



**Mohamed v Nema & 2 others; Ahmaduna Housing Properties Ltd  
(Interested Party) (Environment and Land Miscellaneous Application  
15 of 2023) [2023] KEELC 21335 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21335 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 15 OF 2023  
SM KIBUNJA, J  
NOVEMBER 8, 2023**

**BETWEEN**

**KHALID AGIL MOHAMED ..... APPLICANT**

**AND**

**NEMA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL CONSTRUCTION AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**AHMADUNA HOUSING PROPERTIES LTD ..... INTERESTED PARTY**

**RULING**

[1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Preliminary Objections dated the 24<sup>th</sup> March 2023 and 6<sup>th</sup> March 2023 respectively]

1. Khalid Agil Mohamed, the applicant, filed the chamber summons under certificate of urgency dated 28<sup>th</sup> February 2023 under Order 53 Rule 1 (1), (2) and (4) of the Civil Procedure Rules and the [Law Reform Act](#) chapter 26 of Laws of Kenya seeking for the following orders:
  - a. “Spent.
  - b. The court be pleased to grant leave to apply for judicial review orders of mandamus compelling the National Environment Management Authority, County Government of Mombasa and National Construction Authority to stop the ongoing construction of a high-rise building on Plot No. Mombasa/Block XVI/70.



- c. The grant of leave to operate as a stay of any further construction activities on Plot No. Mombasa/Block XVI/70.
- d. The applicant be awarded the costs of this application.”

The application is supported by the statutory statement and the supporting affidavit both of Khalid Agil Mohamed, sworn on the 28<sup>th</sup> February 2023, in which he inter alia deposed that he is a resident on Mombasa/Block XV1/69 that neighbours Mombasa/Block XV1/70 that belongs to the interested party; that there has been unlawful failure by the respondents to stop the dangerous, unlawful and unauthorized construction of a high rise building on plot Mombasa/Block XV1/70 by the interested party; that the interested party has made a deep excavation which is very close to his property which has weakened part of his perimeter wall that has now collapsed; that the said construction has destroyed water pipes and sewerage system serving his house making it inhabitable; that the interested party has been stockpiling their construction material in front of the applicant’s residence, blocking his access to the property in addition to causing noise and air pollution; that he has made official complaints to the respondents herein but they have failed to take any action and urged the court to grant the orders sought herein.

2. The County Government of Mombasa, 2<sup>nd</sup> respondent, responded to the application by filing the Notice of Preliminary Objection dated 6<sup>th</sup> March 2023, raising two grounds, firstly that the judicial review cannot be used to challenge the substance or merits of decisions taken by a public authority and secondly that the court lacks jurisdiction to grant the leave to apply for judicial review orders in the nature of mandamus.
3. The National Environment Management Authority, 1<sup>st</sup> respondent, also responded to the application by filing the Notice of Preliminary Objection dated 24<sup>th</sup> March 2023, raising two grounds that firstly, the court is without appropriate jurisdiction over this matter as National Environment Tribunal [NET] is the forum of first call as determined in *Kibos Distillers Ltd & 4 others versus Benson Ambuti Adegwa & 3 Others* (2020) eKLR, and secondly that there is an EIA license dated 21<sup>st</sup> December 2022 approving the disputed construction and that the applicant ought to challenge the same in the tribunal pursuant to section 129 of EMCA.
4. The 3<sup>rd</sup> respondent responded to the application vide the replying affidavit sworn on 29<sup>th</sup> May 2023 by one Cindy Ogola, counsel for the 3<sup>rd</sup> respondent, among others supporting the Notices of Preliminary Objection of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
5. The court issued directions on the 27<sup>th</sup> March 2023 after hearing counsel for the parties that the two preliminary objections be heard and determined first through submissions to be filed and exchanged within the timelines given. Consequently, the learned counsel for the 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent and the applicant filed their submissions dated the 28<sup>th</sup> March 2023, 25<sup>th</sup> April 2023 and 3<sup>rd</sup> August 2023 respectively, which the court has considered.
6. The following are the issues for the court’s determinations:
  - a. Whether any of the grounds in the two notices of preliminary objection raise pure points of law that if upheld could determine the matter before the court.
  - b. Whether the application has been filed before this court before exhausting the prescribed statutory forums.
  - c. Whether the court is with jurisdiction to hear and determine this matter.



- d. Who pays the costs in the preliminary objections.
7. The court has carefully considered the grounds on the two Notices of Preliminary Objection filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, 3<sup>rd</sup> respondent's replying affidavit in support of the two preliminary objections, submissions by the learned counsel for the three parties, superior courts decisions relied upon thereon, the record and come to the following findings:

- a. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*, Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. further held,

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In their preliminary objection, the 2<sup>nd</sup> respondent objects to the application stating that judicial review cannot be used to challenge the substance or merits of the decisions taken by a public authority, and as such the court has no jurisdiction to grant leave as prayed in the application. To establish this, evidence would need to be called for which then means the ground does not amount to a pure point of law as required in *Mukisa Biscuit* case [supra].

- b. In the case of *Republic v Attorney General & Another; Ex-parte Applicants: Jude Njomo & Another [2020] eKLR*, it was held that,

“As to whether a jurisdictional objection raises a pure point of law, the relevant consideration as stated in *Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)* is whether that objections can be answered by applying relevant law and legal principles, as opposed to being answered by reference to facts and evidence as well as inferences arising from those facts. To the extent that a Court's jurisdiction flows from either *the Constitution* or statute or both, or and by principles laid out in judicial precedent and can only be determined in reference thereto, it is thus clearly a pure question of law.”

In the 1<sup>st</sup> respondent's preliminary objection, the ground raised is whether the court is with jurisdiction to hear and determine the application or the National Environment Tribunal is the appropriate forum under the statute. It is not in dispute that the ex-parte applicant is seeking leave of this court to apply for the judicial review order of mandamus to compel the



respondents herein to stop the interested party from continuing with construction on Plot No. Mombasa/ Block XVI/70.

- c. The jurisdiction of this court to hear and determine judicial review is anchored in Articles 47 and 165 (6) of *the Constitution* 2010. The 1<sup>st</sup> respondent objects to the jurisdiction of this court to consider these judicial review proceedings, as they are contrary to the doctrine of exhaustion. The 1<sup>st</sup> respondent submitted that the issue raised in the application relates to statutory approvals, permits and licenses granted by the respondents, and as such this court is not the forum of the first instance to determine the dispute. The 1<sup>st</sup> respondent submitted that the application defies the doctrine of exhaustion, which requires one to first exhaust internal mechanisms under the statute before invoking the jurisdiction of this court.
- d. It is trite law that judicial review is a remedy of last resort where there are available adequate remedies provided in statutes. Litigants are required to utilize the other avenues of redress or dispute resolutions in reference to the actions or inaction of public bodies before approaching the courts of law under its judicial review powers. Further its now a constitutional requirement that the court has to consider alternative forms of dispute resolution under Article 159 (2) (c) of *the Constitution*. The Court of Appeal in the case of Geoffrey Muthinja & Another versus Samuel Muguna Henry & 1756 others [2015] eKLR, empathized that where there is a remedy outside court specifically provided for, the same has to be considered and followed before parties came to court for redress. In specific the court held,

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

- e. The application by the applicant is specifically against NEMA, the County Government of Mombasa and the National Construction Authority, 1<sup>st</sup> to 3<sup>rd</sup> respondents respectively. These three public agencies have different mandates and issue different licenses and permits to a developer who seeks to undertake a development like a high-rise apartment. It is mandatory under Section 58 of the Environmental Management and Coordination Act for every proponent of a project before they finance, commence, proceed, carry out or execute any project to submit an Environmental Impact Assessment Study Report to the National Environment Management Authority, 1<sup>st</sup> respondent. Where the 1<sup>st</sup> respondent is satisfied



with the study, evaluation or review report it proceeds to issue an Environmental Impact Assessment license (EIA) on such terms and conditions as may be appropriate. Section 129 (1) of EMCA empowers anyone who is aggrieved by the grant of the EIA license to within 60 days from the date the license was granted, to appeal to the National Environmental Tribunal. The tribunal in turn has the power to issue stay orders maintaining the status quo until the said appeal is heard and determined. From what is disclosed herein, the applicant only made a complaint to the 1<sup>st</sup> respondent which was given reference number NEMA/MSA/1/2023/1023, and was acknowledged receipt on 21<sup>st</sup> February 2023 with a promise to address the issue and give feedback. It appears the applicant did not await the said feedback or seek further inquiry, but instead filed this application on 28<sup>th</sup> February 2023, which was seven days after raising the complaint with the 1<sup>st</sup> respondent.

- f. Under section 56 of Physical and Land Planning Act, the County Government of Mombasa, 2<sup>nd</sup> respondent, has the power in the area where the suit property is situated to consider and approve all development applications, and grant all development permissions as well as ensure the proper execution and implementation of approved physical and land use development plans. Section 57 of the said Act states that no person shall carry out any development without development permission issued by the respective County Executive Committee member. In case a developer commences development without obtaining the required development permission, or being in breach of any condition granted under the development permission, Section 72 empowers a County Executive Committee member to serve the owner or developer of the property with an enforcement notice. The enforcement notice is required to specify the unapproved developments and the conditions to be undertaken as well as the time within which to demolish any building, or to discontinue the use of the land. Where the developer is aggrieved by the enforcement notice, the appropriate forum is the County Physical and Land Use Planning Liaison Committee as provided for by Section 73 (3) of the said Act.
- g. The National Construction Authority, 3<sup>rd</sup> respondent, is mandated to oversee the construction industry by ensuring it promotes quality assurance in the industry. The 3<sup>rd</sup> respondent is obligated to ensure the construction site adheres to the quality standards by engaging a qualified contractor registered with the authority as provided in Section 15 of the [National Construction Authority Act](#). Section 23 of the Act empowers the 3<sup>rd</sup> respondent, through its investigating officer to enter into any construction site where construction works are being carried out and inspect it in relation to the accreditation and certification of the skilled construction workers, construction site supervisors and the payment of levy. Where the said accreditation is not adhered to, the investigating officers are empowered to issue in writing an order suspending all or any part of the construction works until compliance is adhered to.
- h. From the above analysis on some of the statutory responsibilities of the three respondents herein, it is clear that each of the three agencies has its own internal mechanisms for dealing with non-compliance with the terms and conditions laid out in construction approvals. For the 1<sup>st</sup> respondent, we have the National Environmental Tribunal, while in respect of the 2<sup>nd</sup> respondent there is the County Physical and Land Use Planning Liaison Committee and the 3<sup>rd</sup> respondent has the investigating officers. Each of the three agencies has different roles to play in approving and or conduct of the construction works as shown above. These alternative remedies are in my view, not only available but also adequate to address the instant exparte applicant's grievances in the first instance. The exparte applicant would still have recourse to this court in the event he is not satisfied with the decision to be made by any of those other



agencies. It is therefore my finding that it was premature to for the exparte applicant to invoke the judicial review jurisdiction of the court from the circumstances of the instant application.

- i. I have noted that the property where the construction subject matter of the complaints herein is taking place is described as Mombasa/Block XV1/70 in prayers (2) and (3) of the chamber summons, and paragraphs (B), (C) (1), (2) and (4) and (D) (i) and (ii) of the Statutory Statement as well as paragraphs (3) and (4) of the supporting affidavit. That however, annexure “KAM-2” which is a report from Philomu Mapping Services dated the 7<sup>th</sup> February 2023 at the reference and the body of the report refers to Mombasa/Block XV11/70. The plot where the applicant resides is described at paragraph (D) (i) and (v) of the Statutory Statement as Mombasa/Bock XV1/69 while paragraph (2) of the supporting affidavit refers to it as Mombasa/Block XV11/69. The tenancy lease agreement marked annexure “KAM-1” refers to the demised property as Mombasa/Block XV11/69. That as there are no copies of the title documents over the two properties described above that have been availed in this proceeding to help sought out the conflict on the correct description of the title, the court will rely on the descriptions of the properties as captured in the lease document and the experts report by Philomu Mapping Services. The plot where the applicant resides is therefore taken to be Mombasa/Block XV11/69, and not Mombasa/Block XV1/69, while the one where the contested construction is taking place is taken to be Mombasa/Block XV11/70, and not Mombasa/Block XV1/70. The two plots neighbours each other as confirmed by the sketch attached to “KAM-2”.
- j. The court takes judicial notice that there was another suit between Devendra Jakumar Sheith versus Ahmaduna Housing Properties Limited Mombasa ELC No. E010 of 2023 that was struck out through the ruling delivered by this court on the 26<sup>th</sup> April 2023 following a preliminary objection on jurisdiction. The court was then told that there was a pending matter being National Environmental Tribunal Appeal No. E003 of 2023 between the same parties and others over similar issues. The court further takes judicial notice that ELC No. E010 of 2023 had been filed through the same counsel that is appearing for the applicant in this proceeding. The court also takes judicial notice that the plaintiff in ELC No. E010 of 2023 filed an application before the Court of Appeal being Civil Application No. E035 of 2023 for injunction pending appeal over this court’s ruling of 26<sup>th</sup> April 2023. The application was heard and dismissed through the ruling delivered on the 28<sup>th</sup> July 2023. The court has received a copy of the said Court of Appeal ruling through the KLR case back.
- k. The applicant in the chamber summons dated the 28<sup>th</sup> February 2023 herein has presented himself as a tenant in Mombasa/Block XV11/69, while the plaintiff in ELC No. E010 of 2023 filed vide the plaint dated the 13<sup>th</sup> February 2023 had presented himself as a joint owner of Mombasa/Block XV11/69 with his mother. With this apparent contractual relationship between the applicant herein and the plaintiff in that other suit, the court is left wondering why the applicant did not seek to be joined in the previous related proceedings before this court or Court of Appeal or the tribunal and ventilate his interests therein instead of filing a separate proceeding over the same issue.
- l. As pointed out above, it is important to note that the instant application and ELC No. E010 of 2023 were filed through the same firm of advocates, who as officers of the court have obligations, just like the parties, under section 1A(3) of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya to assist the court to further the overriding objectives of the Act that is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Filing of multiple suits in courts over the same subject matters and the same parties or between those



they claim under is a practice that superior courts have frowned upon in numerous decisions as it is likely to bring the dignity and integrity of the court into ridicule through conflicting decisions that may arise therefrom, in addition to wasting judicial resources and time.

- m. It is my considered view that the *ex parte* applicant has failed to use and or first exhaust the available statutory alternative remedies which are equally convenient, beneficial and effective, before coming to this court, as he is obligated by the law to do. I find that the preliminary objection raised by the 1<sup>st</sup> respondent on jurisdiction has merit and is upheld.
- n. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs should follow the events unless for good cause otherwise ordered by the court. I do not find good cause to order otherwise in this matter.
  - 1. The above findings commend to the court that the following orders be issued:
    - a. That the 2<sup>nd</sup> respondent's preliminary objection does not raise a pure point of law and is rejected.
    - b. That the 1<sup>st</sup> respondent's preliminary objection on the court's jurisdiction on this matter is upheld.
    - c. That accordingly the applicant's chamber summons dated the 28<sup>th</sup> February 2023, through which this proceeding was commenced, is hereby struck out with costs.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 8<sup>th</sup> DAY OF NOVEMBER 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF:**

APPLICANT : Mr. Kinyanjui for Gikandi

RESPONDENTS : M/s Kuria for 2<sup>nd</sup> Respondent.

INTERESTED PARTY : No appearance.

WILSON – COURT ASSISTANT.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

