



**County Government of Kilifi v Kilifi Colors & Dreams Limited & another (Civil Appeal 36 of 2022) [2024] KEELC 13724 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13724 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL APPEAL 36 OF 2022  
EK MAKORI, J  
DECEMBER 10, 2024**

**BETWEEN**

**COUNTY GOVERNMENT OF KILIFI ..... APPELLANT**

**AND**

**KILIFI COLORS & DREAMS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR KILIFI COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Senior Principal Magistrate J.M Kituku dated and delivered at Kilifi on 30th August 2022 in Kilifi SPMC ELC Case No. 63 of 2020)*

**JUDGMENT**

1. The Appellant has filed this appeal setting the following grounds in its Memorandum of Appeal:
  - a. That the Learned Honorable Magistrate erred in law and, in fact, by finding and holding that the issues raised in the Appellant’s Notice of Motion Application dated 28<sup>th</sup> January 2022 were Res judicata in line with an earlier Ruling delivered by the Court on 13<sup>th</sup> April 2021.
  - b. That the Learned Honorable Magistrate erred in law and fact by finding and holding that he had jurisdiction to hear and determine the 1<sup>st</sup> Respondent’s suit even though some of the issues raised therein and reliefs sought are issues and reliefs that can only be canvassed and granted by the County Physical and Land Use Planning Liaison Committee.
  - c. That the Learned Honorable Magistrate erred in law and fact by finding and holding that the Appellant’s Notice of Motion Application dated 28<sup>th</sup> January 2022 was an abuse of the Court process and unmeritorious, thereby declining



to strike out prayer (b) sought in the 1<sup>st</sup> Respondent's Complaint dated 12<sup>th</sup> August 2020.

- d. That the Learned Honorable Magistrate erred in law and fact by finding and holding that there is no procedure for striking out some prayers in the main suit through an application.
  - e. That the learned Honorable Magistrate erred in law and fact by failing to appreciate and take into consideration the Appellant's submissions to the effect that:
    - i. The only recourse available to the 1<sup>st</sup> Respondent when the Appellant declined to grant the development approval and clearance was to pursue an Appeal at the County Physical and Land Use Planning Liaison Committee, which is the statutory body exclusively empowered by statute to determine disputes in respect of applications submitted to the planning authority; and not to approach the Court for redress.
    - ii. The Court lacked jurisdiction to hear and determine any questions or issues arising from the Appellant's refusal to grant the 1<sup>st</sup> Respondent development approval and clearance regarding the suit property.
    - iii. Consequently, the Court lacked jurisdiction to consider and grant Prayer (b) of the 1<sup>st</sup> Respondent's Complaint dated 12<sup>th</sup> August 2020 to wit a prayer seeking a mandatory injunction directing the Appellant to issue the 1<sup>st</sup> Respondent the requisite clearance and approval for development of the suit land upon the 1<sup>st</sup> Respondent meeting the requirements for grant of the said clearance approval; when the Court ultimately retires to render its judgment.
  - f. That the learned Honorable Magistrate erred in law and fact by misconstruing the facts and considering irrelevant factors, thus making an erroneous decision.
2. The Appellant proposes that should the Appeal succeed, this Honorable Court should allow the Appeal and substitute it with its Ruling, allowing the Appellant's Notice of Motion Application dated 28<sup>th</sup> January 2022 in its entirety with costs
  3. On 31<sup>st</sup> January 2022, the Appellant filed before the trial Court a Notice of Motion Application dated 28<sup>th</sup> January 2022, which sought to have Prayer (b) of the Plaintiff's [now 1<sup>st</sup> Respondent herein] Complaint dated 12<sup>th</sup> August 2020 and filed in court on 14<sup>th</sup> August 2020 be and is hereby struck out for want of jurisdiction and costs.
  4. By the 1<sup>st</sup> Respondent's Complaint dated 12<sup>th</sup> August 2020 and filed in Court on 14<sup>th</sup> August 2020, the Plaintiff sought the following reliefs against the Appellant and the 2<sup>nd</sup> Respondent herein jointly and severally:
    - a. A declaration that the Plaintiff is the lawfully registered proprietor of the suit land title number Kilifi/Township Block 3/1178 measuring 0.3617 hectares in Kilifi Town.



- b. A mandatory injunction directing the 1<sup>st</sup> Defendant to issue the Plaintiff with the requisite clearance and approvals for the development of the suit land upon the Plaintiff meeting the requirement for the grant of the said clearance approval.
  - c. A mandatory injunction directing the 2<sup>nd</sup> Defendant to issue the Plaintiff with an official search of the suit land from the records held by the 2<sup>nd</sup> Defendant at Kilifi lands registry.
  - d. An order of mandatory injunction directing the 1<sup>st</sup> Defendant to remove all the persons it has allocated and licensed to carry on business on the suit land and hand over vacant possession of the suit land to the Plaintiff.
  - e. General damages.
  - f. Costs of the suit.
5. The Court directed the parties to canvass the appeal through written submissions. They complied.
  6. The issues that I frame for the determination of this appeal are whether the trial Court has jurisdiction to handle the matter in the manner framed in the plaint and whether the appeal should succeed on account that the matter should have been referred to the County Liaisons Committee as the first port of call to handle clearances in development within the County before the Magistrates Court or the ELC is invoked. And who should bear the costs of this appeal?
  7. The appellant believes that the Court should have down tools to await the decision of the Liaisons Committee. The Respondent is of a different view, stating that the Magistrates Court or the ELC can best handle the ownership issue and cannot be handled by the Liaisons Committee under Section 76 of the [Physical and Land Use Planning Act](#) No. 13 of 2019.
  8. The role of this Court at this point is crucial, as it involves re-evaluating the evidence and making its independent conclusion. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:
 

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
  9. The claim in the Lower Court is multifaceted, significantly involving ownership and clearance approvals for development to be issued to the Respondents by the Appellant. The 1<sup>st</sup> Respondent avers that instead; the appellant has allotted the land to other third parties using it as a car washing site.
  10. The Supreme Court has guided how to deal with Multifaceted claims like this one in the leading decision in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment), that parties should not be limited in access to justice whenever they seek to ventilate their



matters - the only catch is - that the forum in which they seek redress is efficacious and adequate and that the doctrine of abstention/exhaustion is applied by the Courts where there exists such primary forum:

“It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC, and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations, as is the case in the present dispute. The fact that licenses may well be a part of the appellant’s petition does not in any way outlaw the hearing and determination of it by ELC.

119. Similarly, in respect of the *Energy Act*, section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal’s attention.

120. In addition to the above findings, since the appellant’s claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC, which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts, therefore, clearly fell into an error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.”

11. In this case, the Trial Court will not be deciding on the clearance and approvals for development. It will be up to the Liaisons Committee established under Section 76 of the PLUPA Act. The ownership issue will come first, so the first port of call will be the Magistrates Court. Therefore, I do not fault the Lower Court for finding that it was the most adequate and efficacious forum as a first port of call to entertain the matter. The appeal is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 10<sup>TH</sup> DECEMBER DAY OF DECEMBER 2024**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Havi, for the 1<sup>st</sup> Respondent

Court Assistant: Abdirashid

In the Absence of:

Ms. Gitari for the Appellant.

