



**Yukos Kitengela Residents Association v County Government of  
Kajiado; Nyoike & another (Interested Parties) (Judicial Review  
E011 of 2021) [2025] KEELC 5682 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5682 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**JUDICIAL REVIEW E011 OF 2021**

**LC KOMINGOI, J**

**JULY 31, 2025**

**IN THE MATTER OF LAND USE PLANNING UNDER  
SECTION 102 AND 103 OF THE NATIONAL LAND POLICY;**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT CAP 286 (REPEALED)**

**AND**

**IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019**

**AND**

**IN THE MATTER OF THE URBAN AREAS AND CITIES ACT, 2011**

**BETWEEN**

**YUKOS KITENGELA RESIDENTS ASSOCIATION ..... EX PARTE APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KAJIADO ..... RESPONDENT**

**AND**

**JOSEPH NYOIKE ..... INTERESTED PARTY**

**OROK BUSINESS CENTRE LIMITED ..... INTERESTED PARTY**



## RULING

1. This Ruling is in respect of the Preliminary Objection dated 13<sup>th</sup> May 2024 by the Respondent seeking that this suit be struck out on the grounds that:
  - i. The Honourable Court is divested of jurisdiction to hear and determine the substantive Judicial Review application by dint of the mandatory provisions of Section 61 (3) and Section 78 (a) and (b) of the *Physical and Land Use Planning Act* 2019
  - ii. The Ex-parte applicant has not exhausted the existing dispute resolution mechanisms before invoking the jurisdiction of this Honourable Court.
  - iii. The Judicial Review application offends the doctrine of Constitutional avoidance.
2. The Preliminary Objection was canvassed by way of written submissions.

### Submissions of the Respondent

3. Counsel for the Respondent submitted that Section 9(2) and 9(3) of the *Fair Administrative Action Act* provides that a Court should not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available are first exhausted. And that the mechanisms set out under Section 61 (3) and Section 78 (a) and (b) of the *Physical and Land Use Planning Act* have not been exhausted by the ex parte applicants. Reference was made to the five bench case of William Odhiambo Ramogi & 3 others V Attorney General & 4 others, Muslim for Human Rights and 2 others (Interested Parties) (2020) eKLR which addressed the doctrine of exhaustion.
4. Counsel went on to submit that Article 159 of *the Constitution* provided for promotion of alternative dispute resolution mechanisms adding that the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR held that: “where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked...”
5. That it was after filing a complaint with the liaison committee that the ex parte applicant ought to have moved this Court through Section 61(4) of the *Physical and Land Use Planning Act*. As such, the Court must down its tools and strike out the matter.

### Submissions of the Interested Parties

6. On whether the Honourable Court lacks jurisdiction to entertain the judicial review application, Counsel also affirmed that this Court did not have jurisdiction to entertain the application because the Ex Parte Applicant had not exhausted the mechanisms of appealing to the County Physical and Land Use Planning Liaison Committee and where necessary the National Physical and Land Use Planning Liaison Committee. Reference was made to the Court of Appeal case of Secretary, County Public Service Board, Secretary, Wajir County Government v Hulbhai Gedi Abdille [2017] KECA 643 (KLR) which held: “where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process...”
7. Therefore, the judicial review application was premature and ought to be struck out.



## Submissions of the Ex parte Applicant

8. On whether the preliminary objection was competent as espoused in *Mukhisa Biscuit Co v West End Distributors* [1969] EA 696, counsel submitted that it must be raised on a pure point of law, but in this case, there was an issue on the decision dated 1<sup>st</sup> December 2021. This is because the decision was made by the Acting County Planner, whereas, Section 57 and 58 of the *Physical and Land Use Planning Act*, only mandated the County Executive Committee Member to grant development permissions. This was therefore a question of fact and not law, and should not be sustained.
9. On whether the County Physical and Land Use Planning Liaison Committee has jurisdiction to hear and determine the Ex-parte Applicant's complaint, counsel submitted that Section 61(3) and 78(a) and (b) of the *Physical and Land Use Planning Act* was in relation to decisions made by the County Executive Committee Member (CECM) responsible for physical and land use planning. In the present case however, the impugned decision of 1<sup>st</sup> December 2021 was made by the Acting County Planner, an officer acting ultra vires who lacked the legal mandate to issue such a decision. The decision was therefore null and void ab initio and could not be appealed against.
10. On whether this Court had jurisdiction to determine the judicial review, counsel submitted that the doctrine of exhaustion was not absolute and there could be exceptions such as: where the remedies are inadequate, ineffective, or unavailable as per Section 9(4) of the *Fair Administrative Action Act*; where the process is unreasonably delayed, unduly burdensome, or procedurally unfair; or where the decision-maker is alleged to have acted ultra vires or in excess of their lawful authority.
11. Counsel also submitted that judicial review is concerned with the decision-making process, not with the merits of the decision itself as held in *Municipal Council of Mombasa v Republic & another* [2002] eKLR and *Republic v Independent Electoral and Boundaries Commission Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. Therefore, the Judicial review was properly before the Court and should be determined in its merits.
12. As such, the preliminary objection should be dismissed with costs to the Ex Parte applicant.

## Analysis and determination

13. I have considered the Preliminary Objection, the written submissions, the authorities cited and find that the issue for determination are:
  - i. Whether the preliminary objection by the Respondent is merited;
  - ii. What orders should issue?
  - iii. Who should bear the costs?
14. The Respondent has filed this preliminary objection on the grounds that Ex-Parte Applicant did not exhaust the dispute resolution mechanism stipulated under Section 61(3) and Section 78 of the *Physical and Land Use Planning Act*. This objection was supported by the Interested Parties, while the Ex-Parte Applicant opposed it.
15. The Ex Parte Applicant contested it on the grounds that the mechanism espoused under the *Physical and Land Use Planning Act* could not be adhered to because the approval decision dated 1<sup>st</sup> December 2021 was ultra vires for not having been issued by a duly authorised officer as per the *Physical and Land Use Planning Act*.



16. It is trite that a Preliminary Objection should be raised on a pure point of law which can dispose of the suit in limine. The locus classicus on the definition of a preliminary objection is the Court of Appeal decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and bolstered by several Supreme Court authorities including *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) where it held:

... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

17. A preliminary objection is argued on the assumption that all facts pleaded are correct. It is not in contention that an approval for construction and improvement of an access road was issued on 1<sup>st</sup> December 2021. However, the Ex-Parte Applicant argues that the said decision was issued by the Acting County Planner of the County Government of Kajiado instead of the County Executive Committee Member as provided for in the Act. Therefore, the decision issued was ultra vires and the Judicial Review was properly before this Court’s jurisdiction.

18. Without getting into the details of the dispute, it is clear that the issue raised has called for justification and clarification which negates the Preliminary Objection’s objective.

19. As such, the Preliminary Objection dated 13<sup>th</sup> may 2024 is found to be without merit and is dismissed.

20. The costs shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. J. Soweto for the Ex Parte Applicant.

Mr. Ambani for the Respondent.

Mr. S. Wachira for the Interested Parties.

Court Assistant – Mutisya.

