respondent and most of the Interested Parties insist that the Petitioners should have appealed to the Machakos County Physical Planning and Land Use Liaison Committee, I find that this was not possible to do so, since there is no evidence presented to prove that as project affected persons, they were indeed served with any notices or involved in the process of Change of User. Further, even from the pleadings presented herein, none of the Respondents nor Interested Parties provided documentary evidence to demonstrate the process the 1<sup>st</sup> Interested Party adhered to, to obtain Change of User so as to develop the aforementioned apartments. To my mind, I find that the 1<sup>st</sup> Respondent and its predecessors did not involve the Petitioners in the process of Change of User. It is trite that in an ideal situation where all parties have been involved in the application for Change of User, the Petitioners as required by law should have lodged an Appeal against any decision, before the Machakos County Physical Planning and Land Use Liaison Committee pursuant to Section 78(a) of the *Physical and Land Use Planning Act* (as read with Sections 10 and 12 of the Physical Planning Act, Cap 286 – Repealed) as well as Section 9(2) of the *Fair Administrative Action Act*, 2015. I opine that the 1<sup>st</sup> Respondent indeed infringed on the Petitioners’ right to fair administrative action as envisaged under Article 47 of *the Constitution* as it had a public duty to involve them in the process of Change of User as a projected affected persons but they did not. Further, as per the *Physical and Land Use Planning Act*, it is the 1<sup>st</sup> Respondent that was expected to come up with the Local Physical Development Plans for the disputed area, to aid in the process of Change of User, which plans were not presented in this



court. In the circumstance, I am of the view that it is only through an order of mandamus that the 1<sup>st</sup> Respondent can be compelled to perform its public duty. (See the case of Republic V Secretary, Ministry of Internal Security & Another, ex parte Schon Noorani & Another (2018) eKLR). I note the 2<sup>nd</sup> Respondent did not rebut the Petitioners' averments that no Environmental Impact Assessment study was ever conducted and that if any was conducted, their views as the project most affected persons was not considered.

27. From the facts before me, I do not find that the Petitioners seek to irregularly circumvent the legal process of Change of User. I find that the Petitioners had a right to information in respect to the application for Change of User but this was curtailed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 1<sup>st</sup> Interested Party. At this juncture, I find that there are exceptional circumstances that warrant this Court to interfere with the process which ought to have been dealt with by the Machakos County Physical Planning and Land Use Liaison Committee.
28. Since the subject area has mixed development of both residential and industrial, I opine that it would be pertinent if the County Government of Machakos provided a structured Local Physical Development Plan (Zoning Plan) for purposes of proper planning so as to avoid future conflict. The Petitioners have further sought for prayers (iii), iv, v, vi, vii as enumerated above, however, at this juncture, I am unable to grant the said orders as the same can only be allowed once the 1<sup>st</sup> Respondent has presented the Local Physical Development Plan (Zoning Plan) for the disputed area and parties have provided concrete evidence on their respective User licenses.
29. In the foregoing, I find that the Petition is partially merited and will proceed to make the following final orders:
  - i. The 1<sup>st</sup> Respondent be and is hereby compelled by an Order of Mandamus to carry out investigations into the circumstances surrounding the change of user of LR No. 12867/11 and on the adjoining LR No. 27317/2 being the subdivision of the parcel of land formerly designated as LR No. 12867/10 as well as on LR Nos. 125867/13 which are subdivisions of the parcel of land hitherto referred to as LR No. 1337 from Industrial development to residential use and to table before this Honourable Court the Report on the investigations in terms of prayer within a period of 90 days for further Orders.
  - ii. The 1<sup>st</sup> Respondent be and is hereby compelled by an Order of Mandamus to prepare and table before this Honourable Court the Local Physical Development Plan (Zoning Plan) to guide development within the area situate within the Athi River locality off the Mombasa-Namanga Road Interchange, Machakos County area within 180 days from the date hereof.
  - iii. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

