



**Kassam & 12 others v JW Archplans Limited & 16 others (Environment & Land  
Petition E007 of 2024) [2024] KEELC 5809 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5809 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E007 OF 2024**

**OA ANGOTE, J**

**JULY 31, 2024**

**BETWEEN**

**KARIM SHERALI KASSAM ..... 1<sup>ST</sup> PETITIONER**  
**J&J FAMILY VENTURES LIMITED ..... 2<sup>ND</sup> PETITIONER**  
**KUNAL BID ..... 3<sup>RD</sup> PETITIONER**  
**SANJAY ADVANI ..... 4<sup>TH</sup> PETITIONER**  
**HARSH NARAN CHAVDA ..... 5<sup>TH</sup> PETITIONER**  
**SHAFIQ DAWOODANI ..... 6<sup>TH</sup> PETITIONER**  
**MARGARET KAPTUIYA KOMEN ..... 7<sup>TH</sup> PETITIONER**  
**FAIZAL JERAJ ..... 8<sup>TH</sup> PETITIONER**  
**SAIRA GILANI ..... 9<sup>TH</sup> PETITIONER**  
**KETAN GOSWAMI ..... 10<sup>TH</sup> PETITIONER**  
**ASHMI SHAH ..... 11<sup>TH</sup> PETITIONER**  
**SHELINA MANJI ..... 12<sup>TH</sup> PETITIONER**  
**HEFNAL TANK ..... 13<sup>TH</sup> PETITIONER**

**AND**

**JW ARCHPLANS LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**TERRA CONSULT ..... 2<sup>ND</sup> RESPONDENT**  
**SSPEKTRA CONSULTING ENGINEERS ..... 3<sup>RD</sup> RESPONDENT**  
**CHALBAK CONSTRUCTION COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**  
**NAIROBI CITY COUNTY GOVERNMENT ..... 5<sup>TH</sup> RESPONDENT**



PATRICK ANALO AKIVANGA .....	6 <sup>TH</sup> RESPONDENT
STEPHEN GATHUITA MWANGI .....	7 <sup>TH</sup> RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ....	8 <sup>TH</sup> RESPONDENT
CATHERINE THAITHI .....	9 <sup>TH</sup> RESPONDENT
SHANTILAL RAYCHAND SHAH .....	10 <sup>TH</sup> RESPONDENT
NATIONAL CONSTRUCTION AUTHORITY .....	11 <sup>TH</sup> RESPONDENT
WATER RESOURCES AUTHORITY .....	12 <sup>TH</sup> RESPONDENT
GREENDIME CONSULTANTS LIMITED .....	13 <sup>TH</sup> RESPONDENT
BENJAMIN N OMBATI .....	14 <sup>TH</sup> RESPONDENT
ROBINSON MAINA KIMARI .....	15 <sup>TH</sup> RESPONDENT
JUSTUS MWAURA .....	16 <sup>TH</sup> RESPONDENT
ZAMIL REALTORS LIMITED .....	17 <sup>TH</sup> RESPONDENT

## RULING

1. Before the Court for determination is the 4<sup>th</sup> Respondent’s Preliminary Objection dated 22<sup>nd</sup> April 2024. The Preliminary Objection is based on the following grounds:
  - a. That the Court lacks original jurisdiction to entertain the Petitioner’s application and Petition both dated 28<sup>th</sup> March 2024 by dint of Section 61(3) and 61(4) of the *Physical and Land Use Planning Act*, 2019 which stipulates that any person aggrieved by the decision of the County Executive Committee Member regarding an application for development permission to first file an appeal against the decision to the County Physical and Land Use Planning Liaison Committee.
  - b. That the Court lacks original jurisdiction to entertain the Petitioner’s application and petition both dated 28<sup>th</sup> March 2024 by dint of Section 129(1) and 130(1) of the *Environmental Management and Coordination Act* 2012 (EMCA) which stipulates that any person aggrieved by the issuance of an approval or license to first file an appeal to the National Environmental Tribunal.
  - c. That the Court lacks original jurisdiction to entertain the Petitioner’s application and Petition both dated 28<sup>th</sup> March 2024 by dint of Section 121 and 124 of the *Water Act* which grants original jurisdiction to the Water Tribunal.
  - d. That in the circumstance the Petitioner’s application and Petition is premature as the Petitioners have failed to exhaust the alternative means of dispute resolution provided under the laws of Kenya as stipulated above.
  - e. That the Petition and the application filed herewith is fatally defective as it offends Order 1 Rule 13(1) and 13(2) and Order 4 Rule 1(2) and (3) of the *Civil Procedure Rules* which requires that where there are more Plaintiffs than one, any one or more of them may be authorized by



any other of them to appear, plead or act for such other in any proceedings and the authority shall be in writing signed by the party giving it and be filed at the time of filing the suit.

2. The preliminary objection was supported by an affidavit sworn by the 4<sup>th</sup> Respondent's director, Ali Hussein Sugule, who deponed that the Court's jurisdiction in this matter is appellate and not original and that the Petitioners' claim should therefore be heard and determined in other forums before the Petitioners can move to this Court.
3. The 4<sup>th</sup> Respondent deponed that without the other Petitioners giving their authority to swear to the 1<sup>st</sup> Petitioner, the Petition and the application before the Court is fatally defective.
4. The Petitioners filed a Supplementary Affidavit sworn by the 1<sup>st</sup> Petitioner and dated 16<sup>th</sup> May 2024, who deponed that the issues raised in the Petition and application go beyond the jurisdiction of the County Physical and Land Use Planning Committee, the National Environmental Tribunal and the Water Tribunal.
5. He deponed that the Petition raises issues relating to the violation of rights and fundamental freedoms under Articles 26, 28, 35, 42, 43(1)(b), 47(1), 50, 69(1), 70, 73, 75(1), 165 and 232 of the Constitution. Consequently, he stated that the Court has jurisdiction to hear and determine the petition and application.

### Submissions

6. The 4<sup>th</sup> Respondent filed submissions on 29<sup>th</sup> April 2024. It was submitted that the gravamen of the Petitioners' case is that the 4<sup>th</sup> Respondent is undertaking the development of apartments without the requisite approvals, consents and permits.
7. It was further submitted that if the Petitioners wished to challenge the permit given to the 4<sup>th</sup> Respondent, they ought to have appealed to the County Physical and Land Use Planning Liaison Committee and the National Environmental Tribunal and The Water Tribunal.
8. Sections 61 (3) and (4) of the Physical and Land Use Planning Act, Sections 129 and 130 of the Environmental Management and Coordination Act, Sections 121 and 124 of the Water Act and the cases of Republic v National Environment Management Authority Ex parte Sound Equipment Ltd [2011] eKLR, Issa Ahmed & 15 others v Mohamed Al-Sawae [2021] eKLR, Kenneth Ngure Mwaaura & another v Rubis Energy Kenya & 2 others [2021] eKLR, Symon Wangombe Gathua & 6 other v Attorney General & 6 others [2020] eKLR and Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others were relied upon.
9. The 4<sup>th</sup> Respondent submitted that the Petition and application were defective for failing to seek the administrative remedies provided for in law before turning to judicial intervention. It was submitted that the suit violated the doctrine of exhaustion. The cases of Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) and Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR were relied upon.
10. The 4<sup>th</sup> Respondent submitted that the suit filed by the Petitioners was fatally defective as the affidavits sworn by the 1<sup>st</sup> Petitioner did not conform to the requirements of Order 1 Rule 13 and Order 4 Rule 1(2) and (3) of the Civil Procedure Rules.
11. It was submitted that there ought to have been either thirteen affidavits on record (one for each Petitioner) or an authority/consent given by the other twelve Petitioners to the 1<sup>st</sup> Petitioner. It was submitted that the absence of the two rendered the suit as filed fatally defective and incompetent.



12. The cases of *Andrew Ireri Njeru – Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Ng'ang'a Kangi & another* [2015] eKLR and *Research International East Africa Ltd v Julius Arisi & 213 others* [2007] eKLR were relied upon.
13. The Petitioners filed submissions on 19<sup>th</sup> June 2024. It was submitted that the Petitioners' claim is that all the Respondents have contributed to the ongoing developments on the suit properties, and that the said developments have had negative effects on the environment leading to the violation of the rights and fundamental freedoms of the Petitioners and the general public.
14. The rights specifically stated to have been violated are Articles 26, 28, 35, 42, 43(1), 47(1), 50, 69(1), 70, 73 and 75(1) of the *Constitution*. It was submitted that while the legitimacy of approvals was also in issue, the heart of the Petitioners' case was the violation of fundamental rights and freedoms.
15. It was further submitted that as per Articles 162 and 165(3) of the *Constitution*, the High Court and by extension, the Environment and Land Court are clothed with jurisdiction to determine whether a right or fundamental freedom has been violated or threatened.
16. It was specifically stated that matters relating to the right to a clean and healthy environment can only be heard by the ELC Court. Section 13 of the *Environment and Land Court Act* and the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) were relied upon.
17. On the question of whether the Petition and the application are fatally defective for lack of consent as alleged by the 4<sup>th</sup> Respondent, the Petitioners submitted that as per the Supplementary Affidavit sworn on 15<sup>th</sup> May 2024, the Petitioners had given their consent.
18. Additionally, it was submitted that under Article 22(1) of the *Constitution*, a person can institute court proceedings alleging violation of a right or fundamental freedom while acting in their own interest, that of a group or the public interest. It was submitted that the instant Petition was instituted by the Petitioners on their own behalf and on behalf of the public.
19. The case of *The Centre for Human Rights and Democracy and 2 others v The Judges and Magistrates Vetting Board and 2 others* [2012] eKLR was relied upon.
20. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents filed submissions on 24<sup>th</sup> June 2024. It was submitted that the Petitioners were aware of the impugned construction on the suit properties since January 2021.
21. In the view of the 9<sup>th</sup> - 11<sup>th</sup> Respondents, it was submitted that the Petitioners failed/neglected to file appeals before the County Physical and Land Use Planning Liaison Committee which had the authority to hear complaints about the ongoing construction.
22. It was submitted that the 1<sup>st</sup> Petitioner did not file a written consent showing that the other Petitioners consented to him swearing affidavits on their behalf.
23. The 14<sup>th</sup> Respondent filed submissions on 15<sup>th</sup> July 2024. It was submitted by the 14<sup>th</sup> Respondent that the dispute before the Court was centred around the *Environmental Management and Coordination Act*, The *Physical and Land Use Planning Act* and the *Water Act*.

### **Analysis and Determination**

24. It is trite that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.



25. The points of law raised by the 4<sup>th</sup> Respondent and supported by the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 14<sup>th</sup> Respondents are that: the Court lacks original jurisdiction to hear the Petition because it raises matters relating to approvals that should be dealt with by the tribunals mentioned in the foregoing paragraphs.
26. It is the Respondents' case that the Petition as filed is in violation of the doctrine of exhaustion of remedies; and, that the suit as filed is fatally defective because the 1<sup>st</sup> Petitioner swore affidavits on behalf of the other Petitioners without their consent.
27. In opposition, the 1<sup>st</sup> Petitioner deponed that while the suit raised issues related to approvals, at the heart of the suit is the violation of rights and fundamental freedoms, which this Court has original jurisdiction. On the issue of consent, it was stated that as per the affidavit sworn on 15<sup>th</sup> May 2024, consent was given. In any case, the 1<sup>st</sup> Petitioner deponed that a person can file a case on his own behalf or in the interest of the public.
28. On the issue of jurisdiction, the Court of Appeal stated as follows in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
29. This Court therefore ought to down its tools if it finds that it has no jurisdiction in the matter. Having perused the Petition, I am of the considered view that it raises both Constitutional and non-constitutional issues.
30. In paragraphs 50 - 67 of the Petition, the Petitioners have questioned the validity of the approvals, licences and permits issued by the Respondents. This would bring the claims under the jurisdiction of the tribunals aforementioned by the Respondents.
31. At paragraphs 75 -81 of the Petition, the Petitioners list the Constitutional provisions on which the Petition is based. The Petitioners have averred that their rights, including the right to a clean and healthy environment have been violated by the developments and the failure by the relevant authorities to take action.
32. The harm occasioned by the development has been stated to include: blocking of light and natural air; water seepage into the Petitioners' homes; damage to the sewer line releasing foul smell into the air; release of sewer effluent into Mathare River and reduction of the size of the public access road.
33. From the foregoing, it is clear that the Petitioners claim is multifaceted in nature. The question now turns to whether this Court is the right forum to hear the claim. Article 70 of the *Constitution* which has been relied upon by the Petitioners states as follows:
- “If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.”



34. The Supreme Court in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) stated as follows:

“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.”

35. The court in the *Nicholus case (supra)* further held as follows:

“In concluding on this issue, it is our finding that it is upon a party to frame its pleadings as it deems fit but in doing so should not create such a disjointed case that a court has to struggle in the identification of each facet thereof. Elegant pleadings also ensure that the responding party has a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it. In the present case and for reasons given above, the issues raised were well within the ELC’s jurisdiction to determine and there was no reason to either reserve or remit any of them and we so hold.”

36. The import of the foregoing is that the Petitioners were within their rights to file the instant suit even though, as has been demonstrated in the foregoing sections, some of their claims could have been adjudicated in other forums.
37. Additionally, and more importantly, the case law buttresses the fact that it is this Court, and not the tribunals, that has the jurisdiction to hear and determine matters relating to the violation of rights and fundamental freedoms such as what is contained in paragraphs 75-81 of the Petition.
38. The Respondents’ argument that the Petition offends the doctrine of exhaustion therefore fails.
39. The 4<sup>th</sup> Respondent also argued that the Petition was defective as the affidavits therein were sworn by the 1<sup>st</sup> Petitioner without the consent of the other Petitioners. In response, the 1<sup>st</sup> Petitioner argued that a Petition can be brought by a person on own behalf or by a person representing a group or in the public interest.



40. Order 1 Rule 13 subrules 1 and 2 of the *Civil Procedure Rules* provides as follows:

- “(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

41. Order 4 Rule 1 sub rules 2 and 3 provide as follows:

2. The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.
3. Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”

42. However, this being a Petition, I believe the same is governed by the Mutunga Rules whose overriding objective as stated in Rule 3(2) is to facilitate access to justice to all persons. Additionally, the Rule 11 (1) provides:

1. The petition filed under these rules may be supported by an affidavit.”

43. The use of the word ‘may’ signals the fact that a supporting affidavit is not a critical document as far as the Petition goes. Consequently, its failure to conform to the required standard should not render the Petition fatally defective.

44. In furtherance of the overriding objective of facilitating access to justice and in consideration of the fact that no prejudice/hardship will be occasioned to the Respondents by the failure of the Petitioners to furnish the 1<sup>st</sup> Petitioner with a written authority to file the Petition, I find the objection to be baseless.

45. In any event, the written authority to file this suit by the Petitioners has been annexed in the Further Affidavit.

46. In view of the foregoing, I find that the 4<sup>th</sup> Respondent’s Preliminary Objection dated 22<sup>nd</sup> April, 2024 has no merit. The Preliminary Objection is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ndambiri for Petitioner

Mr. Daib for 4<sup>th</sup> Respondent

Mr. Ogolla for Juma for 9<sup>th</sup> – 11<sup>th</sup> Respondent

Court Assistant – Tracy

