



Bayusuf & 2 others v Marble Inn Developers Limited & another (Environment & Planning Appeal E003 of 2024) [2024] KEELC 4802 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & PLANNING APPEAL E003 OF 2024**

SM KIBUNJA, J

JUNE 19, 2024

BETWEEN

ABDULHAKIM AHMED BAYUSUF 1ST APPELLANT

SALIM HASSANALI BHALLOO 2ND APPELLANT

FARHIA ABDI YUSUF 3RD APPELLANT

AND

MARBLE INN DEVELOPERS LIMITED 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 2ND RESPONDENT

RULING

1. Vide the application dated the April 19, 2024, the appellants seeks for inter alia, prayers 4 and 5 which are paraphrased as herein under:
 - a. Order of temporary injunction barring the 1st respondent and or their agents from continuing with the illegal construction of the nine (9) floor storey building until determination of the appeal.
 - b. Orders that the 2nd respondent be in charge of ensuring that the 1st respondent complies with the injunction orders and any other orders that the court shall issue.

Prayer 1 was for the application to be certified urgent, while prayers 2 & 3 were for stay and temporary injunction pending the hearing and determination of the application, and are now spent. The application is premised on the sixteen (16) grounds on its face marked (a) to (p), and is supported by the affidavit of Abdulhakim Ahmed Bayusuf, 1st appellant, deposing that the appellants owns MN/1/7813, MN/1/11164, MN/1/7818 and MN/1/17820 situated along Ludwig Von Graapf Road, Mkomani Mombasa; that the 1st respondent irregularly, fraudulently and corruptly procured



an EIA license from the 2nd respondent to construct 42 apartments on 7 floors, and 2 penthouses of 5 bedrooms each on MN/Block 1/7812/2; the appellants were not consulted, and the intended construction violates the zoning by-laws of the area; that the appellants moved to the tribunal on 3rd October 2023, but the 1st respondent used underhand means to obtain a judgement in their favour; the tribunal ignored their evidence challenging public participation, and its judgement will have serious environmental implications; that the 1st respondent's developments are 8 storeys higher than that of the appellants and hence compromises their privacy; the infrastructure in the area was meant for single dwelling units as defined in the lease documents, and the 1st respondent's development is without proper social amenities such as sewer, water supply, drainage and access road; the 1st respondent has not provided proper mechanism to caution the appellants from noise, and the heavy machines used are likely to affect their houses in the long term; that the development will greatly affect the appellants right to clean environment; that the appellants are aggrieved by the tribunal's judgement and have appealed against the entire decision; that unless the application is granted, the appellants and the community in the area are apprehensive that the 1st respondent actions will attract similar other projects leading to deprivation of their rights.

2. The application is opposed by the 1st respondent through the five grounds of opposition dated the 9th May 2024, and replying affidavit of Nasir Ali Osman, director, sworn on the 21st May 2024. It is the 1st respondent's case that prayer 2 is fatally defective, untenable and legally unsustainable as it seeks for stay of execution of a negative judgement contrary to Court of Appeal decision in [Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others](#) (Civil Appeal (Application) E383 of 2021) KECA 491 (KLR) (18 February 2022 (Ruling)); prayers 3 and 4 do not meet the threshold set by Order 40 Rule 1; application is incompetent, legally unattainable and fatally defective for failure to seek for leave to come on record post judgement, and is in violation of order 9 rule 9 of the *Civil Procedure Rules*; that the application is fatally defective and legally incurable as it is based on an appeal that is yet to be admitted under section 79B of [Civil Procedure Act](#) and order 42 rule 11 of *Civil Procedure Rules* and the entire application is an abuse of court process. That the 1st respondent owns MN/1/7812. That the appellants had filed NET No. 43 of 2022 challenging its EIA license, and during the pendency of that appeal, the 2nd to 4th appellants withdrew their appeal, and cannot therefore be parties in this appeal. That the tribunal dismissed the appeal on 21st December 2023, without any evidence being produced to suggest the 1st respondent had obtained its EIA license irregularly, fraudulently or through corruption. That the tribunal did not deal with allegations that the 1st respondent had violated zoning by-laws, which pertains to control of developments, change of user and special conditions of the titles provided for under the [Physical and Land Use Planning Act](#). That as the tribunal did not deal with zoning allegations then, the court sitting on appeal thereof has no jurisdiction to deal with it through the appeal or application. The appellants did not raise the issue of privacy in their appeal before the tribunal and it is not one of the grounds in the appeal before this court, and cannot be subject of this appeal. That the concerns on water supply, sewer system and noise pollution are adequately addressed in the 1st respondent's Comprehensive Environmental Impact Assessment Report that the appellants' have attached, and was upheld by the tribunal. That the appellants' filed their appeal out of time and in violation of section 130 of [EMCA, 1999](#), and are therefore not entitled to injunctive orders under order 41 rule 6(6) of *Civil Procedure Rules*. That the 1st respondent's development is not out of character in that neighbourhood, as the 1st and 2nd appellants among others owns similar structures there. That the appellants are all of Asian origin and have not objected to similar developments by those from their community, but are discriminating against him as he is from the Somali origin. That the 1st respondent's development is at the final stages, and is built in compliance with Mombasa County Government approvals, and will be exposed to Kshs.6 million penalty for stalled construction to the contractor, collapse of its business



and losses in millions. That the application is an abuse of court process, unmeritorious and should be dismissed with costs.

3. Salim Hassanali Bhalloo, the 2nd appellant filed an affidavit in protest to the main appeal, sworn on May 13, 2024, disassociating himself from the appeal, inter alia deposing that he was not aggrieved with the tribunal judgement of December 21, 2023, and did not instruct the firm of Githuku & Githuku Advocates LLP, or any other firm to file an appeal; that he should not remain a party in the appeal and intends to file a notice of withdrawal in NET No. 43 of 2022.
4. The appellants have also lodged for filing a contempt application under certificate dated the May 20, 2024, that was paid for on 3rd June 2024 and directions were on that same date issued.
5. The court gave directions on filing and exchanging submissions in seven days for each side on the May 15, 2024. As of June 3, 2024, no submissions had been filed.
6. The 3rd Appellant filed an undated affidavit of protest denouncing the appeal on the June 6, 2024.
7. The following are the issues for the court's determinations:
 - a. Whether the appellants have met the threshold for issuance of the injunctive order sought at this interlocutory stage.
 - b. Who pays the costs?
8. The court has carefully considered the grounds on the application and of opposition, affidavit evidence, and come to the following determinations:
 - a. It is apparent that the appellants herein had initially filed an appeal before the National Environment Tribunal, being NET appeal No. 43 of 2022, raising five (5) grounds. The appeal was dismissed through the judgement delivered on the 21st December 2023. At paragraph 3 of the said judgement, the tribunal condensed the five grounds into two. It took grounds 1 to 3 together to be on adequacy or otherwise of the public participation before the issuance of the impugned EIA license, and grounds 4 and 5 to appertain to control of developments, change of user and special conditions on the titles. The tribunal at paragraph 6 set out the two issues before it for determinations as follows;
 - i. "Whether there was sufficient public participation before the issuance of the impugned EIA license.
 - ii. Whether the tribunal has jurisdiction to hear and determine grounds 4 & 5 of the notice of appeal.

The tribunal proceeded to analyse the evidence presented, submissions by counsel for the parties, superior courts decisions and pronounced itself on the first issue at paragraphs 23 and 24 that regulations 17 and 21 were not applicable in respect of the 1st respondent's project and that there was sufficient public participation before the impugned EIA license was issued.

- b. The tribunal then embarked on the second issue for determination, and at paragraph 25, restated that its jurisdiction stems from section 129 of *EMCA* and is limited to "grievances about the grant or refusal or transfer of a license or permit, the imposition of any condition, limitation, or the imposition against the person of an environmental restoration order or environmental improvement order by the Authority." The tribunal at paragraphs 26 held as follows about grounds 4 & 5, that they "raise development control and planning issues in that the proposed project is in conflict with the special conditions of the title in question. The



tribunal does not have jurisdiction to deal with development control and planning issues. This is the preserve of the County Physical and Land Use Planning Liaison Committee pursuant to sections 78, 79, and 80 of the *Physical and Land Use Planning Act*.” Then at paragraph 28, the tribunal found the appellants’ appeal to be “devoid of merit” and dismissed it “with an order that each party bears their own costs.”

- c. The appellants, being aggrieved by the tribunal’s decision, lodged the instant appeal through the memorandum of appeal dated the January 16, 2024, and filed on the January 22, 2024, setting out eleven (11) grounds, among them that the tribunal failed to take into account the poor public participation that was selectively done denying the appellants, who are the immediate neighbours to the project, the opportunity to present their views, and wrongly interpreting Regulation 7 of the Environment (Impact Assessment and Audit Regulations), by failing to take into account the zoning laws. The appellants therefore seeks for their appeal to be allowed, judgement of 21st December 2023 to be set aside in its entirety, and they be awarded costs.
- d. The instant application dated 19th April 2024, that is the subject matter of this ruling, has invoked articles 10, 40, 42, 47, 69 & 70 of *the Constitution*, section 13 of *Environment and Land Court Act*, sections 1A, 1B, 3A & 63(e) of *Civil Procedure Act*, order 40 rule 1 and order 51 rules 1 & 4 of *Civil Procedure Rules*. Articles 10, 40, 42, 47, 69 & 70 provides for national values and principles of governance, protection of right to property, environment, fair administrative action, State obligations in respect of the environment and enforcement of environmental rights respectively. Section 13 of the *Environment and Land Court Act* No. 19 of 2011, sets out the jurisdiction of this court, and sections 1A, 1B, 3A & 63(e) of *Civil Procedure Act* provides for the court’s objectives, duty, inherent powers to prevent abuse of its process and issuance of interlocutory orders respectively. Orders 40 rule 1 and 51 rules 1 & 4 of *Civil Procedure Rules* provides for cases in which temporary injunction orders may issue and procedure for making applications to court respectively. Order 40 Rule 1 provides as follows:

“ 1. Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

The appellants herein are seeking for injunction order to bar the 1st respondent from continuing with the 9-floor storey development on the suit property, pending the hearing and determination of the appeal. From the grounds of opposition and replying affidavit filed by the 1st respondent in objection to the granting of the order, the following are the primary ones:

- i. that prayer 2 is defective as the judgement it seeks to stay had negative orders;
- ii. prayers 3 & 4 have not met the threshold under Order 40 Rule 1;



- iii. application offends Order 9 Rule 9 as the leave of the court was not sought, and
 - iv. the 2nd to 4th appellants cannot be parties in this appeal/application as they had withdrawn their appeal before the tribunal.
- e. That as pointed out elsewhere above, prayers 2 & 3 were for the period pending the determination of the application, which period is now past, and neither of the two prayers is for determination in this ruling. Prayer 4 is now the main one for determination. Having considered the affidavit evidence presented by the parties, especially the photographs capturing the developments in the area where the suit property is situated, it is apparent there are other multi-storey structures/buildings in that area, some reportedly belonging to the appellants, of more or less similar sizes to the impugned building being developed by the 1st respondent. The 1st respondent's building, is at the last stages of structural development, and in view of the reported penalties and financial costs that the 1st respondent is likely to face if further construction is stopped, it is only fair and just that if the injunction order is to be granted, then the appellants should be required to deposit an amount to be determined by the court, as security for costs, in an interest earning account.
- f. Order 9 rule 9 of *Civil Procedure Rules*, provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court-

- (a) upon an application with notice to all parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

Rule 10 goes on to provide that an application under Rule 9, above, may be combined with other prayers so long as the question of change of advocate or party acting in person is determined first.

- g. In this matter, the application herein was filed through Ms. Githuku & Githuku Advocates LLP, while the documents attached to the 1st respondent's replying affidavit, including the notices of withdrawal dated 23rd October 2023 and December 14, 2023 by Kishor Meghil Gudka and Farhiya Abdi Yussef, the then 5th and 6th appellants respectively, indicated Ms. John Bwire & Associates as the counsel on record for the appellants. It follows therefore that Ms. Githuku & Githuku Advocates LLP came into this matter representing the appellants, after the tribunal's judgement of 21st December 2023, had been delivered/passed. It follows that Ms. Githuku & Githuku Advocates LLP, were required to comply with the mandatory requirements of Order 9 Rule 9 of Civil Procedure Rules.
- h. I have perused the court record, including the prayers on the application dated the 19th April 2024, and I have not seen evidence of any consent filed between Ms. Githuku & Githuku Advocates LLP and Ms. John Bwire & Associates, or a prayer to sanction the coming on record Ms. Githuku & Githuku Advocates LLP, in place of Ms. John Bwire & Associates, for the appellants. It follows that the drawing, filing, and prosecution of the application dated the 19th April 2024, was through counsel not properly on record for the appellants, and the application is liable to be struck out.



- i. A decision one way or the other, on the whether the 2nd to 4th appellants had withdrawn their appeals before the tribunal, and whether or not they are parties in the appeal and the instant application, should not, in my view affect the outcome of the application. This is because the court would make a decision as between the parties actually before it. The 1st respondent will be at liberty to pursue the matter further during the hearing of the appeal, as its determination would be relevant on matters costs.
- j. That whereas, I would have considered issuing a conditional temporary injunction order as can be seen in (e) above, the determinations aforementioned, and the fact that the application was drawn, filed and prosecuted by counsel who had not complied with order 9 rule 9 of Civil Procedure Rules, leads the court to the conclusion that the application should be struck out.
- k. That in terms of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, that provides that costs follow the events unless otherwise directed for good cause, and as the appellants application is for striking out, I award the 1st respondent the costs.
 1. Flowing from the foregoing, the court finds and orders as follows:
 - a. The appellants’ application dated the 19th April 2024 is hereby struck out.
 - b. The appellants will pay the 1st respondent’s costs in the application.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Appellants : M/s Wangui for M/ Akello

Respondents : M/s Julu for 1st Respondent.

LEAKEY – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

