



Maina v Director General, Nairobi Metropolitan Services & 2 others (Appeal E100 of 2022) [2023] KEELC 834 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
APPEAL E100 OF 2022
J OMANGE, J
JANUARY 26, 2023**

BETWEEN

NDIRANGU WA MAINA APPELLANT

AND

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES 1ST
RESPONDENT**

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

WOODRIDGE CENTRE LIMITED 3RD RESPONDENT

RULING

1. The plaintiff/ applicant suing on his own behalf and on behalf of Lavington Five Roads Association filed an application under Certificate of Urgency praying for the following orders:-
 - a. Spent
 - b. Spent
 - c. That a temporary injunction do issue restraining the 3rd Respondent whether by itself, its employees or its agents or others claiming through or under them from undertaking any construction upon LR 3734/790 Lavington, Nairobi pending the hearing and determination of the instant appeal.
 - d. That the 1st and 2nd Respondents be and are hereby compelled to provide the appellant with a copy of the decision granting the PPA-2 approval to the 3rd Respondents.
2. The application is brought on various grounds the essence of which is that the 1st and 2nd Respondent granted the 3rd Respondent a change of user on the July 21, 2022. The applicants who were aggrieved by the change of user lodged an appeal with the County Physical and Land Use Planning Liaison



- Committee on September 15, 2022. The applicants contend that the Liaison Committee failed to determine the appeal within 60 days prompting the filing of this appeal. The applicant filed an affidavit in support of the application in which he deponed to the circumstances of the case. He averred that the Residents of Lavington Five Roads Association object to the change of user for various reasons including; environmental concerns as the oil and petrol effluent will pollute the environment; alteration of the peaceful residential neighbourhood; safety concern to school going children; noise levels associated with a petrol station; increased vehicle and foot traffic posing a security risk; breach of privacy of residents by the convenience stores; overburdened drainage system among other concerns.
3. In a further affidavit filed on November 17, 2022 the applicant raised concern on conflict of interest regarding the 3rd respondents' director who he alleges also chairs the Nairobi County Planning and Technical Committee which approves planning. In yet another further affidavit dated December 4, 2022 the applicant indicated that he had withdrawn the appeal which had been filed at the County and Physical and Land Use Planning Liaison Committee. He further brought to the attention of the court that an appeal by the 3rd Respondent against an enforcement notice was heard and determined on the same day.
 4. The 1st and 2nd Respondents filed grounds of opposition to the application objecting primarily to the jurisdiction of the court to hear the appeal as there was no decision to be appealed against. The 3rd Respondent case is presented by one Mohamed Ismail who in his Replying Affidavit stated that the 3rd Respondent had complied with all legal requirements before construction. He insisted that in accordance with the requirements of the law there was extensive public participation involving government agencies and key stakeholders. The 3rd Respondent has taken measures to mitigate and address all concerns that were raised during the consultations.
 5. The court directed the parties to canvass the applications by way of written submissions. On the 19th December, 2022 parties confirmed they had filed written submissions. On the same date, parties addressed the court on a preliminary objection filed by the 3rd Respondent.
 6. Learned Counsel for the 3rd Respondent Mr. Ahmednasir submitted that the court has no jurisdiction to hear the appeal which was filed simultaneously with an appeal to the County Physical and Land Use Liaison Committee. Counsel contended that the present appeal contravenes section 61 of the *Physical and Land Use Planning Act*. This court only acquires jurisdiction after the committee has rendered a decision which in this case was not done as the appeal before the Liaison Committee was withdrawn. Learned Counsel for the 1st and 2nd Respondent concurred with these submissions insisting that the appeal as filed does not constitute an appeal as no decision has been rendered by the Liaison Committee.
 7. Learned counsel for the appellant submitted that an appeal was filed to the Liaison Committee which failed to determine the dispute within the prescribed 60 days prompting the appellant to seek recourse in this court. He argued that the doctrine of exhaustion of remedies did not apply in this case as the alternative remedy was not accessible and effective.
 8. I have considered the submissions of all counsel and the authorities that have been cited. The issue that arises for the courts determination are:-
 - a. Does the preliminary objection meet the threshold for a preliminary objection?
 - b. If yes does this court have jurisdiction to hear this appeal?
 - c. Lastly if the court has jurisdiction is the application for injunction warranted?



9. On the first issue, the threshold for a preliminary objection was set out by the Court of Appeal in the *locus classicus* case of *Mukhisa Biscuits Manufacturing Co Limited vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P further held as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

10. The issue of jurisdiction is a pure point of law which is capable of concluding this matter hence meets the test for a preliminary objection.
11. On the question of jurisdiction, it is the contention of counsels for the Respondents that this court only acquires jurisdiction once a decision is rendered by the Liaison Committee which in this case was not done as the appellant withdrew the appeal before a decision could be made. On the other hand, counsel for the appellant argue that given that the committee did not determine the appeal within the prescribed period, the appellant was at liberty to file the appeal in this court. Counsel for the appellant argues that the doctrine of exhaustion of remedies does not apply in this case. I agree entirely. The issue in this case is not whether the doctrine of exhaustion applies but whether this court has jurisdiction to hear an appeal from a decision of the County Executive Committee member.
12. The Supreme Court had occasion to provide guidance on the question of jurisdiction. In the Case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court observed as hereunder; “A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
13. Section 63 (3) and (4) of the County *Physical and Land Use Planning Act* provides;
- “(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.



(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”

14. It is evident from a plain reading of the two sections that the Liaison Committee is the body that has been given the responsibility to hear appeals against decisions of a County Executive Committee member. This court acquires jurisdiction once an appellant is aggrieved by the decision of the committee. In my view, the section envisages that there must be a decision of the Liaison Committee which a party is unhappy with before it files an appeal.
15. The appellant has detailed numerous concerns regarding the appeal that was filed before the Liaison Committee. Did the challenges faced by the applicant confer on this court the jurisdiction to hear the appeal as filed? I find not. While this court if moved appropriately, can address process, procedure gaps and even arbitrariness of lower courts and Tribunals, it cannot do so by conferring on itself jurisdiction which it does not have. The law gives this court jurisdiction to hear appeals from a decision of the Liaison Committee. In this case no decision had been rendered by the Committee which was already seized of the appeal by the time this matter was filed.
16. In enacting the new constitution, the people of Kenya tried to address the problems of efficiency, accessibility and complexity that have perennially besieged. The Constitution therefore has created the superior courts and the subordinate courts which include the magistrates’ courts, the Kadhis courts and Tribunals. Each level of court has its role.
17. In cases where the lower courts fail to properly exercise their Jurisdiction they must be corrected either by exercise of an appellate jurisdiction clearly defined by law or by the Judicial Review mechanism which our law elaborately provides. It is noteworthy that in exercise of its Judicial Review powers this court has wide powers to inquire into the procedural propriety of exercise of authority by courts and other administrative bodies and correct any errors. In this way, the rule of law is strengthened.
18. If the superior courts choose to exercise jurisdiction clearly assigned to other bodies that are alleged to have erred in one way or another not only will there be confusion in the practice of law but the courts will be undermining the aspirations of the Kenyan people to have an efficient legal system in which disputes are resolved by different courts and bodies playing their roles as assigned by the Constitution and the law.
19. Ultimately, I find that the law has not given this court jurisdiction to hear an appeal against a decision of a county executive member. As such this court has no jurisdiction to hear the matter as filed.
20. Consequently I must down my tools as guided by the celebrated case of “Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited (1989) eKLR where the court pronounced:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

I will not therefore make any determination on the merits of the application.
21. The upshot of the foregoing is that the Preliminary Objection succeeds. The petition is struck out with costs to the Respondents.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF JANUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Wamai for the Applicant

Mr. Momanyi for 1st and 2nd Respondents

Mrs Azui for the 3rd Respondent

Steve - Court Assistant

