



**Bhatt & 21 others v Alina Valley Company Ltd & 7 others (Environment & Land  
Petition E024 of 2024) [2024] KEELC 6010 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 6010 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E024 OF 2024  
AA OMOLLO, J  
AUGUST 15, 2024**

**BETWEEN**

**JAGDISH CHANDRA J. BHATT & 21 OTHERS ..... PETITIONER**

**AND**

**ALINA VALLEY COMPANY LTD & 7 OTHERS ..... RESPONDENT**

**RULING**

1. The 3<sup>rd</sup> to 7<sup>th</sup> Respondents filed a preliminary objection dated 17<sup>th</sup> July 2024 against the application and the petition raising five grounds but which I summarise into one thus;
  - a. That this court lacks jurisdiction to hear and determine the notice of motion application dated 26<sup>th</sup> June 2024 and the petition because they offend the doctrine of exhaustion. The applicable law cited which the Respondents plead provide alternative dispute resolution mechanisms were
    - i. Sections 72 and 78 of the *Physical Land Use and Planning Act* of 2019
    - ii. Sections 31-33 and 129 of *EMCA* 1999
    - iii. Sections 9 of the *Fair Administrative Actions Act* of 2015.
2. In support of the PO, the 3<sup>rd</sup> to 7<sup>th</sup> Respondents filed submissions dated 24<sup>th</sup> July 2024 while the 1<sup>st</sup> Respondent submissions are dated 31<sup>st</sup> July 2024. The 3<sup>rd</sup> to 7<sup>th</sup> Respondents submitted that this court derives its jurisdiction from the provisions of section 13 of the *Environment and Land Court Act* of 2011 while section 20(2) provides for adoption of alternative dispute resolution mechanism. They aver that the Applicants herein failed to ventilate their complaints with the relevant authorities and thus failed the doctrine of exhaustion.



3. In elaborating the failure of the applicant to exhaust the alternative mechanisms, the said Respondents cited several cases *inter alia* [Secretary County Service Board and another v Hulbbhai Gedi Abdile](#) [2017] eKLR which held thus;

Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.

4. They stated that sections 61 and 78 of the [Physical Land Use and Planning Act](#) grants jurisdiction to the County Physical and Land Planning Liaison Committee to determine disputes arising from use, regulation and development of land. It is their aversion that since the Applicants are challenging development permission vide their letter of 18<sup>th</sup> July 2022, they ought to have presented their complaints to the County Liaison Committee. In the case of [Susan Wanjiku Maina v the Director of Physical Land Use Planning, Kiambu County and another](#) [2022]eKLR, cited by the Respondents herein the court stated that the dispute had been brought to court prematurely. The 3<sup>rd</sup> to 7<sup>th</sup> Respondents argued further that section 72 of [PLUPA](#) is effective and adequate in addressing the dispute because once an enforcement notice is issued, it works just like an order of temporary injunction.
5. The Respondents submitted on the provisions of sections 31-33 of [EMCA](#) 1999 which establishes the National Environmental Complaints Committee whose primary function is to investigate allegations or complaints against the Authority and also cases of environmental degradation. That from the affidavit in support of the application, the Applicants have been corresponding with the 2<sup>nd</sup> Respondent since 2022 but it is ironical that they did not approach the NECC, nor did they appeal the issuance of the impact license to the National Environment Tribunal created under section 129 of [EMCA](#).
6. They cited the Supreme Court in the case of [Kibos Distillers Ltd v Benson Adega](#) [2020] which found that the ELC did not have jurisdiction to entertain the claim before it. The Respondents submitted that this Petition does not raise real constitutional violations and the application is merely framed in a bill of rights language as a pretext to bypass the exhaustion doctrine. They urged the court to uphold the PO and strike out the application and the Petition.
7. The 1<sup>st</sup> Respondent also submitted on the provisions of section 61 and 78 of the [Physical Land Use and Planning Act](#). That looking at prayers 2-5 of the Petition, the Applicants are challenging the change of user and approvals of the proposed development and added that the alleged violation of the change of user is pegged on the grant change of user and construction licences. It contends that issues regarding change of user falls squarely on the provisions of section 61 of [PLUPA](#).
8. The 1<sup>st</sup> Respondent said the Petitioners were aware of the alternative remedies since 2022 but chose not to ventilate their grievances through those bodies. That the Petitioners through judicial craft have prematurely invoked the jurisdiction of the Court before exhausting the mandatory reliefs provided in the County Liaison Committee and the National Environment Tribunal hence this court should not assume jurisdiction. In support, they cited the Court of Appeal in the case of [Speaker of National Assembly v Karume](#) [1992]KLR 21, which held thus;

“That where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”



9. And the case of *Mui Coal Basin Local Community and 15 Others v PS Ministry of Energy and 17 Others* [2015] eKLR which held that;

The reasoning is based on the sound Constitutional policy embodied in Article 159 of the *Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.”[1] the *Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, the *Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases.

10. I have considered the arguments presented in support of the preliminary objection and note the following; that none of the cases cited by the Respondents ousts the jurisdiction of the court rather they urge the Courts to consider the alternative statutory dispute resolution mechanisms. Secondly, section 20(2) of *ELC Act* does also not envisage the taking away of jurisdiction as it clearly states that

“where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.”

11. It is also noteworthy that the jurisdiction is conferred to this court by article 162(2)(b) of the *Constitution* while the alternative dispute resolution bodies are creation of Statutes thus they cannot supersede the Constitutional provisions. This position was enunciated by the High Court in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020];

“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. This was extensively elaborated by Mativo J in *Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others* [2018] eKLR.”

12. Further in a recent decision of the Supreme Court in the case of *Abidha Nicholas v the Attorney General & 7 Others* [2024]eKLR and which case mentioned their position in *Kibos Distillers v Benson Adega* and several other cases. At paragraph 104 the S.C held thus;

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.”

13. The 1<sup>st</sup> Respondent submitted that the alleged violation of the right to a clean and healthy environment stated in the prayers of the petition were pegged on the licenses granted for the change of use and the proposed project. Had there been no proposed changes on development on the impugned premises, the Petitioners were not complaining. On the question raised by the 3<sup>rd</sup> to 7<sup>th</sup> Respondents that the application and the Petition are judicial crafted/framed in the bill of rights language but no violations of constitutional rights have been pleaded. Whether or not the violations of rights have been demonstrated would require the parties to elaborate and the elaboration require inviting evidence. If that process is adopted, the preliminary objection ceases to be one.
14. On the question of section 61 of *PLUPA* being efficacious and adequate, the Respondents submitted that the enforcement notice suffices as a temporary injunction. The Respondents did not state what next after the notice in a case where some of the orders sought in the petition includes.....
15. Again, on the question of adequacy, the 3<sup>rd</sup> to 7<sup>th</sup> Respondents submitted that the Petitioners ought to have approached the County Liaison Committee, the NET and or the National Environment Complaints Committee. These three bodies have distinct jurisdictions and none can handle all the approvals being challenged at one go as well as the environmental concerns raised. In the case of *William Odhiambo Ramogi & Others v A.G* and others *supra*, also held;

“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.”

16. The Court of Appeal in the case of *Kibos Distillers v Benson Adega supra*, suggested that the ELC ought to have stayed the prayers that touched on constitutional issues and sent to NET the dispute that challenged the issuance of the EIA licensing for which the trial court did not have jurisdiction. The Respondents herein have not moved the court for partial stay of proceedings and filing of a preliminary objection is not a known mode under which this court can make orders for severing the proceedings on what is to be stayed and what should be sent to the County Liaison Committee and the NET. In conclusion, I am not satisfied that the PO raised is merited. The same is dismissed with costs.

**DATED, SIGNED & DELIVERED AT NAIROBI THIS 15<sup>TH</sup> AUGUST, 2024**

**A. OMOLLO**

**JUDGE**

