



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 13 OF 2020

JAMES MUNGAI MUNENE (CHAIRMAN).....1ST PETITIONER

FELIX KINYUA WANJOHI (SECRETARY.....2ND PETITIONER

(suing on their own behalf and and on behalf of VARSITYVILLE RESIDENTS' ASSOCIATION)

=VERSUS=

JOSEPH GITHINJI KAMAU.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA).....3RD RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....4TH RESPONDENT

JUDGMENT

1. Through a petition dated 22/10/2020, **James Muigai Munene** and **Felix Kinyua Wanjohi [the Petitioners]**, suing on their own behalf and on behalf of **Varsityville Residents Association [the Association]** - an association in which they served as Chairman and Secretary, respectively, sought the following verbatim orders against the respondents:

a) A declaratory order do issue declaring that there exists an overriding interest in the nature of a buffer zone of eighteen (18) meters strip between Varsityville Estate and Eastern Bypass Road for purpose of conserving the environment, which buffer zone belonging, under exclusive use and ownership of Varsityville Residents' Association and thus not available for alienation,

occupation and use by any individual or government agency. (sic)

b) A declaration order declaring that the failure by the respondents to fully comply with mandatory provisions of the Environmental Management Co-ordination Act, Chapter 387, Laws of Kenya, the Physical and Land Use Planning Act, No. 13 of 2019, before issuing an environmental impact assessment licence, approval for change of use licence and development permissions respectively had the effect of breaching the petitioners' rights to public participation, clean and healthy environment, or at the very least, had the potential to breach the petitioners' rights to clean and healthy environment as safeguarded/enshrined by Article 42 of the Constitution of Kenya 2010 and given effect by Article 70.

c) A declaration order do issue declaring that the actions of the respondents of granting an EIA licence, change of user approval, development permissions and construction permits, without public participation and compliance with the zoning, planning and land use and environmental laws, and allowing the construction of the 1st respondent's mixed-use business complex with a residential area on the suit property known as Plot No. Ruiru/Ruiru East Block 7/329 contravened Articles 10, 47 and 73 of the Constitution of Kenya, 2010.

d) A declaratory order do issue that the Petitioner's constitutional rights and freedoms as safeguarded/enshrined under Articles 10 , 31 (c), 35(1) (a), (b), 42(a) (b), 47(1) (2) and 50 of the Constitution of Kenya 2010 have been denied, threatened and violated by the respondents herein jointly and severally.

e) A declaration order do issue declaring that the development/ construction of a mixed-use commercial complex on the suit property known as Plot No. Ruiru/Ruiru East Block 7/329 by the 1st respondent within Varsityville Estate, a controlled low-

density residential dwelling has been undertaken in blatant violation of the Constitution of Kenya, 2010 and the law thus null and void ab initio.

f) An order declaring that any approvals for change of user, construction permits, licenses and development permission granted by the 2nd, 3rd and 4th respondents to the 1st respondent for the construction of a multi-dwelling commercial premises on the property known as Plot No. Ruiru/Ruiru East Block 7/329 within Varsityville Estate –a controlled single dwelling residential area have been issued clandestinely, whimsically, in secrecy, illegally and irregularly and the same are hereby revoked or cancelled.

g) An order of permanent injunction restraining the 1st respondent, his agents, proxies, workers, employees from undertaking and continuing construction and development of a mixed-use commercial complex on the property known as Plot No. Ruiru/Ruiru East Block 7/329.

h) A restoration order do issue compelling the respondents to restore the property known as Plot No. Ruiru/Ruiru East Block 7/329 in its initial state by demolishing the illegally erected mixed use commercial complex.

i) An order of permanent injunction restraining the 1st respondent, his agents, proxies, workers, employees or any other person from encroaching and/or trespassing on the 18-meter buffer zone situated in front of Varsityville Estate and adjacent Eastern Bypass without the approval and consent of Varsityville Residents' Association.

j) An order of prohibitory injunction to issue prohibiting the 2nd, 3rd and 4th respondents from issuing construction permits, approvals for change of use, EIA licence, development permissions, approvals and /or licenses to the 1st respondent or any other person(s) within Varsityville Estate for the construction of a multi-dwelling or mixed use commercial premises on the property known as Plot No. Ruiru/Ruiru East Block 7/329 or another property without fully complying with the zoning, physical planning, environmental and land use laws and undertaking mandatory public participation.

k) An order of general damages as against the 1st respondent for nuisance and trespass and/or encroachment by himself, his agents, proxies, workers, employees of the 18-meter buffer zone situated in front of Varsityville Estate adjacent to the Eastern Bypass.

l) An order of general damages as against the respondents herein jointly and severally for violating the petitioners' rights and freedoms as enshrined in the Constitution of Kenya 2010.

m) An order of punitive damages against the 2nd respondent for blatant violation of the zoning, physical planning, land use and environmental laws and provisions of the Constitution of Kenya, 2010.

n) An order of exemplary damages as against the respondents herein jointly or severally for breach of the Constitution and statutory provisions.

o) Costs of this petition.

p) Any other relief that this Honourable may deem fit to grant.

2. In summary, the petitioners and other members of the Association were aggrieved by a multi-storey mixed use commercial complex that the 1st respondent was erecting on **Land Parcel Number Ruiru/Ruiru East Block 7/327**. They contended that the impugned construction constituted an encroachment and trespass on a buffer zone and should never have been permitted by the approving authorities. It was their case that the impugned construction infringed on their right to privacy and to a clean and healthy environment. They contended that the 2nd, 3rd and 4th respondents had illegally allowed construction of a mixed use commercial complex by the 1st respondent within a controlled residential area of Varsityville Estate, adding that the estate lacked a sewer line to handle increased population in the impugned development.

3. The petitioners further alleged that the 2nd respondent had infringed their right to access information in that they had denied them the chance to inspect public documents relating to the licensing/approval of the impugned development. The petitioners added that the 2nd respondent had infringed their right to fair administrative action by refusing to consider or respond to their objections and grievances relating to the impugned project.

4. Together with the petition, the petitioners brought a notice of motion dated 22/10/22, seeking interlocutory injunctive reliefs, pending the hearing and determination of the petition. Subsequently, the petitioners abandoned the interlocutory application and opted to focus on the petition and on the preliminary objections filed by the 1st and 2nd respondents.

5. On 11/5/2021, Gacheru J directed that the preliminary objections and the petition be canvassed contemporaneously through written submissions. When this matter was eventually listed for mention to confirm filing and exchange of written submissions, Gacheru J had been transferred from Thika ELC Station. It is against the above background that the two preliminary objections and the petition fall for contemporaneous determination before this court.

6. The respondents opposed the petition though replying affidavits. They contended that the requisite approvals had been applied for and procedurally issued to the project proponent. They exhibited copies of the approvals in their responses to either the petition or the interlocutory application.

7. Since the two preliminary objections raise questions relating to the *locus standi* of the petitioners to bring this petition and the jurisdiction of this court to adjudicate the dispute in this petition, I will dispose them before I make any pronouncement on the merits of the petition. Indeed, had I been the one seized of this matter from the beginning, I would have first disposed the jurisdictional question in tandem with the principle in **Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Ltd (1989) 1 KLR in which Nyarangi JA stated thus:**

“ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

8. The 2nd respondent’s notice of preliminary objection is dated 4/12/2020. The gist of the preliminary objection is that the petitioners lacked the *locus standi* to initiate this petition because Varsityville Residents Association was a society registered under the Societies Act and could only institute proceedings in the names of its officials. The 1st respondent similarly objected to the petition on the same ground. I will dispose that limb of objection first.

9. The 1st and 2nd respondents’ contention that a society registered under the Societies Act can only sue through its registered officials is indeed the correct position of the law. However, it is not clear what court papers prompted the 1st and 2nd respondents to raise this ground of preliminary objection. I say so because the petitioners made it clear in the citation and descriptive parts of the petition that they were suing on their own behalf and on behalf of **Varsityville Residents Association**. There was nothing in the petition to suggest that the Association had brought the petition in its own name. With or without an annexure of a resolution from the Association, the petitioners do, in their individual capacity, have *locus standi* under Article 70 of the Constitution to initiate proceedings to enforce environmental rights. That is precisely what the petitioners did. For the above two reasons, I find no merit in this particular limb of the objection. I now turn to the 2nd limb of the 1st respondent’s preliminary objection dated 13/11/2020.

10. The second limb of the preliminary objection by the 1st respondent is four- pronged: (i) that the Physical and Land Use Planning Act, No 13 of 2019, divests from this court the primary adjudicatory mandate and vests it in the County Physical and Land Use Planning Liaison Committee, reserving in this court only appellate jurisdiction in physical and land use planning disputes; (ii) the Environment Management and Co-ordination Act (the EMCA) vests primary adjudicatory mandate in environmental impact assessment licensing disputes in the National Environment Tribunal (NET) established under Section 125 of the EMCA and reserves in this court only appellate jurisdiction; (iii) Section 27(3) and (4) of the National Construction Authority Act, No 41 of 2011 vests jurisdiction over disputes relating to licencing by the National Construction Authority in the Appeals Board established under Section 27 of the Act, reserving only appellate jurisdiction in the High Court; and (vi) this petition offends Section 16 of the Government Proceedings Act. I will analyse and make brief sequential pronouncements on the four limbs of the objection in the above order. For clarity and better understanding of the context, I will outline the relevant legal frameworks.

11. Through this petition, the petitioners have challenged the development permission granted to the 1st respondent by the 2nd respondent. In response, the 1s respondent contested the jurisdiction of this court and contended that under Section 61(3) of the Physical and Land Use Planning Act, the primary adjudicatory body vested with jurisdiction to adjudicate this dispute is the County Physical and Land Use Planning Liaison Committee. Section 61(3) of the Physical and Land Use Planning Act which the 1st respondent relied on provides as follows:

“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.”

12. Section 61(4) of the Physical and Land Use Planning Act 2019 [the PLUPA] contain the following framework on the jurisdiction of this court in disputes relating to the development and land use planning:

“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.”

13. From a proper reading of the above framework, it is clear that the PLUPA vests primary adjudicatory mandate in the County Physical and Land Use Planning Liaison Committee. The Act vests in this court appellate jurisdiction over decisions made by the County Physical and Land Use Planning Liaison Committees. The court therefore agrees with the 1st respondent that in so far as this petition challenges the land use approval and development permission granted to the 1st respondent by the 2nd respondent, the primary adjudicatory body to hear and determine the dispute in this petition is the County Physical and Land Use Planning Liaison Committee.

14. Besides challenging the development and land use permission granted to the 1st respondent, the petitioners, through this petition, challenged the EIA licence granted to the 1st respondent by the 3rd respondent. The 1st respondent contested the jurisdiction of this court contending that the dispute should have been lodged at the National Environment Tribunal (the NET). **Sections 129 and 130** of the EMCA provides as follows:

“129(1) Any person who is aggrieved by—

a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

d) the amount of money required to paid as a fee under this Act or its regulations;

e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations

may within sixty days after the occurrence of the event against which the person 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 or its agents 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 orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

e) if satisfied upon application by any party, review any orders made under paragraph (a).

(4) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection (3)(a).

130. Appeals to the Environment and Land Court

(1) any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.

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

(3) Notwithstanding the provisions of subsection (2), where the Director-General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director-General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking, until the appeal is finalised or the time for appeal has expired.

(4) Upon the hearing of an appeal under this section, the Environment and Land Court may—

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

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

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

(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(5) The decision of the Environment and Land Court on any appeal under this section shall be final.

15. A proper reading of the above framework again reveals that the primary adjudicatory body vested with jurisdiction to handle disputes relating to EIA licencing is the NET established under Section 125 of the EMCA. This court is vested with appellate jurisdiction in those

disputes. Consequently, I agree with the 1st respondent that to the extent that this petition challenges the EIA licence granted to the 1st respondent by the 3rd respondent, the court's jurisdiction has been invoked prematurely.

16. The 1st respondent's objection was partly anchored on the provisions of **Section 27** the **National Construction Authority Act** which provides as follows:

“(1) (1) There is established a board to be known as the National Construction Appeals Board (hereinafter referred to as “the Appeals Board”).

(2) The Appeals Board shall consist of the following persons, who shall be appointed

by the Minister—

(2) (a) a chairperson, being an advocate of the High Court of Kenya, who shall be nominated by the Attorney-General;

(b) a person with professional knowledge and experience in architecture, quantity surveying, engineering, building surveying or project management; and

(c) a person nominated by the Chartered Institute of Arbitrators (Kenya Chapter).

(3) An appeal shall lie to the Appeals Board at the suit of any person aggrieved by a decision of the Board under section 26(4).

(4) A person aggrieved by the decision of the appeals Board may within thirty days from the date of the decision of the Appeals Board appeal to the High Court.”

17. A proper understanding of the above framework requires that one reads the following provisions of **Section 26(4)** of the same Act:

“Any contractor aggrieved by a decision of the Board to —

(a) refuse to register the contractor;

(b) delete the contractor's name from the register; or

(c) suspend the contractor,

may within thirty days from the date of the decision of the Board appeal to the Appeals Board against the decision of the Board and the Appeals Board may give such directions in the matter as it deems proper.”

18. My interpretation of the framework in **Sections 26(4)** and **27** of the Act is that a contractor who is aggrieved by a decision of the Board of the National Construction Authority is required to lodge an appeal to the Appeals Board established under Section 27 of the Act. The petitioners in this petition are not aggrieved contractors. I do not therefore find any merit in the limb of the 1st respondent's objection that was anchored on Section 27 of the National Construction Authority Act.

19. Our courts have umpteen times stated that where Parliament has established primary dispute adjudication bodies and mechanisms, those mechanisms must be exhausted before the jurisdiction of our superior courts is invoked. The Court of Appeal emphasized this principle in **Speaker of the National Assembly v James Njenga Karume [1992] Civil Application No Nai 92 Of 1992 (Nai 40/92 UR) eKLR** in the following words:

“In our view, there is considerable merit in the submission 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.”

20. Not too long ago, the **Supreme Court of Kenya** in **Benard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR** outlined this principle in the following words:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

21. Similarly, not too long ago, the **Court of Appeal** in **Kibos Distillers Limited & 4 others v Benson Ambuti & 3 others [2020] eKLR** laid down the following principle relevant to these objections:

“Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legitimately been mandated to hear and determine a dispute.”

22. Lastly, the 1st respondent's objection was anchored on Section 16 of the **Government Proceedings Act** which provides as follows:

"(1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that—

(i) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.

23. Counsel for the 1st respondent urged the court to find that because the petitioner prayed for prohibitive injunctive orders, the petition herein contravened the law. The petitioners prayed for a total of 15 orders. Only 3 out of the 15 prayers relate to injunctions. The inclusion of the three prayers would in my view, not be a proper basis for striking out the entire petition. I do not find merit in this limb of the objection.

24. Consequently, it is my finding that the dispute in this petition revolves around questions of approvals and licencing under the Environmental Management and Co-ordination Act (the EMCA) and the Physical and Land Use Planning Act (the PLUPA). The primary dispute adjudicatory body mandated to adjudicate environmental impact assessment licensing disputes under the EMCA is the National Environment Tribunal (NET). This is by dint of the provisions of **Sections 125 and 129** of the EMCA. The primary dispute adjudication body mandated to adjudicate physical, land use, and development approval and permission disputes under the Physical and Land Use Planning Act 2019 is the County Physical and Land Use Planning Liaison Committee. This court is vested with appellate jurisdiction in those disputes. The result is that I uphold the objection anchored on the provisions of the EMCA and the PLUPA. I accordingly strike out the petition on the above grounds. The petitioners will be at liberty to ventilate their grievances in the relevant primary dispute adjudication bodies in accordance with the relevant procedures.

25. Having come to the above findings on the two preliminary objections dated 13/11/2020 and 4/12/2020 respectively, I will down my tools in tandem with the principle in **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**. **I will not make any analysis or pronouncement on the merits of the issues raised by the petitioners because that may prejudice the parties to this petition were they to ultimately go to the proper adjudication bodies for the adjudication of the disputes.**

26. Lastly, because there was no evidence that all the approvals and licences which the respondents exhibited in their responses had been availed to the petitioners prior to the filing of this petition, there will be no award of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF MARCH 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr. Kahare for the Petitioners

Mr. Mararo for the 2nd Respondent

Mr. Kinyua for the 1st Respondent

Court Assistant: Lucy Muthoni