Nzomo (Suing on his own behalf and on behalf of Kunde Road Residents Welfare Association) v Ontime Real Estate Ltd & 2 others (Environment & Land Petition E004 of 2023) [2024] KEELC 1572 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1572 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E004 OF 2023

AA OMOLLO, J

MARCH 14, 2024

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 40, 47, 60, 61, 64 AND 184 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 40, 49, 50, 55 AND 56 OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019

AND

IN THE MATTER OF SECTION 7, 8, 9(2) AND 11 OF THE PHYSICAL AND LAND USE (LOCAL PHYSICAL AND LAND USE DEVELOPMENT PLAN) REGULATIONS, 2021

AND

IN THE MATTER OF SECTION 3 (2A), (3, 4, 5(A), 40, 48 AND 51 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999

BETWEEN

RAPHAEL NZOMO (SUING ON HIS OWN BEHALF AND ON BEHALF OF KUNDE ROAD RESIDENTS WELFARE ASSOCIATION) ..... PETITIONER

AND

ONTIME REAL ESTATE LTD ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI ..... 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3RD RESPONDENT

RULING

1. Each of the 3 Respondents raised a preliminary objection seeking to have the Petition struck out. The 1st Respondent filed a notice of motion application dated 23rd November, 2023 premised on the provisions of article 165(3) of the *Constitution* and Rule 4(1) of the *Constitution of Kenya (Practice & Procedure) Rules* 2013. The application sought the following orders;

    a. That this Honourable Court be pleased to certify this Application as very urgent and dispense with service of the same upon the Petitioner/Respondent in the first instance.

    b. That this Honourable Court be pleased to strike out the Petition dated 27th October, 2023 for being an abuse of the process of the Court.

    c. That the costs of this Application and the Petition be borne by the Petitioner/Respondent.

2. The 2nd Respondent's Preliminary Objection dated 6th November, 2023 raised the following grounds;

    a. There is a prevailing judgment that was issued by a competent court in Appeal Ref. No. NCCG/NMS/PLUPLC/019.

    b. The Petitioner's suit is incompetent as it offends the mandatory provisions of Section 7 of the *Civil Procedure Act* Cap 21.

    c. The suit is an abuse of the court process and may lead to an embarrassment in the administration of justice where conflicting judgments are arrived at.

    d. The Petitioner in any event should file an appeal to the appropriate court rather than instituting a fresh suit in this court.

3. The 3rd Respondent's Preliminary Objection stated that;

    a. This Petitioner is fatally defective as it offends the provisions of Section 125 and 129 of the *Environment Management and Coordination Act*, 1999 (EMCA) and as such cannot be ventilated before this Honourable Court.

    b. The Petition is premature as the Petitioner has not exhausted the available dispute resolution mechanisms established under section 125 and 129 of *EMCA*.

    c. The Petitioner's Petition and Application are thus an abuse of the process of this Honourable Court and should be dismissed with costs.

4. Directions were taken on 13th December, 2023 for prosecution of the Preliminary Objections and the application by way of written submissions. Vide submission dated 20th December, 2023, the 1st Respondent stated inter alia that the Petition as filed ignores the Statutory Dispute Resolution Mechanism set out under Section 61(4) of *Physical Land Use and Planning Act*, Section 129 of *Environment Management & Coordination Act* and section 9 of the *Fair Administration Actions Act*. The 1st Respondent stated that prior to commencing development, it obtained the requisite approvals from the 2nd and 3rd Respondents.

5. The 1st Respondent submitted that the Petitioner has not disclosed any material infringement or violation of their constitutional rights to warrant constitutional litigation. It is submitted further that the Petitioner did not appeal the decision of County Physical Planning Liaison Committee which

struck out their claim for being filed out of time. The 1st Respondents went on to address the court on the doctrine of Constitutional avoidance and or doctrine of exhaustion.

6. They stated that the net effect of this doctrine is that where there are adequate statutory avenues for resolution of a dispute, the Constitutional Court ought to defer to the statutory options and decline to entertain the dispute. In essence, therefore, when formulating a claim, a claimant must pursue a statutory relief where it is available through an ordinary suit as opposed to approaching the Constitutional Court. In the same vein, they took take cognizance of the case of *Sumayya Athmani Hassan v. Paul Masinde Simidi & Another* (2019) eKLR where the Court of Appeal opined as follows:

> "…. where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question."

7. They submit that the instant Petition, albeit crafted under the guise of "constitutional issues", ultimately seeks to nullify the development approvals and the EIA License issued to the 1st Respondent on the basis that they violate the respective statutory provisions and the Regulations made thereunder. It is apparent that the Petitioner's argument, being in the nature of breach of the obligations under either the *Physical Planning and Land Use Act* or the *Environmental Management and Coordination Act*, can only be dispensed with in the first instance, through the laid down dispute resolution structures. Thus they emphatically submit that no constitutional question arises for determination by this Court.

8. The 1st Respondent contended that paragraph 46 – 52 of the Petition pleading that the EIA license was irregularly obtained is a matter within the framework of Section 129 of the *EMCA*. Hence same should have been challenged before the NET and not invoke the original jurisdiction of this court. They referred this court to the Court of Appeal case in *Kibos Distillers Ltd. & 4 Others v Benson Ambuh Adega & 3 Others* (2020) eKLR that the Petitioner blatantly ignored the statutory provision to institute an appeal before the NET. It also cited *NET v Overlook Management Ltd & 5 Others* (2019) eKLR and *Issa Ahmed & 15 Others v Mohamed Al-Sawwe* (2021) eKLR for the proposition PLUPLC/019. The 2nd Respondent cited several cases that discussed the purpose of *res judicata inter alia Njangu v Wambugu & Another* NRB HCCC 2340 of 1991 (unreported).

9. The 3rd Respondent's submissions are dated 19th January, 2024 and stated that the petition offends the provisions of Section 125 and 129 of *EMCA*. The 3rd Respondent referred this court to Section 9 of *EMCA* which outlines its that;

> "The Authority to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of the Government of Kenya in the implementation of all policies relating to the environment."

10. On abuse of the process of the Court, they referred the court to the case of *Muchanya Investments Ltd v. Safaris Unlimited (Africa) & 2 Others* (2009) eKLR 229 which held thus;

> "What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

11. The 2nd Respondent's submissions are dated 23rd January, 2024 in support of their Preliminary Objection dated 6th November, 2023 and stated that the petition offends Section 7 of the *Civil Procedure Act* (*res judicata*) because there is a prevailing judgment in Appeal Ref. NCCCG/NMS. It went on to quote Section 58 which deals with approval of EIA licences and Section 129 touching on appeals against granting or refusal to grant a licence together with Section 130 which discusses appeals to the Environment and Land Court.

12. Consequent to the provisions of the law stated, the 3rd Respondent submits that the issues raised in paragraph 46 – 54 and 61 (on public participation and failure to comply with EIA regulations) are matters falling within the jurisdiction of the National Environment Tribunal. In discussing the doctrine of exhaustion, the 3rd Respondent cited *Geoffrey Muthinja Kabiru & 2 Others v. Samuel Muya Henry & 1756 Others* (2015) eKLR where the court held thus;

> "…. We see this as the crux of the matter in this and similar cases. 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 within churches, as is bound to happen. 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. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely."

13. At paragraph 45 thereof, the Petitioner indeed claims that he has lodged this Petition as a consequence of the Committee's determination, to assert their rights under the *Constitution* and statute. The 3rd Respondent submitted that in addressing this issue it is trite that where a suit primarily seeks to enforce fundamental rights and freedoms, it must be demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in "Bill of Rights language" as a pretext to gain entry to the Constitutional court lest the same will be barred by the doctrine of exhaustion.

14. The Petitioner also filed their submissions dated 31st January, 2024 to contest the application and the two sets of preliminary points of law. The Petitioner submits that their petition raises issues that far exceed the realm of grant of approvals by the 2nd and 3rd Respondents. That the petition alleges violation of rights including, access to information, right to a clean & healthy environment; National values and Principles of governance et al. they referred the court to the provisions of article 60 of the Constitution and Section 3 of the *EMCA* No. 3 of 1999.

15. In arguing that they should not be closed out due to the time bar set out in Section 129 of *EMCA* and Section 75 of *Physical Land Use and Planning Act*, they cited the case of *John Kabukuru Kibicho &*

Another suing on their name and on behalf of Milimani Residents (Nakuru) Welfare Association where Munya Sila held as follows;

> "But how did the Respondents expect the Petitioners to pursue an appeal to the Liaison Committee when they had no notice of the decision approving the change of user? The respondents cannot be allowed to use their own failure to communicate their decision, to shut out the Petitioners from accessing this court, yet their failure to communicate, effectively barred the petitioners from appealing their decision to the Liaison Committee within the stipulated time. Having not been notified of the decision, the petitioners could clearly not have accessed the Liaison Committee within the statutory period. I therefore do not agree with the Respondents that the Petitioners had the avenue of presenting their grievances to the Liaison Committee and I cannot allow the Respondents to use their own omissions to slam shut the door of justice in the face of the petitioners. I do hold that the petitioners had a right to access this court."

16. The Petitioner, also referred to the decision of *West Kenya Sugar Company Ltd. v. Busia Sugar Industries Ltd & 2 Others* (2017) eKLR thus;

> "This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the *Constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of this Court. A look at the mandate given to the National Environment Tribunal under section 129 of *EMCA* aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with license and licensing...
>
> This court was established by Article 162(2)(b) of the *Constitution of Kenya* 2010. One of its mandate therein is to determine the environment and the use and occupation of and title to land. The issues herein deal with the environment use and occupation of land..."

17. It was further submitted for the Petitioner that where the dispute is multifaceted, the most suitable forum is the ELC by virtue of article 162 (2) of the *Constitution*. In support of this argument, they referred to the case of *Taib Investments Ltd v Fahim Salim Said & 5 Others* (2016) eKLR. They also urged that the Petition is not *res judicata* because the former suit was not decided on merit. They cited *Kibogy v. Chemwemo* (1981) KLR 35 and *Wangalu v. Kania* (1987) KLR 51 to buttress their arguments. The Petitioners urged that the application and the Preliminary Objections be dismissed with costs.

18. After reviewing the application and the Preliminary Objections, the two issues framed for my determination are:

    a. Whether the petition is *res judicata*

    b. Whether the jurisdiction of this court is ousted under the doctrine of exhaustion.

19. One of the principles set which the court ought to consider before striking out a suit was laid out in the case of *D.T Dobie (K) v Muchina* (1982) 1 KLR that striking out is a draconian step which should only be adopted if the matter is so hopeless that it cannot be cured even by amendment. The 1st Respondent accused the Petitioner for abusing the process of this court first by filing a single petition to challenge two sets of development approvals under and second, by avoiding the statutory, process provided to dispute such approval.

20. For filing a single petition to determine the approval under *EMCA* and *PLUPA*, I find no abuse of court process given that the cause of action arose from a single transaction. On the question of by passing the statutory bodies that would have rendered themselves on the issues raised, the petitioner pleaded at paragraph 44 that it lodged an appeal before the NBI County Physical Planning Liaison Committee which appeal was struck out for being filed out of time.

21. There is no tune for raising constitutional petitions and the previous step taken having been struck out for non-compliance with time lines set under the statute, the Petitioner was left no option but to file the petition. Since the appeal before the Liaison Committee was not heard on merit, the questions of res judicata raised by the 2nd Respondent's Preliminary Objection does not lie. There was no merit judgment issued in Appeal No. NCCG/NMS/PLUPLC/019 that barred the filing of any subsequent suit.

22. In answer to the doctrine of exhaustion, the Supreme Court of Kenya in the case of *Abidha Nicholus v. the Attorney General & 7 Others* (2023) eKLR discussed whether the jurisdiction of this court given under article 162 (2) and 165 (1) (c) of the *Constitution* can be taken away by statutory provisions. The Supreme Court distinguished the case of *Kibos Distillers Ltd v. Benson Adega Ambuti* referred to by the Respondents (at paragraph 95 of their judgment) by stating thus;

> "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..." (Emphasis ours)

23. According to the Supreme Court at paragraph 100 in the *Abidha Nicholus case* the provisions of *EMCA* and Energy Act do not expressly oust the jurisdiction of the ELC in respect to procedure for the determination of disputes that involve the management of the environment or issues of petroleum energy. They were persuaded by the holding of the Court of Appeal in *Kenya Revenue Authority & 2 Others v. Daraza Investments Ltd* (2018) eKLR which made reference to the provisions of Section 9(4) of *Fair Administrative Actions Act* thus;

> "Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the application, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
>
> Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

24. The Supreme Court stated thus at paragraph 104;

> "Having considered the above complaints, we reiterate our earlier findings in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Article 22, 23(3) and 162(2)(b) of the *Constitution* as read with Section 4(1) of the *Environment and Land Act*. We say so because neither the NET, EPRA not EPT have the

jurisdiction to determine alleged violations of the *Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 Others v. Attorney General & 6 Others; Muslims for Human Rights & 2 Others (Interested Parties)* (2020) eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola J) stated:

> " In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedom and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

25. In light of the foregoing finding in the case of *Abidha Nicholas supra* on jurisdiction, the question then is whether this petition raises any constitutional issues. The Respondents submitted that paragraphs 44 – 56 of the petition on raises administrative issues which have nothing to do with breach of constitutional rights. I have perused the petition and note for instance that paragraphs 55, 56 and 58 raises the issue of destruction of indigenous trees (harm to the environment). Paragraph 61 pleads breach of rights under article 184 of the *Constitution* and a breach of the right to public participation under article 10. Whether or not there is merit in the alleged breaches can only be determined during the hearing of the petition.

26. Consequently, I draw the conclusion that both the application and the two sets of the Preliminary Objection are not merited as the two applicable statutes (*EMCA* No. 3 of 1999 and *PLUPA* No. 13 of 2019) do not oust the jurisdiction of the court where the claim based on alleged breaches of constitutional rights. Secondly, the Petition is not *res judicata* as there is no merit decision in place. They are all dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

A. OMOLLO

JUDGE