Ngomo Multi-Purpose Co-operative Society v Republic & another (Civil Appeal E009 of 2022) [2025] KECA 935 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 935 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E009 OF 2022

KI LAIBUTA, LA ACHODE & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

NGOMO MULTI-PURPOSE CO-OPERATIVE SOCIETY ..... APPELLANT

AND

REPUBLIC ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court in Nairobi (Yano J), dated 14th June 2021 in Misc. Application No. ELC JR8 OF 2020)

JUDGMENT

1. Ngomo Multi-Purpose Co-operative Society Ltd (the appellant), applied and was granted leave on 14th October 2020, to file a judicial review application in the superior court. It then filed a substantive application, MSA Misc. Application No. ELC JR8 OF 2020, under Order 53 Rule 3 and 4 of the Civil Procedure Rules, Sections 8(1) and 9 of the *Law Reform Act* and Section 9 of the *Fair Administrative Action Act* against the Republic and the County Government of Mombasa.

2. In the application, the appellant sought an order of prohibition, to prohibit the 2nd respondent from executing, or effecting the Enforcement Notice dated 30th September 2020 issued under the *Physical and Land Use Planning Act*, 2019 as served upon it (the appellant) and its tenants.

3. The appellant premised its application on the grounds set out in the statutory statement. In the supporting affidavit sworn by Emily Koki Nzioki on 13th October 2020, it was deposed that the appellant was the lawful proprietor of an interest in fee simple over the property known as subdivision 1096 (Orig.66/2) Sec VI MN. Sometimes in October 2016, the 2nd respondent threatened to demolish structures standing on a portion of the property on the basis that they were blocking an access road.

4. The 2nd respondent issued notice under the Physical Planning Act, 1996, which statute had since been repealed and replaced by the *Physical and Land Use Planning Act* of 2019. As a result, the appellant lodged an appeal with the Physical Planning Liaison Committee (PPLC), of Mombasa County, seeking to stay the demolition notice pending determination of the matter.

5. The appellant averred that, sometimes in May 2018, it was advised by the 2nd respondent to make payment for survey to be carried out to re-establish the beacons, which it did. However, the 2nd respondent did not deploy any surveyor to the property. Instead, it served the appellant with another notice of intended demolition dated 30th September 2020 issued under the *Physical and Land Use Planning Act*, 2019.

6. It was the appellant's deposition that the aforesaid notice and its intended consequences were arbitrary, capricious and in breach of the rules of natural justice; and that the 2nd respondent's action was in clear breach of the requirements of Section 4 of the *Fair Administrative Action Act*, especially sub-sections (1) and (4). The appellant averred that there was real possibility of its right to fair administrative action being abrogated and its property interfered with arbitrarily.

7. In rebuttal, the 2nd respondent filed grounds of opposition dated 10th February 2021, stating that the application was an abuse of court process and should be dismissed with costs. That it violated the provisions of Section 38 of the Physical Planning Act of 1996, as repealed by Section 72 of the *Physical and Land Use Planning Act* of 2019; that it contravened Section 9(2) of the *Fair Administrative Action Act*, and that the application did not warrant issuance of the orders of judicial review sought against the respondents as it failed to satisfy the conditions required to grant such orders.

8. Upon considering the matter before him, Yano J. found that the application was incompetent for reasons that the court lacked jurisdiction to hear and determine it. He dismissed the application with costs to the 2nd respondent.

9. The appellant was aggrieved by the above ruling and filed this appeal. In its memorandum of appeal dated 2nd February 2022, it raised five grounds as follows:

> "(a) The judge erred in law in failing to find that the second enforcement notice dated 19th September 2020 issued by the 1st respondent was unreasonable, arbitrary and/ or capricious insofar as there was in existence before the former Physical Planning Liaison Committee (PPLC) established under the repealed Physical Planning Act Cap 286, an appeal by the appellant herein taken from the notice dated 19th October 2016 in respect of the self-same matter, which appeal was still pending determination.
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> b. The judge erred in not appreciating wholly or at all, that the remedy of Appeal provided for under section 72 (3) and (4) of the *Physical and Land Use Planning Act*, 2019 was a replica of the appellate right obtaining under section 38 (4) of the repealed Physical Planning Act, Cap 286 and that the remedy of appeal under the said provision had already been invoked in respect of a similar enforcement notice issued under the former statute and which proceedings were still pending and the purport and effect of the latter notice would be to circumvent, albeit mischievously, the stay of the enforcement notice resultant from that pending appeal.
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> c. The judge erred in law in applying to the case before him section 9(2) of the *Fair Administrative Action Act* so as to deny the applicant the right of review

when there was in fact no internal mechanism that was reasonably capable of being invoked insofar as the sole such mechanism had already been invoked in circumstances that were entirely similar to the present and the resultant appeal was still pending which fact underlined the unreasonableness and or arbitrariness of the action complained of.

d. The judge erred in law in the circumstances in relying on the decision in Republic v Nairobi City County Government Ex parte Ndiara (2017) eKLR and in not appreciating that there would be exceptions to the rule espoused in Speaker of the National Assembly v Karume (2008) 1KLR 425 insofar as the said decision does not cover every single case and the circumstances obtaining in the case before him fell among such exceptions.

e. The judge erred in accepting the argument by the respondent that the appellant ought to have taken steps to inquire on the progress of the appeal before the PPLC as taken from the notice of 19th October 2016, while the same appeal was lying before PPLC which was itself an entity under the aegis of the 1st respondent's establishment and by accepting that proposition, the judge effectively enabled the respondent to rely on its own inertia as a defence to the appellant's complaint."

10. The firm of M/s. Moses Mwakisha & Company Advocates filed written submissions dated 19th September 2024 on behalf of the appellants urging that once the appellant invoked the provisions of the Physical Planning Act (now repealed) by preferring an appeal to the Physical Planning Liaison Committee (PPLC) as was required under the statute, the Enforcement Notice of 5th October 2016 was stayed, that the re-issuance of the self-same notice required the appellant to file an appeal like the one already pending before the PPLC, and that as such, the proper remedy was to challenge the notice by way of the process of judicial review as the appellant did.

11. Counsel urges that the sole avenue for challenging the Enforcement Notice in the case at hand was the appellate process that now obtains under Section 72 of the Physical Planning and Land Use Act, 2019 which replaced Section 38 of the repealed PPA and replicates the previous appeal mechanism, and that it would have been a replication and therefore, superfluous for the appellant to invoke that process where the 1st respondent was clearly acting arbitrarily and in abuse of process.

12. Counsel posits that the learned judge erred in holding that the application before him offended Section 9 (2) of the *Fair Administrative Action Act*. That a proper appreciation of the background facts as addressed shows that there was no alternative remedy that would have been more efficient than staying the second replicated notice, that an appeal on the second notice was not the most suitable or efficacious mechanism to address the apparent anomaly, and that the court ought to have proceeded to pronounce itself on the propriety of the second notice considering the appellant's complaint as laid before it and that the notice had the potential to subject the appellant to vexation on the self-same issue.

13. In addition, it was submitted that the Liaison Committee which existed under the repealed Physical Planning Act, and is now constituted under Section 73 to 81 of the *Physical and Land Use Planning Act*, is a body within the Development Control Mechanism within the County Government. Thus, the delayed appellate process for which the appellant was being crucified was one in which the County Government rather than the appellant had control.

14. There was no response or written submissions on behalf of the respondents. When the appeal came before us for hearing on 11th November 2024, Mr. Mwakisha, learned counsel appeared for the

appellant. There was no representation for the respondents although a hearing notice was duly served on 22nd October 2024 upon M/s Kisingo Advocate, who were on record.

15. This being a first appeal, our mandate is to subject the whole evidence to fresh and exhaustive scrutiny and draw our own conclusions, bearing in mind that we did not have the opportunity to see and hear the witnesses first hand and give due allowance thereto. This role was succinctly stated in the decision of this Court in Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

16. Upon considering the record of appeal and the rival submissions before us, it is our view that this appeal can be disposed of by determination of the sole issue as to whether the court's jurisdiction of judicial review was invoked prematurely.

17. It is not contested that the 2nd respondent issued the appellant with two Enforcement Notices, one dated 5th October, 2016 and another one dated 30th September 2020. It is also not contested that the appellant filed an appeal over the initial notice on 17th October 2016, which was still pending before the Physical Planning Liaison Committee when the second one was served.

18. Section 38 of the repealed Physical Planning Act 1996 provided for an inbuilt internal dispute resolution mechanism, which now reposes in Section 72 of the current *Physical and Land Use Planning Act* of 2019. It is trite that, where a process of internal dispute resolution mechanism is provided, it should be exhausted before the jurisdiction of the court is invoked to review an administrative action.

19. The Black's Law Dictionary 10th Edition, defines the doctrine of exhaustion as follows:

> " Exhaustion of remedies: The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary."

20. Section 9(1) of the *Fair Administrative Action Act* (the Act) provides that, a person aggrieved by an administrative action may apply for judicial review of such a decision in the High Court, or a subordinate court upon which original jurisdiction is conferred, pursuant to Article 22(3) of *the Constitution*.

21. However, sub-sections (2) and (3) of the Act limit this avenue of redress by providing a specific threshold to be satisfied whereby administrative action is only subject to judicial review if alternative mechanisms, including internal mechanisms of review and appeal have been exhausted. The sub-sections stipulate as follows:

> " (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.

(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 the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

22. The Court of Appeal pronounced itself on the question of exhaustion of internal dispute resolution remedies in the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR as follows:

> "....In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions...."

23. Similarly, in Republic v National Environment Management Authority Exparte: Sound Equipment Ltd, [2011] eKLR, this Court observed that:

> "……Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

24. More recently, in the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] KECA 643 (KLR), this Court placed reliance on the decision in Speaker of the National Assembly (supra) and expressed itself thus:

> " Time and again it has been said that 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 if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

25. We note that the appellant had submitted to the internal dispute resolution mechanism by lodging a memorandum of appeal dated 17th October, 2016 with the PPLC against the Enforcement Notice dated 5th October 2016 and issued under the Physical Planning Act, 1996.

26. The doctrine of exhaustion can be overlooked in exceptional circumstances, such as where the alternative remedies are inadequate, unavailable, or would cause irreparable harm to the complainant. The process which spawned this appeal was one in which the respondent rather than the appellant had control, but it refused and/or neglected to act on the appellant's appeal for several years.

27. There is evidence that the 2nd respondent gave the appellant hope by directing it to pay survey fees for the boundaries to be re-established and the appellant complied. Instead of deploying the surveyor, the 2nd respondent served the appellant with another Enforcement Notice dated 30th September 2020, intending to proceed with the demolition under the *Physical and Land Use Planning Act*, 2019.

28. These two Enforcement Notices had the same communication. However, the appeal lodged over the first notice had not been determined and was pending before the PPLC. In the circumstances, the

appellant was left with no choice, but to invoke the jurisdiction of the court. Therefore, we find that the superior court erred in holding that the appellant did not exhaust the internal dispute resolution mechanism before approaching the court for judicial review.

Consequently, the appeal is found to have merit and is hereby allowed with costs to the appellant.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

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JUDGE OF APPEAL

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