



**Wagitaha Holdings Limited v Haldoor Real Estate Limited & 2 others (Environment and Planning Civil Case E003 of 2023) [2024] KEELC 839 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 839 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING CIVIL CASE E003 OF 2023  
AA OMOLLO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**WAGITAHA HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**HALDOOR REAL ESTATE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR DEV MANAGEMENT, THE NAIROBI COUNTY GOVERNMENT ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicants filed a Notice of motion dated 16<sup>th</sup> August 2023 seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That pending the inter parties hearing and determination of this suit, a temporary injunction be issued restraining the 1<sup>st</sup> Defendant/Respondent, its agents, servants employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from continuing with construction or development and/or any activity thereon whatsoever of the Property Number Nairobi/ Block 104/72 Along Mukunga Road, Pangani Ward, Starehe Sub County —Nairobi City County.
  - d. That the costs of this Application be provided for.
  - e. That any other orders that court may deem fit.



2. The motion was supported by an affidavit and further affidavit both sworn by Gidraph Mbogo Babu, the director of the Plaintiff on 16<sup>th</sup> August 2023 and 19<sup>th</sup> October 2023 respectively. The Applicant outlined its grounds and reiterated the same in the supporting affidavit. The Applicant stated it is the owner of the property known as Nairobi/ Block 104/73 adjacent to Nairobi/ Block 104/72 along Mukunga Road, Pangani Ward, Starehe Sub County —Nairobi City County, herein after referred to as “the suit property” owned by the 1<sup>st</sup> Defendant who is undertaking a proposed construction of a multi dwelling residential flat (15 floors) on Block/104/72.
3. The Applicant contended that the 1<sup>st</sup> Defendant/ Respondent has commenced unauthorized constructions and/or developments on the subject property by demolishing houses thereon and/or are now carrying out extensive excavation works on the property without submitting the statutorily required Environmental Impact Assessment Report (EIA Report) to the 2<sup>nd</sup> Defendant (NEMA) and/or without obtaining the EIA Licence and requisite building plans.
4. The Plaintiff/Applicant stated that together with nineteen (19) other area residents being inconvenienced by the 1st Defendant/ Respondent's activities in terms of privacy, noise and construction debris, wrote an objection to the proposed constructions to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Respondents. That the 1<sup>st</sup> Defendant/ Respondent failed to install appropriate protection measures as per the building code to prevent construction debris from falling into the adjoining properties. Thus, the neighbours and their families are exposed to security risks, nuisance anguish, agony and injury. Further, that the ongoing construction threatens to alter the character of the subject premises by changing the purpose for which it was designated as single dwelling houses in a low-density area.
5. The Applicant continued in deposing that the construction has destroyed electricity wires and pipes which the 1st Defendant/ Respondent was forced to repair and the destroyed water pipes caused water drenching in the area which may weaken the shared boundary wall and a threat to the health of the Persons residing in the Plaintiffs property and it would further affect the environment of the entire area where it is taking place and expose the Plaintiff/Applicant and its neighbours to health hazard, pollution and nuisance.
6. The Applicant added that the 1<sup>st</sup> Defendant/ Respondent is well aware that it has not been issued with an EIA Licence by the 2<sup>nd</sup> Defendant/ Respondent but has been carrying out the construction, excavation and/or related activities at night causing nuisance to its neighbours during their resting hours. It stated that this application is necessitated by the urgent necessity to safeguard the quiet possession of the Plaintiff/Applicant and other neighbours from the impune and illegal exploitation by the 1st Defendant/ Respondent as failure to stop the said constructions shall render this application nugatory.

### **1st Defendant's Response**

7. The motion was opposed by the 1<sup>st</sup> Defendant/Respondent vide preliminary objection and Grounds of objection both dated 1<sup>st</sup> September 2023 and a replying affidavit sworn on 1<sup>st</sup> September 2023 by Khalif Ali Gure, a Director of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent objected to the jurisdiction of this court to determine the application and the entire suit for the reason that the entire suit offends the doctrine of exhaustion.
8. The 1<sup>st</sup> Respondent explained that it is a real estate development company and it purchased the suit property for development purposes which land is located within the rezoned areas of Pangani Estate and the entire Mukunga Road undergoing a gentrification and is now full of high-rise developments. They denied that they are undertaking construction on the suit property and stated that currently the



site is vacant and that indeed when they bought the property from its previous owner, there was a single dwelling structure on the property and which structure they demolished to give way to their Engineers and Architects to access the site for the purposes of preparing designs and drawings for the development.

9. The 1<sup>st</sup> Respondent posited that demolitions were necessary as it would have been impossible for them to undertake design works for the engineering/structural designs for the foundations without access to the soil substructure on the property. That an excavation of the ground was conducted in order to enable them undertake geotechnical surveys for the reason that they intend to construct a high rise building of at least 10 floors (subject to Nairobi City County approval) and there is no way they can proceed with designs without ascertaining the true status of the soil structure on the site.
10. They confirmed that they had not received approvals from Nairobi City County, NEMA or NCA but their design team, after conducting the tests on site prepared the drawings and designs required for applying for Approvals, applied and is pending approval by the Nairobi City County. They added to also commencing the approval process for the EIA License from NEMA and for which they hired an EIA expert who is currently on site assisting with the process which is yet to be concluded. They added that the National Construction Authority's approvals can only be applied for after Nairobi City County and NEMA approvals have been granted and therefore the averments by the Applicant are premature.
11. The 1<sup>st</sup> Respondent contended that there are numerous high-rise developments in the estate as shown in the pictures produced and that the approval of high-rise buildings is not within the jurisdiction of this Court but a function of the 2<sup>nd</sup> Defendant where the application for building approval is pending before it and the Applicant and other residents of the estate have written an objection to it.

## **2<sup>nd</sup> Defendant's/Respondent's Replying Affidavit**

12. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 16<sup>th</sup> October 2023 on its behalf by Catherine Thaithi, the County Director of Environment, Nairobi County. She deposed that following the institution of the suit, an inspection of the suit premises was carried out on 11<sup>th</sup> October 2023 by environmental inspectors from its offices. The Inspectors observed that the site had been excavated but there were no ongoing works at the time of the visit, there was no evidence of EIA License on site and that from its database the proposed project had not been approved.
13. The 2<sup>nd</sup> Respondent stated that the 1<sup>st</sup> Respondent have indicated that they scheduled to undertake public participation meeting an avenue through the Applicant will be able to give views on the intended development and which views will be taken into consideration while reviewing the application for an EIA License.
14. The 3<sup>rd</sup> Defendant filed grounds of opposition dated 12<sup>th</sup> October 2023 stating that the Applicant has failed to exhaust the alternative means of dispute resolution provided by the *Physical Planning and Land Use Act*, No.13 of 2019 and that in the absence of ongoing construction on the suit property, there is no basis for seeking the injunctive orders sought in the application.

## **Submissions.**

15. The parties agreed to prosecute the application by filing of written submissions. The Plaintiff submitted that the 1<sup>st</sup> Defendant's preliminary objection is premised on Section 61(3) and (4) of the *Physical and Land Use Planning Act*, No 13 of 2019 but the suit is not challenging any decision making of the Planning Authority given that the 1<sup>st</sup> Respondent has categorically stated that he has not received any approvals and/or decision from the Planning Authority or NEMA.



16. They submitted that the subject of the Plaint is how the 1<sup>st</sup> Defendant conducted demolitions and excavations on the suit property without procuring approvals and without regard to the inconveniences it caused to its adjacent neighbors, which are issues of fact and not law. In support they cited the case of *Karanja v County Government of Kilifi* (Environment & Land case 92 of 2021) [2022] KEELC 3599 (KLR).
17. Further, the Plaintiff/Applicant submits that provisions of Section 13 of the *Environment and Land Court Act* and Section 3(3) of the *Environmental Management & Coordination Act* has clothed this court with jurisdiction thus the PO should be dismissed.
18. The 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondents relied on the case of *Mukisa Biscuit Company vs West End Distributors Limited* (1969) EA to support preliminary objection sating that it is valid because the main issue is based on whether the Applicant has exhausted all the avenues before approaching the court as provided in Section 61(3) and (4) of the *Physical and Land Use Planning Act*.
19. Consequently, that the court lacks jurisdiction to hear this matter in view of the doctrine of exhaustion of the mechanisms under statute on resolving this matter and that any person aggrieved by the decision of the Committee may Appeal against that decision to this court as an appeal. In support, they cited the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, *Dickson Mukwe Lukeini v Attorney General & 4 Others* [2020] eKLR and *KO Holdings Ltd v County Government of Kiambu Redhill Kentmere Residents Association* (2019) eKLR among others.
20. From the pleadings and the arguments made for and against the preliminary objection and the application it is not disputed that the 1<sup>st</sup> Respondent do not have approvals from the relevant government agencies. Consequently, I am called to answer;
  - a. Whether or not this court has jurisdiction to entertain the matter.
  - b. Whether or not the orders sought can be granted.
21. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent argues that this court’s jurisdiction is ousted by the doctrine of exhaustion. The jurisdiction Liaison Committee of the 3<sup>rd</sup> Defendant/Respondent as well as the National Environment, Tribunal (NET) can only be invoked where a decision has been made. Section 80 (1) of *Physical Land use and Planning Act* No. 13 of 2019 states thus;
 

“ A person who appeals to County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form”

Similarly, section 129(1) of *EMCA* states thus;

“ 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”
22. In this instant where the 1<sup>st</sup> Respondent has not commenced process which calls for decisions of those bodies, there is nothing which the plaintiffs or any 3<sup>rd</sup> parties can raise objections to. The preliminary objection raised is thus premature and without any merit. The preliminary objection is dismissed for want of merit.
23. On the second question whether the order of injunction sought can be granted, the Applicants have highlighted the inconveniences suffered by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent has admitted to carrying out demolitions and excavations on the suit plot. The 1<sup>st</sup> Respondent argues that the



- excavations were necessary for their architects and engineers to do a ground survey in preparing the designs of the structures to be put up. That they have since lodged their application for developmental approvals.
24. The *Physical Land Use and Planning Act* is described in its preamble as an Act of Parliament to make provision for the planning, use, regulations and development of land and for connected purposes. Under section 2, development means carrying out any works on land or making any material change in the use of any structures on the land.
  25. From the above definition, it is my considered view that the works of demolitions of the old structures and the excavations undertaken on the land required permission to be obtained from the 3<sup>rd</sup> Defendant. It is the process of obtaining such permission which would grant the Applicant opportunity to become aware of any developments near them and to raise any objections if they deem so. To the extent that the works were undertaken without developmental approvals, and without affording the Applicants opportunity to air their grievances in the manner the work was done, I am satisfied that they have demonstrated they have a prima facie case.
  26. On whether they will suffer irreparable loss, that may not be ascertainable from the nature of claim as at now. In any event, some effects of pollution are long term nowonder the law put means of regulating development to avoid exposure and in this case, the 1<sup>st</sup> Respondent has so far failed to comply with planning regulations. Under the heading of balance of convenience, it shifts on the orders being granted. I hold so because the 1<sup>st</sup> Respondent having commenced development without permission may continue to do so to the detriment of the Applicants right to fair administrative action and clean environment.
  27. I find that the Applicant has made out a case to warrant the granting of the orders of temporary injunction. In conclusion, the motion dated 16<sup>th</sup> August, 2023 is allowed in terms of prayer (C) hereof with costs to the applicant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. OMOLLO**

**JUDGE**

