



Gichohi & another v Rajuun Properties Limited & 2 others (Environment & Land Case E049 of 2023) [2024] KEELC 4668 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E049 OF 2023**

AA OMOLLO, J

JUNE 6, 2024

BETWEEN

NANCY WANJIRU MAINA GICHOHI 1ST PLAINTIFF

DAVID MAINA GICHOHI 2ND PLAINTIFF

AND

RAJUUN PROPERTIES LIMITED 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 2ND DEFENDANT

NEMA 3RD DEFENDANT

RULING

1. The 2nd Defendant filed a preliminary objection dated 19th September 2023 in regard to the Plaintiff's notice of motion dated 9th August 2023 on the grounds that the impugned notification of approval of development permission dated 6th October 2022 ought to have been challenged within 14 days from the date it was made as per Section 61(3) & (4) of the *Physical and Land Use Planning Act* No. 13 of 2019 which provides as follows:
 - (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 county executive committee member and that committees 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.



2. That prayer number 7 of the Notice of Motion which is the only prayer touching on decision made by the 2nd Defendant cannot be entertained at this forum as no appeal has been heard and determined thus at this stage the Honourable Court lacks jurisdiction to hear and determine the subject application and suit.
3. That also, the application prima facie does not disclose any cause of action and/or impropriety on the part of the 2nd Defendant and should be dismissed with costs.

Submissions

4. In support of its Preliminary objection, the 2nd Defendant and the 1st Respondent filed submissions dated 3rd November 2023 and 5th October 2023 respectively while the Plaintiff filed submissions dated 26th January 2024.
5. The 2nd Defendant outlined the background of the matter stating that the Plaintiffs state that they are the registered owners of Land Parcel Number: Nairobi/Block 104/232 within Juja Road Estate Sector A, on which their residential home stands and that the 2nd Defendant gave approvals to the 1st Defendant to commence demolitions of houses on Nairobi/Block 104/228, 104/229, 104/230 and 204/231 which are adjacent to the Plaintiffs' property in order to give rise to mix use development.
6. That the said demolitions and construction are unlawful because they did not witness the requisite environmental impact assessment being conducted prior to the demolition and construction on the land parcel and have also objected change of user of the parcels to the Director General of the Nairobi Metropolitan Services (as it then was) and the Chief Officer Urban Planning and Development of Nairobi County.
7. The 2nd Defendant submitted that the Plaintiffs' main grievance is the approval of an application for change of user by the Defendant/Respondent issued on 16th October, 2022 which the Plaintiffs are aggrieved about and would wish the same to be set aside by this honorable Court as per the prayers on the plaint.
8. The 2nd Defendant contended that the impugned notification of approval of development permission alluded to by the Plaintiffs ought to have been challenged within 14 days from the date it was made, before the County Physical and Land Use Planning Liaison Committee as per Section 61(3) & (4) of the *Physical and Land Use Planning Act*, No. 13 of 2019 thus this court lacks jurisdiction to hear and determine the application and suit.
9. They submitted that the Plaintiffs herein failed to pursue the available statutory dispute resolution mechanisms provided under the Act thus this court lacks jurisdiction in this matter as it is only vested with final appellate jurisdiction in relation to disputes under the said Act and in support cited the case of *Speaker of National Assembly v James Njenga Karume [19921 Civil Application No. Nai 92 of 1992 (Nai 40/92 UR) eKLR*, *Bernard Murage v Fineserve Africa Limited & 3 Others* [20151 eKLR, *Daniel Kariuki Mbugua & 8 Others v Joseph Njenga Wachaiyu & 4 others* [20221 eKLR, *Issa Ahmed & 15 Others v Mohamed Al-Sawae* [20211 eKLR and *Kibos Distillers Ltd & 4 Others v Benson Ambuti Adegua & 3 Others* [20201 eKLR.
10. The 1st Defendant submitted that the Preliminary Objection by the 2nd Defendant is indeed valid citing the landmark case of Mukisa Biscuit Company vs West End Distributors Limited (1969) EA 696 which described what a preliminary objection. They contended that Doctrine of exhaustion was never exhausted by the Plaintiffs/Applicants before approaching this Court thus it lacks jurisdiction in the matter.



11. They also cited the case of *Dickson Mukwe Lukeine v Attorney General & 4 others* [2012] eKLR where Justice Majanja held that parties should use the applicable procedures to resolve disputes as provided by the statute before going to court to submit that failure of the Plaintiffs to pursue an appeal before the Liaison Committee meant that they had invoked the court's jurisdiction prematurely.
12. The Plaintiffs submitted that the provision of Section 61(3) and (4) of the *Physical and Land Use Planning Act*, No. 13 of 2019 has not been couched on mandatory terms therefore the same ought not to be the ground upon which the court may be deemed not to have jurisdiction.
13. They stated that this court is clothed with jurisdiction to hear this matter by virtue of Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. That the 1st Respondent's proposed development is breach of the Plaintiff's right to a clean and healthy environment under Article 42 and offends the obligations in respect to the environment under Article 69 of *the Constitution*.
14. In reliance to the case of *Paolo Di Maria & 5 others v Alice M. Kuria & 5 others* [2021] eKLR where the court upheld the position in *TAIB Investment Ltd vs Fabim Salim said & 5 others* the Plaintiffs submitted that they are seeking for reliefs relating to environment, land use and development and further they are claiming a violation of their constitutional right to a clean and healthy environment as well as their right to enjoyment of their property, thus these issues fall within the mandate of this court.
15. The Plaintiffs submitted that the Preliminary Objections are to be made on points of law and not facts and that in order the Court to determine the Application filed, it would have to look at the facts and in support cited the case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696 as upheld in the case of *Oraro vs. Mbaja* [2005] eKLR.
16. This is because in the Application made by the Plaintiffs, one of the grounds is that in order to get the necessary approvals for the parcels of land (suit property), the 1st Respondent submitted fraudulent details to the 2nd Respondent, including the location of the parcel of land and also presented fraudulent details to the 3rd Respondent in an effort to defeat justice.
17. They added that the 1st Defendant herein obtained development permission without following requisite process in that there was never any proper Environmental Impact Assessment carried out to show the implications of their development project and that they presented fictitious signatures to the 3rd Defendant to show that the Plaintiffs were not opposed to their development as they were not aware of the change of user so as to object to it in time.

Determination:

18. It is trite law that a preliminary objection be based only on points of law. The 2nd Respondent has contended that based on the provisions of Section 61(3) & (4) of the *Physical and Land Use Planning Act* No. 13 of 2019 this court lacks jurisdiction to hear and determine the application and suit filed by the Plaintiffs. This is premised on the argument that the suit filed by the Plaintiffs touches on the approval of an application for change of user issued to the 1st Defendant.
19. It is true that the *Physical and Land Use Planning Act* has elaborate procedures regarding dispute resolution and institutions to deal with such disputes when they arise. The processes have been captured sufficiently by both parties and the 1st and 2nd Defendants have contended that the Plaintiffs



have not exhausted the procedures provided. Section 61 of PLUPA states that when considering an application, in paragraph 1(d);

“The County Executive Member shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area”

20. The inference deduced from the above provision is that the application was somehow communicated to members of the public to give their feedback. For the Court or Liaison Committee to determine when time began to run, it is my considered view that the law presumed some communication to the public had taken place which placed the Applicant in the know about the application and a decision to be made over the same. Those facts cannot be ascertained while dealing with a preliminary objection.

21. Further, the exhaustion doctrine was aptly articulated in Anthony Miano & others v Attorney General & others [2021] eKLR 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.

22. The Plaintiffs acknowledge their right appeal against the decision to the County Physical and Land Use Planning Liaison Committee but contend that their issues involve breach of their right to a clean and healthy environment under article 42 and breaches the obligations under article 69 of the Constitution. The Plaint filed outlines the Constitutional rights alleged as being offended by the acts and or omissions by the Defendants as well as the statutory provisions thereof. The PLUPA limits the jurisdiction of the County Physical and Land Use Planning Liaison Committee to handle appeals of decisions of a county executive committee member regarding an application for development permission. Any dispute outside that lies with the ELC court.

23. The Supreme Court of Kenya deeply addressed the question of when a party should approach a statutory body first before coming to court in the case of Nicholus Abidba v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) as follows;

“104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 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 nor 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 a 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, JJ) stated:

“In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms 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.” [Emphasis ours].

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

the Constitution and relevant laws and has the duty to safeguard and enhance the environment.”

110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the Energy Act. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.”

24. In the instant case, the application before the court and the suit raises breaches of rights and other matters thus falling outside of the powers of the Liaison Committee set out in the Physical Land Use and Planning Act, 2019. Thus, I am persuaded by the above findings hence I hold that this court has primary jurisdiction to hear and determine this matter being a dispute that goes beyond being aggrieved with an application for a development. That the dispute involves issues on constitutional rights which can only be dealt within the Court forum and not before the County Physical and Land Use Planning Liaison Committee.

25. The preliminary objection is thus be dismissed with costs to the Plaintiff.



DATED, SIGNED AND DELIVERED AT NAIROBI 6TH DAY OF JUNE, 2024

A. OMOLLO

JUDGE

