



REPUBLIC OF KENYA



**Mbidhi (On behalf of 50 others and residents of Kimathi Estate LR No. 209/17383 known as Nairobi Block 51/1-359) v Nairobi City County; National Land Commission & another (Interested Parties) (Constitutional Petition E024 of 2023) [2024] KEELC 4531 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4531 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CONSTITUTIONAL PETITION E024 OF 2023**

**J OMANGE, J**

**MAY 30, 2024**

**IN THE MATTER OF ARTICLES**  
**6,10,19,20,22,23,27,28,33,40,42,43,47,48,60,62,64,66,70,159,165,174,176,186**

**AND**

**OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012, SECTIONS 88 AND 89**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT CAP (286)**

**AND**

**IN THE MATTER OF CONTRAVENTION TO RIGHT TO HUMAN DIGNITY, RIGHT TO EQUALITY, RIGHT TO ENVIRONMENT, ECONOMIC & SOCIAL RIGHTS**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 27, 42, 40, 43 & 47**

**AND**

**IN THE MATTER OF INFRINGING THE RIGHT TO QUITE ENJOYMENT OF PROPERTY ABBETTING NUISANCE**

**IN THE MATTER OF PROPER USE AND MANAGEMENT OF LAND**

**AND**

**IN THE MATTER OF LAND ACT 2012 SECTIONS 4-2B-D-H & 1,8,9,10,17,23,24,26,65 & 66**



**AND**

**IN THE MATTER OF RIGHT TO WAY UNDER THE PUBLIC ROADS ACT SECTION, 6(1&2), SEC. 139, 140,141,142,143,144,145,146,147,148 & 149 OF THE LAND ACT, RIGHT TO LIFE/DIGNITY/SECURITY, RIGHT TO PROPERTY**

**AND**

**IN THE MATTER OF THE LAND ACT 2012 SECTIONS 4**

**AND**

**IN THE MATTER OF IRRELEVANT CONSIDERATION  
IN FORCEFULLY OPENING SECURITY GATES**

**BETWEEN**

**ALFRED OWUOR MBIDHI ..... PETITIONER  
ON BEHALF OF 50 OTHERS AND RESIDENTS OF KIMATHI ESTATE LR NO.  
209/17383 KNOWN AS NAIROBI BLOCK 51/1-359**

**AND**

**NAIROBI CITY COUNTY ..... RESPONDENT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED  
PARTY**

**RULING**

1. The Petitioners who are residents of Kimathi Estate filed this Petition that seeks various orders on the basis that the Respondent has ordered the opening of gate C and D which have been closed since 1998. That the opening of the gate violates the Petitioners rights to quiet enjoyment of their property.
2. In the Notice of Motion application dated 17<sup>th</sup> May 2023 the Petitioners sought the following orders: -
  - a. That pending the inter-parties hearing and determination of this application conservatory order is hereby issued in the nature of on injunction that the Respondent or lessor be hereby directed, prohibited, barred from forcefully demolition, removing, opening of gates C leading to Athi Road and Gate D Next to Heshima road to the leased property known as 7383 Now Nairobi Bock 5l /1-139 Kimathi Estate, Nairobi County.
  - b. That pending the final hearing and determination of this petition status quo be maintained in regards to the current position as for the last 2 decades of gates C leading to Athi rood and Gate D Next to Heshima road to the leased property known as 7383 Now Nairobi Block 5111-139 Kimathi Estate, Nairobi County.
  - c. Any other further orders that the court may deem fit to grant.



3. The Application is supported by the affidavit sworn by Alfred Owuor Mbidhi on behalf of the Petitioners in which he avers that at all times the Petitioners are residents, members of Kimathi Estate, and the bonafide legal Joint-possessors of property situated of Bahati Division, Makadara Constituency-and that the Respondent had neglected the responsibility of securing the estate prompting the Petitioners to put up gates known as gates C and D.

That the gates have been in place for two decades until the 4<sup>th</sup> May 2023 when the Respondent issued a notice on the reopening of the gates.

4. He deposes that the actions of the Respondent if allowed will be detrimental to the Petitioners right to life, human dignity, protection of right to property and Environment rights hence the need for this court to intervene.
5. The Respondent opposed the application vide a notice of preliminary objection dated 5<sup>th</sup> July 2023 and a Replying Affidavit dated 30<sup>th</sup> January 2024.

The preliminary objection was anchored on the fact that the application offends the Exhaustion doctrine and usurps the jurisdiction and mandate of the County Physical and Land Use Planning Liaison Committee as provided in Section 72(3) and (4) of the [Physical and Land Use Planning Act](#) of 2019.

6. In the affidavit sworn by Stanley Ruto, he reiterates that the Respondent was carrying out its obligation as mandated by Section 56 of the [Physical and Land Use Planning Act](#) 2019 which is to regulate use and development of land and buildings within its jurisdiction. That the Petitioners had initiated a development project without its authority and necessary approvals hence the issuance of the notices.
7. He deposes that the Petitioners have not demonstrated how their rights have been violated by the Respondent as it was carrying out its obligations.

He asked the court to consider the wider interest of the public as the said developments hinders movement of members of the public not just within the estate but outside as well.

8. The Respondent filed submissions on the Preliminary objection dated 7<sup>th</sup> February 2024. Counsel submitted that this court lacks jurisdiction as there are other statues conferring jurisdiction on other bodies, which the Petitioners have not explored and have thus invoked the court's jurisdiction prematurely.

He cited Section 72(3) of the [Physical and Land Use Planning Act](#) 2019 that indicate that an aggrieved party after issuance of an enforcement notice ought to appeal to the County Physical and Land Use Planning and Liaison Committee. Further the Respondent placed reliance on a number of cases that addressed the exhaustion doctrine including; Mombasa High court constitutional petition No 159 of 2018 consolidated with constitutional petition no 201 of 2019 [William Odbiambo Ramogi & 3 others v Attorney General & 4 Others](#).

9. The Petitioners filed submissions dated 20<sup>th</sup> February 2024 in response to the Preliminary objection. Counsel submitted that considering that the issues had to do with violation of the Constitution, the court ought not to dwell on formalities and procedural technicalities.

Further it was submitted that there are exemptions to the doctrine of exhaustion as stated in the case of [Anthony Miano & Others v Attorney General & Others](#) [2021] eKLR in which the court pointed out that where there is violation of fundamental rights, the court should exercise its unfettered discretion so as to achieve the ends of justice.



10. The Petitioners argued that where there was public interest, the court should exempt parties from the exhaustion doctrine. Lastly the Petitioner submitted that the preliminary objection did not meet the threshold of a pure point of law.
11. Having considered the pleadings and the submissions herein, the first issue for determination before diving into the merits of the application is whether the Preliminary Objection dated 5<sup>th</sup> July 2023 is merited.

The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

12. The Court went further to note that: -

“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.”

13. Likewise, the Court in the case *Oraro v Mbaja* [2005] eKLR 141, on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with 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 and 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 objection 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.”

14. The Preliminary objection in this matter is founded on the notion that the Petitioner failed to exhaust the dispute resolution mechanism provided in Section 72(3) of the *Physical and Land Use Planning Act* of 2019. Jurisdiction is a point of law that must be raised at the earliest opportunity.

The objection, therefore, attains the threshold of a pure preliminary point of law. The objection is also clear on the provision of the law allegedly contravened.

15. The next issue is whether the Preliminary Objection is merited. Courts including this court, have previously held that a party is required to exhaust any alternative dispute resolution mechanism before



filing a matter in Court. The Court of Appeal in the case of *Geoffrey Muthinja & another* (*supra*) observed as follows:

“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.”

16. In the case of *William Odbiambo Ramogi & 3 others* (*supra*) the five-judge bench had occasion to explore the issue further as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself.

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....”

17. The Court further outlined exceptions to the rule as follows:

“As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, 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 must not be ousted.

The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively.”

18. This court has held the view that it is essential that courts promote Alternative Dispute Resolution. This is a constitutional imperative. As such where the statute is clear that an issue ought to be determined before another court or Tribunal, this court ought to down its tools and give a chance to that process.

To do otherwise would be to fail to discharge the constitutional mandate under Article 159. Challenge of the Enforcement Notice properly falls within the mandate of the Liaison Committee.

19. Section 77 of the *Physical and Land Use Planning Act* establishes the County Physical and Land Use Planning Committee.



The functions of the committee are defined in Section 78 of the Act. The functions of the County Physical and Land Use Planning Liaison Committee shall be to: -

- “(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
- (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- (d) hear appeals with respect to enforcement notices.”

20. I am therefore clear that the issue of the Enforcement Notice should be ventilated before the Liaison Committee. However, in the instant case there are other issues which arose even before issuance of the enforcement notice.

The Petitioners aver that they have grievances which predate the notice. The remedies sought by the Petitioner are what the Supreme Court termed as mixed grill remedies. Having anxiously considered the Petition, I note that there are clear remedies the Petitioners seek which it can only ventilate in this court in a Petition such as this.

There is however a prayer regarding enforcement of the notice which should be properly ventilated in the Physical and Land Use Planning Committee.

21. In the case of Benard Ambuti Andega & 2 Others v Kibos Distillers Ltd. and 5 Others [2020] eKLR the Supreme Court gave guidance on how a court should handle a multifaceted claim. The apex court guided;

“Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents.

The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the Constitution was protected.”

20. In the end the court makes the following orders;

- a. The issue of the enforcement notice is referred to the Nairobi County Physical and Land Use Planning Liaison Committee for adjudication as a dispute within the framework of the Physical and Land Use Planning Act 2019.
- b. The hearing of this Petition is held in abeyance pending the determination of the hearing at the Physical and Land Use Planning Committee.
- c. Each party to bear their own costs.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 30<sup>TH</sup> OF MAY, 2024.**



**JUDY OMANGE**

**JUDGE**

In the Presence of;

Ms. Kwamboka for the Respondent

Mr. Segero for Gregory Ndege and Associates for-Petitioner

Court Assistant: Steve Musyoki

