Northern Block Residents Limited v National Environment Management Authority & 2 others (Environment and Land Case Judicial Review Application E001 of 2024) [2024] KEELC 6170 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6170 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E001 OF 2024

OA ANGOTE, J

SEPTEMBER 26, 2024

IN THE MATTER OF: AN APPLICATION BY NORTHERN BLOCK RESIDENTS LIMITED, PEPONI ROAD RESIDENTS ASSOCIATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND OTHER DECLARATORY ORDERS.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 47(1) & (2), 42, 69 & 70

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE ENVIRONMENT AND CO-ORDINATION ACT, 1999

AND

IN THE MATTER OF: THE PHYSICAL LAND USE AND PLANNING ACT, 2019

AND

IN THE MATTER OF: THE NAIROBI CITY COUNTY DEVELOPMENT CONTROL POLICY,2022

AND

IN THE MATTER OF: ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

AND

IN THE MATTER OF: CONSTRUCTION OF MULTI-DWELLING DEVELOPMENT BY TREEHOUSE FIFTY-EIGHT LIMITED ALONG PEPONI RISE ROAD IN VIOLATION OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010, THE PHYSICAL AND LAND USE PLANNING (GENERAL DEVELOPMENT PERMISSION AND CONTROL)

REGULATIONS, 2021, THE NAIROBI CITY COUNTY ZONING GUIDE AND THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

BETWEEN

NORTHERN BLOCK RESIDENTS LIMITED ..... APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

NAIROBI CITY COUNTY GOVENMENT ..... 2ND RESPONDENT

TREEHOUSE FIFTY-EIGHT LIMITED ..... 3RD RESPONDENT

RULING

1. The Ex parte Applicant has filed a Chamber Summons application dated 31st January 2024 pursuant to Order 53 Rule 1 (2) and (4) of the Civil Procedure Rules 2010 in which it has sought for the following orders that:

    i. Spent.

    ii. Leave be granted to the Applicant to apply for an order of Certiorari to remove into this Court and quash forthwith the Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022 issued by the 1st Respondent to the 3rd Respondent.

    iii. Leave be granted to the Applicant to apply for an order of Certiorari to remove into this Court and quash forthwith the Environmental Impact Assessment Report with application reference number 35579 dated 15th September 2022 and submitted by the 3rd Respondent to the 1st Respondent.

    iv. Leave be granted to the Applicant to apply for an order of certiorari to remove into this Court and quash forthwith the Approval of Development Permission with Reference Number PLUPA-COU-000269 and dated 28th July 2022 granted by the 2nd Respondent.

    v. Leave be granted to the Applicant to apply for an order of prohibition against the 3rd Respondent from commencing with, carrying out or continuing with any construction of multi-dwelling residential blocks on Land Reference Number 1870/VIII/112 along Peponi Road.

    vi. Leave be granted to the Applicant to apply for a declaration that the 3rd Respondent's Environmental Impact Assessment Report with application reference number 35579 and dated 15th September 2022 and Environmental Impact Assessment Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022 by the 1st Respondent violates the provisions of Regulations 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and the provisions of Article 47 of *the Constitution* of Kenya 2010 and the *Fair Administrative Action Act*, 2015.

    vii. Leave be granted to the Applicant to apply for a declaration that the 2nd Respondent's decision to issue the Approval of Development Permission dated 28th July 2022 to the 3rd Respondent

for construction of multi-dwelling high density residential blocks violates the 2nd Respondent's Zoning Guide for Nairobi County, the provisions of Article 47 of *the Constitution* of Kenya, 2010, the *Fair Administrative Action Act* 2015, Section 58(7) and (8) of the *Physical and Land Use Planning Act* 2019 and Regulation 15(2) of the Physical and Land Use Planning (Development Permission and Control) General Regulations.

viii. The grant of leave to institute judicial review proceedings do operate as a stay of the Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022, the building plan approval reference number PLUPA-BPM-000269 and dated 28th July 2022 and a stay of the ongoing construction being carried out by the 3rd Respondents on Land Reference Number 1870/VIII/112.

ix. The costs of this application be provided for.

2. This application is supported by the Verifying and Supporting Affidavit of Tom Kabuga, a Director of the Applicant, and the supporting affidavit of Ruth Ndesanjo together with the statutory statement.

3. The ex parte Applicant avers that it is an umbrella organization formed by resident associations on the half acre zone on the Northern Block and that sometime in April 2023, the residents' association's members noticed the commencement of construction on Land Reference Number 1870/VIII/112 (the Suit Property).

4. According to the ex parte Applicant's Director, at that time, there was no notice board erected on the suit property as required by Regulation 11(3) of the Physical and Land Use Planning (Building) Regulations, 2021 and that it was not until around 15th May 2023 that the Applicant's members realized that the 3rd Respondent has erected a notice board indicating the details of the suit property and the nature of the project.

5. It was deposed that the Applicant later learnt that the owner of the suit property was the 3rd Respondent, Treehouse Fifty-Eight Limited and that the 3rd Respondent had applied for and obtained a Form No. PPA 2 – Notification of Development Permission dated 28th July 2022 (PPA 2) which authorized the change of user of the 3rd Respondent's property from "residential" to "multi-dwelling units (duplexes)."

6. It was deposed that the 3rd Respondent obtained approved building plans from the 2nd Respondent on 4th August 2022 and submitted an Environmental Impact Assessment (EIA) Report dated 20th September 2022 to the 1st Respondent.

7. The Applicant's Director deponed that the 3rd Respondent retained Messrs' iPlan Consult (Intl) Ltd. to prepare the EIA report; that iPlan only consulted 16 different individuals within Peponi Road area under the guise of public participation; that there was no consultation with the Applicant or members of the 1st or 2nd Applicant; and that the 1st Respondent issued the 3rd Respondent with an EIA Licence dated 21st October 2022.

8. In her Supporting Affidavit, Ruth Ndesandjo, a resident along Peponi Road for over fifty years stated that she was not consulted prior to the grant of the approvals for construction of the development and was not aware of any public participation undertaken prior to the commencement of the constructions.

9. The Applicant claims that the 3rd Respondent's construction is in violation of the Nairobi County Development Control Policy and the Zoning Guide (the Zoning Guide), which stipulates that the

only permissible developments within Zone 13B, which includes the Peponi Area Road in Kitisuru Area, is "low density residential use: maisonettes and one-family dwelling houses".

10. It is the Applicant's case that the 2nd Respondent's decision to change the user of the suit property from residential to multi-dwelling Units (duplexes) and allowing the construction of a multi-storeyed multi-dwelling residential block is in clear violation of the Zoning Guide and is therefore illegal, null and void.

11. The Applicant asserts that due to the deliberate failure by the 3rd Respondent to conduct a proper and effective public participation with residents who would be directly impacted by the development, and its deliberate failure to erect a notice board prior to commencement of the construction in violation of the Physical Planning Act, its Regulations and the *Environmental Management and Co-ordination Act*, 1999 (the EMCA), the Applicant's statutory right to challenge the EIA Licence before the National Environment Tribunal within 60 days, as specified in Section 129 of EMCA, has been compromised.

12. It was deposed that the Applicant has no other recourse in law as the alternative remedy is unavailable due to effluxion of time limited by operation of law.

13. According to the Applicant, the 3rd Respondent failed to publicize the application for development permission as required by Sections 58(7) and (8) of the *Physical and Land Use Planning Act* as well as Regulation 15(2) of the Physical and Land Use Planning (Development Permission and Control) (General Regulations), 2021 and as a result the approval came to the attention of the Applicant after the statutory 14 days window had shut.

14. The Applicant's Director further deponed that the relevant part of Peponi Road forms part of a riparian area. Consequently, it was deposed, proliferation of construction of multi-dwelling and parking spaces will inevitably lead to the destruction of the environment through loss of forest cover.

15. They also aver that permitting illegal construction of concrete jungles will depreciate the value of the properties in the vicinity including the properties of the Applicant's members.

16. The 1st and 2nd Respondents opposed the application vide Notices of Preliminary Objection dated 9th April 2024 and 5th March 2024 respectively. They aver that this suit is fatally defective as it offends the provisions of Sections 125 and 129 of the Environmental Management and Coordination Act, 1999 (EMCA), which provides that the Applicant ought to have first approached the National Environment Tribunal (NET) by way of appeal challenging the alleged grant and/or violation of the conditions of the EIA License.

17. They also assert that this court's jurisdiction is further ousted by dint of Section 78(b) of the *Physical and Land Use Planning Act*, 2019 which provides that any person aggrieved by the decisions made by the planning authority with respect to physical and land use development plans in the county shall appeal against such decisions to the County Physical and Land Use Planning Liaison Committee. They assert that this suit is not ripe for determination by this Court while exercising its original jurisdiction on environmental matters.

18. The 3rd Respondent also filed a Notice of Preliminary Objection dated 27th February 2024 on the grounds that the application seeks orders on behalf of a private entity against a private entity, which can only be sought or granted in a suit and not judicial review proceedings in view of Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules.

19. According to the 3rd Respondent, the Applicant lacks locus standi to bring these proceedings; that the Applicant has deliberately failed to avail itself of the alternative remedy in law and that this court lacks jurisdiction to grant the orders sought in this application against the 3rd Respondent.

20. The 3rd Respondent also filed a Replying Affidavit and a Further Replying Affidavit, both sworn by Amjad Abdul Rahim and dated 15th April 2024 and 10th July 2024 respectively. Mr. Amjad Abdul Rahim, a director of the 3rd Respondent, deponed that the 3rd Respondent was incorporated on 18th June 2019 under the name 'Treehouse Fifty Eight Limited" and subsequently changed its name to "Treehouse Forty Eight Limited."

21. It was deposed by the 3rd Respondent's Director that the applicant is the registered owner of the suit property known as Land Reference Number 1870/VIII/12 situated along Peponi Road, Nairobi, upon which development consisting of 48 high-end residential units is being done and that the Applicant, which is a private limited liability company owned by two shareholders, cannot be described as an umbrella organization.

22. Further, it was deposed, there is no evidence that the Applicant or its members are residents or owners of properties along Peponi Road or its neighbourhood and that the Applicant has consequently failed to establish that it has any interest in the subject matter of these proceedings and lacks locus standi to bring these proceedings.

23. He further asserted that the 3rd Respondent only commenced excavation after receiving the 1st Respondent's Environmental Impact Assessment License issued on 21st October 2022 and after installing the necessary signage, which was in early November 2022, and not in April 2023 as alleged and that the allegation that the sign was erected months after the development began was therefore untrue.

24. The deponent stated that the "Zoning Guide" which the Applicant refers to has not been approved, passed or adopted by the 2nd Respondent and is therefore not applicable or enforceable. He also stated that the Applicant was incorporated on 9th September 2022, at which time the consultation and public participation conducted by the 3rd Respondent's environmental consultant had already been completed.

25. Mr. Amjad Abdul Rashid deponed that the Applicant cannot blame the 1st and 3rd Respondents for its own failure to seek a remedy at the National Environment Tribunal and that if the Applicant had a valid reason for failing to meet the timelines for filing any appeal at NET, it has a right to apply for extension of time for such filing.

26. He also stated that as the development comprises of only 48 units, there was no requirement under the applicable regulations to conduct public hearings as part of public participation and that he was advised by his architects that the development does not require any publicizing of its application for approval to the 2nd Respondent.

27. Mr. Amjad Abdul Rashid averred that after being served with the court papers in these proceedings, the 3rd Respondent instructed an independent environmental expert to conduct a mini survey of the neighbouring area around the property to ascertain any adverse impact of the 3rd Respondent's development and that the resultant report, attached as AAR shows that the Applicant has exaggerated the potential adverse environmental impact that the development will have in the area.

28. Mr. Amjad Abdul Rahim averred that stoppage of the development will greatly prejudice and cause immense loss to the 3rd Respondent, who has already sold 18 of the 48 units and has expended over Kshs. 450 million shillings on the project, which is valued at Kshs. 3,782,130,000 once completed.

29. Tom Kabuga for the Applicant responded to this Affidavit through a Further Affidavit dated 13th May 2024 in which he deposed that the two members of the Applicant were Peponi Road Residents

Association and Spring Valley Residents Association, which were registered entities made up of respective members.

30. With respect to the Zoning Guidelines, Tom Kabuga stated that the same were stamped and approved on 10th February 2022.

31. Wilfred Masinde the Acting Deputy Director Planning Compliance & Enforcement also filed a Replying Affidavit on behalf of the 2nd Respondent sworn on 22nd May 2024. He deponed that the 3rd Respondent lawfully lodged an application dated 9th May 2022 for development permission for change of user from single dwelling residential units to multi-dwelling units (flats) on the suit property and that in compliance with Section 33(1) of the Physical Planning Act, the 2nd respondent issued the 3rd Respondent with Approval for Development Permission dated 28th July 2022 and that the 2nd Respondent did not receive any complaint until it was served with this application in February 2024.

32. He deponed that the application offends Section 9(2) of the *Law Reform Act* which stipulates that an application for mandamus, prohibition or certiorari should be made within six months of the prescribed act or omission; that it similarly offends Order 53 Rule 2 of the Civil Procedure Rules which provides that leave for an order of certiorari shall not be granted in unless the application for leave is made not later than 6 months after the date of the proceedings and that the ex parte applicant did not seek leave of this court to file this application out of time.

Submissions

33. The Applicant's Counsel submitted that Section 13(2) of the *Environment and Land Court Act* clothes the court with jurisdiction to deal with matters relating to among others, environmental planning and protection, climate issues as well as any other dispute relating to land and environment.

34. Counsel submitted that the Applicant and its members have a right to a clean and healthy environment and the right to a fair administrative action; that Article 22 of *the Constitution* provides for the enforcement of the Bill of Rights where individuals acting in the interest of a group or class of persons have the right to institute court proceedings for a claim that their right or fundamental freedom in the Bill of Rights has been violated or are under threat and that this suit relates to environmental planning and seeks to challenge the approvals which were issued contrary to the zoning guide.

35. Counsel submitted that further, the application relates to the right to a fair administrative action as its members were not granted an opportunity to submit their comments before the development was approved by the 2nd Respondent.

36. Counsel also submitted that this court has the mandate and jurisdiction to determine the issues of constitutional violation under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read together with Section 13(3) of the *Environment and Land Court Act*.

37. Counsel relied on the cases of Nicholus vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR), William Odhiambo Ramogi & 3 Others vs Attorney General & 6 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR, West Kenya Sugar Co. Limited vs Busia Sugar Industries Limited & 2 Others [2017] eKLR.

38. Counsel submitted that the 6 months' time limit does not apply to administrative decisions but to judicial and quasi-judicial proceedings. He relied on Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules 2010.

39. Counsel also relied on the Court of Appeal decision in Republic Vs Kenya National Highways Authority & 2 Others Ex-Parte Amica Business Solutions Limited [2016] eKLR, where the court held that the six months limitation would not apply to decisions made by administrative bodies which fall outside the purview of the definition of "decision, judgement, order, decree or other proceedings" as contemplated under Order 53 Rule 2 of the Civil Procedure Rules.

40. The Applicant's counsel submitted that as the statutory period has lapsed, the relief sought from NET and the Liaison Committee would be ineffective. Counsel urged that leave should be granted as the Applicant has satisfied the conditions set out in Meixner & Another vs A.G [2005] KLR 189 as cited in Republic vs Kenya Revenue Authority Commissioner ex parte Keycorp Reals Advisory Limited [2019] eKLR.

41. Counsel for the 1st Respondent submitted that this Court lacks the jurisdiction to hear and determine this case. Counsel relied on Section 129(1) and (2) of the Environmental Management and Coordination Act which provides that appeals with respect to grant of a licence or decisions of the Director General or NEMA are to be filed to the National Environment Tribunal.

42. Counsel also relied on Section 129(3) of EMCA which states that NET is empowered to issue conservatory or injunctive orders while exercising its mandate. He submitted that the jurisdiction of NET is of judicial review nature, in relation to the licensing powers of NEMA, as envisioned under Section 9 of the *Fair Administrative Action Act*.

43. It was Counsel's submission that this matter falls within the jurisdiction of NET under Section 129(1) (a) and (2) of EMCA, and this suit goes against the requirement that one must first exhaust internal mechanisms for appeal or review available under any other written law are first exhausted. They argue that whether the Respondents followed due process in the application and issuance of the EIA license is a question that can and should only be answered by NET while exercising its original jurisdiction under Section 129(3) of EMCA.

44. Counsel for the 2nd Respondent submitted that the application before this court cannot stand as it has been brought out of the stipulated six months. They submitted that Section 9(2) of the *Law Reform Act* provides that an ex parte application for leave to bring an application for an order of mandamus, prohibition or certiorari must be made within six months upon which the decision was made. They also relied on Order 53 Rule 2 of the Civil Procedure Rules, 2010.

45. Counsel submitted that the Applicant lodged this application on 31st January 2024 which is almost two years from the date the 2nd Respondent made its decision and granted approval of development permission to the 3rd Respondent. Further, that the Applicant did not seek leave to lodge this application. They relied on the determinations of the Court of Appeal in Ako vs Special District Commissioner Kisumu & Another [1989] eKLR, Speaker of National Assembly vs James Njenga Karume [1992] eKLR and Mohamed Shally Sese (Shah Sese) vs Fulson Company Ltd & Another [2006] eKLR.

46. Counsel for the 3rd Respondent submitted that under Section 9(3) of the *Law Reform Act* and under Order 53 Rule 2 of the Civil Procedure Rules 2010, an applicant that wished to bring an ex-parte application for order of certiorari must seek leave and do so within six months of the decision made.

47. They relied on the case of Republic vs Deputy County Commissioner Ikutha sub-County ex party Ruth Kavengi Mulyunga; Musyoka Mbeeni Kimuli (Interested Party) [2022] eKLR.

48. Counsel submitted that this application was lodged almost 18 months after the 2nd Respondent's development was approved, 17 months after the date of the EIA report and 15 months after the 1st

Respondent issued the NEMA license. Counsel argued that this application is therefore incompetent for having been filed out of time and not within the ambit of six months as required by the law.

49. As to the leave to apply for an order of prohibition against the 3rd Respondent, the 3rd Respondent's Counsel submitted that the applicant is a private company seeking leave to apply for the judicial review remedy of prohibition against the 3rd Respondent, which is also a private company.

50. He argued that it is an elementary principle of administrative law that prerogative remedies and orders are only available as against the government, public or judicial bodies in the exercise of their statutory mandates, and that such orders cannot lie against private persons such as the 3rd Respondent.

51. Counsel relied on the cases of St Patrick Hill School Ltd vs Permanent Secretary Ministry of Foreign Affairs [2008] eKLR, Republic vs Registrar of Societies Nairobi Kenya, Attorney General & 3 others & 2 others [2014] eKLR and Republic vs Ponangipalli Venkata Ramana Rao & Another ex parte; Tumaz & Tumaz Enterprises Limited [2022] eKLR.

52. Counsel submitted that the Applicant only has itself to blame for failing to meet the timelines for the filing of any appeal at NET; that if the applicant had a valid reason for filing an appeal to NET, it has a right to apply for extension of time and its remedy as provided under EMCA would still be available should the applicant chose to avail itself of it.

53. It was counsel's submission that these are judicial review proceedings and not a constitutional Petition; that therefore the law and legal time limits applicable to judicial review proceedings and remedies apply to these proceedings and cannot be ignored; that the prayer for leave to operate as stay would restrain the 3rd Respondent from continuing with construction on its property and that the 3rd Respondent would greatly suffer prejudice and immense loss if the stay is granted.

Analysis and Determination

54. Having considered the application, preliminary objections and replying affidavits filed by the parties, the following issues are for this court's consideration:

    a. Whether this court has the requisite jurisdiction to determine this suit.

    b. Whether this court should grant leave to the Applicants to file an application for orders of certiorari and prohibition.

    c. Whether leave should operate as stay of Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022, the building plan approval reference number PLUPA-BPM-000269 and dated 28th July 2022 and a stay of the ongoing construction being carried out by the 3rd Respondents on Land Reference Number 1870/VIII/112.

55. This is an application for leave to file an application for orders of certiorari and prohibition, filed under Order 53 Rule (1) and (2) of the Civil Procedure Rules, which provides as follows:

> " Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]
>
> 1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.
>
> 2. An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —

(a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and

(b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application."

56. The Respondents have challenged the jurisdiction of this court to hear and determine the application for leave to commence judicial review proceedings, and for the said leave to operate as a stay for the ongoing constructions.

57. As the Respondents have rightly submitted, jurisdiction is everything, and without it, this court has no power to make one more step. (Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited [1989] KLR 1).

58. 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. This was held in Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696.

59. The Respondents have asserted that this court lacks the jurisdiction to determine this suit because the Applicants have failed to exhaust the remedies prescribed under Section 129 of the Environmental Management and Coordination Act as well as under Section 78 of the *Physical and Land Use Planning Act* 2019.

60. According to the Respondents, it is only the National Environment Tribunal that is clothed with original jurisdiction under Section 129(3) of EMCA to determine any dispute by a person aggrieved by the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under EMCA.

61. They also assert that under Section 78(b) of the *Physical and Land Use Planning Act*, the County Physical and Land Use Planning Liaison Committee has the jurisdiction to hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county.

62. The Applicants on their part, assert that the Environment and Land Court is clothed with the requisite jurisdiction under Section 13(2) of the Environment and *Land Act* and under Article 162(2)(b) of *the Constitution*, to deal with matters relating to among others, environmental planning and protection, climate issues as well as any other dispute relating to land and environment.

63. The dual arguments propounded by the parties reflect the two schools of thought which have developed in the courts as to whether the Environment and Land Court is precluded from determining appeals from NEMA. The first school of thought asserts that parties are bound by the doctrine of exhaustion, which requires a party to exhaust any dispute resolution mechanism provided by a statute and/or law before resorting to the courts.

64. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume [1992] KLR where the court held that:

> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

65. The Court of Appeal in National Environmental Tribunal vs Overlook Management Limited & 5 Others [2019] eKLR on the question of NEMA's jurisdiction held as follows:

> " ... where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal to the Appellant (i.e NET). Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd Respondent, its Director-General or its committees, then such a party can lodge an appeal pursuant to sub-section 2 of that provision."

66. The Court of Appeal in Kibos Distillers Limited & 4 Others vs Benson Ambuti Adega & 3 Others [2020] eKLR, while faulting the ELC for assuming jurisdiction before the parties had exhausted other mechanisms in resolving their dispute held as follows:

> " ... I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction. A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body. In addition, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all- encompassing provision that confers at first instance jurisdiction upon the Tribunal...It was never the intention of *the Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court."

67. The Supreme Court in Albert Chaurembo Mumbo & 7 others vs Maurice Munyao & 148 others; SC Petition *No 3 of 2016*, [2019] eKLR reaffirmed this position, where it held that:

> " ...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

68. The second school of thought is that if the prayers of a Petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacks the jurisdiction to determine the constitutional issue hence the provisions of Section 129 of *Environmental Management and Co-ordination Act*, are inapplicable to such claims.

69. The Supreme Court appraised the totality of these divergent approaches to the exhaustion principle in Nicholus vs Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR). This determination is the prevailing authority on exhaustion of legal remedies, which is binding upon this court.

70. The pinnacle court held that the provisions of *Environmental Management and Co-ordination Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NET, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner.

71. The Supreme Court was persuaded by the finding of the Court of Appeal in Kenya Revenue Authority & 2 Others vs Darasa Investments Ltd [2018] eKLR which held as follows:

> " What then, is the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others [2017] eKLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No 2 of 2008. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:
>
> > "Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

72. The Supreme Court asserted that there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer.

73. Therefore, the question that is for this court's determination is whether it is in the interest of justice for the Applicant to be exempted from exhausting the remedies under NEMA and the *Physical and Land Use Planning Act*.

74. The Applicants assert that due to the deliberate failure by the 3rd Respondent to conduct a proper and effective public participation with residents who would be directly be impacted by the development, and its deliberate failure to erect a notice board prior to commencement of the construction in violation of the Physical Planning Act, its regulation and the *Environmental Management and Co-ordination Act*, 1999 (the EMCA), the Applicant' statutory right to challenge the EIA Licence before the National Environment Tribunal within 60 days, as specified in Section 129 of the EMCA, has been compromised.

75. The Applicant's suit is pegged on the alleged failure of the 3rd Respondent to involve the members of the Peponi Road Residents Association and Spring Valley Residential Association, who assert that they neighbor the development and would be adversely impacted by the completion of the said development. The Applicant also asserts that the change of user granted to the 3rd Respondent was illegal, and contrary to Zoning Guidelines.

76. According to the Applicant, the 2nd Respondent's decision to change the user of the suit property from residential to multi-dwelling units (duplexes) and allowing the construction of a multi-storeyed multi-dwelling residential block is in clear violation of the Zoning Guide and is therefore illegal, null and void.

77. The Applicant additionally claim that the relevant part of Peponi Road forms part of a riparian area. Consequently, it asserts, proliferation of construction of multi-dwelling and parking spaces will inevitably lead to the destruction of the environment through loss of forest cover.

78. While the 3rd Respondent has asserted that it in fact commenced construction in November 2022 rather than April 2023, it has not presented any evidence that it duly and timeously erected the notice board as required under the EIA license and under the law. It has also not presented any evidence that it issued any public notification in its application for change of user, as required under Section 58 (7) and (8) of the *Physical and Land Use Planning Act*, as read together with Regulation 15(2) of the Physical and Land Use Planning (General Development Permission And Control) Regulations.

79. It is then apparent that the Applicant, on the face of the application had no reasonable opportunity to present its appeals before the relevant authorities, being NET and the County and Physical Planning and Land Use Liaison Committee, due to the alleged failure by the 3rd Respondent to put up and publish the relevant notices. If that is so, how would the Applicant's members been able to appeal against these decisions of NEMA and the county government, if at all?

80. Under Section 129(1) of *Environmental Management and Co-ordination Act*, a person aggrieved by the grant of a license may only appeal against such decision within sixty days after its issuance. While the Respondents assert that the National Environment Tribunal has the mandate to extend time for filing appeals, this mandate only applies where time has not been limited by a statute. This is set out in Rule 7 of the National Environmental Tribunal Procedure Rules, 2003 as follows:

> " The Tribunal may for good reason shown, on application, extend the time appointed by these Rules (not being a time limited by the Act) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient."

81. Considering that the Environmental Management and Coordination Act clearly stipulates the time within which an appeal against a grant of a license may be filed, NET has no authority to extend the time for filing such an appeal.

82. As to the Applicants' dispute with respect to the issuance of development permission, under Regulation 8 of the Physical and Land Use Planning (Development Control Around Strategic Installations) Regulations, any person aggrieved by a decision of the County Executive Committee Member with respect to an application for development permission under these Regulations may appeal in writing to the County Physical and Land Use Planning Liaison Committee within fourteen days after the decision.

83. There is no provision for extension of time by a County Physical and Land Use Planning Liaison Committee.

84. This court is therefore satisfied that the alternative remedies provided for under *Environmental Management and Co-ordination Act* and the *Physical and Land Use Planning Act*, are not available to the Applicants in the circumstances of this case. It must then find that the exhaustion doctrine is not applicable herein.

85. In reaching this finding, this court is guided by the articulation of what constitutes an accessible, affordable, timely and effective alternative forum as set out by the African Commission of Human and Peoples' Rights in Dawda K. Jawara vs Gambia [ACmHPR 147/95-149/96]:

> " A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable

of redressing the complaint [in its totality].. a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

86. It is therefore in the interest of the Applicant to be availed the right to access justice. This court finds that it has jurisdiction over the subject matter of this suit.

87. As to whether the applicants have the requisite locus standi, the Respondents assert that the Applicant has failed to establish that it has any interest in the subject matter of these proceedings. Locus standi, which refers to the right to appear in court, has been fundamentally transformed under *the Constitution* of Kenya 2010. By dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.

88. Further, with respect to environmental rights, Article 70 prescribes that an applicant does not have to demonstrate that he/she or any other person has incurred loss or suffered injury. Any person can institute proceedings under Article 70.

89. Section 3 (3) of the *Environmental Management and Co-ordination Act* further stipulates that if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress.

90. Having found that this court has the jurisdiction to determine this suit and that the Applicant has the requisite locus standi, this court shall now proceed to consider whether it ought to grant leave to the Applicants to file an application for judicial review, and whether such leave should apply as a stay.

91. As noted above, this application is pursuant to Order 53 Rule (1) and (2) of the Civil Procedure Rules which provides as follows:

> " Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]
>
> 2. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.
>
> (2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
>
> (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
>
> (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application."

92. Order 53 Rule 2 prescribes that applications for leave for an order of certiorari against any judgement, order, decree or other proceeding for the purpose of its being quashed should be made within six months after the date of the proceeding.

93. The reasons for an application for leave were set out in in *Republic vs County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996*:

> " The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially."

94. It is trite that this court ought not to delve deeply into the arguments of the parties at this stage, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. The court in Njuguna vs Minister for Agriculture [2000] 1 E.A 184, held that:

> " the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application."

95. Mativo J. (as he was then) in Republic vs Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited [2019] eKLR cited with approval the decision in Meixner & another v A.G [2005] KLR 189, where the court laid out the following conditions of what an Applicant must show at the leave stage:

> " (i) Sufficient interest in the matter otherwise known as locus standi.
>
> (ii) He/she is affected in some way by the decision being challenged.
>
> (iii) He/she has an arguable case and that the case has a reasonable chance of success.
>
> (iv) The application must be concerned with a public law matter that is the action must be based on some rule of public law.
>
> (v) The decision complained of must have been taken by public body, that is a body established by statute or otherwise exercising a public function."

96. In this case, the Applicant has sought leave to remove into this Court and quash the Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022, the Environmental Impact Assessment Report with application reference number 35579 dated 15th September 2022 and the approval of Development Permission with Reference Number PLUPA-COU-000269 and dated 28th July 2022.

97. The Applicant has also sought for leave to apply for orders of prohibition against the 3rd Respondent from commencing with, carrying out or continuing with any construction of multi-dwelling residential blocks on Land Reference Number 1870/VIII/112 along Peponi Road.

98. The Applicant has additionally sought for orders declaring that the issuance of the challenged EIA license and development permit was contrary to the Environmental (Impact Assessment and Audit) Regulations, 2003, the Zoning Guide for Nairobi, the *Fair Administrative Action Act*, 2015 and *the Constitution* of Kenya 2010.

99. Order 53 Rule 2 of the Civil Procedure Rules as read with Section 9 (3) of the *Law Reform Act* provides for the time limits within which an application for an order of certiorari can be filed.

100. Order 53 Rule 2 of the Civil Procedure Rules provides that: -

> "Leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application foe leave is made not later than 6 months after the date of the proceedings or such shorter period as may be described by any act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time."

101. Section 9(3) of the *Law Reform Act* provides that: -

> "In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings, for purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such period as may be prescribed under any written law."

102. The limitation period of six (6) months is however applicable only in certain instances. In the case of Republic vs. Kenya National Highways Authority & 2 Others Ex-parte Amica Business Solutions Limited [2016] eKLR, the Court of Appeal held as follows:

> "In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.
>
> We are persuaded in this respect by the High Court decision in The Goldenberg Affair Ex-parte Hon. Mwalulu and Others, HCMA No. 1279 of 2004 [2004] eKLR, and Republic vs. The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi, H.C. Misc. Application *No. 1235 of 1998* where the courts held that the six (6) months limitation period set out in order 53 Rules 2 and 7 only applied to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, certainly not to contents of one private letter in response to another.
>
> We are also persuaded by the Tanzania Court of Appeal decision in Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals and Others, Dar-es-Salaam Civil Appeal No. 31 of 1999 [1995 – 1998] 1 EA 199 in which case the court held that

> the phrase "or other proceedings" has to be construed ejusdem generis with 'judgment, order or decree, and conviction'' as having reference to judicial or quasi-judicial proceedings as distinct from the acts and omissions for which certiorari may be applied for. We hold the view therefore that the six month's limitation would not apply to "decisions" made by administrative bodies which fall outside the purview of the definition "decision, judgment, order, decree or other proceedings" as contemplated under Order 53 Rule 2 of the *Civil Procedure Act*."

103. The six (6) months' limitation period set out in Order 53 Rules 2 and 7 of the Civil Procedure Rules is only applicable to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, and certainly not to administrative decisions like in this case.

104. In this case, the decisions by NEMA and the Nairobi City County Government were not made in proceedings that involved the Applicant. The Applicant was thereafter not made aware of the decisions. This court has already found that the 3rd Respondent has not presented any evidence to show that it put up public notices or erected the notice board before it began construction.

105. This court must therefore find that the decisions challenged herein are exempted from the 6 months limitation prescribed under Order 53 Rule 2 of the Civil Procedure Rules.

106. The court has already established that the Applicant herein has locus standi to file this suit and is likely to affected in some way by the decisions being challenged. The court is also satisfied that the National Environment Management Authority and the Nairobi City County are public bodies which were exercising their statutory mandate.

107. While the Applicant has sought to quash the Environmental Impact Assessment Report with application reference number 35579 dated 15th September 2022, this report is not a decision or action by a judicial or administrative body. This is a project report, which is defined in Section 2 of EMCA as a summary statement of the likely environmental effects of a proposed development. Judicial review orders can therefore not be sought against the same.

108. In summary, save for prayer no. 4, this court grants leave to the applicant as prayed. The final issue for determination is whether such leave should operate as stay.

109. Under Order 53 Rule 1(4) of the Civil Procedure Rules, the grant of leave to apply for an order of prohibition or an order of certiorari shall, if the court so directs, operate as a stay of the proceedings in question until the determination of the application, or until the court orders otherwise.

110. The order of stay is for the purpose of preserving the status quo pending determination of the judicial review proceedings. (Republic vs Nairobi City County Assembly Service Board Ex parte Applicant Pauline Sarah Akuku [2022] eKLR). In Republic vs National Transport & Safety Authority & 10 others [2014] eKLR, the Court expressed itself as follows:

> "In judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case. The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise, the Court will be reluctant to suspend the operation of a law."

111. In determining whether or not leave should act as a stay, the Court is guided by the sentiments of Odunga J. (as he was the) in Beatrice Kwamboka vs Leader of Majority Party of the Nairobi County Assembly [2016] eKLR where the learned Judge put it thus:

> "Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of alms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the Court, so far as possible to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court in exercising discretion, should therefore always opt for the lower rather than the higher risk of injustice."

112. The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision-making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made.

113. In this case, the Applicant has sought to stay the implementation of the Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022, the building plan approval reference number PLUPA-BPM-000269 dated 28th July 2022 and a stay of the ongoing construction being carried out by the 3rd Respondent on Land Reference Number 1870/VIII/112.

114. The centrality of the right to a clean and healthy environment in this suit, and the impugned process that the 3rd Respondent is alleged to heve followed to obtain the change of user of the suit property and the NEMA license, which can only be determined with finality after hearing the substantive Motion, this court finds it suitable that leave do operate as stay, pending the determination of this suit.

115. Further, the validity of the construction on the suit property is the very question for this court's attention. Allowing construction activities to continue would render the judicial review application nugatory.

116. The upshot of the foregoing is that the application herein is partially merited and the following orders do issue:

a. The Applicant's prayer for leave to apply for an order of certiorari against the Environmental Impact Assessment Report is declined.

b. Leave is hereby granted to the Applicant to apply for an order of Certiorari to remove into this Court and quash forthwith the Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022 issued by the 1st Respondent to the 3rd Respondent.

c. Leave is hereby granted to the Applicant to apply for an order of certiorari to remove into this Court and quash forthwith the Approval of Development Permission with Reference Number PLUPA-COU-000269 and dated 28th July 2022 granted by the 2nd Respondent.

d. Leave is hereby granted to the Applicant to apply for an order of prohibition against the 3rd Respondent from commencing with, carrying out or continuing with any construction of multi-dwelling residential blocks on Land Reference Number 1870/VIII/112 along Peponi Road.

e. Leave is hereby granted to the Applicant to apply for a declaration that the 3rd Respondent's Environmental Impact Assessment Report with application reference number 35579 and dated 15th September 2022 and Environmental Impact Assessment Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022 by the 1st Respondent violates the provisions of Regulations 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and the provisions of Article 47 of *the Constitution* of Kenya 2010 and the *Fair Administrative Action Act*, 2015.

f. Leave is hereby granted to the Applicant to apply for a declaration that the 2nd Respondent's decision to issue the Approval of Development Permission dated 28th July 2022 to the 3rd Respondent for construction of multi-dwelling high density residential blocks violates the 2nd Respondent's Zoning Guide for Nairobi County, the provisions of Article 47 of *the Constitution* of Kenya, 2010, the *Fair Administrative Action Act* 2015, Section 58(7) and (8) of the *Physical and Land Use Planning Act* 2019 and Regulation 15(2) of the Physical and Land Use Planning (Development Permission and Control) General Regulations.

g. The grant of leave to institute judicial review proceedings shall operate as a stay of the Environmental Impact Licence Number NEMA/EIA/*PSL/2227*1 issued on 21st October 2022, the building plan approval reference number PLUPA-BPM-000269 and dated 28th July 2022 and a stay of the ongoing construction being carried out by the 3rd Respondent on Land Reference Number 1870/VIII/112.

h. The substantive Notice of Motion to be filed and served within 21 days of the date of this Ruling.

i. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Richu holding brief for Mr. Mureithi for Applicant

Mr. Sarvia for 3rd Respondent

Ms Filsna holding brief for Salim Omar for 2nd Respondent

Court Assistant - Tracy