



**Ramji v County Government of Trans-Nzoia & 2 others (Environment & Land
Case E022 of 2023) [2024] KEELC 1471 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E022 OF 2023
FO NYAGAKA, J
MARCH 19, 2024**

BETWEEN

VIPUL RATILAL GOSAR RAMJI APPLICANT

AND

COUNTY GOVERNMENT OF TRANS-NZOA 1ST RESPONDENT

GEORGE NATEMBEYA 2ND RESPONDENT

ERIC WAFULA 3RD RESPONDENT

RULING

1. This is a composite Ruling in respect of the Notice of Motion Application dated 19/04/2023 ('hereinafter 'The Application') and the Notice of Preliminary Objection dated 16/10/2023 (hereinafter 'The Objection').
2. The Application was lodged by Vipul Ratilal Gosar Ramji (hereinafter 'The Applicant'). It is supported by his two Affidavits deponed to on 19/04/2023 and 18/09/2023. He seeks the following reliefs;
 1. ...spent
 2. That while pending the inter partes hearing and determination of this Application, this Hon. Court be pleased to issue a temporary injunction, restraining the defendants, servants, agents, employees from trespassing, entering, further damaging or demolishing or in any way interfering with the Plaintiff's user and developments standing on land parcel Nos. Kitale Municipality Block 32/3-114 Kitale Municipality Block 11/240, 383,384 and 386.
 3. That upon inter partes hearing and determination of the Application the injunction granted in the interim be confirmed/or granted in terms of prayer No. 2 while pending the hearing and determination of this suit.



4. That the County Commandant, Trans-Nzoia County be directed to ensure that orders of this honourable Court are complied with.
5. That costs be provided for.
3. In the grounds in support of the Application as well as the Affidavits, the Applicant pleaded that he is the registered owner of the lands comprised in Kitale Municipality Block 32/3- 114 and Kitale Municipality Block 11/240, 383,384 and 386 (hereinafter ‘The Suit Properties’).
4. It was his case that the land comprised in title No. Kitale Municipality Block 32/3-14 are subdivisions of L.R No. 6624 and have never been public land. He referred to the letter dated 21/02/2019 authored by the National Land Commission County Coordinator of Trans-Nzoia to the effect that it is not public land.
5. With respect to Parcel No. Kitale Municipality Block 11/240 it was his case that it is his land. He referred to photocopies of title deed and leases in his favour. It was his case that he stores his machinery and packages water from in the said land. The Applicant pleaded that the utterances of the 2nd and 3rd Defendant that he grabbed public land and that they would reclaim it are false and capable of inciting members of public against him.
6. The Applicant pleaded that on 7th to 8th March 2023 between 01:00 AM and 03:00 AM, a substantial portion of his stone perimeter wall was pulled down and his three houses badly damaged.
7. He deposed that in the year 2015, the 1st Respondent gave him the approval to build the perimeter wall. He referred to the invoices and receipts issued to him by the County Government. He went further to claim that the County Government of the Trans-Nzoia, the 1st Respondent herein, has stopped him from re-constructing the damaged wall calling for ownership documents which he already has. The actions of the Respondents are an affront to his right to protection of property and that his bid to resolve the dispute amicably through alternative means have been in vain.
8. In the further Affidavit, the Applicant stated that the perimeter wall was constructed in the year 2015 after its plan was approved by the County Government upon him paying requisite fees and that no query was ever raised by the 1st Defendant before demolition of the wall.

The Submissions

9. The Applicant filed written submissions dated 13/10/2023. They argued that they had established the conditions for the grant of temporary injunction as set out by the case of Anielo Giella -vs- Cassman Brown (1973) EA 358.
10. On the requirement of establishing a prima facie case with probability of success, they submitted that they had demonstrated ownership of the suit properties through lease certificates and lease documents. Further, they referred to the invoices issued by the County Government of Trans-Nzoia to the Applicant’s then partner Avir Shah for Kshs. 32,500/- which entailed application form, plan approval, public health inspections, building occupation certificate development authority certificate and hoarding.
11. The Applicant referred to annexure VGRR(2)(b) under the heading ‘Plan approval for plot No. 179/4 GI’ which was his plot. He submitted that he paid the 1st Respondent Kshs. 32,500/- and as such it was estopped from claiming that there was no approval. Based on the foregoing, the Applicant submitted that he had satisfied the grant of a temporary injunction and unless it is granted, they are in danger of destruction and waste by the Defendants.



1st & 2nd Respondents' Response

12. In opposition to the Application, the County Government of Trans-Nzoia and George Natembeya filed the Preliminary Objection dated 16/10/2019, The Replying Affidavit and Further Affidavit of Truphosa Amere, The County Secretary, deposed to on 30/06/2023 and 26/09/2023 respectively.
13. I will consider foregoing pleadings sequentially.

The Preliminary Objection

14. The Preliminary Objection was couched in the following terms;
 1. This Honourable Court lacks jurisdiction to hear and determine this matter as the nature of the dispute relates to physical and land use planning as provided under the [Physical and Land Use Planning Act](#), Number 13 of 2019.
 2. That the suit was filed with disregard to the mandatory provisions of sections 61(2) and 72 (3) (4) of the [Physical and Land Use Planning Act](#).

The Submissions

15. The 1st and 2nd Respondent urged the Preliminary Objection through written submissions dated 26/10/2023. They argued that according to Section 57 of the [Physical and Land Use Planning Act](#) there is imposed a requirement that no development can be carried out within a County without a county development permission from the relevant executive committee. It was therefore its position that the County Executive Committee Member acted within the confines of law when he requested the Applicant for his development permission for verification but instead rushed to this Court and obtained injunctions.
16. They submitted that they had nothing against the Applicant especially on repossession of the land since the issue on validity of the titles or the ownership was already pending before this Court in ELC No. 11 of 2019 Avir Kanti Ratilal Shah & Vipul Ratilal Dodhia -vs- County Government of Trans-Nzoia & Erick Wafula.
17. On the foregoing factual background, the Respondents submitted that this Court had no jurisdiction as per the provisions of Section 61(2) of the [Physical and Land Use Planning Act](#) which requires an aggrieved Applicant for development permission to appeal such decision to the County Physical and Land Use Planning Liaisons Committee.
18. The Respondents referred further to Section 72 which requires a part aggrieved by an enforcement notice to appeal to the County Physical and Land Use Planning Liaisons Committee.
19. They relied on the decision of Issa Ahmed & 15 Others -vs- Mohammed Al-Sawae (2021) eKLR to buttress the need to abide by the foregoing mechanisms on approval of development permissions.
20. In conclusion, the 1st and 2nd Respondent submitted that the Applicant had not exhausted the alternative mechanism of resolving the dispute and as such this Court lacks original jurisdiction to entertain the suit.

The Replying Affidavits

21. In the Replying Affidavit deposed to on 30/06/2023, the County Secretary stated that the Application was an abuse of Court meant to assist the Applicant conduct illegalities as far as complying with the physical planning and land use law was concerned. She deposed that the 1st Respondent had not sought



- any information regarding the Applicant's property in Kitale Municipality Block 11/240, 385 and 386 but sought specifically and only for construction approvals and its accompanying documents of Kitale Municipality Block 32/3-114. As such, the injunctive orders sought in respect of the other properties not in question were premature and a plot to bar the 1st Respondent from asking any queries on the said parcels.
22. She deponed further that the Applicant was abusing court process since the parcel of land No. 32/3-114 was before this Court in ELC No. 11 of 2009 and had not in any way questioned it since it was awaiting Court's determination. She deposed that contrary to what the Applicant had alluded to, there had been no approval of the construction since nothing has been presented before the 1st Respondent under the Ministry of Lands as requested by the County Executive Committee. She referred to the request marked as TA-1.
 23. The 1st Respondent asserted that despite the meetings and undertakings from the Applicant, the construction proceeded in blatant disregard of the law and their notices. She swore that on 05/05/2023 the Applicant was proceeding with onsite construction without approvals as per the Physical Planning Act for which they were arrested by the County Enforcement Officers. She deposed further that the Applicant could not use the instant Application to deal with the criminal matter pending at the police station in order to avoid producing approval documents for construction and as a means to provide a leeway to have this court allow him to construct without regard to laid down procedures.
 24. In the Further Affidavit deposed to on 26/09/2023, she deponed that perimeter wall in Kitale Municipality Block 32/3-114 which the Applicant began reconstructing without requisite approvals from the County's Physical Planning Department collapsed due to heavy rainfall and as such, through county agents, it stopped any further construction.
 25. It was her position that despite making an undertaking to present the approval documents, the Applicant failed to and consequently, the County gave an official notice requesting evidence of approvals vide letter dated 20/03/2023. She deponed that the Applicant had been playing cat and mouse games and could not avail the documents for perusal. She deposed that he presented photocopies whose authenticity was questionable and upon asking the Applicant to present the originals, he vehemently opposed.
 26. She deposed further that in order to address the issue, the Applicant held a meeting with the 1st Respondent's County Chief Executive Committee member for Lands together with member of the County Land Task Force in which the Applicant promised to avail the documents approving the impugned construction. She deposed that eventually the Applicant presented the alleged approval and upon subjecting them to verification process, it emerged that the signature thereon did not belong to the County Executive Committee of Lands. To that end, they reported the matter to Kitale Police Station vide OB No. 76/05/05/2023 for forgery and attendant investigation.
 27. The County Secretary deposed further that when the purported approval took place the acting Director Miss Beatrice Wangila was in office and could have been the only person to approve the Applicant's constructions. She referred Miss. Wangila's affidavit.
 28. It further was her case that instead of presenting the document, the Applicant sought alternative means of dispute resolution by engaging the County Commandant and the County Executive Member for Lands, the Officer in Charge Lands, the Criminal Investigations Office, County Chief Investigating Officer (CCIO) and the Applicant herein. That mechanism resolved that he avails the original documents either to the CEC Ministry of Lands or the County Commandant for verification, an act the Applicant did not carry out.



29. She concluded that the Applicant just like any other citizen, is under an obligation to present documents for verification in line with Physical Planning and Land Use Act. She deponed that he was tactically using the Court process to assist him disobey and circumvent the construction laws and related regulations. She deponed that issuing the Orders prayed for would result in usurpation of the County Government powers or authority.

The Submissions

30. The 1st Defendant argued its case through written submissions dated 06/10/2023. It reiterated that by the Applicant coming to this Court, he was undermining the competent authority duly established under the *Physical and Land Use Planning Act*. It referred to the decision in Republic -vs- County Government of Mombasa Ex-Parte Emdund Kirigah Makusha; Fahmi Hussein Swaleh (interested Party) [2021] eKLR where the court observed that the *Physical and Land Use Planning Act* provides procedure of challenging the counties enforcement notices. It summed that the County Government had the requisite authority to seek and conduct verification of documents in line with *physical and Land use Planning Act*.
31. As regards propriety of the injunctive orders sought, the 1st Respondent submitted that it did not challenge the ownership status of the suit property other than asking for approvals authorizing erection of the Perimeter wall. It therefore argued that from its stand point, the substratum of the suit is strictly in relation to enforcement notices sent to the Applicant. It was emphatic that the Applicant had not established the requirements set out in the Giella -vs- Cassman Brown (1973) EA 358 case since the orders sought are at variance with the dispute apparent on the face of the record. The Respondents submitted further that the Court should set aside the injunctive orders issued against it for failing to abide by the demands of the authority requiring him to avail the documents for verification.

The Applicant's Response to the Preliminary Objection

32. The Applicant responded to the Objection through written submissions dated 15/11/2023. He submitted that it had submitted an application to the Defendant for development permission in the year 2015, over 8 years ago and was given permission to construct the perimeter wall.
33. The Applicant submitted that in the year 2021, it presented to the 1st Defendant drawings for the three residential homes over the suit property and the development permission was given and the houses constructed. He argued that the provisions of Physical Planning and Land Use Act provisions did not apply to the facts of the instant case. He argued that the instant case was different in that in the Plaintiff, the damages sought to compensate for losses and declarations prayed for and as such, upholding the Preliminary Objection is untenable.

The 3rd Respondent's Case

34. Erick Wafula, the 3rd Respondent herein responded to the Application only through his replying Affidavit deposed to on 25/05/2023. He was not opposed to the 1st and 2nd Respondents' Preliminary Objection.
35. It was his case that the claim by the Applicant that he named him as a land grabber was without evidence. He deposed that the Applicant had not presented the names of any of those people who allegedly demolished the perimeter wall and destroyed the houses thereon and how they are connected to or related to him.



36. He further deposed that the Applicant had not presented or provided any evidence of any report being made to law enforcement officers about the alleged demolitions and that he had never been charged with any offence of malicious damage to property in relation to the Applicant's property.
37. In conclusion, the 3rd Respondent deposed that the Applicant referred to the suit property Kitale Municipality Blocks 11 and 32 which are already before this Court and in Environment and Land Case No. 11 of 2009 wherein Orders were issued by Hon. Njoroge J. maintaining the status quo until the substantive hearing of the dispute.

The Submissions

38. The 3rd Respondent urged his case further through written submissions dated 15/11/2023. From the outset, he argued that the Application herein was sub judice the ELC Case No. 11 of 2019 which is before this Court. He relied on the decision of the Supreme Court Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) to bolster the significance of the doctrine of sub-judice. He argued that in it, the Court observed inter-alia that the purpose of sub-judice is to stop filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter to avoid court process.
39. On the issue whether the Applicant had made a case for the grant of an injunction, the 3rd Respondent submitted that, being a discretionary function of the Court, the Applicant had not demonstrated a prima-facie case for failing to avail any evidence linking him to the alleged demolition. He submitted that there had been no police investigations or arrest connected with the demolition. To that end, he argued that the Applicant had not established a prima-facie case.

Issues for Determination

40. Having carefully sifted through the pleadings herein, the evidence presented and the submissions, the issues that emerge for determination are as follows;
 - i. Whether the Preliminary Objection is proper in law.
 - ii. Depending on (i) above, whether the Preliminary Objection is merited.
 - iii. Depending on (ii) above, whether the Applicant has made a case for the issue of temporary injunction Application pending the inter-partes hearing and determination of the main suit.
 - iv. Reliefs.
41. I will analyse the foregoing issues in their order as hereunder.

Analysis and Determination

(i) Whether the Preliminary Objection is proper in law

42. Preliminary objections are in principle a means to end litigation on an issue from the outset. They do away with the need to go into the merits of the case. For them to do so, they must, in the way they are raised, abide by the principles developed by courts over time.



43. In the long-standing seminal case of *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors* (1969), the Court discussed what a Preliminary Objection is. The learned judge observed;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

...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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

44. While citing the foregoing case, the Court, in *Oraro -vs- Mbaja* (2005) KLR 141 the Court remarked as follows;

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

45. In the case of *Omondi -vs- National Bank of Kenya Ltd & Others* [001] KLR 579; [2001] 1 EA 177, the Court defined the parameters that aid a court in determining a preliminary objection. It observed that;

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion....”

46. I have interrogated the two issues raised in the Preliminary Objection and carefully weighed them against the principles set out in the preceding paragraphs. I find that it meets the threshold as it is purely founded on a pure point of law on the jurisdiction of this court.

(ii) Whether the Preliminary Objection is merited

47. The position taken by the 1st and 2nd Respondent stems from the contention that the Applicant's claim is one that involves development permission as opposed to ownership of the suit properties. In



- the premises, the Respondents contend that the dispute ought not be before this Court as per the mandatory provisions of Section 61(2) and 72(3)(4) of the *Physical and Land Use Planning Act*.
48. In order to get to the substratum of the foregoing issue, it is necessary to interrogate the Plaintiff and the responses by the Respondents. In a claim of this nature, those are the source of information as to whether the issues in a preliminary objection involve only points of law. I will start with the Plaintiff.
 49. In paragraph 6 of the Plaintiff is a claim that at some point in the year 2018, one Eric Wafula, the 3rd Respondent herein, complained to the National Land Commission that land Reference No. 6624 now Kitale Municipality Block 32/3-114 was public land. The Plaintiff claimed further that the National Land Commission replied to the 1st Respondent in writing that the said land has never been public land.
 50. The only other claim of ownership is seen again in paragraph 9 where the Applicant averred that the 2nd and 3rd Respondents made speeches that he had grabbed public land. However, in the said paragraph he does not indicate or identify the land that was a subject of the 2nd and 3rd Respondents claim. He only contends that he would adduce video clips as evidence.
 51. As guided by the decision in *Omondi -vs- National Bank of Kenya Ltd & Others* [2001] KLR 579; [2001] 1 EA 177, this Court looks at pleadings in the process of determining a Preliminary Objection. I have keenly analysed the entire Plaintiff. Notably, the only contention in respect of ownership is in paragraph 6 and 9 of the Plaintiff, and when these are juxtaposed with the reliefs sought in the Plaintiff, apart from the two paragraphs, the rest of the Plaintiff between paragraphs 10 - 15 revolves around the construction of a Perimeter wall in the land comprised in L.R No. 6624. The Applicant claims that it was constructed and duly completed in the year 2015 and in the year 2021, he submitted to the 1st Defendant building plans for three residential houses to be built on parcels No. Kitale Municipality Block 32/41, 62 and 63.
 52. He subsequently narrated how early in the morning of 18/03/2023 between 1.00 am and 3.00 am, a group of people trespassed into their land comprised in Kitale Municipality Block 32/3-114 and destroyed the perimeter wall and three residential buildings. The subsequent paragraphs indicate the 'haggle' between the Applicant and the 1st Respondent on re-construction of the perimeter wall. It is on the foregoing basis the Applicant sought injunctive reliefs from this Court.
 53. Therefore, as for the demolitions that allegedly took place, the Applicant has not, in the pleadings, drawn any link of them to the Respondents herein. At no point in time did the Plaintiffs claim that the alleged unidentified persons were employees or agents of the 1st Defendant or indeed of the other Defendants. In any event, it is a criminal matter to be dealt with under the Criminal Justice system.
 54. It is worth noting that paragraph 10 of the Plaintiff which introduces pleading about the destruction of the Plaintiff's wall does not in any way attribute the destruction to the Defendants, their agents and or servants. In it the Plaintiff only avers that on the material date at night over 100 people trespassed into the Plaintiff's land (suit lands) and demolished a substantial part of the stone wall running to about 250 metres. In the circumstances this Court is prepared to find that the claims on the damages both general and special damages and exemplary ones for trespass are those that do not disclose any reasonable cause of action against the Defendants and should be summarily rejected and are hereby dismissed.
 55. Further, I have also had the occasion to interrogate the 1st and 2nd Respondents' Statement of Defence. Whereas they do not lay claim of ownership of the suit properties, it is their contention, as seen in paragraph 5 that the ownership status of the suit properties is the subject of ELC Case No. E011 of 2019, *Avir Kanti Shah -vs- County Government of Trans-Nzoia & Erick Wafula*, and not in the instant suit.



56. Lastly, before this Court departs from the above point, it is puzzling why the Plaintiff did not in any way bother to file his claims over the ownership of the suit lands in Kitale ELC No. E011 of 2019 but instead decided to bring a separate issue relating to the suit land. Other than a desire to have a multiplicity of suits and increase costs, or getting other favourable orders against the Defendants hence an abuse of the process of the Court, one wonders why the Plaintiff resorted to the instant suit. But since the Defendants have clearly denied that they have nothing, in this suit, to do with the ownership of the suit land, it distils the matter to only the issues that fall under the *Physical and Land Use Planning Act*. On this, the 1st and 2nd Defendants raised the legal point of the issue being sub judice.
57. Of sub-judice, Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR the learned judge

“ 18. Both suits challenge the same decision. The prayers sought in both suits are the same. Since both the suits cite similar issues, the decision of the first suit should be binding on those issues and it need not be tried again. If the plea in the first suit succeeds, then it will render the second case res judicata. In fact, a favourable decision would not only benefit the Nairobi Branch, but the entire bar in the country. This truth renders the second suit useless and of no utilitarian value. A second trial on the same issues would entail duplication of work as evidence required to prove those issues in the first suit would be similar to those in the second suit (read instant suit). Thus, it is desirable that such issues be resolved or adjudicated by one court only. It will avoid conflicting decisions or complications arising therefrom.

19. In order to check this very problem, there exists the concept of sub-judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub-judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on.”

58. Further, the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR, pronounced itself on the subject of sub-judice as follows: -

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.



- (68) In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.
- (72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of *the Constitution* and that Court has already been moved.
- (73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).

59. From the above authorities, it is clear that where issues are substantially issue before another court of con-current or other competent jurisdiction the sub-judice rule would apply and the suit wherein it is raised subsequently ought to be stayed pending the determination of the earlier one. To the extent that the claims about ownership of the suit lands are common between the instant suit and in E011 of 2019, they are sub-judice. This Court would have stayed the instant suit pending the determination of the earlier one. However, given that from the pleadings it is clear that though the Plaintiff attempted to raise the issue of ownership herein it is not in contention, there is no issue to wait for a conclusion on first. Thus, this Court would and does hereby respectfully decline jurisdiction. That being the finding, it leaves the claims about the development plans.

60. Other than the foregoing, the 1st and 2nd Respondents expressly state in paragraph 12 that they have no ownership interest in the suit property herein. To further bolster the foregoing position, it is imperative to reproduce excerpts of paragraph 6 of the Replying Affidavit deposed to on 30/06/2023 by Truphosa Amere. She stated;

“The 1st Respondent has not sought any information regarding the Applicant's Property on Kitale Municipality 11/240, 383, 385 and 386 but only sought specifically for construction approvals and its accompanying documents of Kitale Municipality Block 32/3-114.”

61. It is abundantly clear that on both suit properties, the 1st and 2nd Defendants do not lay claim of ownership but only that of construction approval in respect of Kitale Municipality Block 32/3-114.

62. Based on the pleadings of both parties and more so the 1st and 2nd Respondents' concession that in the claim herein they do not pursue ownership of the suit properties, and having considered the fact that the Applicant has not rebutted the 1st and 2nd Respondents' claim that the ownership of the suit properties is the subject of adjudication in ELC Case No. E011 of 2019, Avir Kanti Shah -vs- County Government of Trans-Nzoia & Erick Wafula, I find, and hereby hold, that what remains of the suit



herein is the contention on construction approvals/ Development Permission between the Applicant and the 1st and 2nd Respondents.

63. It now behoves this Court to take look at the *Physical and Land Use Planning Act* and the question whether the Applicant improperly invoked its Jurisdiction as claimed by the 1st and 2nd Respondents. The Preliminary Objection is founded on Sections 61(2) and 72(3)(4) of the Act.
64. Section 61(2) provides as follows;
- (2) With regards to an application for development permission that complies with the provisions of this Act and within thirty days of receiving an application for development permission, the county executive committee member may -
 - (a) grant the applicant the development permission in the prescribed form and may stipulate any conditions it considers necessary when granting the development permission;
 - (b) refuse to grant the applicant the development permission in the prescribed form and state the grounds for the refusal in writing.
 - (3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
 - (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.
65. Section 61(2) is self-explanatory. It sets out the procedure for seeking development permissions and more importantly, for purposes of the issue on preliminary objection in this suit, creates the avenue for the resolution of grievances where approval is not granted.
66. The Application for development permission lies, in the first instance, at the County Executive Committee. Where it is not granted, and an applicant feels disgruntled, he/she/it escalates the dispute before the County Physical and Land Use Planning Liaison Committee.
67. Further to the foregoing, Section 72(3)(4) of the *Physical and Land Use Planning Act* provides as follows;
- (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.
68. The factual foundation of this dispute, having excluded the ownership status, aligns the claims herein squarely with the provisions of the *Physical and Land Use Planning Act*. The Applicant must subject himself to and exhaust the process anticipated in the Act. The only time the doors of this Court will be open for him is when he is aggrieved by the decision of County Physical and Land Use Planning Liaison



Committee. Otherwise, and without an application for orders to be granted under the exceptions given under Section 9 of the *Fair Administrative Action Act*, the suit would be and remains one brought in the wrong forum.

69. The foregoing is in keeping with Article 159(2)(c) of *the Constitution* that recognizes and entrenches the use of alternative mechanisms of dispute resolution as hereunder;

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

- (a) ...
- (b) ...
- (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

70. Further, this Court refers to the decision in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 Others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where it was observed;

“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 the Courts”

This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

71. The exceptions to the doctrine of Exhaustion were discussed in R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) (supra) where the Court observed thus;

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This



exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)”

72. From the foregoing, this Court is of the unwavering conviction that there are no exceptional circumstances, or a demonstration of the lack of adequate audience or the risk of not preserving constitutional values before the 1st Respondent as to bring this dispute within the exceptions under the doctrine of exhaustion.
73. In conclusion, therefore, I find merit in the Preliminary Objection dated 16/10/2023 and hereby allow it, for the reasons that this suit was filed prematurely, before the doctrine of exhaustion was duly respected and therefore this Court lacks the Jurisdiction to deal with the instant suit in light of Section 61(2) as read with Section 72(3) of the *Physical and Land Use Planning Act* 2019.
74. Consequently, the Notice of Motion dated 19/04/2023 was based on a claim that was not supposed to be before this Court in the first instance and therefore not worth considering on merits. It is lost. I therefore make the following orders:
1. The suit is hereby struck out It is so ordered. for want of Jurisdiction.
 2. The temporary Order of injunction issued against 1st 2nd and 3rd Respondents herein on 20/04/2023 is hereby discharged and accordingly set aside.
 3. Costs of The Notice of Motion Application dated 19/04/023, the Preliminary Objection dated 16/10/2023 as well as the main suit to be borne by the Applicant herein.
75. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 19TH DAY OF MARCH, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

