



Mwingi Court Residents Association v Barasa t/a Gabasa (K) Enterprises & 3 others (Environment & Land Petition E016 of 2024) [2024] KEELC 7480 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7480 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E016 OF 2024

AA OMOLLO, J

NOVEMBER 7, 2024

IN THE MATTER OF: ARTICLES 2, 19(1), 20, 22, 23, 24, 27, 40, 42, 47, 66, 69, 70, 162(2)(B), 258(2) AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATIONS OF ARTICLES 40 & 42 OF THE CONSTITUTION

BETWEEN

MWINGI COURT RESIDENTS ASSOCIATION PETITIONER

AND

GABRIEL KHISA BARASA T/A GABASA (K) ENTERPRISES 1ST RESPONDENT

TELPOSTA PENSION SCHEME 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA) 3RD RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 4TH RESPONDENT

RULING

1. For determination is the notice of motion application dated 21st May, 2024 premised on the provisions of article 70 of *the Constitution*, Section 3(1) of EMCA and Order 40 of the Civil Procedure Rules. The Applicant prays for orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this Petition an injunction be granted restraining the 1st and 2nd Respondents acting through their servants, agents or employees from



continuing with any development, works and/or construction as Nairobi/Block 23/576 and Nairobi/Block 23/577 located along Mwingi Road, Kileleshwa Nairobi.

- d. That the Officer Commanding Station, Kileleshwa Police Station be directed to ensure compliance of these orders.
 - e. That such other orders as this Honourable Court may find necessary to preserve the suit property.
 - f. That costs of this application be provided for.
2. The same is founded on the grounds listed on its face inter alia;
- i. The 1st and 2nd Respondents are undertaking unlicensed and authorized commercial development on Nairobi/Block 23/576 and Nairobi/Block 23/576 which properties are opposite the Petitioner's members estate.
 - ii. That the unlicensed and unauthorized commercial developments are creating noise, nuisance and general disturbance therefore violating the Petitioner Members right to enjoy their properties as contemplated by Article 40 of *the Constitution* and right to clean and healthy environment as contemplated by Article 42 of *the Constitution*.
 - iii. The petitioner contends that the 1st and 2nd Respondents actions are illegal, high handed and infringe on their constitutional right to own and quietly enjoy the use of their land and right to a clean and healthy environment.
 - iv. The Petitioner further avers that the 1st and 2nd Respondents intend unless restrained by this Honourable Court, to continue to their illegal, unlicensed and unauthorized construction and or development.
3. The Motion is further supported by the affidavit of Eunice Nyala, the Chairperson of the Petitioner. She deposed that the area is zoned for building apartments upto 4 floors. Therefore, the 2nd schedule of EMCA requires anyone intending on carrying out developments that are out of character with the area to undertake an environmental impact assessment study and obtain building permission from the 4th Respondent.
4. Ms Nyala avers that the Petitioner's members noted with concern an upcoming commercial development on the suit properties which is right across their estate. That they took up the issue with their area MCA to establish with the County Government how the change of user was obtained. Consequently, they wrote letters of complaint to the 3rd and 4th Respondents. Pursuant to their complaints, officers of the 4th Respondent visited site and ordered the closure of the construction before it restarted again on 29th April, 2024. It is because of the re-start of the construction before their complaints were addressed that they decided to filed the present suit.
5. Each of the Respondents filed replying affidavits in opposition to the granting of the injunction orders. Vide a replying affidavit dated 27th May, 2024, the 1st Respondent deposes that he secured the requisite approvals from the 4th Respondent as well as NEMA license and proceeded to annex copies thereof. That the fact of 3rd and 4th Respondents issuing licenses presupposes the views of the resident neighbours were considered.
6. The 1st Respondent argued that the dispute before the court should have been filed before the County Liaison Committee as provided in Section 76 – 81 of PLUPA or NET under Section 125, 129 & 130



- of EMCA. He avers that the Petitioner has not shown how they have breached *the Constitution*. He urged the court to dismiss the application.
7. The 2nd Respondent filed a Replying Affidavit sworn by Peter K. Rotich who said he is the administrator. Mr. Rotich confirmed the 2nd Respondent is the owner of the suit land and confirm leasing it to the 1st Respondent on 1st May, 2023. He added that clause 8 of the lease required the 1st Respondent not to use the property in a way that would be a nuisance to neighbours.
 8. The 2nd Respondent avers that clause 16 of the lease required the 1st Respondent to seek its prior written consent before making any structural alterations or improvements on the property. That no such prior approval was sought by the 1st Respondent for the impugned development. This made them write the letter dated 18th March, 2024 informing the 1st Respondent that the ongoing developments were in breach of clause 8 and 16 of the licence agreement. He added that the 1st Respondent was yet to respond to their letters of 18th March, 2024 and 15th May, 2024.
 9. The 4th Respondent's reply was sworn by Fredrick Ochanda the assistant director of Development Control on 3rd July, 2024. He stated that the application is defective and an abuse of the court process. That the Applicant failed to point out how the county has failed to undertake public participation. He confirmed that they received a change of user application on 3rd July, 2023 ref. PLUPA – COU – 001235-N. They were satisfied it complied with the requirements of the Act and proceeded to grant the approval.
 10. According to the 4th Respondent, a site advert had been placed on the property and another placed in the newspaper before the said approval on 30th August, 2023. The deponent avers the developer has not shown evidence of approval of structural plans hence he has not complied with the requirements of the PLUPA No. 13 of 2019. Despite this, assertion, he urged the court not to grant the orders sought.
 11. The various parties filed their respective submissions which I have duly read and considered. The principles guiding the grant of order of temporary injunction are well settled. This court is called to determine if the Applicant has demonstrated a prima facie case or irreparable loss or if the balance of convenience tilts in their favour.
 12. The 1st Respondent raised the question of jurisdiction stating the Applicant has not exhausted the mandatory alternative remedies. He cited the case of Owners of Motore Vessel Lilian 'S' vs Caltex Oil Kenya Ltd. (1989) KLRJ on jurisdiction and Geoffrey Muthinja & Another vs Samuel Muguna & 1756 Others (2015) eKLR on the doctrine of exhaustion, this court refers to article 162(2)(b) of *the Constitution* which gives this court power to hear and determine all disputes relating to Land and Environment. Such jurisdiction cannot be ousted by an Act of Parliament (in this case PLUPA *Act No. 13 of 2019* and EMCA of 1999). This position was upheld by the Supreme Court of Kenya in the case of Abidha Nicholus vs. Attorney General & Others (2023) eKLR.
 13. The Supreme Court in the Abidha Nicholus while appreciating the importance of alternative dispute resolution bodies were persuaded by the elegant reasoning of a three-judge bench of the High Court decision in William Odhiambo Ramogi & 3 Others vs. Attorney General & 6 Others (2020) EKLR for the proposition that where there are allegations of violations of fundamental rights and freedoms, the same is not barred by the doctrine of exhaustion.
 14. Now on the merits of the application, the Applicants pleaded that the 1st Respondent was undertaking unlicensed and unauthorized Commercial developments on the suit property. In opposing this averment, the 1st Respondent deposed that he had obtained the requisite change of user license and



- Environment Impact Assessment license. He added that the issuance of these licenses by the 3rd and 4th Respondents pre-supposed that the neighbours including the Applicant were consulted.
15. As the proponent of the development, the sections of the law he has cited in his replying affidavit imposes on him a duty to undertake the process of obtaining the requisite licenses. He has not shown any iota of evidence that the Applicants or any neighbours were consulted. The 4th Respondent stated the change of user application was advertised but no such evidence was annexed by either of the 1st and 4th Respondent nor dates and name of the newspaper where the advertisement for the change of user placed was disclosed in the pleadings filed.
 16. Further, the lease exhibited by the 1st Respondent confirms the area was residential and for any change of use of happen, an application was to be made to the approving authorities including the 2nd Respondent who was to give such consent. The 2nd Respondent deposed that no such consent was sought. That when they received complaints from neighbours, they sent an agent who confirmed that there were ongoing developments.
 17. It is the 2nd Respondents averment that the development that were being undertaken were in breach of the lease which caused them to write to the 1st Respondent on 18th March, 2024 and 15th May, 2024. The 2nd Respondent pleaded that the 1st Respondent was yet to respond to these letters. Similarly, the 4th Respondent accuses the 1st Respondent of not seeking and obtaining or showing evidence of approval structural plans for the impugned development. Thus, there is a likelihood that the development being undertaken by the 1st Respondent is illegal.
 18. In light of the facts presented by the Applicants and some of which has been corroborated by the 2nd and 4th Respondents, it is clear the Applicant has demonstrated the possibility that developments being undertaken by the 1st Respondent is unauthorized. Secondly, the Applicants have shown that they were not put on notice of the proposed changes before the EIA and Change of User licenses were issued. I am therefore persuaded that they have demonstrated a prima facie case. I need not go on to the 2nd heading of irreparable, loss in view of the facts set out herein above.
 19. Consequently, I hold that the motion dated 21st May, 2024 is merited and it is allowed in terms of prayer (c) and (d) pending hearing and determination of the Petition. Costs of the application in the cause.
 20. Pursuant to my finding here above, there is no reason to vary the orders issued on 22nd May, 2024 as sought in the 1st Respondent's motion dated 27th May, 2024. That application is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH NOVEMBER, 2024

A. OMOLLO

JUDGE

