



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JUDICIAL REVIEW APPLICATION NO E014 OF 2020

IN THE MATTER OF AN APPLICATION BY ONE HUNDRED AND TWO PEPONI ROAD LLP & PEPONI ROAD RESIDENTS ASSOCIATION (IN FORMATION) FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND OTHER DECLARATORY ORDERS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010: ARTICLES 47 (1) & (2); 42, 69 & 70

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

AND

IN THE MATTER OF CONSTRUCTION OF OFFICE BLOCKS BY AIR VIEW PROPERTIES LIMITED ALONG PEPONI RISE ROAD IN VIOLATION OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010, THE NAIROBI CITY COUNTY ZONING GUIDE AND THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATION, 2003

BETWEEN

ONE HUNDRED AND TWO PEPONI ROAD LLP.....1ST APPLICANT

PEPONI ROAD RESIDENTS ASSOCIATION (IN FORMATION).....2ND APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

AIR VIEW PROPERTIES LIMITED.....3RD RESPONDENT

RULING

1. By a Chamber Summons dated 18th December 2020 the Ex parte Applicants herein sought leave to institute judicial review proceedings against the respondents. Upon considering the said summons this Honourable Court granted the leave sought and directed the Ex parte Applicants to file a substantive motion within twenty one (21) days. The court also directed that the leave granted do operate as a stay pending the hearing and determination of the substantive motion.

2. Pursuant to these directions the Ex parte Applicants filed a notice of motion dated 23rd December 2020 seeking orders:-

1) That an order of certiorari to remove into the High Court and quash forthwith the Environmental Impact Licence dated 13th October 2020 issued by the 1st respondent to the 3rd respondent.

2) That an order of certiorari to remove into the High Court and quash forthwith the Environmental Impact Assessment Report dated 3rd March 2020 submitted by the 3rd respondent to the 1st respondent.

3) That an order of certiorari to remove into the High Court and quash forthwith the Form PPA 2 – notification of approval of development permission dated 13th November 2018.

4) That a declaration that the 3rd respondent's Environmental Impact Assessment Licence dated 13th October 2020 violates the provisions of Regulation 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and the provisions of Article 47 of the Constitution of Kenya, 2010 and the Fair Administrative Action Act, 2015.

5) That a declaration that the 2nd respondent's decision to issue Form PPA 2 – Notification of Approval of Development Permission dated 13th November 2018 to the 3rd respondent for construction of office blocks violates the 2nd respondent's Zoning Guide for Nairobi County and the provisions of Article 47 of the Constitution of Kenya, 2010 and the Fair Administrative Action Act, 2015.

6) That an order of Prohibition against the 3rd respondent for continuing with any construction of office blocks on Land Reference Number 17/432 along Peponi Rise Road, off Peponi Road.

7) That an order of general damages be issued against the 1st – 3rd respondents for violating the applicant's constitutional right to fair administrative action as guaranteed under Article 47 of the Constitution of Kenya 2020.

8) That costs of this application be provided for.

3. In response the 1st respondent filed a Notice of Preliminary Objection dated 17th February 2021. The grounds are:-

1) That this honourable court is not the appropriate forum to hear this matter by dint of section 129 of the Environmental Management and Coordination Act, 1999. The 3rd defendant pleads the issue of jurisdiction and will rely on the recent decision of the Court of Appeal in *Kibos Distillers Ltd and 4 Others vs Benson Ambuti Adega and 3 Others [2020] eKLR*.

2) That the *ration decidendi* in the decision of *KO Holdings Ltd vs County government of Kiambu and Another (2019) eKLR* produced by the plaintiffs in this case, equally supports the striking out of this suit on jurisdiction. This matter can only have been filed at the National Environment Tribunal.

4. The 2nd respondent filed grounds of opposition dated 26th January 2021.

5. The 3rd respondent also opposed the Notice of Motion. There is a replying affidavit sworn by Jayantilal Jivray Mepa Shah, a director of the 3rd respondent, on a notice of preliminary objection dated 5th February 2021. The 3rd respondent also filed a notice of preliminary objection. The grounds are:-

a) That this honourable court lacks jurisdiction to entertain the present application herein by virtue of Section 125, Environmental Management and Coordination Act, Cap 387, Laws of Kenya.

b) That 2nd Applicant, Peponi Road Residents Association (In Formation), being an unincorporated body has no capacity to sue in the manner it has purported to do.

c) That this suit is *res judicata* an account of High Court Judicial Review Application No E1158 of 2020 *One Hundred and Two Peponi Road LLP & Another vs National Environment Management Authority & 2 Others*.

d) That consequently, the present suit and notice of motion application dated 23rd December 2020 herein is a sheer abuse of court process.

e) That the applicants have invoked the jurisdiction of this honourable court prematurely without exhausting the alternative remedies of dispute resolution provided for by the statute.

f) That in the circumstances, both the suit and Notice of Motion application dated 23rd December 2020 should be struck out with costs.

6. On the 9th February 2021 the court directed that the preliminary objections by the 1st and 3rd respondents be heard first in priority to the Notice of Motion dated 23rd December 2020. The court also directed, with the consent of parties that the preliminary objections be canvassed by way of written submissions.

The 3rd Respondent's Submissions

7. They are dated 17th February 2021. What constitutes a preliminary objection was well articulated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**. Justice Mrima in the decision of **County Government of Migori**

vs INB Management IT Consulting Ltd [2019] eKLR discussed the centrality of the court's jurisdiction by quoting the cases; **Supreme Court of Nigeria supreme Case No II of 2012 Ocheja Emmanuel Dangana vs Hon. Atai Aidoko Aliusman & 4 Others; Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR; Samuel Kamau Macharia & Another vs KCB Ltd & Others vs KCB Ltd & Others [2012] eKLR.**

8. The Notice of Preliminary Objection dated 2nd February 2012 raises pure points of law. The ground of jurisdiction is so central to the suit for reasons that the Applicants herein have deliberately failed to exhaust the legal avenues statutorily sanctioned before approaching this honourable court. The applicants herein ought to have filed a complaint and exhausted the legal avenues provided by the National Environment Tribunal under section 125 and 129 (3) of Environmental Management and Coordination Act and the liaison committee provided for under the Physical Planning Act.

9. It has put forward the case of **Kibos Distillers Ltd & 4 Others vs Benson Ambuthi Atega & 3 Others [2020] eKLR**. This Honourable court has no original jurisdiction to handle this matter on account of craft of pleadings by the applicants herein.

10. It has also put forward the case of **White Horse Investment's Ltd vs Nairobi City County [2019] eKLR**. The applicants have not demonstrated that there existed exceptional circumstances in moving this court before exhausting the legal mechanisms and avenues provided for under the Environmental Management and Coordination Act, Cap 387 Laws of Kenya and the Physical Planning Act. It has put forward the case of **Charles Ngigi Ndung'u & 2 Others vs County Government of Kiambu & 7 Others [2019] eKLR; Speaker of National Assembly vs Hon. James Njenga Karume [2008] 1KLR 425; Koome Mwambia & 3 Others vs Deshun Properties Company Ltd & 4 Others [2014] eKLR; Symon Wangombe Gathua & 6 Others vs A.G & 6 Others [2020] eKLR**. It prays that the present suit and the entire proceedings be struck out as the applicants have not exhausted the statutory legal avenues provided before filing this suit.

11. The 2nd applicant herein has no *locus standi* to file the present suit. It ought to have filed through its representatives in tandem with the provisions of Section 41 of the Societies Act. The suit ought to be struck out as being frivolous and an abuse of the court process.

12. The present suit is res judicata. The applicants herein filed High Court JR Application No E1158 2020 **One Hundred and Two Peponi Road LLP & Another vs NEMA & 2 Others**. The directions were given by Lady Justice P. Nyamweya on 18th December 2020, that the file be placed before Duty Judge ELC on 4th January 2021. Rather than Wait for the directions, the applicants brought these proceedings. It has put forward the case of **Sagal Investment Ltd & Another vs Gulf African Bank Ltd & Another [2020] eKLR**.

13. The applicants seek an order of certiorari for court to remove and quash forth with Form PPA2 – Notification of Approval of Development Permission dated 13th November 2018. It has relied on Rule 9 (3) of the Law Reform Act which provides that:-

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction of other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired”.

It has also put forward the case of **Republic vs Chairman Evurore Land Disputes Tribunal & 2 Others Ex parte Njeru Kirimo [2014] eKLR**.

14. It prays that the Notice of Motion dated 23rd December 2020 together with the suit be struck out with costs to the 3rd respondent.

15. On the 4th March 2021, Mr. Mwangi holding brief for Mr. Wambwoto for the 1st respondent informed the court that the 1st respondent associated itself with the 3rd respondent's submissions in support of the preliminary objection dated 17th February 2021.

16. It appears the 2nd respondent did not tender any written submissions.

The Ex parte Applicants' submissions

17. The 3rd respondent cannot submit and rely on the issues and grounds that are not captured in the preliminary objection. They have relied on the case of **Political Parties Forum Coalition & 3 Others vs Registrar of Political Parties & 8 Others [2016] eKLR**.

18. The substance of the application is the decision by the 1st respondent to grant an Environment Impact Assessment Licence on 13th October 2020 to the 3rd respondent without following due process. Section 129 (1) of the Environment Management and Coordination Act provides a limitation period of 60 days from the date of the occurrence of the impugned event, within which the dissatisfied party is to present an appeal to the National Environment Tribunal. The statutory timeframe of 60 days for appealing the 1st respondent's decision to grant an Environmental Impact Assessment Licence to the 3rd respondent has since lapsed on account of no fault of the applicants.

19. By failing to adhere to the letter of the law in the manner in which the Environmental Impact Assessment Licence was issued, the 1st and 3rd respondents greatly prejudiced the applicants' right to appeal within 60 days.

20. The National Environment Tribunal has no jurisdiction to extend the limitation period of 60 days stipulated under section 129 (1) of the Environmental Management and Coordination Act. They have put forward the cases of **Albert Mumma in his capacity as Chairman Karen-Langata District Association (KLDA) vs Director General (NEMA) & 2 Others [2019] eKLR; David Awori & 2 Others on**

behalf Gigiri Village Association vs Director General (NEMA) & 2 Others [2019] eKLR; Micah Mutoko & 4 Others vs Director General (NEMA) & 2 Others [2018] eKLR.

21. The affidavit of Karim S. Anjarwalla sworn on the 18th December 2020 elucidates the steps taken by the applicant's to obtain information from the 1st respondent as well as the failure by the 3rd respondent to put up any signage on their property indicating the nature of the project they were undertaking and the approvals received. Justice in this case demands that this court dismisses the preliminary objection as it seeks to drive the applicants from accessing justice contrary to Article 48 of the Constitution of Kenya, 2010.

22. Article 22 and 258 of the Constitution provides that every person has the right to institute proceedings claiming that the constitution has been contravened and 'person' in this regard includes one who acts in the public interest. They have put forward the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR**. The 2nd applicant herein is suing not just on its behalf but on behalf of all its members who will be affected by the 3rd respondent's project. There is a valid applicant and application before this court. The 3rd respondent has not stated what prejudice it will suffer by the participation of the 2nd applicant in these proceedings.

23. The issue of whether the suit is **res judicata** will require the ascertaining of facts. They have put forward the cases of **Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another [2014] eKLR; George Kamau Kimani & 4 others vs County Government of Trans Nzoia & Another [2014] eKLR**. A preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by the rules of evidence.

24. The orders issued by Lady Justice Nyamweya on 18th December 2020 did not fully determine the merits of the case of HCJR E11580 of 2020. The same was withdrawn by the Applicants through a Notice of Withdrawal on 18th December 2020. They have put forward the case of **Beljing Industrial Designing & Research Institute vs Lagoon Development Ltd [2015] eKRL**. The 3rd respondent has failed to prove all the limbs necessary to render this suit *res judicata*. They pray that the preliminary objections be dismissed with costs.

25. I have considered the preliminary objections, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the preliminary objections are merited.

26. The Ex parte applicants' cases is premises on the 1st respondent's issuance of the Environmental Impact Assessment Licence to the 3rd respondent on 13th October 2020. Section 9 (2) and (3) of the Fair Administrative Action Act, implores on courts to take up matters only if it is shown that the alternative mechanisms have been exhausted.

27. The 3rd respondent's director Jayantilal Jivraj Mepa Shah in his replying affidavit sworn on the 5th February 2021 states in paragraph 10:-

“That upon payment of the advertisement charges, the standard carried a public notice on the 19th January 2018 inviting anyone with an objection to the proposal of the change of user to forward the same in writing within 14 days of the notice. Annexed hereto and marked “JJMS 4(a)(b)” are copies of both the standard advertisement order dated 18th January 2018 and the advertisement extract carried on the standard on the 19th January 2018”.

In paragraph 11 he states:-

“That despite the notice of change of user from Single Dwelling Units to the offices and the latest attempt is an afterthought on the part of the applicants herein.”

In paragraph 17 he states:-

“That in any event, the applicants herein have not exhibited any evidence of any complaint or objection from either the 1st and 2nd respondent that the 3rd respondent has failed to comply with the conditions set out in the notification approval dated 13th November 2018.”

It is clear from the above averments that the ex parte applicants were aware of the 3rd respondent's plans to undertake the construction way back in 2018.

28. **Section 129** of the Environmental Management and Co-ordination Act provides that:-

Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

29. In the case of **Patrick Musumba vs National Commission & 4 others Nairobi [2016] eKLR**, the court relied on the Court of Appeal Decision on **Republic vs NEMA Ex parte Sound Equipment Ltd [2011] eKLR** where the Court made it clear that **“challenges to Environmental Impact Assessment study report and/or Environmental Impact Assessment Licenses 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”**.

30. Similarly, in the case of **Speaker of the National Assembly vs Hon. James Njenga Karume [2008] 1KLR 425**, the Court of Appeal held that:-

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed”.

I find that the Ex parte Applicants ought to have invoked the jurisdiction of National Environment Tribunal under section 125 and 129 (3) of Environment Management and Coordination Act before moving this court.

31. Also in the case of **Kibos Distillers Ltd & 4 others vs Benson Ambuti Atega & 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.....”

32. One of the prayers sought in the Notice of Motion dated 23rd December 2020 is for “an order of certiorari to remove into the High Court and quash forthwith the form PPA 2 – Notification of Approval of Development Permission dated 13th November 2018”. The Physical Planning Act has its own mechanism for dispute resolution. **Section 13(1) - (3)** of the Physical Planning Act provides that:-

“1. Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.

2. Subject to subsection (3), the liaison committee may reverse, confirm or vary the decision appealed against and make such order as it deems necessary or expedient to give effect to its decision.

3. When a decision is reversed by the liaison committee it shall, before making any order under subsection (2), afford the Director an opportunity of making representations as to any conditions or requirements which in his opinion ought to be included in the order, and shall also afford the appellant an opportunity to replying to such representations.”

Section 15(1) to (3) of Physical Planning Act provides that:-

“1. Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.

2. The National Liaison Committee may reverse, confirm or vary the decision appealed against.

3. The provisions of this Act relating to the determination by the Director or local authority of objections to physical development plans or development applications, as the case may be, or the determination of an appeal under section 13, shall apply *mutatis mutandis* to the determination of appeals by the National Liaison Committee under this section.”

33. The Ex parte Applicants have failed to demonstrate that there existed exceptional circumstances to warrant them to move this court before exhausting the mechanism set out in the Physical Planning Act. This position was stated in the case of **Republic vs NEMA Civil Appeal No 84 of 2010** where it was held:-

“The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case, and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

34. Similarly, in the case of **Director of Planning and Architecture County Government of Mombasa vs Makupa Transit Shade Ltd [2019] eKLR**, the Court of Appeal held thus:-

“...where there is an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether a matter is exceptional, it is necessary for the court to examine carefully the suitability of the statutory tribunal appeal. In the context of a particular case and ask itself whether the statutory body had the powers to determine the issues at hand. It is common ground that the issue at hand in this matters was about physical planning and execution of a development plan regarding land reclamation. The issues were purely matters of land reclamation, planning and development that are covered under the Physical Planning act. For the foresaid reasons we are persuaded the respondent ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning Act before engaging the High Court”.

I am guided by the above authority.

35. I agree with the Ex parte applicant’s submissions that these proceedings are not *res judicata* as HC JR E1158 of 2020 was not heard and determined on its merits. It was transferred to this court but the applicant withdrew the same. I am also of the view that the 2nd applicant lacks the *locus standi* to institute these proceedings in the absence of evidence of registration.

36. All in all, I am persuaded that the Ex parte applicants herein ought to have exhausted the alternative mechanism of dispute resolution in the Environmental Management and Coordination Act and Physical Planning Act before moving this court. The upshot of the matter is I find merit in the preliminary objection and the same is upheld. The Notice of Motion dated 23rd December 2020 and the entire proceedings are hereby struck out with costs to the respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15th day of April 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kanja for Mr. Abbas for the Ex parte Applicants

No appearance for the 1st Respondent

Mr. Maina for the 2nd Respondent.

Mr. Kaula for Mr. Kimani for the 3rd Respondent

Phyllis – Court Assistant