REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC PETITION NO.E002 OF 2020

DANIEL WAITHANJI MWANGI...........1st PETITIONER

FRANCIS MACHARIA MWANGI.......2ND PETITIONER

JOHN NJOROGE MWANGI................3RD PETITIONER

VERSUS

CONTRACTORS AND

HARVESTORS LIMITED..........................RESPONDENT

J U D G M E N T

1. The petitioners herein moved the court through a petition dated 23rd October, 2020. The petitioners describe themselves as the registered proprietors of all that parcel of land L.R No. 519/354 situated in Njoro within an area designated as an Industrial Zone. They bring this petition against the respondent who they assert is the owner of all that parcel of land L.R No. 519/344 situated within a designated industrial zone adjacent to the petitioner's land.

2. The petitioners aver that the respondent intends to subdivide and offer for sale 50ft by 100ft plots for purposes of residential use on its parcel of land which lies within the designated industrial zone. The petitioners further aver that the respondent has not obtained a change of user and or conducted an environmental impact assessment and that the petitioners' have not been furnished with an application for approval given that the intended project does not conform to the conditions attached to the lease title. The petitioners further also aver that the process of planning approval has not been lawfully adhered to.

3. The petitioners' state that they have been running a large sawmill company in the name of Biashara Masters Sawmill Ltd at the industrial zone for over 3 decades and any such developments as envisaged following the subdivisions would deny them their right to use and enjoy property, as emissions and noise nuisances from the industry cannot be habitable for residents.

4. The petitioners further averred that the development or construction of the residential buildings within the industrial zone would be illegal and would give rise to endless conflicts on account of environmental issues hence depriving the petitioners their right to quiet possession and enjoyment of their industrial use of the property.

5. The petitioners alleged that there was contravention of Articles 22(1), 42, 69 and 70 of the constitution and sought orders that:

a) The petitioners constitutional right to own and enjoy their property has been threatened.

b) An order of permanent injunction restraining the respondents by themselves or their agents, servant and employees from subdividing, offering for sale for purposes of constructing residential buildings and/or any other way interfering with the designated use of the land known as L.R 519/344.

c) Costs of this petition.

6. The facts in support of the petition have been verified vide the verifying affidavit sworn by Daniel Waithanji Mwangi the 1st petitioner herein.

7. The respondents filed a preliminary objection and a replying affidavit sworn by one Robert Mwaura in response to the petition. He

deposed that the petition had been overtaken by events and was speculative as it failed to demonstrate the threats of violations and further failed to particularize the loss and/or damage likely to be incurred subsequent to the respondent's alleged actions and specific persons who stand to suffer the loss or damage. The deponent explained that their property LR No. 519/344(former parcel) was initially classified as light industry but in the year 2015, the respondent applied for its change of user with a view of subdividing it which was approved and changed to residential on 22nd October, 2015. The respondent annexed letters from the Ministry of Lands approving the said subdivisions and advising on the creation of new registry index map (RIM).

8. The respondent averred that upon obtaining an approval for the change of user, the respondent proceeded to subdivide the former parcel which resulted in creation of several parcels some of which were sold to third parties whereas others were retained by the Respondent including Njoro/Township Block 1/361 whose user as per the lease is unequivocally shown as residential and lies adjacent to the petitioners' parcel of land L.R No. 519/354. The Respondent stated that the former parcel of land was no longer in existence as a result of the change of user and subsequent subdivision.

9. The Respondent further averred that the doctrine of laches precluded the petitioners herein from instituting the present suit as the same ought to have been instituted if at all at the time of subdivision of the former parcel of land in the year 2015. Further, the respondent claimed the petitioner had failed to demonstrate the linkage between the respondent's purported failure to obtain a change of user and the impact of the same on their rights. The Respondent additionally stated that Biashara Masters Saw Mills Limited is a separate and distinct entity from each of the individual petitioners' and that the petitioners' apprehension of conflict on account of environmental issues as a result of any intended disposition of the adjoining parcels of land and their use for residential purposes is speculative and unfounded.

10. The Respondent averred that there was no imminent threat of loss to the petitioners' right to the use and enjoyment of its property and that the grant of the reliefs sought by the petitioners' would unjustly and irreparably interfere with the respondent's and third parties *bona fide* proprietary interests hence the petition ought to be dismissed with costs.

11. The court gave directions that the petition together with the respondent's preliminary objection be canvassed by way of written submissions. Both parties filed and exchanged their submissions.

12. The petitioners raised two issues for determination, one whether or not the actions of the respondents violated and/or threatened to violate the constitutional right to own and enjoy property and, secondly, whether the orders sought in the petition should be allowed. It is the petitioners' contention that if the respondents were issued with any change of use, that information was totally new to them as they were never involved in the process leading to the grant of change of user. Equally the petitioners asserted that they were not involved in the process that led to the issuance of the Environmental Impact Assessment and consequently there was no compliance with the provisions of the Physical Planning Act.

13. The petitioners argued that the actions by the respondent amount to a designed scheme to eliminate the petitioners presence from the said area by deliberately and maliciously engaging in a project that would make it untenable for the petitioners sawmill business to continue in operation in the area and eventually lead to closure of the same. The petitioners further submitted that by converting the adjacent zone from light industry to residential in the midst of existing industries, it was evident that consideration was never given to the neighboring property owners rights.

14. The petitioners further submitted that the Environmental Impact Assessment that was carried out by the respondents to their exclusion leading to the change of user violated the petitioners' right to a fair administrative process under Article 47 of the constitution. They further argued that no public participation took place and that no posters or newspaper advertisements were availed to demonstrate public participation was carried out. They relied on the case of ***John Kabukuru Kibicho & Another Vs County Government of Nakuru & Others [2016] eKLR .***

15. In conclusion, the petitioners argued that there had been a violation of Articles 69 and 70 of the Constitution and that it was their case that in the event any party whom the respondents sold any of the subplots decided to construct residential buildings for habitation, such building or house may be inhabitable due to the petitioners' operations of their industry of a Sawmill business and hence prayed that the petition be allowed as prayed.

16. The respondent submitted on four main issues, that the court lacked jurisdiction to hear and determine the petition; that the petition was barred by the doctrine of latches; that the petition disclosed no violation or threat to the Constitution; and that the petition did not satisfy the threshold for grant of permanent injunction.

17. On the first issue the respondent submitted that the jurisdiction of this court has been invoked prematurely as the petitioners have neglected to follow the procedure outlined under section 61(3) and 4 of the Physical and Land Use Planning Act. They cited several judicial decisions in support of this submissions including ***Deepak Harakch & Another Vs Anmol Limited & 4 others [2018] eKLR.***

18. On the second issue, the respondent submitted that the petition has been overtaken by events and is thus barred by the doctrine of latches from instituting the present proceedings as the same ought to have been instituted at the time of subdivision of the former parcel of land in the year 2015 . The orders sought in the petition even if granted are incapable of being executed and would therefore be ineffectual.

19. On the third issue, the respondent argued that the petitioners failed to plead with particularity and/or precision the nature of the violations with the result that the petition was largely based on speculations. The respondent contended the petition was at best merely speculative and cited the case of ***Christian Juma Wabwire Vs Attorney General [2019] eKLR*** to support their submission that a court must be guided by evidence in its decisions and not by mere allegation or speculation.

20. Finally on last issue, the respondent submitted that the petitioner failed to satisfy the required threshold as they failed to demonstrate with particularity any actual proprietary rights that risk being violated in the event a permanent injunction was declined. The respondent further

submitted that the petitioners should be disentitled to the costs as they failed to particularize their claim. The Respondent asserted that the petition was without merit and did not meet the required threshold of a constitutional petition and accordingly urged the court to dismiss the same with costs.

Analysis and determination.

21. Upon review and consideration of the petition, the affidavits and the submissions by the parties, the issues that arise for determination are; firstly, whether the constitutional jurisdiction of this court has been properly invoked; and secondly, whether the reliefs sought in the petition are merited.

> *6. Article 22 of the Constitution grants an individual power to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. Further, procedural law in regard to constitutional matters is that where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain the dispute. See* ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.*** *Consequently, when formulating his case, a party must take the statutory route where it is available as opposed to the constitutional one.*

22. The above principle essentially is what has come to be known as the exhaustion principle, which simply put is to the effect that where there is an alternative remedy provided by statute, that remedy must be pursued and exhausted before any other remedy can be sought through the courts. The exhaustion principle has received numerous judicial expression such that the courts cannot waiver in the application of the principle. In the case of ***Geoffrey Muthinja Kabiru & 2 others -vs- Samuel Muriga Henry & 1756 others (2015) eKLR*** the Court of Appeal stated:-

> *" It is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a 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 there is a post-ponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside the Courts. This accords with Article 159 of the constitution which commands court to encourage alternative means of dispute resolution."*

23. In the case of ***Zoa limited –vs- Arrid Mani & 2 others (2020) eKLR Obaga J,*** *d*eclined to grant any reliefs where the exhaustion doctrine had ben contravened. In the case he stated thus:-

> *" Whether the 2nd and 3rd Respondents applied the necessary criteria before granting approvals is not for this court to address at this stage and in any case if the applicant was dissatisfied with the grant of the approvals and licences,, it was free to ventilate its grievances before the National Environment Tribunal and County Physical and Land use planning liaison Committee as provided for under the physical and Land use Planning Act. This was the reasoning in* ***Deepak (Havakch & Another -vs- Anmol limited & 4 others 92018) eKLR*** *where justice Eboso declined to grant an injunction where the applicant had not exhausted the mechanism under the then physical planning Act(Now repealed)"*

24. The court of Appeal as early as 1992 had pronounced itself on the exhaustion doctrine in the case of ***Speaker of National Assembly -vs- James Njenga karume (1992) eKLR*** when it stated:-

> *" In our view there is considerable merit in the submission that 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. We observe without expressing a concluded view that order 53 of the civil Procedure Rules cannot oust clear constitutional and statutory provisions.*

25. The court of Appeal in the case of ***Samson Chembe vuko -vs- Nelson Kilumo & Another (2016) eKLR*** emphatically reiterated the exhaustion doctrine when the court upheld the decision by Angote, J to strike out the suit before the Environment court on the basis that the Court lacked jurisdiction to deal with physical planning and development issues that fell to be dealt with by the various bodies established under Physical Planning Act in the first instance.

26. In the petition before the court it is evident that the core issues at the heart of the petition are that the petitioners complain that the Respondent had not obtained change of user, and the appropriate development approval for residential houses in an area that is designated for industrial purposes. The petitioners further complained that the respondent had not conducted an Environmental Impact Assessment (EIA) for the project as envisaged under the Environment Management Co-ordination Act (EMCA). The petitioners contended the respondent's actions are a violation of Article 42, 69 and 70 of the constitution as the right to have a clean and healthy environment would be impacted negatively if the respondent's development project was permitted to proceed.

27. The respondent countered the petitioners assertions stating that they applied for change of user which was procedurally given by the County Government and the resultant title following the change of user was duly issued to the Respondent. The Respondent further contended the petitioners allegations that the respondent had subdivided its land into resindential subplots of 50ft by 100 ft was not supported by any evidence and was merely speculative. The assertion by the petitioners that there was bound to be conflicts arising from environmental issues, the respondent argued was unsupported and was equally speculative and Courts of law cannot act on speculations. The respondents further contended that the petition lacks precision in the manner it was pleaded and hence failed the test established in the case of ***Anarita Karimi Njeru -vs- Republic No.10 (1979) KLR 154*** and further restated in the case of ***Mumo Matemo –vs- Trusted Society of Human Rights Alliance (2014) eKLR*** . In the ***Anarita Karimi Njeru*** case the court stated:-

> *"If a person is seeking redress from the high court on a matter which involves a reference to the constitution, it is important (if*

only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

28. As I have demonstrated above and is evident from the pleadings, the issues in this petition relate to the change of user allegedly procured by the respondent to change user of L.R No.519/344 from light industry to residential and whether or not any appropriate Environmental Impact Assessment (EIA) was procedurally obtained for change of user. The issue of whether the change of user and/or indeed whether subdivision approval was regularly obtained are matters that definitely fell under the Physical and Land Use planning Act, 2019. The petitioners petition is predicated on the apprehension that the respondent intended to subdivide and have multiple residential developments effected on the resultant subplots. The petitioners however have not availed any evidence that any development approval had been sought for as envisaged under section 576 of the Physical and Land use Planning Act, 2019. Under section 57 (1) of the Act, it is mandatory for development permission to be sought and granted by the relevant County Executive Committee member before a development can be effected within a county. The Executive Committee member has power to revoke and/or modify any development permission if the provisions of the Act are contravened.

29. Section 61 of the Act provides for the facts to be considered before any development permission is granted and provides under section 61 (3) for dispute resolution in case any person is aggrieved with the decision made by the County Executive member. An appeal lies to the County Physical and Land use Planning Liaison Committee. The decision of the County Physical and land use planning Liaison committee is appealable to the Environment and Land Court . The Act as is evident sets out a concise dispute resolution mechanism which the petitioners did not invoke.

30. As relates to the Environmental Impact Assessment that the petitioners allege the Respondent did not avail, the Environment Management and Coordination Act provides the process and procedure of conducting an EIA report and application for EIA license under section 58 of the Act. The National Environmental Management Authority (NEMA) established under the Act has authority and power to evaluate EIA reports and to issue EIA licenses and can revoke, suspend or cancel Environmental impact Assessment Licences issued under the Act, if such licence is contravened.

31. NEMA also is empowered to carry out environmental audit and monitoring and where appropriate to make restoration orders. The Environment Management and Co-ordination Act (EMCA) provides a dispute resolution mechanism in regard to matters touching on the environment through the National Environment Tribunal (NET) established under section 125 of the Act. Section 126 (2) of the Act provides as follows:-

126 (2) The Tribunal shall, upon an appeal made to it in writing by any party or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon and every award, directions, order or decision made shall be notified by the Tribunal to the parties concerned, the authority or any relevant committees thereof as the case may be.

32. Appeals against the decision/award of the Tribunal under section 130 of the Act lie to the Environment and Land Court.

33. Having regard to the provisions of the Physical and Land use planning Act and the Environment Management and Co-ordination Act in regard to disputes touching on matters covered by the respective provisions of the Acts, the Environment and Land Court lacks the original jurisdiction to deal with such matters. This is understandable since the curt exercise appellate jurisdiction over decisions made by the institutions established under these Acts.

34. The exhaustion doctrine discussed earlier divests this court of the original jurisdiction. This court in keeping with the law must confine itself to exercising appellate jurisdiction in mattes where the statutes make provisions for alternative dispute resolution mechanism. The petitioners in the present matter had an obligation to exhaust the dispute resolution mechanism provided under the physical and Land Use Planning Act, 2019 and/or the Environment and management Co-ordination Act.

35. Having come to the conclusion that this court lacks the requisite jurisdiction to entertain the petition, that is sufficient to dispose of the matter. Without jurisdiction the court cannot make any valid findings. The decision of the court would be null and void. Nonetheless, even if I had found the court had jurisdiction, I am afraid having considered and evaluated the pleadings I was not persuaded the petitioners had a meritorious petition. The petition in my view was premature, was speculative and did not satisfy the threshold established in the ***Anarita Karimi Njeru*** case (supra) and lacked reasonable precision. The petition lacked sufficient particularity to enable the respondent to respond with specificity. It is noteworthy that there was no tangible evidence that the respondent had subdivided the land and was offering the same for sale for development of residential premises. The petitioners in my view had alternative avenue through which they could pursue their interests as outlined earlier in this judgment.

36. The upshot is that I find no merit in the petition presented by the petitioners . The petition is dismissed with costs to the respondent.

37. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021.

J M MUTUNGI

JUDGE