



Maina (Suing on his Behalf and as the Chairman of Lavington Five Roads Association) v Director General, Nairobi Metropolitan Services & 2 others (Civil Application E069 of 2023) [2023] KECA 890 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KECA 890 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E069 OF 2023
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
JULY 24, 2023**

BETWEEN

NDIRANGU WA MAINA (SUING ON HIS BEHALF AND AS THE CHAIRMAN OF LAVINGTON FIVE ROADS ASSOCIATION) APPLICANT

AND

DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI CITY 2ND RESPONDENT

WOODRIDGE CENTRE LIMITED 3RD RESPONDENT

(An application for interim orders of injunction against the 3rd respondent pending the hearing and determination of an intended appeal from the Ruling and Order of the Environment and Land Court at Nairobi (Omange, J.) dated 26th January 2023 in ELC Appeal No. 100 of 2022)

RULING

1. Before this Court is a Notice of Motion dated February 28, 2023 brought by the applicant under the provisions of rules 5(2) (b), 47 and 49 of this *Court's rules*. The applicant prays for a temporary injunction to restrain the 3rd respondent whether by itself, its employees or its agents or others claiming through or under them from undertaking any construction on LR No 3734/790 Lavington, Nairobi, pending the hearing and determination of an intended appeal from the ruling and order of the Environment and Land Court (ELC) at Nairobi which was delivered on January 26, 2023 in ELC Appeal No 100 of 2022.
2. The proceedings before the trial court and in this Court, relate to a change of user of a parcel of land known as LR No 3734/790 Lavington, Nairobi, (hereinafter referred to as 'the suit property') from



residential to light industrial use, specifically the construction and/or the setting up of a petrol service station and related amenities.

3. A precis of the relevant facts leading to this application is that sometime in May 2022 the 3rd respondent applied for change of user of the suit property to the 1st and the 2nd respondents. On May 25, 2022 the applicant learnt about the application through an advertisement in a local newspaper. The applicant is the Chairman of a residents' association known as Lavington Five Roads Association ('LFRA'), which comprises residents of properties along Apple Cross Road, Muhoya Avenue, Mbabane Road, Maji Mazuri Road and James Gichuru Road in Lavington area. The applicant contends that the said area is a low-density residential zone and falls under zone 5C under the Nairobi City Zoning plans.
4. On June 6, 2022 LFRA wrote to the Director General, Nairobi Metropolitan Services, objecting to the proposed change of user. Subsequently, the 1st and 2nd respondents invited the committee members of LFRA to a meeting to discuss the issue of the objections that had been raised but no agreement was arrived at.
5. That notwithstanding, the applicant discovered that on July 21, 2022 the 1st and 2nd respondents granted the change of user without any notification to LFRA. Consequently, the applicant lodged an appeal with the County, Physical and Land Use Planning Liaison Committee (hereinafter referred to as 'the Liaison Committee') on September 15, 2022.
6. The applicant contended that as per the relevant provisions under the *Physical and Land Use Planning Act*, No 13 of 2019, the Committee was supposed to hear and determine the appeal within 30 days of filing, which period lapsed on October 15, 2022. However, as at the time the 30 days were lapsing, the Committee was yet to hear the appeal, it had not even allocated it a case number. Upon follow up, the applicant was informed that the Committee was unable to consider the appeal owing to quorum constraints.
7. This turn of events and the fact that the 3rd respondent had already commenced construction works on the suit property precipitated the institution of an appeal by the applicant before the ELC, to wit, ELC Appeal No E100 of 2022 which was filed contemporaneously with an application seeking a raft of interim protection measures.
8. The applicant in his appeal before the ELC contended, inter alia, that the Committee erred in law and in fact by failing to consider in its entirety the grounds for objection to change of user; and that it erred by allowing the change of user to the 3rd respondent. A conglomerate of other arguments was raised before the ELC in support of the applicant's arguments that construction of the intended petrol service station would completely alter the nature and character of the neighborhood and that the residents of Lavington area would lose calm and peaceful residential environment prevailing at the time.
9. The ELC issued an interim injunction directing the 3rd respondent to temporarily cease construction works on the suit property. What followed was the filing of a preliminary objection by the 3rd respondent challenging the jurisdiction of the ELC to hear and determine the appeal. The arguments by the 3rd respondent were not only that the appeal before the Committee had been presented outside the statutory timeline, but also that the ELC lacked the requisite jurisdiction to hear and determine the appeal by the applicant for the singular reason that there was no decision delivered by the Liaison Committee.
10. The ELC (Omenge, J) vide a ruling delivered on January 26, 2023 agreed with the arguments by the 3rd respondent that it did not have jurisdiction to hear and determine the appeal. As a consequence, the appeal was struck out with costs. It is this decision that has precipitated the filing of the instant application.



11. The applicant contends that the intended appeal is arguable and has high chances of success. The grounds in support of this argument are laid down on the face of the application, the affidavit in support and in the memorandum of appeal annexed to the affidavit of the applicant. It is contended that the learned judge erred in law and fact; in finding that the applicant withdrew its appeal before the Committee; when she mistakenly relied on supposed further affidavit dated December 4, 2022 purportedly sworn by the applicant when in fact there exists no such further affidavit or no such averment at all; in finding that the ELC only acquires jurisdiction to hear the matter after the Committee renders its decision; by filing to take into consideration the inherent jurisdiction of the ELC; in exercising her judicial discretion by awarding costs to the respondents whereas the matter before court was a public interest matter where the applicant was acting in the interest of his community.
12. On the strength of the grounds cited above, the applicant urged us to find that the intended appeal is arguable.
13. On the nugatory aspect, the applicant reiterated that the construction of the petrol station would completely alter the nature and character of the neighbourhood and that the applicant as well as the residents would lose the prevailing calm and peaceful residential environment. Other arguments advanced by the applicant are that the noise levels associated with construction works will cause great nuisance and disturbance to the residents including schools around the area; the proposed petrol station will occasion increased traffic congestion in the area as it is situated next to a roundabout at a major intersection; increased vehicle and foot traffic to the petrol station would pose a security threat to the area; the proposed development consisting of overlooking convenience stores would be a breach to the adjacent residents' constitutional rights to privacy and that the said project would occasion a burden to the already overwhelmed drainage system and further worsen the perennial flooding experienced in the area.
14. The applicant further stated that there had been previous change of user attempts of a similar nature which the residents successfully opposed; and there are at least three other petrol service stations within one kilometre radius from the suit property. The applicant therefore challenges the utility value of having a fourth petrol service station in the neighborhood.
15. The applicant further contended that the 3rd respondent has already, on the strength of the change of user approval obtained an Environmental Impact Assessment license from the National Environmental Management Authority. The applicant has filed an appeal at the National Environment Tribunal challenging the said license and pursuant to the provisions under the Environment Management Act, once an appeal is lodged at the Tribunal, the 3rd respondent ought to maintain status quo pending outcome thereof. However, the situation on the ground is that the 3rd respondent is proceeding with construction works unhindered. The applicant maintains that if the orders sought are not granted, the construction works will go on and may even be completed before the intended appeal is heard and determined. The applicant argued that unless the orders sought are granted, in the event the appeal is successful, the same will merely amount to an academic exercise and the orders issued will be otiose.
16. The application is strenuously opposed by the 3rd respondent by way of a replying affidavit sworn by Mohammed Salah Ismail, its director. He contended that contrary to the averment by the applicant that the suit properly falls within zone 5C under the Nairobi County Development Control Policy which is a zone for residential purposes only, the suit property falls under zone 5E 'James Gichuru Corridor' which allows for mixed development viz, commercial, hotels, residences and offices.



17. In response to the averment that the area is strictly residential, the 3rd respondent contends that the area is highly commercialized and that there are other large scale commercial and light industrial development within the area. The 3rd respondent highlighted several developments in the area which include; Whitefield Edge Building located opposite the suit property which is a 3-levels building comprising of commercial office space, retail space and parking space; Lavington Curve which is a modern shopping complex located approximately 400 meters from the suit property and which comprises of a busy supermarket, retail shops, restaurants, bars and other amenities; Shell Petrol Station located opposite the Lavington Curve comprising of a petrol station, garage, restaurant and parking lots; Lavington Mall located about 450 meters from the suit property which has a busy supermarket, retail shops, gym, restaurants and other amenities; and Rubis Petrol Station comprising of a petrol station, garage, shops, restaurants and parking amenities. According to the 3rd respondent, all these developments are located within a 500-meters radius of the applicant's neighborhood and are indicative of the highly commercialized user within the area.
18. As regards to the ongoing developments on the suit property, it is the 3rd respondent's averment that those are pursuant to a change of user which was legally obtained from the 1st and 2nd respondents on July 21, 2022 and that the relevant provisions under the Physical Planning and Land Use Act were complied with. It is further contended that all the concerns raised by the applicant were addressed by the 3rd respondent; that the 3rd respondent explained to the applicant its compliance with the zoning regulations, the various ways in which it conducted public participation, its development application process, and the various mitigation measures that it had put in place.
19. On the issue of the appeal lodged by the applicant before the Liaison Committee, the 3rd respondent contended that the provisions of section 61 (1) (2) of the *Physical and Land Use Planning Act* imposes a statutory timeline within which a person aggrieved by the decision of the 2nd respondent may lodge an appeal. The 3rd respondent avers that the appeal lodged by the applicant on September 15, 2022 was outside the said period of 14 days and for that reason could not be sustained.
20. As regards the ruling on the appeal filed before the ELC, it is contended that the court returned the correct finding that it did not have the requisite jurisdiction to hear and determine the said appeal. It is averred that the Liaison Committee did not render a decision on the appeal filed therein by the applicant and therefore, in the absence of a decision from the Committee, the jurisdiction of the ELC could not have arisen.
21. In sum, it is contended that the instant application is premised on mere conjecture and unfounded apprehension; that there are no tangible legal issues which could render the intended appeal arguable and that the applicant stands to suffer no prejudice as the zone in question and specifically the location of the suit property has completely transformed to commercial user.
22. At the hearing of the application, learned counsel Mr Wamae appeared for the applicant, learned counsel Mr Mukonyi for the 1st and 2nd respondents while learned counsel Ms Osman was present for the 3rd respondent. Mr Wamae and MsOsman highlighted their respective written submissions, which we need not rehash. Mr Mukonyi did not make any oral submissions but told the Court that his clients were opposed to the application.
23. We have carefully perused the record, submissions by counsel and considered the applicable law. It is trite law that in an application of this nature, an applicant must demonstrate that the appeal or intended appeal is arguable, which is to say that it is not frivolous. The applicant must also show that the appeal, if successful, would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe vs Tony Ketter & Others [2013] eKLR*.



24. The applicant contends that the learned judge erred by striking out his appeal on the ground that the ELC did not have the requisite jurisdiction to hear and determine the appeal. One of the grounds relied on by the ELC in arriving at the said decision was that the Committee had not rendered a decision on an appeal filed therein by the applicant and therefore, the jurisdiction of the ELC could not be said to have arisen. The applicant on the other hand contends that the refusal by the Committee to make a decision amounted to a decision and therefore the ELC had the requisite jurisdiction to hear and determine the appeal filed before it. Related to this is the question whether the ELC ought to have exercised its inherent jurisdiction to hear and determine the appeal. The arguments advanced by the applicant are, in our view, not idle and can only be interrogated by way of an appeal. We are cognizant of the fact that to demonstrate that an appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd, Civil Application No Nai 345 of 2004*. We are satisfied that the intended appeal is arguable.
25. Turning to the second limb of nugatory aspect, the applicant has incessantly argued that the construction of the petrol station and related amenities will completely alter the nature and character of the neighbourhood, and that the residents within the Lavington area will be denied the calm and peaceful residential environment currently prevailing. Several ways in which the petrol station will negatively impact on the environment have also been pleaded. The applicant contends that the construction works are at a very advanced stage and that unless stay orders are granted, the project may be completed before the intended appeal is heard and determined, rendering the intended appeal an academic exercise.
26. The Constitution of Kenya under Article 42 guarantees every Kenyan the right to a clean and healthy environment. The same Constitution under Article 40 guarantees every Kenyan the right to own property, enjoyment whereof shall not be curtailed arbitrarily and/or unnecessarily. In the circumstances of this case, this Court is called upon to balance the competing interests of the applicant and those of the 3rd respondent. Whereas the 3rd respondent submitted that it would suffer great loss and prejudice if the stay orders were issued, this Court cannot turn a blind eye to the adverse effects the entire project could have on the physical and social environment currently existing in the area. In *Reliance Bank Ltd vs Norlake Investment Ltd [2002] 1EA 227*, this Court stated as follows in defining when an appeal may be rendered nugatory:
- ' Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.'
27. The potential harm or risks to the environment (if any) may, in our considered view, be irreversible and may not be adequately compensated in damages. On the other hand, the losses or damages which would be occasioned by issuance of orders of stay are in our view quantifiable and would be adequately compensated in damages.
28. Having taken all factors into consideration, the potential risk to the environment associated with the said project outweighs the losses which the 3rd respondent stands to suffer if orders of stay are not granted. The balance therefore tilts in favour of issuance of the orders sought by the applicant. In the upshot, the Notice of Motion dated February 28, 2023 is hereby allowed as prayed. We direct that the main appeal be set down for hearing on priority basis, and in any event within the next five months. The costs of this application shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

D. K. MUSINGA, (P.)



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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

