Nginyi v Alphope Holdings Limited & 4 others (Judicial Review E022 of 2021) [2022] KEELC 14723 (KLR) (3 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14723 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

JUDICIAL REVIEW E022 OF 2021

MD MWANGI, J

NOVEMBER 3, 2022

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: NOTIFICATION APPROVAL OF DEVELOPMENT PERMISSION OF CHANGE OF USER ON L.R. NO.

NAIROBI/BLOCK 139/705 ISSUED TO JAMES NJIRAINI GACHANJA BY THE NAIROBI CITY COUNTY ON 26TH SEPTEMBER 2018

AND

IN THE MATTER OF: ARTICLES 22,23,42,47,69,70,232(1),232(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: LAND ACT NO 6 OF 2012, PHYSICAL PLANNING ACT (NO 6 OF 1996), ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

BETWEEN

DENNIS MWANGI NGINYI ..... APPLICANT

AND

ALPHOPE HOLDINGS LIMITED ..... 1ST RESPONDENT

DIRECTOR OF PHYSICAL PLANNING NAIROBI CITY COUNTY ..... 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY ..... 4TH RESPONDENT

CHIEF LANDS REGISTRAR ..... 5TH RESPONDENT

JUDGMENT

Background

1. The*ex parte* applicant in this matter by way of the notice of motion application dated November 8, 2021 and brought under the provisions of order 53 rule 3(1) of the *Civil Procedure Rules* & sections 8 & 9 of the *Law Reform Act*, cap 26 of the Laws of Kenya seeks for judicial review orders for: -

    a. An order of *certiorari* for purposes of quashing the administrative action of the 2nd respondent, whether by themselves, their servants, agents, officers, successors, and/or assigns to quash the administrative action of September 13, 2018 approving the change of user PRN: PPA-CU-AAB344 (PPA 2) for the construction of multi-storey dwelling and/or apartment building on LR No Nairobi/Block 139/705 submitted by James Njiraini Gachanja to the 2nd respondent on behalf of the 1st respondent.

    b. An order of prohibition directed to the 2nd respondent prohibiting it from approving any building plans for LR No Nairobi Block 139/705 and also directed to the 5th respondent prohibiting him/her not to issue any lease with regards to the proposed change of user with regards to multi-dwelling units.

    c. An order of *mandamus* directed to the 2nd and 4th respondents compelling them to demolish the multi-dwelling units now erected on LR No Nairobi Block 139/705.

    d. A permanent injunction restraining the 2nd and 4th respondents whether by themselves, their servants or agents or howsoever otherwise from approving any change of user or approval of building plans for multi-dwelling units with regards to LR No Nairobi Block 139/705.

    e. A declaration that Nairobi Block 139, Marurui under the auspices of Marurui Estate Residents Welfare Association (MERWA) is an area set aside for single dwelling units as per the leases issued for that area by the 5th respondent.

    f. An order for costs and such furtheror other relief be granted to the applicant as this court deems fit.

2. The application is backed by 'the statement' dated November 8, 2021 and the verifying affidavit sworn by Dennis Mwangi Ngunyi onNovember 8, 2021.

3. The application is opposed by all the respondents.

The Applicant's Case.

4. The applicantis the owner of a parcel of land known as LR No Nairobi/Block 139/706 which borders the 1st respondent's parcel of land known as LR No Nairobi/Block 139/705.

5. The applicant in his pleadings avers that both parcels of land and the whole general area (block 139) are registered under a lease which provides that they shall only be used for one private dwelling house and that the buildings shall not cover more than 50% of the land or as may be provided by the local authority in its by-laws.

6. The applicant further avers that sometimes in the year 2021, he noticed some developments in the 1st respondent's parcel of land, LR No Nairobi/Block 139/705. There was however, no signboard nor a notice erected on the 1st respondent's land indicating the kind of proposed development as required by the law.

7. The applicant later on through other means learnt that the 1st respondent was constructing flats/ apartments despite the limitations in the leases for that general area. The 1st respondent had allegedly gotten approval to undertake the proposed kind of development from the respondents.

8. The applicant madethe effort of informing his estate's association (Marurui Estate Residents Association), the2nd respondent as well as the 3rd & 4th respondents who however took no appropriate action to stop the development.

9. It was only the 4th respondent who belatedly took the action of marking the 1st respondent's apartments/flats as illegal structures, but after they had been constructed.

10. Theapplicant is categorical that the 2nd respondent, the Director of Physical Planning of Nairobi City County, has never erected on the 1st respondent's land a public notice on the change of user (from one dwelling unit to multi-dwelling units) at any one time and or published such an intention in an advertisement in any local newspaper. The failure by the 2nd respondent particularly denied the applicant, and the residents of the affected estate, the opportunity to file an objection to the alleged change of user thereby violating their right to fair administrative action.

11. The applicant affirms that the 2nd respondent proceeded without notice to the residents of the estate to approve change of user of the 1st respondent's parcel of land from a single dwelling unit to multi-dwelling units on September 13, 2018. The change of user was issued to one James Njiraini Gachanja, an agent of the 1st respondent on September 26, 2018.

12. Accordingly, on March 31, 2021, the 1st respondent commenced the construction of a multi-dwelling apartment building on the parcel of land Nairobi/Block 139/705 having irregularly obtained the change of user through material non-disclosure of facts and blatant falsehoods. In any event, the ex parte applicant opines that by the time the 1st respondent commenced the construction, the approvals had already expired having been issued in September 2018.

13. Theapplicant further contends that the construction undertaken by the 1st respondent violates the building code as the pillars of the building have been constructed against his own wall; putting his house at risk in case of a fire outbreak or other disaster. Further that the construction covers the entire plot contrary even to the alleged approval by the 2nd respondent. Finally, that the construction was commenced without any Environment Impact Assessment Report being prepared.

14. Theapplicant claims that after he served the 1st respondent with a demand to stop the construction, the 1st respondent threw all caution to the wind in a bid to rush the completion of the structure and defeat the purposes of this case. As a result, the applicant alleges that the building is now 'sinking' posing a threat to the entire neighborhood in general but to the applicant's life and home in particular.

15. After theapplicant obtained leave of this court to file for judicial review orders, the 4th respondent's, (National Construction Authority - NCA) officers proceeded to the site and marked the building as unauthorized, illegal and unlawful. The applicant states that this was an indication that the construction was undertaken without an NCA approved contractor contrary to the requirement in the approval 'PPA 2' (albeit, expired)

16. Theapplicant finally asserts that the approval 'PPA 2' required the 1st respondent to commence construction within one year of its issuance and to complete within 2 years, which period ended in September 2020. Further that no structural plans were submitted neither was an environmental impact assessment report conducted. It is the applicant's further assertion that no change of user was undertaken at the Ministry of Land's offices. The planning brief submitted before change of user did not attach photos of the immediate surroundings of the 1st respondent's parcel of land rather what the planner attached were the photos of the commercial centre at Marurui to misrepresent to the Nairobi City Planning Committee about the status of the general area.

17. Theapplicant states that the development by the 1st respondent is not only a nuisance but infringes on his rights to privacy and the right to own and enjoy his property in a serene atmosphere and environment. The construction has further breached all the 'planning allocation of leases regulations and conditions' and environmental laws and by-laws. The applicant, therefore terms it an illegality.

18. Theapplicant states that he acquired and developed his property in the belief that the conditions/ regulations in the leases for the area around him would be respected to ensure only controlled developments. The applicant and his neighbors' expectation was that, in case there was an application for change of user by any one of them, they, as interested parties would be informed and consulted. in this instance, there was not even pretence of public participation at all prior to the issuance of the approval and change of user of the 1st defendant's parcel of land.

19. The applicant justifies the orders sought in this matter by an argument that the actions of the 2nd respondent amounts to clear violations of the right to fair administrative action as set out in sections 7, 8, 9, 10 & 11 of the *Fair Administrative Action Act* and a breach of the provisions set out in sections 10(2), (c) of Act No 9 of 1996. Further that they amount to a contravention of the applicant's rights under articles 22, 23, 42, 47, 69, 70, and 232 (1) of the *Constitution*.

20. The applicant affirms that the 2nd respondent is by law obligated to listen to and act on any complaints raised by any person in regard to its decision of issuing approvals. In this instance it blatantly and unlawfully neglected to do so.

21. Notice and demand were duly issued to the 1st respondent by the applicant to stop further construction but it took no heed despite the fact that the documents that it had been issued by the 2nd respondent had already expired.

Response by the 1st Respondent.

22. The1st respondent's response to the notice of motion application by the *ex parte* applicant was by way of a replying affidavit sworn by one Dennis Ben Mosota, a director of the 1st respondent company.

23. Thedeponent confirmed that the 1st respondent was and remains the registered proprietor of the parcel of land known as Nairobi Block/139/705 at Marurui within Nairobi County, which it acquired from one John Migwi, the previous proprietor.

24. Prior to selling the said property to the 1st respondent, the said John Migwi had applied for a change of user and development permission from the Nairobi City County Government. In compliance with the then *Physical Planning Act*, cap 286 Laws of Kenya, (now repealed) a notification had been published in the Daily Nation Newspaper of July 27, 2018 inviting any person who had an objection to the proposed change of user to forward it to the County Secretary of the Nairobi City County Government stating the grounds of the objections thereto.

25. The deponent deposesthat no objections were received either from the applicant in this case or any other person forthat matter. The 2nd respondent therefore, and in the absence of any objections to the proposed change of user considered the application on September 13, 2018 and approved the same on September 27, 2018.

26. The deponent opines that the 1st respondent fully complied with the provisions of the *Physical Planning Act* (now repealed), specifically section 30(1) thereof. Further, it's the deponent's view that the 2nd respondent had due regard to the provisions of the law then applicable and the favourable comments by the officers/authorities stipulated under section 32 of the repealed Act.

27. The deponent avers that the application by the applicant herein is an afterthought. The applicant is guilty of inordinate delay as he seeks to object to a development after the lapse of over 2 years, after the issuance of the development permission. He had slept on his right to appeal against the issuance of the development permission. Theapplicant had had a reasonable opportunity to raise his concerns in the right forum but he however slept on his rights.

28. The deponent denies the allegations by the applicant in respect to the submission of structural plans and categorically aver that the 1st respondent duly complied with the conditions set out in the development permission by submitting structural plans which were duly received and approved as well as submitting the 'renewal for site construction board' on the property indicating the project, the architect and the NEMA & County Government of Nairobi Licenses. The deponent further affirms that prior to the expiration of the permission issued on August 8, 2018, the 1st respondent actually applied for renewal under the repealed *Physical Planning Act*, 2019, though it was yet to procure the renewal certificate.

29. The deponent states that the 'general character' of the area where the 1st respondent's development is located is a 'mixed use' development which was clearly set out in the planning brief submitted by the 1st respondent to the 2nd respondent. The development according to the deponent is therefore not 'out of character' with the general area.

30. In respect to the Environmental Impact Assessment, the deponent deposes that the 1st respondent duly complied and submitted a report dated May 19, 2021 to the 3rd respondent in accordance with section 58(1) of the *Environment Management and Coordination Act*, 2015 and the regulations 2003. NEMA duly issued the 1st respondent a licence number NEMA/EIA/PSL/14103.

31. The deponent denies that the 1st respondent was ever issued with a 'stop order' directing the stoppage of the construction at any one time.

32. It is the 1st respondent's contention that after being issued with the NEMA licence, it erected a conspicuous sign outside its property clearly indicating the NEMA licence number and thereby constructively notifying all the residents of the estate of its issuance. The applicant did not appeal against the issuance of the licence as provided for under section 129 of the EMCA.

33. Finally, the 1st respondent avers that it complied with the provisions of section 31 of the *National Construction Authority Act* and duly obtained a certificate of compliance, which it has attached to the replying affidavit marked and marked as 'DBM9'. The deponent deposes that the development has not been 'earmarked' for demolition by the 4th respondent for non-compliance as alleged by the applicant.

34. The 1st respondent therefore prays for the dismissal of the notice of motion by the applicant.

Response by the 2nd Respondent.

35. The 2nd respondent responded to the application herein by way of the replying affidavit sworn by one Abwao Erick, the Nairobi City County Attorney on the December 22, 2021.

36. In essence, the deponent deposes that the 2nd respondent followed the due process as prescribed by the law in approving the application for change of user by the 1st respondent. The 2nd respondent did not receive any objection from the applicant or any other party despite appropriate notice having been given. it is therefore inconceivable for the applicant to allege that the 2nd respondent did not consider the issues raised. No issue was raised whatsoever by any person. The alleged complaints came after the approval had already been given to the 1st respondent.

37. The allegations bythe applicant are therefore not only malicious but unfounded. The deponent asserts that the 2nd respondent conducted its statutory mandate in accordance with the law.

Response by the 3rd Respondent.

38. The 3rd respondent, NEMA, responded to the application by way of a replying affidavit sworn by one Ali Mwanzei, its Deputy Director in charge of field operations. He deposed that NEMA had received an Environment Impact Assessment Summary Project Report from the 1st respondent on or about May 20, 2021.

39. After reviewing the report, it became apparent that the project was of such a magnitude that required a comprehensive EIA project report. NEMA accordingly advised the 1st respondent on June 4, 2021. The 1st respondent did not however comply; it did not submit the report as required. The 3rd defendant did not therefore issue a license. It was only after the 3rd defendant was served with the pleadings in this matter that it became aware of the infraction by the 1st defendant.

40. NEMA conducted a site visit after receiving the pleadings and realized that the 1st respondent had commenced the project without an EIA license and or approval of the NEMA. It therefore immediately issued the 1st respondent with a stop order halting any further construction activities on the site until compliance and approval was issued appropriately.

41. The 3rd respondent therefore denies the applicant's allegations that it was at all times aware of the issues. It is further categorical that it did not issue an EIA license to the 1st respondent.

Response by the 4th Respondent.

42. The 4th respondent, the National Construction Authority (NCA) responded to the application by way of a replying affidavit sworn by one Stephen Mwilu, its Compliance Manager.

43. The deponent deposed that the mandate of NCA is to oversee the construction industry and co-ordinate its development as well as promote and ensure quality assurance in the construction industry.

44. Regulation 17 of the National Construction Authority Regulations, 2014 provide for registration of all construction works, contracts or projects either in public or private sector in accordance with the Act.

45. The mandate of the 4th respondent is complementary to the role of other agencies and regulators including the County Governments & NEMA. It is the County Governments that undertake the approval process of any construction project within their respective counties. The 4th respondent only

comes in to register the construction works once a construction project has been approved by the relevant county government.

46. In the instant case,the 4th respondent received the 1st respondent's project registration application via its online project registration system(OPRS) with all the requisite documentations attached including approvals from the City County Government and NEMA. After review and verification, the 4th respondent went ahead to issue a compliance certificate registration number 53127915710160 dated December 2, 2021 to the 1st respondent.

47. The4th respondent asserts that the 1st respondent furnished it with all the requisite documents that informed the issuance of the certificate of compliance. Before the issuance of this compliance certificate, the 4th respondent had first suspended the works on the 1st respondent's proposed residential development since it was found to be non-compliant with all the 7 key areas indicated on the 'suspension of works' letter dated June 23, 2021.

48. When the 4th respondent conducted another site inspection in line with section 23(2) of the Act and the 1st respondent's site was still non-compliant, it again suspended all the works for a second time. It only issued the compliance certificate upon being satisfied of the 1st respondent's full compliance with the terms and conditions specified in the 7 key areas.

49. It's the 4th respondent's contention that the issues raised in the application herein are covered under the *Physical and Land Use Planning Act*, 2019, which governs issues relating to planning, use, regulation and development of land in Kenya and to which the 4th respondent is not a regulator.

50. The4th respondent therefore asserts that the orders sought by the applicant against it lack merit and are therefore frivolous as they don't touch on the statutory mandate of the 4th respondent.

Response by the 5th Respondent.

51. The 5th respondent is the Chief Land Registrar who is represented by the Attorney General. The 5th respondent's response was a preliminary objection dated February 25, 2022. The preliminary objection is framed as follows: -

    a. That thishonourable court does not have the jurisdiction to entertain this matter as there is a clear procedure for redress set out under section 78 of the *Physical and Land Use Planning Act*, No 13 of 2019.

    b. That where there is a clear procedure for the redress of any particular grievance prescribed by an Act of Parliament that procedure should be strictly followed.

Court's Directions.

52. The court's directions in this matter, with the agreement of the parties were that the case be dispensed with by way of written submissions. The preliminary objection by the 5th respondent too was to be dispensed with in the same manner. Parties complied and the court has had the occasion to read the comprehensive submissions put forth by all the parties.

53. I wish to appreciate the advocates for all the parties in this matter for their effort which will definitely enrich the jurisprudence in the various aspects of the law under consideration.

Issues for determination

54. As already pointed out, the 5th respondent raised a preliminary objection challenging this court's jurisdiction to entertain this matter on the basis that there is an alternative clear procedure for redress of the kind of grievances raised by the *ex parte* applicant set out under section 78 of the *Physical and Land Use Planning Act*, No 13 of 2019.

55. The 5th respondent was categorical that where there is a clear procedure for the redress of any particular grievance prescribed by an Act of Parliament, that procedure should be strictly followed.

56. It is the court's opinion that since the issues raised in the preliminary objection by the 5th respondent touch on the jurisdiction of this court to entertain the matter before it, the preliminary objection must be considered first.

57. 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."

58. The *ex parte* applicant approached this court by way of judicial review seeking as already pointed out earlier to nullify 'the administrative action' of the 2nd respondent approving change of user of the 1st respondent's parcel of land LR No Nairobi/Block 139/705 and prohibit it from approving any building plans on the suit property amongst the other orders sought; all flowing from the approval of change of user.

59. Section 9 of the *Fair Administrative Action Act* makes provision giving right to an aggrieved party 'arising from an administrative action' to apply for judicial review of such an administrative action.

60. Section 9 of the *Fair Administrative Actions Act* (FAAA) provides that;

> '9. Procedure for judicial review'
>
> (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.
>
> (2) The High Court or a subordinate court under subsection (1)shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. (emphasis mine)

(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or asubordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if thecourt considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

61. The subsection (2) above is clear, plain and unequivocal that a court shall not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

62. Subsection (4) allows the court the discretion, 'in exceptional circumstances' and on application by the applicant, to exempt such an applicant from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

63. Section 12 of the FAA Act is also quite instructive. It provides that this Act (FAA Act) is an 'addition to' and not in derogation from the general principles of common law and the rules of natural justice.

64. The preliminary objection by the 5th respondent though not expressly stated to be brought under section 9 of the FAA Act clearly aligns with the provisions of that section.

65. The Supreme Court of Kenya in the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others* (2020) eKLR, while citing its earlier decision in *R v Karisa Chengo* (2017) eKLR emphasized that: -

> " By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics..... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

66. The court had also in the case of *Samuel Kamau Macharia& anotherv Kenya Commercial Bank Ltd & 2 others* (2012) eKLR also held that:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

67. The Supreme Court went further to point out that a court must operate within the constitutional limits.

> "It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

68. This court must then make a determination whether the issues in question in this matter fall within its 'defined scope'.

69. The Court of Appeal of Kenya pronounced itself in the famous case of *Speaker of National Assembly v Karume* (1992) KLR in the following words: -

> "Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

70. The Karume case was decided prior to the 2010 *Constitution*. However, the reasoning in the case has been adopted and affirmed post the 2010 *Constitution*.

71. In the case of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* (2015) eKLR, the Court of Appeal once again upheld the exhaustion doctrine in the following words: -

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is 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 the courts."

72. The Court of Appeal was emphatic that the exhaustion doctrine aligns with article 159 of the *Constitution* which enjoins courts to encourage alternative means of dispute resolution.

73. The Supreme Court too in the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others* (2020) eKLR, affirmed the exhaustion doctrine.

74. Discussing the doctrine, also referred to as the 'doctrine of judicial abstention', the Supreme Court stated that the doctrine is not founded in constitutional or statutory provisions. It 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 otherwise legislatively mandated institutions and mechanisms.'

75. In this case, section 78 of the *Physical and Land Use Act* is explicit that the County Physical and Land Use Planning Liaison Committee has the responsibility to hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county and appeals against decisions made by the planning authority with respect to physical and land use development plans in the county.

76. The applicant in this matter should therefore have exhausted that internal mechanism before approaching this court as he did by way of judicial review. Section 9(2) of the FAA Act is categorical, couched in mandatory terms, leaving nothing to doubt that a court shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The liaison committee ought to have been the first port of call. It is only 'in exceptional circumstances' and on application by the applicant that the court would have had the leeway to exempt such an applicant from the obligation to exhaust the alternative remedies in the interest of justice.

77. No exceptional circumstance(s) has been pleaded in this matter and no application has been made for such exemption anyway by the applicant. For that reason, I uphold the preliminary objection by the 5th respondent.

78. In any event, the remedy of judicial review is different from a review or an appeal. The matter before me was framed in the form of an appeal from the administrative decision of the 2nd respondent to this court.

79. In *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal stated;

> "Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision the maker took into account relevant matters or did into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision".

80. Peter Kaluma in his book, '*Judicial Review, Law Procedure and Practice*' at page 46 states that;

> "Judicial review is not an appeal from a decision but a review of the decision making process and the legality of the decision making process itself. When determining an appeal, the court is concerned with the merits of a decision. Conversely in judicial review the court's exclusive concern is with the legality of the administrative action or decision in question. Thus instead of substituting its own decision for that of another body, as happens in appeals, the court in an application for judicial review is concerned with the question as to whether or not the action under attack is lawful or should be allowed to stand or be quashed."

81. The upshot is that the preliminary objection by the 5th respondent is upheld and the application by the *ex parte* applicant is hereby struck out.

82. Having found that this court lacks the jurisdiction to entertain this matter, I must down my tools as held in the famous case of *Owners of the Motor Vessel "Lillian S"*(1989) KLR.

> '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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

83. The only issue that I must now consider is that of costs. The matter before the court was in the nature of a public interest litigation seeking to enforce the right to a clean and healthy environment amongst

others. For that reason, I will not condemn the *ex parte* applicant to pay the costs of the case. Each party shall bear its own costs.

84. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Korir holding brief for Mr. Thimba for the Applicant.

Mr. Ngara for the 3rd Respondent.

Ms. Cindy Ogola holding brief for Ms. Carol Korir for the 3rd Respondent.

Ms. Nganga for the 1st Respondent.

Ms. Shenga holding brief for Kioko for the 2nd Respondent.

Court Assistant- Hilda.

M.D. MWANGI

JUDGE