



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Nairobi City County & another (Environment and Land Case Civil
Suit E149 of 2023) [2024] KEELC 6672 (KLR) (6 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 6672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E149 OF 2023**

**MD MWANGI, J
AUGUST 6, 2024**

BETWEEN

FRANCIS CHRISTOPHER MAINA NJOROGE PLAINTIFF

AND

THE NAIROBI CITY COUNTY 1ST DEFENDANT

NJIRU AGERIA DEVELOPMENT COMPANY LIMITED 2ND DEFENDANT

RULING

(In respect of the preliminary objection dated 15th March, 2024 seeking to strike out the plaintiff's suit in its entirety for violating the doctrine of exhaustion)

Background

1. This ruling is in respect to the preliminary objection by the 1st Defendant dated 15th March, 2024. The 1st Defendant asserts that:
 - I. That this Honourable Court lacks jurisdiction to deal with the subject matter in dispute as set out in the plaint dated 20th April, 2023.
 - II. That by virtue of Section 72 (3) of the *Physical and Land Use Planning Act* (PLUPA) Cap 303 the plaintiff has failed to exhaust the remedies provided by law.
 - III. That by virtue of Section 72 (4) of the *Physical and Land Use Planning Act* Cap 303 the plaintiff may only approach this Honourable Court as an appellate Court and on points of law only.
 - IV. That by virtue of the ruling dated and delivered on 17th October, 2023, this Honourable Court found that it lacked jurisdiction to deal with the matter as set out in the application dated 26th April, 2023 which is a carbon copy of the plaint.



Court's Directions

2. The Court's directions were that the Preliminary objection be canvassed by way of written submissions. I have had the occasion to peruse and consider the submissions by the parties which now form a part of the record of this Court.

Issues for Determination

3. The sole issue for determination is whether the preliminary objection is merited.

Determination:

4. In its ruling of 17th October, 2023, this Court struck out the plaintiff's Notice of Motion dated 26th April, 2023 with costs to the Defendant/Respondent on the basis that it violated the doctrine of exhaustion and amounted to an abuse of the process of Court in view of the clear provisions of Sections 72 and 73 of the *Physical and Land Use planning Act*. In the said ruling the court expounded on the provisions of PLUPA vis a vis the plaintiff's case.
5. The Court observed that the ownership of the suit property is not in dispute in this case. The Plaintiff's complaint in this matter is against the enforcement notice issued by the 1st Respondent. The *Physical and Land Use Planning Act, Act No. 13 of 2019*, is the relevant statute that makes provision for the planning, use, regulation and development of land. The objectives of the Act set out in Section 3 thereof include: -

‘Providing a mechanism for dispute resolution with respect to physical and land use planning’
6. Section 72 of the PLUPA empowers the County Executive Committee Member to serve upon an owner, occupier, agent or developer of property or land with an enforcement notice where a development has commenced on any land without development permission or where any condition in the development permission granted has not been complied with. It provides that where any person upon whom an enforcement notice has been served is aggrieved by that notice, as in this case, that person has a right of appeal to the relevant County Physical and Land Use Planning Liaison Committee within 14 days of being served.
7. Section 73(4) of the *Physical and Land Use Planning Act* provides that any party who is aggrieved by the determination of the County Physical and Land Use Liaison Committee may appeal to the Court (read Environment and Land Court) only on a matter of law and the Court shall hear the appeal in 30 days.
8. As this Court stated in its ruling in the case of Eric Kiprotich Soi & Another -vs- Director General Nairobi Metropolitan Services [2022] eKLR:

“the law is therefore clear that this Court, on matters falling under the provisions of the *Physical and Land Use planning Act*, enjoys appellate jurisdiction and on matters of law only.”
9. The Plaintiff/ Applicant has not come to this Court by way of an appeal. From his Plaint, the Plaintiff seeks a permanent injunction against the Defendant restraining him from destroying his perimeter wall, digging sewerage trenches and trespassing on his property. It is evident that this suit has been occasioned by the issuance of the Enforcement Notice by the 1st Defendant.



10. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019; William Odhiambo Ramogi & 3 Others -vs- Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows at paragraph 52 of its judgement:

“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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* ...”

11. The Court of Appeal in the case of Geoffrey Muthiga Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 others (2015) eKLR, had also expressed itself on the doctrine of exhaustion 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”.

12. In as far as the grievance against the enforcement notice is concerned, this Court lacks the jurisdiction to consider it in the first instance in accordance with the provisions of the *Physical and Land Use Planning Act*. This Court’s jurisdiction in matters concerning ‘enforcement notices’ is appellate. The same ought to be heard and determined in accordance with the provisions of section 72(3) of the *Physical and Land Use Planning Act* by the relevant County Physical and Land Use Planning Liaison Committee. The attempt by the Plaintiff to circumvent the law by instituting the instant suit before exhausting the mechanism provided for under the Statute is nothing but an abuse of the process of Court and clearly a violation of the doctrine of exhaustion.

13. Accordingly, the Court upholds the 1st Defendant’s the preliminary objection dated 15th March, 2024. The Plaintiff’s suit violates the doctrine of exhaustion and amounts to an abuse of the process of Court in view of the provisions of Section 72 and 73 of the *Physical and Land Use Planning Act*. It is hereby struck out with costs to the Defendants.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF AUGUST 2024

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Wachakana for the Plaintiff

Mr. King’ori for the 1st Defendant

Mr. Thuku for the 2nd Defendant

Court Assistant: Yvette

M. D. MWANGI



JUDGE

