Malusha v Swaleh & another (Civil Appeal E051 of 2022)
[2025] KECA 761 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 761 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E051 OF 2022

F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

EDMUND KIRIGHA MALUSHA ..... APPELLANT

AND

FAHMI HUSSEIN SWALEH ..... 1ST RESPONDENT

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

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (N. A. Matheka, J.) delivered on 9th November 2021 in Judicial Review No. 10 of 2020)

JUDGMENT

1. This is an appeal from the judgment of the Environment and Land Court at Mombasa (N. A. Matheka, J.) delivered on 9th November 2021 in ELC JR Case No. 10 of 2020 filed by the appellant, Edmund Kirigha Malusha, against the 1st respondent, the County Government of Mombasa, vide a Chamber Summons dated 24th November 2020 followed by a Notice of Motion dated 10th December 2020. The 2nd respondent, Fahmi Hussein Swaleh, was joined as an interested party.

2. In its application for judicial review, the appellant sought an order of certiorari to quash the 1st respondent's notice dated 19th November 2020 directing the appellant to demolish a structure erected on his Plot No. MSA/Block XVI/1404 (the suit property) within 7 days of the notice; and costs of the application.

3. The appellant's case was that he was the owner of the suit property, which was fully developed; that the 2nd respondent owned the neighbouring parcel No. MSA/Block XVI/1406; that, in response to a complaint by the 2nd respondent, the 1st respondent issued the appellant with a compliance notice dated 19th November 2020 requiring him to demolish an unspecified structure on his plot within 7 days from the date of the notice on the grounds that it constituted trespass; that the 2nd respondent's

complaint was never communicated to the appellant; that the 1st respondent issued the appellant with the notice without visiting the disputed site to ascertain the facts on the ground; that the appellant was condemned unheard; that the 1st respondent had no power to declare with finality that a party had trespassed without investigating the complaint over the disputed boundary, which had not been fixed by the land registrar; that the 1st respondent had acted ultra vires its powers; that by its conduct, the 1st respondent abdicated its discretionary role as an impartial arbiter, and acted in breach of the rule against bias; and that judicial review was the only appropriate and effective remedy.

4. In his verifying affidavit sworn on 24th November 2020, the appellant deponed that he bought the suit property in 1994 and constructed a permanent house thereon with approval from the then Municipal Council of Mombasa dated 16th November 1994; that the genesis of the 1st respondent's action was the 2nd respondent's decision to pull down his residential house on their plot and build a modern house; that the new building was done in such a way as to leave no space for the perimeter wall between the two plots; that the 2nd respondent nevertheless decided to continue with construction of the wall until it became apparent that any further construction would overlap onto the appellant's side and uproot the steel staircase leading to the appellant's house; and that it was at that point that the 2nd respondent claimed that the appellant has trespassed on his land.

5. The appellant further averred that, by a letter dated 25th February 2020, he called upon the 1st respondent to intervene; that the 1st respondent directed the appellant to seek the assistance of a surveyor; that the appellant engaged the services of Mr. Edward Kiguru Land Surveyors, who surveyed the disputed area and prepared a report dated 5th March 2020; that it was apparent from the said report that the development in the appellant's plot did not overlap onto the 2nd respondent's parcel; that the appellant forwarded the report vide a letter dated 9th March 2020; that, when the appellant sensed that the 1st respondent was not concerned and had left the issues to the appellant and the 2nd respondent to find a solution, he decided to seek the assistance of his advocates who advised him to cause the boundary to be fixed by the Land Registrar in the event that it had not been fixed; that, vide a letter dated 17th November 2020, the appellant's advocates called upon the Land Registrar, Mombasa, to visit the two plots and fix their common boundary; and that, when the request to the Land Registrar was made known to the 2nd respondent, the 1st respondent issued the impugned enforcement notice, leading to the appellant's conclusion that the notice was a scheme by the 1st and 2nd respondents to render the impending boundary verification superfluous.

6. In conclusion, the appellant contended that, where there is a dispute over a boundary that has not been fixed by the Land Registrar, the 1st respondent had no power to declare with finality that a party had trespassed; and that, for the ends of justice to be realised, the impugned notice had to be quashed.

7. In response, the 1st respondent filed a Statement of Grounds of Opposition dated 15th June 2021 opposing the application on the grounds that the invocation of judicial review remedies offended the doctrine of exhaustion of local remedies; that the appellant invoked the 1st respondent's intervention vide his letter dated 25th February 2020, and that he could not purport to extricate himself from the 1st respondent's decision; that, if aggrieved with the 1st respondent's decision, judicial review remedies were not the appropriate recourse; that the appellant ought to have filed a civil suit; that the judicial review proceedings were premature and fatally defective; and that the proceedings were therefore vexatious, frivolous and an abuse of court process.

8. The 1st respondent also filed a replying affidavit sworn on 27th July 2021 by Calistus Luseno Imbwaka, the 1st respondent's Building Inspector. Mr. Imbwaka deponed that the appellant's application was incompetent and should be dismissed in limine on the grounds set out in the 1st respondent's Statement

of Grounds of Opposition; that, whereas the appellant's house was approved in 1994, it was not clear whether he restricted himself to the approved plans during construction, and during any further renovations of the house; that, upon receipt of the complaint by the appellant personally, they issued a notice in compliance with the Physical Planning Act; that, prior to issuance of the impugned notice, Mr. Imbwaka personally visited the site on 18th November 2020 and verified that the steel staircase had encroached into the 2nd respondent's property; that the 2nd respondent had further shown him a survey report by Sky Geo Experts Co. Ltd dated 12th November 2020 with findings that the steel stair case had encroached into the 2nd respondent's property; and that, upon verification with the original approved building plan issued to the appellant in 1994, it was confirmed that the offending staircase was not part of the original building plan.

9. Mr. Imbwaka further deponed that, after he had raised a grievance and a notice issued, the appellant ought to have filled inspection forms and requested for a joint survey having first ascertained the position of his beacons and obtained a beacon certificate, which the appellant had failed to do; that the appellant had to take recourse in the laid down dispute resolution mechanisms instead of prematurely rushing to court; that, whereas the Land Registrar was "invited" to fix a boundary vide the letter dated 17th November 2020, the letter was not copied to the 1st respondent, who had the mandate to ensure proper physical planning within Mombasa County; that the allegation that the appellant was condemned unheard could not lie as it was in response to the appellant's letter that he caused the inquiry to be made, leading to an inspection on the physical structures, which showed non-compliance with the law; and that the 1st respondent acted fairly and in compliance with the law by issuing the impugned notice.

10. The 2nd respondent did not enter appearance or file a response to the appellant's application, which was canvassed by way of written submissions filed by the appellant and the 1st respondent.

11. In its judgment dated 9th November 2021, the ELC (N. A. Matheka, J.) held that the dispute related to discharge of powers conferred to the public authorities established under the *Physical and Land Use Planning Act*, 2019 (the Act) and, in particular, the power to issue enforcement notices; that, under section 72 of the Act, local authorities (County Governments) have power to issue enforcement notices on land owners or occupiers of land within their area of jurisdiction; that the Act also provides the procedure of challenging such a notice by an aggrieved person, and the consequences of failure to challenge such a notice; that the appellant did not file or attempt to file an appeal to the County Physical and Land Use Planning Liaison Committee (the Liaison Committee) against the enforcement notice as required by law; that the suit therefore offended the doctrine of exhaustion of remedies as provided by statute; that the 1st respondent neither acted in excess of its powers nor illegally to warrant issuance of the orders sought; and that the 1st respondent produced photographs as evidence that it visited the site on 18th November 2020 and confirmed that the appellant had encroached onto the neighbouring plot.

    Accordingly, the court dismissed the appellant's application with costs.

12. Aggrieved by the learned Judge's decision, the appellant filed the instant appeal on the following 6 grounds set out in his Memorandum of Appeal dated 3rd June 2022:

    > " 1) The Learned Judge erred in law and fact in holding that ELC Judicial Review No. 10 of 2020, the subject of this appeal, offended the doctrine of exhaustion of statutory remedies without considering the fact that based on the dispute placed before the 1st Respondent by the Appellant, the enforcement notice date 19.11.2020 was a constructive ruling.

2. The Learned Judge erred in law and fact in holding that there was no exceptional circumstances in ELC Judicial Review No. 10 of 2020, the subject of this appeal, warranting the by passing of the relevant County Physical and Land Use Planning Liaison Committee referenced under Sec. 72 of the *Physical and Land Use Planning Act*.

3. The Learned Judge erred in law and fact in dismissing the Judicial Review subject of this appeal on technicality, thereby justifying:

   i. The 1st Respondent's open bias in handling the matter placed before it by the appellant for arbitration.

   ii. The 1st Respondent's ultra vires move in using the enforcement powers conferred upon it by the Physical and Land Use Planning Act to enforce the provisions of the *Trespass Act*.

   iii. The Respondent's failure in complying with the mandatory requirements of enforcement notice under Sec. 72(2)(a) of the *Physical and Land Use Planning Act*.

   iv. The 1st Respondent's ultra vires move in dealing with a dispute over boundary between private owners."

4. The Learned Judge erred in law and fact by upholding the enforcement Notice issued under the Physical Planning Act, Cap. 286 while she had found that the said Act was no longer operation having been repealed by the *Physical and Land Use Planning Act*, 2019.

5. The Learned Judge erred in law and fact in holding that the Appellant ought to have filed an appeal with the relevant County Physical and Land Use Planning Liaison Committee while that committee has no jurisdiction over matters pertaining to boundary disputes and Trespass within the meaning of the *Trespass Act*.

6. The Learned Judge inherently erred in law and fact in interpreting the provision of Sec. 9(3) of the Fair Administration *Act No. 4 of 2015*."

13. In support of the appeal, learned counsel for the appellant, M/s. Odongo B. O. & Co., filed written submissions dated 14th April 2023.

14. In rebuttal, learned Counsel for the 1st respondent, M/s.Ameli Inyangu & Partners, filed written submissions and a list of authorities dated 5th December 2024.

15. Having considered the record of appeal, the grounds on which it is anchored, as well as the rival submissions made to us, we form the view that the appeal stands or falls on our finding on three main issues, namely: whether the learned Judge erred in failing to find that the enforcement notice was null and void on the ground that it was issued under the repealed Act; whether the learned Judge erred in dismissing the appellant's suit on the ground that it offended the doctrine of exhaustion of administrative remedies, and in failing to find that there were exceptional circumstances exempting the appellant from the obligation to exhaust such remedies; and whether the learned Judge dismissed the judicial review application purely on technicalities, thereby justifying the 1st respondent's bias, ultra vires actions and non-compliance with the Act

16. On the 1st issue as to the validity of the impugned enforcement notice, the learned Judge observed that:

> " The Physical Planning *Act No. 6 of 1996* has since been replaced by the *Physical and Land Use Planning Act* No. 13 of 2019, which repealed it under Section 91. The new Act has a commencement date of 5th August, 2019. The *Physical and Land Use Planning Act* has provided for the Physical and Land Use Planning Liaison Committees and the appeal processes at Part VI, Sections 73 to 89 and for enforcement notices at Section 72. As pointed out above, the dispute herein relates to discharge of powers conferred to the public authorities established under the *Physical and Land Use Planning Act*, and in particular, the power to issue enforcement notices which notice was issued on the 19th November 2020."

17. Taking issue with the learned Judge's decision, learned counsel for the appellant submitted: that it was not in dispute that the enforcement notice in issue was issued under a repealed Act of Parliament; that the learned Judge did make that observation in her judgment and held that the Act was no longer operational; that the Physical Planning Act, 1996 was repealed under section 91 of the *Physical and Land Use Planning Act*, 2019; that the

transitional provision under section 92 of the repealing Act only dealt with matters relating to approved developments and pending development applications made under the repealed Act; that this provision did not retain any provision on enforcement notices under the repealed Act; and that the subject notice was therefore void for all intents and purposes, and that it ought not to have been validated by dismissing, on a technicality, the judicial review application challenging it. Counsel urged us to allow the appeal.

18. On their part, learned counsel for the 1st respondent submitted: that the trial Court did not render its decision on the merits of the impugned enforcement notice or uphold it; that the judicial review application was dismissed for offending the doctrine of exhaustion of administrative remedies; and that, the trial Court having not considered this issue, this Court should not fault the learned Judge on account of an issue not adjudicated upon. In conclusion, counsel urged us to take judicial notice that the dispute having arisen in 2020, it was subject to the Physical Land Use and Planning *Act No. 13 of 2019* (PART VIII), which had repealed all previous statutes relating to physical land use and planning. They asked us to dismiss the appeal.

19. A cursory look at the record before us shows that the validity of the form of the enforcement notice was not in issue. It was not raised by the appellant in his judicial review application or submissions before the ELC.

20. Notably, the appellant's Statement of Grounds pursuant to Order 53 rule 1(2) of the Civil Procedure Rules dated 24th November 2020 did not raise the issue as one of the grounds on which relief was sought. Order 53 rule 4(1) of the Civil Procedure Rules provides that "no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement." To our mind, at no point during the proceedings before the ELC did the issue emerge as one left for the court to determine. Accordingly, the learned Judge did not, and could not, consider or determine the issue in her impugned judgement.

21. In Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR, this Court elucidated on the circumstances under which a court can make a determination on an unpleaded issue in the following words:

> " Parties are indeed bound by their own pleadings .... Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not

pleaded, then the court will make a determination on the matter. As was held in Odd Jobs v Mubia [1970] EA 476, 'a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.'"

22. The appellant latched onto the learned Judge's observation that the Physical Planning Act, 1996 had been repealed by the *Physical and Land Use Planning Act* (Cap. 303), which commenced on 5th August 2019 as a basis for raising this issue on appeal to this Court despite having not raised it in his pleadings or submissions before the ELC.

23. Whether or not an issue not pleaded or determined in the court below may be raised for the first time on appeal was comprehensively addressed in the case of Stallion Insurance Company Limited v Ignazzio Messina & C S.p.A [2007] KECA 305 (KLR) where this Court held that:

> "We are of the further view that the appellant's case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in United Dominion Trust Case (Supra) may illustrate the point: -
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> '.... As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below
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> .... It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court.'
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> The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court's decision, the court stated: -
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> 'Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation.'"

24. In view of the foregoing, we reach the inescapable conclusion that the learned Judge was not at fault in declining to determine the newly raised challenge on the form of the enforcement notice. Its validity or invalidity was not pleaded or raised as an issue for determination by the ELC. Neither can it be raised for the first time on appeal to this Court. Accordingly, this ground of appeal fails.

25. Turning to the 2nd issue as to whether the learned Judge was at fault in dismissing the appellant's suit on the ground that it offended the doctrine of exhaustion of statutory remedies, or in failing to find that there were exceptional circumstances exempting the appellant from the obligation to exhaust the said

remedies, we take to mind the learned Judge's observation in her judgment rendered in the following words, which we take the liberty to cite in extenso:

> "It is clear from the foregoing cited provisions of the law that Local authorities (in the circumstances of this case read County Governments), have power to issue enforcement notices on land owners or occupiers of land within their area of jurisdiction. It is also clear that the Act provides the procedure of challenging such a notice by an aggrieved person and the consequences of failure to challenge the notice.
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> In the circumstances of this case, the applicants who did not file an appeal against the enforcement notice as by law required. I find no evidence capable of proving that the applicant filed an appeal or made attempts to file an appeal as by law required which were frustrated by the
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> respondent. I agree with respondent's submissions that she neither acted in excess of her powers nor acted illegally to warrant issuance of the orders sought ....
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> The decision sought to be challenged was made under Section 72 of the *Physical and Land Use Planning Act*. As such, there is prescribed procedure of challenging such a decision under the said Act. By dint of Section 72(3) the respondent ought to have first lodged an appeal against the said suspension to the relevant County Physical and Land Use Planning Committee. The Committee shall then hear and determine within 14 days. I see no exceptional circumstances in this matter to bypass the said Committee.
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> The *Physical and Land Use Planning Act*, 2019 contains the steps the ex-parte Applicant ought to take before approaching this court for judicial review. Undoubtedly, the ex-parte Applicant is dissatisfied with the enforcement notice issued by the Respondent under Section 72 of the Act. Section 80 thereof states that being aggrieved, the ex- parte Applicant has recourse to the County Physical and Land Use Planning Liaison Committee. It is clear that no such appeal was registered. Had that been done, then the ex-parte Applicant could have raised his concerns on procedural impropriety in the issuance of the enforcement notice or illegality thereof with the production requisite evidence.
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> Be that as it may, the applicant submitted that the said notice/decision was made pursuant to a complaint which was never communicated to the exparte applicant and without hearing him and done in the office without visiting the site hence condemning the applicant unheard. The respondent submitted that he did visit the site on the 18th November 2020 and he confirmed that the exparte applicant had encroached into the neighbouring plot. He produced the said photographs as evidence.
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> In view of the above, I find that this suit offends the doctrine of exhaustion of remedies provided in a statute. It follows that the applicant's application for Judicial Review orders offends the mandatory provisions of section 9 (3) (4) of the Fair Administration Act. In addition, and without prejudice to the above, the applicant has not established any grounds for this court to grant the Judicial Review Orders of Certiorari."

26. In their submissions, counsel for the appellant contended that the enforcement notice ought to be treated as a constructive ruling; that challenging such notices in court does not amount to a violation of the doctrine of exhaustion; that the enforcement notice came as a result of a boundary dispute between two neighbouring individuals; that it was not issued because the appellant had violated any Physical Planning Regulations; and that the Liaison Committee has no power to arbitrate over boundary disputes between private land owners under the *Physical and Land Use Planning Act*.

27. Counsel further argued that, even if it were to be said that the notice ought to have been referred to the Liaison Committee in accordance with section 72(3) of the Act, there would have been no fair trial for reasons that the decision to issue the notice was made in response to the appellant's complaint, and yet he was condemned unheard. Counsel explained that the appellant's complaint was lodged with the County Department of Lands, Planning and Housing where the said Liaison Committee is domiciled; that the department had shown a glaring bias; that the manner in which the 1st respondent dealt with the respondent's complaint violated the mandatory provisions of section 4 of the Fair Administrative Actions Act; and that, when the appellant submitted his survey report in March 2020, the 1st respondent remained silent while it issued the enforcement notice within 7 days of the date of the survey report prepared for the 2nd respondent, thereby demonstrating lack of fairness.

28. Counsel went on to submit that the Liaison Committee, which is part of the County Department of Lands, Planning and Housing, had shown open bias and could not be impartial; that this is the fear that compelled the appellant to challenge the enforcement notice in court in place of the Liaison Committee; and that, therefore, there were exceptional circumstances to warrant bypass of the Liaison Committee.

29. Counsel further submitted that section 9(3) of the *Fair Administrative Action Act* does not envisage dismissal of proceedings for failure by the applicant to first exhaust the available administrative remedies, but that it mandatorily requires the court to direct the applicant to first exhaust those remedies; that no proceedings can be dismissed under this clause as was the case here; that the Judge erred in interpreting the said provision to mean that it calls for dismissal of such applications; that the 1st respondent raised the issue of violation of the doctrine of exhaustion while it knew that it had not established the Liaison Committee; and that the said Committee has not been established to date.

30. In rebuttal, counsel for the 1st respondent submitted that, having been issued with an enforcement notice dated 19th November 2020, and having been aggrieved thereby, it behoved the appellant to first appeal to the Liaison Committee and, subsequently, to the ELC. According to counsel, this appeal is provided for under Section 72(3) of the *Physical and Land Use Planning Act*. Counsel contended that the ELC is not the primary adjudicatory body vested with jurisdiction to deal with grievances over enforcement notices, and that failure to exhaust the administrative remedies aforesaid amounts to breach of the exhaustion doctrine.

31. In addition, counsel cited the case of Whitehorse Investments Ltd v Nairobi City County [2019] KECA 102 (KLR) where this Court upheld the decision of the superior court which declined judicial review remedies sought in an application challenging and enforcement notice under the Physical Planning Act on the ground that the application was initiated prematurely, and that the appellant therein failed to first exhaust the appropriate remedies under the Act.

32. Counsel further submitted that the enforcement notice was issued after the 1st respondent analysed the appellant's survey report, the 2nd respondent's documents, and after conducting a physical inspection of the properties, which showed that the appellant's staircase was not part of the building plans approved in 1994; that the appellant failed to adhere to the internal dispute resolution mechanisms provided for under section 72 of the Act to challenge the enforcement notice and appeal to the Liaison Committee; and that the appellant did not seek exemption from the requirement to exhaust the internal dispute resolution mechanisms pursuant to section 9 (4) of the *Fair Administrative Action Act*.

33. Counsel cited the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR) for the proposition that the exhaustion doctrine serves the purpose of ensuring that there is a 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 of courts. According to counsel, the appellant was indolent and, consequently, equity would not come to his aid.

34. Counsel further cited the case of Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd [1960] EA 620 for the proposition that, although an appellate court has discretion to allow an appellant to take a new point on appeal, it will not do so if the matter had not been properly pleaded, or if all facts bearing on the new point have not been elicited in the court below.

35. On the authority of Godfrey Osotsi v Amani National Congress Party [2019] KEHC 8272 (KLR), counsel posited that, even though Section 9 of the *Fair Administrative Action Act* does not specify what amounts to exceptional circumstances, courts have defined exceptional circumstances to mean circumstances that are out of the ordinary and render it inappropriate or impossible for the applicant to first pursue the internal dispute resolution mechanisms. According to counsel, the appellant provided no reasons or exceptions to justify bypassing an appeal to the Committee, and neither did any circumstances exist to suggest that it was impossible for the Committee to adjudicate over the appeal and render a decision.

36. Having considered the impugned judgment and the rival submissions, we hasten to observe right at the outset that the doctrine of exhaustion of remedies requires parties to pursue all available administrative or alternative remedies before seeking judicial intervention so as to ensure that courts are not burdened with cases where alternative avenues for resolution have not been explored. The doctrine applies in equal measure to disputes arising from the use and development of land and buildings, and in the interests of proper and orderly development pursuant to the *Physical and Land Use Planning Act*, Cap. 303 (the Act).

37. Section 56 of the Act grants county governments power to undertake control of developments within their respective jurisdictions, which includes power to prohibit or control the use and development of land and buildings in the interests of proper and orderly development; to consider and approve all development applications and grant all development permissions; and to ensure the proper execution and implementation of approved physical and land use development plans.

38. Section 72 of the Act, which provides for the issuance of enforcement notices, reads:

> 72. Enforcement notice
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> 1. A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
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> a. a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
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> b. any condition of a development permission granted under this Act has not been complied with.
>
> 2. An enforcement notice shall—
>
> a. specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
>
> b. specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

c. require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

3. Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

4. Any party aggrieved with the determination of the county physical and land use planning Liaison Committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.

5. A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.

39. Section 80 of the Act sets out the manner in which an appeal against an enforcement notice issued pursuant to section 72(4) is lodged and determined. Section 80 reads:

80. Appeal to a County Physical and Land Use Planning Liaison Committee

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

2. A County Physical and Land Use Planning Liaison Committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination.

3. The Chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court and published in the Gazette or in at least one newspaper of national circulation.

40. Contrary to the appellant's allegations, the 1st respondent's issuance of the enforcement notice did not amount to a "constructive" determination of a boundary dispute between the appellant and the 2nd respondent. The sequence of events and the 1st respondent's inquiry leading to the issuance of the enforcement notice clearly show that it was based on information gathered by the 1st respondent leading to the conclusion that the appellant's development had not complied with the building plan approved in 1994, and that the development was in breach of the Act.

41. The 1st respondent's inquiry leading to its finding that the appellant's development ran afoul of the approved building plan and the Act was prompted by the appellant's own complaint vide his letter dated 25th February 2020, followed by the rival documents supplied by the 2nd respondent. To our mind, the enforcement notice had everything to do with the appellant's breach of the Act by undertaking his development contrary to the approved development plans. Accordingly, the notice had nothing to do with a boundary dispute. Neither did it transform the resultant enforcement notice into what the appellant viewed as a "constructive ruling" on the misperceived boundary dispute.

42. Whereas the appellant was aggrieved by the 1st respondent's enforcement notice, he elected to seek judicial review and evade the statutory procedure laid down under the Act for appropriate administrative remedies on the grounds that the Liaison Committee would not have acted fairly in determination of his complaint. Section 72 of the Act sets out in no uncertain terms the appropriate remedy for a party aggrieved by an enforcement notice, to wit, an appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of service upon him of the enforcement notice.

43. As was correctly observed by the learned Judge, the appellant presented no evidence that he appealed or attempted to appeal to the relevant Liaison Committee despite clearly identifying the department in which it was domiciled. Counsel's submission that the Liaison Committee had not been established was neither pleaded nor supported by any evidence. As readily admitted by counsel, their submission in that regard amounted to giving evidence from the bar. Accordingly, no special circumstances were either pleaded or otherwise established as a matter of fact to warrant the appellant's departure from the statutory requirements for exhaustion of the requisite administrative remedies.

44. Section 9 of the *Fair Administrative Action Act* provides for judicial review applications on the condition that mechanisms for review or appeal from an administrative action have first been exhausted; or on the condition that there exists exceptional circumstances warranting the bypassing of the remedies and the applicant has brought an application seeking to be exempted from the obligation to first exhaust the said remedies. Section 9 reads:

> 9. Procedure for judicial review
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> 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.
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> 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 subsection (1).
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> 4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

45. It is instructive that section 9(2) of the *Fair Administrative Action Act* underscores the exhaustion doctrine in mandatory terms and expressly bars the High Court or a subordinate court from reviewing any administrative action or decision under the Act pursuant to subsection (1) unless the mechanisms, including internal mechanisms for appeal or review, and all remedies available under any other written law are first exhausted.

46. In Speaker of the National Assembly v Karume [1992] KECA 42 (KLR), this Court held that:

> " 15. 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."

47. In Republic v National Environmental Management Authority [2011] KECA 412 (KLR), this Court also held that:

> " The principle running through these cases is 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 was 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 – see for example R V. Birmingham City Council, ex parte Ferrero Ltd. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute."

48. In the majority decision in Director of Planning & Architecture, County Government of Mombasa v Makupa Transit Shade Limited [2019] KECA 785 (KLR), Koome, JA (as she then was) considered the complaint of the respondent therein that the subject letter said to be an enforcement notice was not compliant with the relevant provisions of the now repealed Physical Planning Act and held that the respondent therein ought to have first referred the matter to the Liaison Committee instead of prematurely filing a judicial review application:

> " 16. Although the impugned letter in my view was not elegantly drawn, nonetheless the contents therein clearly points to some breaches in specifically of the named conditions ....
>
> 17. In my own analysis of the matter, if the respondent was able to construe that the contents of the said letter amounted to a dispute that was filed in court, I see no reason why the respondent could not have referred the matter to the Liaison Committee first as provided for the Physical Planning Act ....
>
> > "Counsel for the respondent argued most eloquently that the appellant should have advised them to file the matter before the Liaison Committee. With tremendous respect, I do not think that it was a duty or obligation of the appellant to inform a party where to file their disputes. The fact that the respondent understood the gravity of the letter of suspension as amounting to a dispute is proof of their knowledge of the law and ability to look out for the provisions of the relevant law. After all there is the old maxim that says ignorance of the law is no defence.
> >
> > ... ."

> 18. ... where there is 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 a matter is exceptional, it is necessary for the court to examine carefully the suitability of the statutory tribunal in the context of the particular case and ask itself whether the statutory body had the powers to determine the issue at hand. It is common ground that the issue at hand in this matter was about physical planning and execution of a development plan regarding land reclamation. The issues were purely matters of land reclamation, planning and development that are covered under the Physical Planning Act. For the aforesaid reasons, I am persuaded that the respondent ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning Act before engaging the High court."

49. As for what would be considered as "exceptional circumstances" for purposes of an exemption under section 9(4) of the *Fair Administrative Action Act*, the observation of Mativo,J. (as he then was) in Republic v Council for Legal Education Exparte Desmond Tutu Owuoth [2019] KEHC 11742 (KLR) is persuasive. According to the learned Judge:

> " 32. There is no definition of 'exceptional circumstances' in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.
>
> 33. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.
>
> ... .
>
> 39. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively."

50. The golden thread that runs through the afore-cited judicial authorities is that failure to exhaust alternative remedies provided under statute law in breach of the exhaustion doctrine renders any court

proceedings futile in the absence of any exceptional circumstances to warrant departure from the mandatory requirement to exhaust such alternative remedies.

51. In our considered view, the appellant's unfounded fear that the 1st respondent's Liaison Committee would be biased based on the manner in which the County Department of Lands, Planning and Housing dealt with his complaint does not amount to exceptional circumstances that would excuse him from first exhausting the administrative remedies provided for under the Act. It is not lost on us that the 1st respondent's action was triggered by the appellant's own complaint, which was duly investigated and a conclusive decision made to issue the enforcement notice.

52. It is also noteworthy that, in his replying affidavit and the evidential documents annexed thereto, the 1st respondent's Building Manager demonstrated that the enforcement notice was not an arbitrary action on the 1st respondent's part, but one made after Mr. Imbwaka's site visit of 18th November 2020 and his confirmation that the appellant's steel staircase, which encroached onto the 2nd respondent's property, was not part of the building plan approved in 1994. Accordingly, we reach the conclusion that the appellant has not laid any or any sufficient basis to suggest that the 1st respondent's action was tainted with bias, or that the 1st respondent's action imputes bias on the part of its Liaison Committee to the extent that it could not possibly have determined an appeal by the appellant with fairness and impartiality.

53. In Judicial Service Commission v Shollei & another [2014] KECA 334 (KLR), Okwengu, JA held that:

> "78. Thus it is crucial in determining real or apparent bias, that the first step be the ascertainment of the circumstances upon which the allegation of bias is anchored. The second step is to use the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias."

54. In the same case, Kiage, JA additionally observed that:

> "102. I do not accept the thesis that bias is established merely by the seriousness or the stridentness of the allegations. What is required is proof by evidence, the burden being borne by he or she that alleges. It is not difficult to see what mischief would arise were courts to hold that seriousness of allegations, as opposed to their proof, is the proper basis for apprehending bias. Such apprehension, in my respectful view, is regrettable, not reasonable."

55. Having considered the record as put to us and the comprehensive submissions by counsel, we find nothing to suggest that the appellant's apprehension of bias, which is alluded to for the first time in the submissions before us was, by any stretch of imagination, reasonable. Moreover, and not without significance, the appellant made no attempt to seek the superior court's exemption from the statutory requirement to exhaust the alternative remedies under the Act. Accordingly, the learned Judge was not at fault in dismissing the appellant's application for judicial review on the grounds that it offended the doctrine of exhaustion in the absence of any exceptional circumstances to warrant exemption therefrom.

56. In addition to the foregoing, we hasten to observe that the appellant's argument that no proceedings can be dismissed pursuant to section 9(3) of the Fair Administrative Actions Act for failure to exhaust statutory remedies does not hold. Section 9(3) mandates the court to direct the applicant to "first exhaust such remedy before instituting proceedings under subsection (1)." The provision envisages institution of fresh proceedings, if necessary, after exhaustion of the prescribed remedies and, therefore, the appropriate manner of dealing with the premature application before the court would be to dismiss

it. Sustaining the premature application without any legal basis would amount to issuing orders in vain. In conclusion, that ground of appeal fails.

57. Turning to the 3rd and final issue as to whether the learned Judge dismissed the judicial review application on technicalities thereby justifying the 1st respondent's alleged bias, ultra vires actions and non-compliance with the Act, learned counsel for the appellant submitted that it was wrong for the learned Judge to lay emphasis only on the technical aspect of the subject Judicial Review application and closing her eyes to the reality of the troubles the appellant went through before coming to court. Counsel argued that, by dismissing the applicant's judicial review application purely on technicalities, the learned Judge essentially sanctified and justified the 1st respondent's open bias in handling the appellant's complaint as well as the 1st respondent's ultra vires move in using the enforcement power conferred upon it by the *Physical and Land Use Planning Act* to enforce the *Trespass Act* Cap. 294 and to deal with boundary disputes.

58. Counsel went on to suggest that the enforcement notice was also intended to determine a dispute under the *Trespass Act*. In our considered view, no useful purpose would be served by our pronouncement on each of the glaringly diversionary arguments advanced by counsel to avoid the real issues of compliance addressed by the enforcement notice. Suffice it to observe that the notice was not essentially issued in respect of a complaint over trespass per se or a boundary dispute, but was primarily intended to address noncompliance with the Act with regard to the approved development plans. The secondary issue of trespass was merely consequential to the statutory breach to which the enforcement notice relates.

59. For the avoidance of doubt, the enforcement notice stated as follows:

> " The development has breached the following:
>
> 1. Section 30 of Physical Planning Act that requires you to obtain approval of the County Government of Mombasa before carrying out any development within its jurisdiction.
>
> 2. *Trespass Act* Chapter 294 Section 3 sub-section 1 and 2 which states that
>
> a. Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
>
> b. Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him."

60. On their part, learned Counsel for the 1st respondent submitted: that section 9(2) of the *Fair Administrative Action Act* enjoins courts not to 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; that the provision is couched in mandatory terms with the use of 'shall'; that, furthermore, it is trite that parties are encouraged to exhaust internal dispute mechanisms before approaching a court of law; that the County Physical and Land Use Planning Liaison Committee is constituted under section 72 of the Physical Land Use and Planning Act to hear any appeals arising out of any grievance from an enforcement notice served upon a party; and that the appellant ought to have challenged the enforcement notice on appeal to the Liaison Committee.

61. Counsel further submitted that the appellant's judicial review application subject of this appeal was dismissed on a substantive ground and not on a technicality; that the Judicial review application was dismissed on a point of law, and not on interrogation of the process and/or any reasons thereof leading to the issuance of the impugned enforcement notice; that grounds 3(i),(ii),(iii) and (iv) of the instant appeal touch on the appellant challenging the 1st respondent's process leading up to the issuance of the enforcement notice and apparent bias thereon; and that those grounds do not fall for determination by this Court in view of the fact that they were not in issue before the trial court.

62. To our mind, the appellant's judicial review was not dismissed on mere technicalities as suggested by the appellant, but on a point of law on the learned Judge's finding that it offended the doctrine of exhaustion as set out in section 9 of the *Fair Administrative Action Act*. We need not overemphasise the fact that this doctrine is not a mere procedural technicality. The invaluable doctrine serves the purpose of, inter alia: promoting administrative autonomy and efficiency by allowing specialised administrative agencies to regulate matters falling within their unique expertise in the manner provided for by law; reflecting the principle of separation of powers by ensuring that administrative agencies (which are part of the executive) are given the first opportunity to exercise their functions without undue judicial interference or intervention; promoting judicial economy by providing alternative channels through which some disputes can be resolved without involving the courts; and of encouraging alternative dispute resolution mechanisms, such as adjudication, mediation and arbitration.

63. As was held by this Court in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (supra):

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the 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 a 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.
>
> We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed."

64. The alleged ultra vires actions the appellant complains of (that the 1st respondent was using its enforcement power to enforce the *Trespass Act*, and in attempting to determine a boundary dispute which was the preserve of the Land Registrar) and the allegation that the 1st respondent had failed to comply with the mandatory requirements of section 72(2)(a) of the Act ought to have been the basis of an appeal before the Liaison Committee. The appellant unilaterally chose to bypass the Liaison Committee and file the judicial review application. In our view, the appellant's apprehension that the Liaison Committee was already biased against him was not a conclusion that a fair minded and informed observer would make in the circumstances of this case. In conclusion, the learned Judge was not at fault in dismissing the appellant's application for the afore-cited reasons. Accordingly, the appellant's contention that the dismissal was founded on a mere technicality does not hold.

65. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal

fails and is hereby dismissed. Consequently, the Judgment and Decree of the ELC at Mombasa (N. A. Matheka, J.) delivered on 9th November 2021 is hereby upheld.

66. The appellant shall bear the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY 2025.

F. TUIYOTT

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR