Saylesh Court Limited v County Government of Nairobi & 4 others (Environment & Land Petition E006 of 2022) [2022] KEELC 2358 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2358 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E006 OF 2022

LN MBUGUA, J

JULY 7, 2022

BETWEEN

SAYLESH COURT LIMITED ..... PETITIONER

AND

COUNTY GOVERNMENT OF NAIROBI ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

ANIL SHANTKLAL MULJI THAKKAR ..... 3RD RESPONDENT

SANJAY S. THAKKAR ..... 4TH RESPONDENT

DIPAN SHANTKLAL MULJI THAKKAR ..... 5TH RESPONDENT

RULING

1. This suit was filed by way of a petition dated 3.3.2022, in which the Petitioner claims that it is the registered owner of LR NO. 209/4516 which is a residential development under the *Sectional Properties Act* comprising of 8 single storey residential units. They contend that the 1st Respondent has approved building plans for the proposed developments on adjustent land no. LR. 1870/IV/187 which approvals are not in conformity with the county's approved planning and development zoning policies. That the 3rd-5th Respondents illegally acquired a change of user approval of the suit property from residential to offices without either notifying the Petitioners who are the immediate neighbours or carrying out public participation.

2. The Petitioners claim that the office block construction sanctioned by the 1st and 2nd Respondents, damaged their property particularly unit no.8. Adding that the Respondents also placed a generator next to unit no. 8's master bedroom which is a nuisance to the quiet enjoyment of the property. The Petitioner also takes issue with the issuance of an Environment Impact Assessment license issued by the

2nd Respondent to the 3rd-5th Respondents averring that the same is out of character with the existing environment and that there was no public participation.

3. The Petitioners further state that they raised complaints with the National Construction Authority (NCA) on the nature of the construction carried out on L.R No. 1870/IV/187 and NCA issued various stop orders to the 3rd - 5th Respondents but the same were ignored and the construction continued.

4. The Petitioners therefore seek the following orders in the main suit

   a. A declaration that the respondents have violated the petitioner's rights to a safe, clean and healthy environment.

   b. A declaration that the decision in approving the change of user by the 1st respondent of L.R No. 1870/IV/187 was contrary to Article 10, 42, 47, 66, 68 and 73 of *the Constitution* of Kenya hence unconstitutional consequently null and void.

   c. A declaration that the approval by the 1st Respondent of the building plans for L.R No. 1870/IV/187 amounted to dereliction of its obligations and was therefore a violation of Article 42, 66 and 73 of *the Constitution* of Kenya.

   d. A declaration that the decision in approving and issuance of an environment impact assessment license by the 2nd Respondent for L.R No. 1870/IV/187 was contrary to Article 10,42,47, 66 and 73 of *the Constitution* of Kenya hence unconstitutional consequently null and void.

   e. An order by the Honourable Court under Article 70 of *the Constitution* cancelling the licenses, approvals and or permits issued by the 1st and 2nd Respondents to the 3rd, 4th and 5th Respondents in respect of the re-development of L.R No. 1870/IV/187.

   f. An order directing the 3rd, 4th and 5th Respondents to immediately demolish the office block constructed on L.R No. 1870/IV/187 and take restorative steps in respect of the plot and the environment.

   g. An order for the payment of general damages by the Respondents to the Petitioner for violating its right to a safe, clean and healthy environment.

   h. An order for costs of the petition.

5. The petitioner has also filed an application contemporaneously with the suit seeking conservatory orders to restrain the Respondents from any dealings with the suit property.

6. In response to the above, the 2nd Respondent filed a Notice of Preliminary Objection dated 25th April 2022 challenging the application and the petition as being premature on the grounds that it was an abuse of the court process since Petitioners did not adhere to provisions of Section 125 and 129 of the *Environmental Management and Coordination Act*, 1999 (EMCA) and Section 61(3) of the *Physical Planning and Land Use Act*, 2019 (as read with the Physical Planning Act, Cap 286-repealed). The 3rd–5th Respondents also filed a Preliminary Objection dated 17th May 2022 asking the Court to dismiss the suit for being an abuse of the court process for the same reasons as those outlined by the 2nd Respondent.

7. This ruling is therefore in respect of the two Preliminary Objections.

Submissions of the 2nd Respondent

8. In their submissions dated 23rd May 2022, the 2nd Respondent stated that they are the statutory body mandated to exercise general supervision and coordination over all matters relating to the environment. Reference was made to the provisions of Section 9 (i) and (1) and Section 58 of the *EMCA*. It was further submitted that Section 125 of the said Act establishes the National Environment Tribunal, while Section 129(1) and (2) provides for appeals to the Tribunal on grievances under the Act and that the orders sought by the Petitioner were matters well placed under the jurisdiction of the Tribunal.

9. On matters planning, it was submitted that grievances over change of user and approval of building plans were issues under the mandate of the County Physical and Land Use Planning Liaison Committees as provided under Section 61 of the *Physical and Land Use Planning Act* (2019).

10. The 2nd Respondent therefore contends that the suit should be dismissed with costs as it went against the doctrine of exhaustion.

11. In support of their arguments, the 2nd Respondents proffered the following cases; *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR; *Jason Edward Matus & Another v Summit Gehlot & Another; NEMA & 2 Others (Interested Parties)* [2021] eKLR; Court of Appeal case of *Kibos Distillers Limited and 4 others v. Benson Ambuti Adega and 3 others* [2020) eKLR (and the decision of the Supreme Court in the same case) and *United Millers Limited v. Kenya Bureau of Standards and 5 others* (2021) eKLR where the common factor was that courts' original jurisdiction does not operate to oust the jurisdiction of other competent organs mandated to address disputes.

Submissions of the 3rd- 5thRespondents

12. In their submissions dated 6th June 2022, the 3rd -5th Respondents aver that the Preliminary Objections which questioned the jurisdiction of this court were on pure points of law as established in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696. They contend that this court does not have jurisdiction to determine the dispute because there are bodies established and mandated to address the issues raised.

13. Reference was made to the provisions of Sections 125 and 129 of the *Environmental Management and Coordination Act* and the cases of; *County Government of Migori v INB Management IT Consulting Limited* [2019] eKLR; *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others* [2012] eKLR; *Kibos Distillers* (supra), *Whitehorse Investments Ltd v Nairobi City County* [2019] eKLR; *Charles Ngigi Ndungu & 2 others v County Governmnet of Kiambu & 7 others* [2019] eKLR; *Koome Mwambia & 3 others v Deshun Properties Company Limited & 4 others* [2014] eKLR; *Symon Wangombe Gathua & 6 others v Attorney General & 6 others* [2020] eKLR and *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR 229.

14. The 3rd-5th Respondents urge the court to dismiss the suit with costs as the same is an abuse of the court process.

Submissions of the Petitioner

15. Vide the submissions dated 2nd June 2022, the Petitioners contend that this court has jurisdiction to determine the dispute at hand arguing that the issues raised were beyond the National Environmental Tribunal (NET) and the Nairobi County Physical Planning Liaison Committee noting that some of the issues were on interpretation of *the Constitution* and the said forums could not determine such questions. To butress their arguments, the Petitioners made reference to the case of *Ken Kasing'a*

v Daniel Kiplagat Kirui & 5 others [2015] eKLR and asked the court to dismiss the Preliminary Objections with costs.

Analysis and determination

16. I have considered all the arguments raised herein and I have keenly perused the pleadings of the petitioner. The issue falling for determination is whether the suit and the application should be struck out with costs for want of jurisdiction.

17. The Supreme Court in *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR stated:

> "(17) On the issue of jurisdiction, we stated in Aviation & Allied Workers Union Kenya v. Kenya Airways & Others; SC Application No. 50 of 2014, [2015] eKLR that where a court's jurisdiction, is objected to by any party to the proceedings, such an objection must be dealt with as a preliminary issue, before the meritorious determination of any cause".

18. The Supreme Court in the above mentioned case of *United Millers Limited made reference to their case in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, where the court stated that;

> " Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance..".

19. The Respondents contend that the laid down dispute resolution mechanisms under the *Environmental Management and Co-ordination Act* and *Physical and Land Use Planning Act*, 2019 should have been exhausted before turning to this court for redress.

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

> "(1) (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."

21. Section 130 further stipulates:

"(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 High Court."

22. When it comes to issues of planning, the 2nd Respondent has put the issue into a better perspective in submitting that

"Section 61 of the *Physical and Land Use Planning Act* of 2019 provides for and enumerates the procedures that must be complied with in the event that some one is aggrieved and or dissatisfied by the grant and or refusal to grant any approval under the Act". .

23. Subsection 3 and 4 there of provides as follows;

"(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".

24. Section 78 further provides:

"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";

25. Regulation 11 of the *Physical and Land Use Planning (Liaison Committees) Regulations*, 2020 provides:

> "(1) A person who is aggrieved by a decision of the planning authority may file an appeal to the Committee in accordance with section 32 (4) or 75(2)".

26. What resonates from the foregoing precedents and the various statutory frameworks is that litigants should not hide behind Constitutional questions to avoid abiding by the laid out dispute resolution procedures. Thus Courts ought to be fora of last resort and not the first port of call the moment a storm brews, see- *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR.

27. In the current suit, the claimant is by and large challenging the change of user and building approval plans issued to the 3rd - 5th respondents as well as the Environmental Impact Assessment license which are issues falling under the various bodies with statutory mandate.

28. In *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR, the Supreme Court of Kenya stated that;

> "Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism. Emphasize added".

29. I stand guided by the aforementioned statutes and case law and conclude that this is a matter where the court, though having jurisdiction in matters land is called upon to exercise restraint. The petitioner is called upon to lodge his grievances before the relevant bodies for the adjudication of the dispute at hand.

In that regard, the suit and the application are hereby struck out and each party is to bear their own costs thereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kimani holding brief for M/s Akanga for 3rd – 5th Respondents Muyai for 2nd Respondent

Court Assistant: Eddel