Wagitaha Holdings Ltd v Haldoor Real Estate Ltd & 2 others (Environment and Planning Civil Case E003 of 2023) [2024] KEELC 13856 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13856 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING CIVIL CASE E003 OF 2023

AA OMOLLO, J

DECEMBER 17, 2024

BETWEEN

WAGITAHA HOLDINGS LTD ..... PLAINTIFF

AND

HALDOOR REAL ESTATE LTD ..... RESPONDENT

AND

NATIONAL ENV. MANAGEMENT AUTH ..... 1ST DEFENDANT

THE DIRECTOR DEVELOPMENT NAIROBI COUNTY GOVERNMENT .... 2ND DEFENDANT

RULING

1. On 15th February 2024, the court ordered that: (a) pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the 1st Defendant and anyone affiliated with it from continuing with construction or development and any other activity on the suit property; (b) that parties to comply with Order 11 within 30 days herein from the date hereof; and (c) that mention 11th April 2024 to confirm compliance; and that notice to issue to the 2nd Respondent.

2. The 1st Defendant's Notice of Motion dated 11th July 2024 sought to report its compliance with the prayers raised in the Plaintiff's previous application.

    a. spent;

    b. That this Honourable court be pleased pending the hearing and determination of this application inter partes;

c. That this Honourable court be pleased to allow the Applicant to commence construction since it has obtained all the requisite approvals and licences keeping in fact that it could not adequately be compensated by damages as compared to the Plaintiff;

d. That in granting prayers (a), (b) and (c) above, this Honourable court be pleased to strike out the suit.

3. In support, an Affidavit dated 11th July 2024 was sworn by Khalif Ali Gure; the Director of the 1st Defendant. The Deponent avowed that there had been a single dwelling house that was demolished to pave way for the engineers and architects to access the site and to prepare designs and drawings for the development. In addition, the demolition was to aid in the geotechnical surveys to confirm the soil structure since the 1st Defendant planned to develop the suit property. He attested that there was no construction going on on-site.

4. He confirmed that after the design team conducted their drawings and designs, then that would be the time to apply for the necessary approvals; including NEMA, Nairobi City County and the NCA. It was averred that having obtained the necessary approvals to mitigate any environmental concerns that may arise during the construction process, aggrieved parties with complaints may report to; the Liaison Committee under the *Physical and Land Use Planning Act*; Number 13 of 2019 and the National Environmental Tribunal for hearing and determination. The attester swore that the complainants had not exhausted their options and ought to have filed under this court on appeal.

5. According to the 1st Defendant, the court ought to set aside, review or vary the order issued on 20th March 2024 since they had now received all the necessary approvals and stated that the entire suit be struck out under the doctrine of exhaustion.

6. Gidraph Mbogo Babu; a Director of the Plaintiff entity swore a Replying Affidavit dated 1st October 2024. He averred that the 1st Defendant had demolished the single dwelling structure on the suit property and carried out extensive excavation in readiness to put up a construction. The Deponent averred that there cannot be any demolition or construction before an EIA licence is issued; according to Part VI of the EMCA.

7. The Deponent averred that the excuses given by the 1st Defendant; that they were giving way for the engineers and architects is misleading as the allegation was never supported by evidence. In addition. the 1st Defendant itself acquiesced that they did not have the approvals and licences before the pending suit was initiated.

8. Accordingly, the demolition of the single dwelling structure and the excavation had caused the Plaintiff and the neighbours material damage through destruction of water and electricity pipes, falling debris which infringed on the quiet and peaceful enjoyment of the Plaintiff and other neighbours in the area. That the proposed development on the suit property was a high-risk development that was out of character to the neighbouring premises.

9. The attester stated that the 1st Defendant had moved into the suit property without public participation from the neighbours. Because of that, Respondents state that the EIA licence issued to the 1st Defendant was illegal and unprocedural according to Article 42 [right to a clean and healthy environment and examples]and Article 69 (d) [obligations in respect of the environment-public participation]of *the Constitution* and section 3 (3) of the *Environmental Management and Co-ordination Act* [EMCA] (entitlement to a clean and healthy environment [3] right to a clean and healthy environment has been violated). That the application dated 11th July 2024 ought to be treated with extreme prejudice as it deserves and be dismissed with costs.

10. For the 2nd Defendant, Catherine Thaithi; the County Director of Environment, Nairobi County swore a Replying Affidavit dated 1st August 2024. She explained the position of NEMA as being the principal instrument of government established under section 7 and 58 of the EMCA [establishment of NEMA] to exercise general supervision and coordination over all matters relating to the environment.

11. She deposed that pursuant to the prescribed rules and guidelines, a proponent of the project is required to submit the report to NEMA prior to being issued with an EIA licence by NEMA. On the 12th of October 2023, NEMA received a Comprehensive Project Report for the development of the suit property for approval. The centre of any development is the public participation of neighbours and anyone else likely to be affected by the intended project.

12. The 2nd Defendant deposes that any person aggrieved with the issuance of a licence by NEMA should file an appeal at the National Environment Tribunal; in line with section 129 of the EMCA which the Plaintiff had not exhausted.

13. Wilfred Masinde; the acting Deputy Director Compliance and Enforcement deposed on the behalf of the 3rd Defendant via Replying Affidavit dated 9th September 2024. He stated that around June 2023, the 1st Defendant made development applications for change of user from residential to commercial residential in respect to the suit property. That after it carried out the necessary evaluation of the development application, it issued the 1st Defendant with permission on 5th July 2023 on condition that the developer submits satisfactory building plans within 2 years and completion of construction be done within a portion of 3 years otherwise its approval would automatically lapse.

14. He deponed that any party that is aggrieved by the decision of the 3rd Defendant in regard to an application for development ought to appeal to the Nairobi County Physical and land use Planning Liaison Committee in the first instance. According to its record, there have been no cases filed with the committee as provided for under section 61 (3) of the *Physical and Land Use Planning Act*.

15. The 1st Defendant filed written submissions dated 11th September 2024. It stated that there was emergence of new material evidence which would persuade the Honourable court to review its order issued on 20th March 2024; some of which are the 3rd Defendant approval on 30th November 2023 and the EIA licence from the 2nd Defendant on 26th April 2024 and a certificate of compliance on 20th May 2024 from the National Construction Authority (NCA).

16. The 1st Defendant argued 4 issues to be determined:

    (a) Whether the Honourable court should be pleased to set aside, vary or discharge the orders of injunction issued on 20th March 2024 in terms of prayer (b) in the application;

    (b) Whether this court should be pleased to strike out this suit on grounds of muteness in terms of prayer (d) of this application;

    (c) Whether the doctrine of exhaustion has crystallised in favour of the 1st Defendant as against the Plaintiff; and

    (d) whether the costs of this application be in the cause.

17. On review, the 1st Defendant highlighted Order 40 Rule 7, Order 45 Rule 1; and Republic versus Public Procurement Administrative Review Board and 2 others [2018] eKLR; on section 80 CPA and Order 45 CPR

18. On review by "sufficient reason" the 1st Defendant relied on the case Official Receiver and Liquidator versus Freight forwarders Kenya limited (2000) eKLR and Shanzu Investments Limited versus Freight Forwarders Kenya Limited [2000] eKLR; and section 80 CPA. It also relied on further cases; Nairobi Civil Appeal 100 of 1993; Shanzu Investments Ltd versus Commissioner of Lands;

19. The 1st Defendant submitted that for review based on "discovery of new information" and "the discretion of the court" that was noted in the case of [2024] KEELC 3667 (KLR). It submitted that now that they had all the licences and approvals, that was sufficient reason to permit it to continue construction. In addition, the Plaintiff, having not exhausted its options, should have the orders issued be varied, set aside or discharged and the suit struck out. On the line that the main suit and Plaintiff's applications and orders were moot, there was no significance in continuing with the suit. The 1st Defendant quoted a plethora of definitions and caselaw on the above submission.

20. The 1st Defendant came to an end by submitting that costs are defined in section 27 of the CPA and in the case of Party of Independent Candidate of Kenya & another versus Mutula Kilonzo & 2 others [2013] eKLR citing Murray C J in Levben Products versus Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227

21. The Plaintiff filed submissions dated 1st October 2024. The issues it identified for determination were: (a) whether the 1st Defendant complied with the relevant legal requirements in being issued with the approvals and licences for the impugned development; (b) whether the stated committees and tribunals can handle any violations to the Plaintiff; and what orders as to costs.

22. The Plaintiff submitted that 1st Defendant had failed to file evidence that public participation had been conducted in line with section 58 of EMCA. The Plaintiff noted that it had just become aware of the approvals by the 1st Defendant's application. The Plaintiff smells mischief with the Defendants' licences and approvals and the manner in which they were issued. That the relevance of the public participation is in the management, protection and conservation of the environment. [SEE Articles 42, 69 (d) and 70 of *the Constitution*, sections 3 (5) (b) and 58 of the EMCA]. Reference was made to the case of Mary Waithira Njoroge versus Murang'a South Water & Sanitation [2022] eKLR as well as numerous other caselaw on it.

23. The Plaintiff noted that as at the filing of the case the 1st Defendant had not any approvals and licences; the Plaintiff could not file its grievances with the quasi-judicial bodies. The fact that it is a breach of constitutional rights is a second valid reason why the suit was filed in the ELC court. Importantly, there is no legal provision of regularising applications for licences and approvals retrospectively to projects already started. The Plaintiff submitted that the suit can't be struck out without figuring out whether the 1st Defendant's actions were legal.

24. As to costs, the Plaintiff cited the case of Jasbir Singh Rai & 3 others versus Tarlochan Singh Rai & 4 others [2014] eKLR.

25. The 1st Defendant professed that having obtained the necessary approvals to mitigate any environmental concerns that would arise during the development, aggrieved parties such as the Plaintiff ought to redirect their case to quasi-judicial committees and tribunals. It was this Defendant's belief that the issuances of the licences and approvals ousts the jurisdiction of this court.

26. The 2nd Defendant associated itself with the 1st Defendant's submissions dated 11th September 2024 in its entirety and reiterates that because the 1st Defendant had been issued all the approvals and licences, this suit had been overtaken by events. The 1st Defendant had the backing of the 2nd and 3rd Defendants indicating that the application, evidence and responses were sound. The 2nd Defendant noted that there

were variances in the argument between the Plaintiff and its pleadings and the assertions made by the 1st, 2nd and 3rd Defendant's pleadings.

27. It posited that this court ought to rely on section 129 (1) of the EMCA on issuance of the EIA licence, paragraph 2 (1) (a) of the 2nd schedule to the EMCA, The EIA and Audit Regulations 2023 as amended by *Legal Notice 32 of 2019*. The 2nd Defendant submitted that the averment as to the irregularity of the licencing procedure had never been pleaded by the Plaintiff.

28. The 3rd Defendant filed its submissions dated 8th October 2024 and quoted Order 10 Rule 7 of the Civil Procedure Rules and cited a myriad of caselaw. It reiterated on the matter that the Plaintiff should have filed its grievances with the National Environmental Tribunal established under sections 125 and 129 (1) (2) of the EMCA. It submitted that any grievance on the application for development permission ought to be taken to the County Physical and Land Use Planning Liaison Committee under section 61 (3) of its law.

Analysis and Determination:

29. The are twin issues for determination; first is whether this court's jurisdiction has been ousted and second whether the 1st Defendant's application meets the threshold for a review application. In ascertaining the merit, this court is guided by the provisions of order 45 rule 1 of the Civil Procedure Rules which provides thus;

> .... who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

30. The 1st Defendant has stated that they have laid a basis on the heading of sufficient cause because they now have obtained the relevant development permissions. From the arguments put forth by the Defendants, it is not disputed that at the commencement of this suit, the 1st Defendant had not obtained the requisite licences. It is their argument that since the licences have now been issued, the suit has been overtaken by events and the jurisdiction of this court is now ousted.

31. Article 162 (2) (b) and 165 establish the ELC court and gives it powers thus the powers of this court being derived from *the Constitution* its jurisdiction is not automatically ousted by Acts of Parliament. Articles 23, 47, 165, highlights the authority of the courts to uphold and enforce the Bill of rights, give fair administrative action and enforce rights if a person who alleges that the right to a clean and healthy environment has been/is/likely to be denied, violated, infringed and threatened may apply for redress of those environmental rights.

32. Although the Physical Land Use and Planning Act of 2019 and the Environmental Management and Coordination Act of 1999 provide for mechanisms to redress grievances arising from their implementation, the said Acts as stated hereinabove donot per se oust jurisdiction of the Courts. In the case of Republic versus Kenya School of law & 2 Others exparte Kgaborone Tsholofelo Wekesa (2019)eKLR Mativo J (as he then) was held thus;

> " while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the

issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[23] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

33. One of the exceptions in this case being that, the orders sought to be reviewed were made by this court and the NET or the County Liaison Committee lacks powers to review the same. Section 3 of EMCA also gives the Environment and Land Court original jurisdiction to handle grievances as relate to harm to the environment. Thirdly, as at the time the suit was filed, not all the approvals had been obtain and thus the ousting of the jurisdiction cannot be done retrospectively.

34. On merits of the application, the Applicant has annexed copies of the licences issued to it by the County Government on 30th November, 2023; NEMA on 26th April 2024 and NCA on 20th May 2024 respectively. For the licence from NEMA which regulates development on the environment, there are regulations put in place to be complied with before a licence is issued inter alia section 58 of EMCA and the Environmental (Impact Assessment and Audit) Regulations, 2003.

35. The 1st Defendant correctly argues that the Plaintiff can only approach the NET to challenge the process in the manner the licence was obtained. However, it is the 1st Defendant/Applicant who is asking the court to exercise discretion in its favour, and therefore had a duty to demonstrate to the court that it has a licence which was obtained in accordance with the law. The development permissions granted cannot be used to state that the Respondent mislead the court to grant the orders as they were obtained after the Plaintiff's application was heard and determined on merit (particularly the lack of NEMA and NCA licences). In the instant, what is annexed by both the 1st and 2nd Defendants are copies of the license and a comprehensive report without evidence stakeholder (plaintiff's) engagement.

36. The report annexed by the 2nd Respondent does not mention anything about notification made to members of the public or their engagement. Fair administrative action provided for under article 47 of *the Constitution* requires of the decision-maker to afford a hearing to parties who are likely to be affected by their decision. Consequently, the absence of evidence of such participation undertaken either by the 1st and 2nd Defendants, I am not persuaded that sufficient cause has been shown to review the orders of this court issued on 15th February, 2024.

37. In light of the foregoing analysis, I hold that the application is without merit and it is dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2024

A. OMOLLO

JUDGE