Ochola v The County Government of Kwale & another (Environment & Land Case 48 of 2021) [2023] KEELC 284 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEELC 284 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE 48 OF 2021

AE DENA, J

JANUARY 23, 2023

BETWEEN

ARIKO ODERO OCHOLA ..... PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KWALE ..... 1ST DEFENDANT

KHAMISI OMAR MWANDARO (FORMERLY COUNTY ADMINISTRATOR) COUNTY GOVERNMENT OF KWALE ..... 2ND DEFENDANT

(FORMELY ELC CASE NO. ELC NO. 166 OF 2019)

JUDGMENT

Introduction

1. By a plaint amended on December 6, 2019 the plaintiff sued the Defendants and seeks for judgement against the 1st defendant as follows; -

    a. An order of the Honorable Court directing the 1st defendant, particularly the Kwale County Director of Physical Planning and Land Use Planning of Government of Kwale, to issue the Applicant herein with Development permission for the extension of his building located on the land parcel No. Kwale/Ukunda/3610.

    b. An order of this Honorable Court directed at the 1st defendant, its servants and agents, prohibiting them from denying the plaintiff/Applicant, the right to develop the already approved floors of his building on the land parcel No. Kwale/Ukunda/3610.

    c. An order of this Honorable Court directed at the 1st defendant, its servants and agents, prohibiting them from harassing the plaintiff and his servants or tenants in parcel No. Kwale/Ukunda/3610.

d. An order of this Honorable Court directed at the 2nd defendant, its servants and agents, prohibiting them from harassing , intimidating , arresting and interfering with the plaintiffs tenants or the plaintiff/ Applicants workmen working on the site of the already approved floors of his building on the land parcel No. Kwale/Ukunda/3610.

e. An order of this Honorable Court directed at the Diani OCS to ensure compliance with the orders herein.

f. Costs of this suit and interests

g. Any other relief this court will deem fit to grant.

2. The plaintiff pleads that he is the proprietor of land parcel No. Kwale/Ukunda/3610. That in the year 2014 he made an application to the 1st defendant for approval of a four floors development on the same which was approved. That subsequently in the year 2016 he made a further application by submitting the building plans to the 1st defendant for approval for extension of an additional floor and pent house, paid the requisite fees but received no response thereto, despite several follow up visits to the Kwale Physical Planners office. That later in 2019 learnt of a letter dated March 13, 2019 to the Physical Planner by the Airport Manager Ukunda raising navigational safety concerns caused by his development directing the county to liaise with the Kenya Civil Aviation Authority (KCAA) and Kenya Airports Authority (KAA) on the same. The plaintiff states that assisted by his lawyers height approval was granted in August 2019. That upon submission of the said approvals to the Physical Planners office with the aim of obtaining the requisite application form for the extension, his representative was denied the same and to date no explanation for the failure to grant the approval has been given despite the plaintiffs fulfilling all set conditions. This is termed as gross act of abuse of office. It is also pleaded that the 2nd defendant through the instigation of the 1st defendants had on several occasions harassed the plaintiff's tenants with threats to vacate the plaintiffs building thereon including arrest of workers working on the already approved building and tenants.

3. The suit is defended by the 1st defendant through a Statement of Defence dated February 18, 2022. The 1st defendants Defence is largely based on the powers conferred to the Director of physical Planning to regulate the use of land and planning Physical by the *Physical Planning Act* Cap 286 of the Laws of Kenya (now repealed), the requirements to obtain development approval through the relevant local authority also replicated in the Physical Planning Act 2019. It is pleaded that the suit parcel is categorized under Zone 2 of the Ukunda Diani Local Physical Development Plan. That despite the advice of the physical planner the plaintiff has never presented an application for development permission as required under the Act neither had he presented any approved plan for the existing initial building. That what the plaintiff referred to as development permission for the later were not approvals for purpose of the Act having been issued by the County Structural Engineer and not the physical planner contrary to the Act and likewise the approvals from KCAA and KAA.

4. The 1st defendant denies most of the allegations in the plaint and maintained that if any arrests were made they were duly undertaken under the 1st defendant's enforcement powers given under the Act through enforcement notices which were precipitated by the plaintiffs acts of breach of the law. The jurisdiction of the court was denied. In addition, the court was urged to strike out the suit with costs on the basis of the plaintiff's illegal actions.

5. The 2nd defendant did not enter appearance despite having been duly served. The matter was heard by viva voce evidence on May 25, 2022 and July 5, 2022 through the virtual court platform.

Plaintiffs Case

6. PW1 was Ariko Odero Ochola, the plaintiff who gave evidence in support of his case. He relied on his witness stated dated September 16, 2019 which was a replica of the averments set out in the amended plaint herein. He produced a title deed for Kwale/Ukunda/3610 and narrated to the court how he sought the approval from the 1st defendant to develop the same and what he paid for culminating into issuance of a letter of approval on the strength of which he proceeded to construct and produced copies of documents in relation thereto. He also explained to the court of his decision to extend the same in the year 2016, the approvals he also sought from the 1st defendant, what the 1st defendants required from him, their assessment of the proposed extension and the payments he made. He further narrated how he accessed a letter dated May 13, 2019 by the KCAA which he curiously noted was never copied to him as the developer and that instead of the Physical Planner liaising with the KCAA and KAA as proposed in the letter, he was issued with enforcement notices stopping further works culminating to the filing of an appeal before the Liaison Committee and which appeal was never responded to despite several reminders.

7. It was PW1 evidence that in addition to the appeal he had the existing building structural integrity evaluated by Nyali Consulting Engineers Ltd who affirmed its fitness and subsequently obtained height approvals from KCAA and KAA which despite submitting numerous times to the 1st defendant did not yield approval of the extension. He told the court that he also submitted and resubmitted to the 1st defendants both the initial building plans as well as those for the extension. That 7 years down the line, despite him meeting all the conditions including those by KCAA and KAA, no approval has been granted and the reason thereof remained unknown to him.

8. In addition to the above the plaintiff testified of how his tenants and construction workers would be harassed through arrests, made to report daily at the police station, detention/confiscation of construction work tools deployment of bulldozers for demolition leading to tenants leaving the premises causing him damages. He alleged the existence of tall buildings next to his house but whose owners were never harassed. The Plaintiff produced in support of his case copies of the documents listed in the plaintiffs list of documents as exhibits (PEXB 1-23).

9. On cross examination he affirmed that his architect did everything correctly because he met the deliverables. He told the court that the building was currently 5 floors including the penthouse though not finished. He conceded that the letter from KCAA (EX 16) did not override other government requirements. He told the court that there was sufficient room to do the extension and still comply with the 20 metres height requirement.

10. With the above the Plaintiff closed his case.

1st Defendants Case

11. DW1 was Ali Abdalla Budzuma the Kwale County Physical planner appointed in the year 2016. He told the court his role as county physical planner entailed interalia advising on policy on physical planning, licensing and preparation of physical plans. He adopted his witness statement dated February 18, 2022 as his evidence in chief. His testimony was that the development plans were presented to his office by the plaintiff's agent whom he advised that the proposal exceeded the prescribed limits of the zone the parcel was situate. He termed this a pre-application discussion where he further advised on need to review and resubmission in the prescribed format. That the approval by the structural engineers could not stand for an approval. He reiterated he did not have an application in this regard, that no approval had been given for the development to continue since the plaintiffs' agent afterwards

withdrew/collected the plans and never filed any application. He informed this court that his telephone conversations with the plaintiff were always cordial and that he had no vendetta with the plaintiff. He produced the documents in the list of documents dated February 18, 2022 as part of his evidence.

12. During cross examination he confirmed that feedback on applications is notified through form PPA2. He stated that a preliminary examination is undertaken against the development plan for the area before a client is advised to make an application in this case he used (DEXB 2). He testified that though DEXB 2 lacked the certification by the director of physical planning it did not mean it wasn't approved and reiterated it was a true copy of the original which he had duly certified. He reiterated an application must be made in the prescribed form with attached plans. He conceded he refused to process the application. He clarified on reexamination that he used the word application in reference to the plans that he received. That Kwale did not have a signed copy of the approved development plan because approval was done at the headquarters and only shared in soft. He reiterated he was clear in his mind that the application would not succeed for noncompliance with the gazetted development plan for the area the presence of an application notwithstanding.

13. With the above the 1st defendant closed his case.

14. Parties filed and exchanged submissions which they also highlighted orally on September 19, 2022 which I have read and considered.

Jurisdiction of the Court

15. The jurisdiction of this Court has been denied under paragraph 25 of the 1st defendants Statement of Defence and I find it necessary that I should clear this first before I craft the issues. The jurisdiction of the Environment and Land Court is derived from Article 162 (1)(2)(b) of the *Constitution* to hear and determine disputes relating to environment, and the use and occupation of , and title to land. This article is read together with the *Environment & Land Act* Sec.13 which confers the Environment and Land Court with original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of the *ELC Act* or any other law applicable in Kenya relating to environment and land. The court has power to hear and determine interalia disputes relating to environmental planning and protection, land use planning, land administration and management;

16. It is submitted on behalf of the 1st defendant that the court cannot usurp the mandate of the Physical Planner in granting the orders sought under the doctrine of separation of powers. Counsel for the plaintiff did not submit on the issue. This being the main basis for calling into question the jurisdiction of this court, it is my view that the mere fact that a court may not be mandated to tread on certain areas should not be a reason for ousting jurisdiction. The matter before me is on the use of land relating to its physical planning and the court is seized of original jurisdiction under Article 162(2) to hear it. In my mind what the court should tread careful on is to ensure at the point of formulating its orders, it does not exercise powers it does not have. This will become clearer when dealing with the reliefs sought.

Analysis and Determination

17. I have carefully perused and considered the pleadings filed in this case, the oral testimonies of the witnesses and the documents placed before this court and submissions by counsels. The main issue that stands out is whether the orders sought should be granted and if not what remedies would be available to the Plaintiff. In my view a determination on this can be arrived at by answering i) Whether the plaintiff made an application for approval for extension of his building on land parcel No. Kwale/Ukunda/3610 ii) Whether the 1st defendant has unreasonably refused to grant approval for the said

extension and Whether the plaintiff obtained approval permission to develop his land parcel No. Kwale/Ukunda/3610.

Whether the plaintiff made an application for approval for extension of his building on land parcel No. Kwale/Ukunda/3610

18. It is not in dispute that no approval has been given by the 1st defendant in respect of the plaintiff's extension indeed it is confirmed by DW1 during his entire oral testimony and confirmed during cross examination that as far as he was aware the county has never issued approval for the extension. Indeed, this is the main reason why the plaintiff is before court as evidenced by prayer (a) of the amended plaint herein. The reasons why the same has not been issued is the contest between the parties. According to DW1 the plaintiff only approached his office to make inquiry (which he termed pre-application discussions) about the proposed extension plans for his building and which upon considering them against the Ukunda/Diani Physical Development Plan he advised that the extension could not be undertaken/approved as it exceeded the designated 4 floors for the zone the plot was situate. Gazette Notice Number 13918 dated 28/09/2012 publishing the Ukunda/Diani Local Physical Development Plan and the Ukunda/Diani Physical Development Plan (see DEXB 1&2) were produced as exhibits in this regard. That thereafter the plaintiff's agent whose name he could not remember, collected the plans never lodged the application. That as such there has been no application for physical planning before his desk to consider.

19. The power of the 1st defendant to undertake development control which goes with the mandate to consider and approve all development applications under the *Physical Planning Act* Chapter 286 of the Laws of Kenya (now repealed) cannot be gainsaid. Power for development control is donated under section 29 of the *Act*. Section 30 read together with sections 31 and 33 makes it mandatory to obtain a development permission before one can carry out a development. I have noted in the definition section that for purposes of the Act a development includes an addition to a building meaning an extension as is the case in the instant suit. In any case it is admitted by the plaintiff that he was aware he was required to obtain approval even for the extension and therefore it is not in dispute. The Act stipulates that this permission is to be obtained from the local authority (now the County) where the subject land is situated.

20. The Act further defines development application and development permission thus;-

> " development application" means an application made under
>
> section 31 for permission to develop land;
>
> "development permission" means a development permission granted under section 33 by a local authority to an applicant to develop'

21. From the above it is clear and mandatory that the process commences with an application by the proposed developer to the relevant county office in this case the 1st defendant. Section 31 is to the effect that the person requiring a development permission shall make an application in the form prescribed in the fourth schedule to the clerk of the relevant local authority. This application shall be accompanied by various plans among other particulars which are mentioned therein. I also looked at the 4th schedule to the Act which is Form P.P.A.1 it is dubbed Application For Development Permission. I noted that it is to be submitted as hereunder; -

'To be submitted in triplicate in respect of each transaction and sent to or left at appropriate office of the Local Authority.'

22. Was this application made as required under the Act? The plaintiff stated in cross examination that the application was made through his agent and on the other hand DW1 states no application was submitted but that the agent made initial inquires in his office and he advised accordingly. PW1 reiterated in cross examination that he paid for application form for the extension and was issued with a receipt by the 1st defendant which he produced and also pointed it was duly signed by the County engineer and others as shown on its face. It was submitted on behalf of the 1st defendant that a payment slip is the only proof that an application was made and that the paying in slip produced by the plaintiff is signed by the County Engineer and not the physical planner. Further that physical planning fees were not levied implying that the paying in slip was in respect of building permit fees and thus no application was made for physical planning approval. Mr. Wasilwa counsel for the plaintiff refereeing to the same paying slip submitted that the plaintiff paid Kshs. 2000/- for form PPA-1 which is the application form whereupon he was required by the 1st defendant to pay Kshs. 26,150 for the approval of the extension which he paid as evidenced in PEXB 7. It is submitted the said application is still pending before the defendant and was never withdrawn. According to counsel it did not make sense for the plaintiff to deposit plans, proceed to make payment and fail to lodge the application. I have reviewed this document and to put the record straight this exhibit is a 'Paying Slip' dated 11/10/2016. It tabulates the various fees to be paid the first one being 'Application Form' at Kshs.2000. At the bottom the County Treasurer office has signed against 'Payment received by and the receipt no. is endorsed thereon as 3211732016100023 and the date is given as 31/10/2016. I also observed that the physical planning fees were not assessed.

23. This court recalls DW1 explaining that the process is regulated by law and roles are specifically cut out for each department. This is the form that DW1 had maintained throughout his evidence that it starts with his office before the rest of the departments can carry out their actions. Let me say that in the ordinary cause of business the applicant or his agent will fill in the form and this is supported by the endorsement in the form P.P. A1 that it should be filled in triplicate. Curiously the forms filled by the plaintiff or his agent were not presented before court as evidence. The burden of proof was on the plaintiff to prove that the application was made and was made as required under the Act. This was a very critical piece of evidence yet the plaintiff did not find it necessary to present before court in support of his claim that he presented an application. If the application was filed why was it not presented before court? I do not buy the argument that payment for the application form fees and issuance of a receipt perse represents that an application is made for purposes of the Act. It cannot be so. Even if the Physical planning fees were assessed it would not change this position. An application is made by filling the form and attaching the relevant documents and the plaintiff failed to present this document. I note that the plaintiff admitted during cross examination that he did the application through his agent and which is perfectly within the law and noting that he resides abroad. Additionally, he never presented this witness and mere belief that his architect did everything correctly because he got the deliverables as he stated in cross examination to me is not enough. I begin to mule over whether his agent may have taken some shortcuts in the process misleading his client who was outside jurisdiction. Allegations of soliciting for bribes to impute that the defendant's officers wanted an inducement to give the approval/ form have not been proved and had it been so a report ought to have been made at the relevant state agency, no such evidence was submitted. It is therefore my finding that there was no application for development permission for the extension of the 5th floor and the pent house that was submitted for consideration and approval.

24. It is the plaintiffs evidence that in the year 2019 he came back to Kenya to make follow up on this issue and he produced copies of Memo dated March 13, 2019 from KAA; Enforcement Notice slated to take effect on 1April 2, 2019; Enforcement Notice intended to take effect on June 5, 2019 and Letter dated August 13, 2019. I have noted the contents of the documents culminating into height approval by the

KCAA and KAA for safety purposes. I'm aware that during the proceedings the plaintiff demonstrated how it was still possible to comply with the height approval even with the additions he had made. For me I don't think this is the preserve of this court to do. The said approvals and or letters were to be subject of further consideration by the county. Infact PW1 conceded in cross examination that the said approvals were subject to other governmental approvals.

25. The above discussions and findings speaks to the issue whether the 1st defendant has unreasonably refused to grant approval for extension. I need not belabor the point. I find no reason to make a finding that the approval was unreasonably denied or withheld.

26. The issue of pre-application consultations has featured prominently during DW1 oral testimony and cross examination but in view of the above finding as well the fact that it is an informal process I will not dwell much on it. It is still not an application anyway as envisaged under the Act. Consequently, I will not delve into issues of the local physical development plan whose authenticity was impugned by the plaintiff's counsel during cross examination. In my view and considering the evidence adduced in this regard I find no reason to impugne the said document the same having been produced by the physical planer whose evidence was that he participated in its formulation. In any event this is a public document that can be obtained by anyone. The plaintiff had all the time to present the approved version to counter the exhibit that was produced. He did not. In any event whether or not it is the approved version these were issues considered at the informal discussions which do not form part of the formal application.

Whether plaintiff obtained approval permission to develop his Land Parcel No. Kwale/Ukunda/3610

27. It is evident that there are two sets of approval that feature in the pleadings. The first I have already dealt with in relation to the extension of the 5th floor and penthouse. The second approval is with regards to the initial development comprising of the 4 floors which the plaintiff claims throughout his pleadings and oral evidence that he obtained development approval from the County. This question is relevant to prayer (a) of the amended plaint seeking to prohibit the 1st defendant, from denying the plaintiff the right to develop the already approved floors of his building on the land parcel No. Kwale/Ukunda/3610. The defendant pleaded that upon investigation it occurred to them that even for the initial building the plaintiff had not obtained approval from the physical planner. DW1 during his testimony explained the approval process and reiterated it was vested in the Director of physical planning who must first accord the planning permission before the structural approval by the country engineers and not the other way and the latter's stamp by itself cannot pass for a county approval. The plaintiff on the other hand produced a copy of Notification of approval dated November 27, 2014. He told the court in cross examination that as a layman he treated the letter dated 27/11/14 issued by the County structural engineer as the approval and which he gave to his architect. The court is therefore tasked to determine whether the Notification of approval dated November 27, 2014 is a development permission approval within the context of section 30 as read together with sections 31 and 33 of the repealed Act which are largely replicated in the new Act.

28. Section 30 of the repealed *Act* dealt with development permission and provided as follows;

> 30 (1)
>
> No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.
>
> The above provision does not refer to the physical planner but that the said development permission is granted by the local authority. The plaintiff also produced copies of Receipt dated 27th November 2014 for Kshs 67,316.00/- from the defendant for building plans

and Receipt 26th November 2014 for Kshs 2,000.00/- from the defendant for an approval form [PPA1]. My review of these documents show the dates sequentially flowing with the issuance of the said notification of approval. I also reviewed PEXB 2 because when PW1 was questioned during cross examination whether it was a receipt he insisted that it was a receipt for which he would always pay to KCB though he did not have the same before court. It is the defendant who was best placed to give information on whether the payment was made and therefore the burden shifted to them to prove otherwise. They did not provide proof that the payment was not made in respect of that Bill. Moreover, it has not been denied that these documents were not documents of the county except that DW1 insisted there was no evidence that payment was made to the physical planning department with regard to the development permission which to me cannot stand because the bottom line is that all these collections are paid to the county.

29. Section 33 dealt with Approval of Development Application as hereunder; -

> 33. (1) Subject to such comments as the Director may make on a development application referred to him under section 32, a local authority may in respect of such development application— (a) grant the applicant a development permission in the form prescribed in the Fifth Schedule, with or without conditions; or (b) refuse to grant the applicant such development permission.
>
> PW1 clarified during reexamination that PEXB 3 is the said PAA 2, endorsed the 'County Government of Kwale' and below the date was indicated as issued under the Physical Planning Act. Further it was copied to the Commissioner of Lands Nairobi and County Physical Planning Officer. That to him the County Government and the office of the physical planner were one and the same. He stated he had not received any letter from the physical planner disowning the approval. DW1 confirmed during cross examination that upon receipt of an application the applicant is notified in writing of approval through form PPA2. I agree with the plaintiff's observations. In addition, from his testimony DW1 never denied this document to be a document of the county neither did he deny having received his copy.

30. This notification conveys the following; -

> RE: Proposed Development on Plot No. Kwale/Ukunda/3610
>
> Your application for the above submitted on 26th November, 2014 has been approved by the County Government of Kwale
>
> .....
>
> The above to me confirms there was an application (application No.16/2015 as endorsed on the PPA2) that was made, for proposed development on the plaintiff's property and is conveying its approval. The plans produced as PEXB 22 also bear the stamp of the County Structural Engineer dated 27/11/2014 who is also the signatory of the approval. It was not made clear by the 1st defendant whether every department would issue its own notification. But I note that at section 33 that approval is subject to such comments as the Director (in this case the physical planner) may make. DW1 never indicated to the court whether he had any comments to make or not on the initial development if at all. The PPA2 produced indicates it is approval for 'Proposed development on plot Kwale/Ukunda/3610. The 1st defendant being a repository of all approvals issued by itself did not produce any of their records to show that on that specific day or period no such approval including the one alleged by DW1

was granted or issued by the county. How do you explain the defendant's indolence coming to discover later in the year 2019 when the 4 stories were already in place? How else can this be explained except that there was an approval? This court was not convinced that there was no approval for the initial four stories on Plot No. Kwale/Ukunda/3610 belonging to the plaintiff.

31. This judgement would be incomplete if I do not address the enforcement notices with regard to the extension and the alleged appeals to the liaison Committee. These are contained in PEXB 9,10,11,12, and 20 (see the plaintiffs list of documents). It is not in dispute that the 1st defendant has powers of enforcement under section 38 of the Act including the new Act. The plaintiffs stated in his view that the enforcement notices were used to harass his workers and tenants interalia. Two enforcement notices are dated 17th May 2019 and 27th March 2019. The plaintiff appealed against them to the liaison committee which has to-date not decided on the same. I note from paragraph 5 of the said notice the operation of this enforcement notice was suspended by dint of the appeal filed to the liaison committee and pending its determination. It is PW1 evidence that while the building is at 5th floor it is not complete following the notice. Appeal was lodged vide a letter dated 30th May 2019 which was produced as evidence and it is duly stamped as having been received by the Physical Planning office on 3rd June 2019. The appeal in respect of both enforcement notices has not been withdrawn though I must state that the 1st defendant's failure to do anything about the appeal is not acceptable

32. Is the plaintiff entitled to the orders sought in the plaint? The plaintiff craves for an order directing the 1st defendant, particularly the Kwale County Director of Physical Planning and Land Use Planning of Government of Kwale, to issue the Applicant herein with Development permission for the extension of his building located on the land parcel No. Kwale/Ukunda/3610. It has been urged by the defendant that this court has no powers to grant this prayer by dint of the doctrine of separation of powers and the court was referred to the Supreme court advisory opinion *in the matter of the National Land Commission* (2015) eKLR. However, I'm aware that in exercise of its jurisdiction the ELC has power to make any order and grant any relief as the Court deems fit and just, including (a) interim or permanent preservation orders including injunctions;(b) prerogative orders; (c) award of damages; (d) compensation;(e) specific performance;(g) restitution;(h) declaration; or (i) costs. Based on my analysis herein it is my view that this order cannot issue to the plaintiff. Firstly, on the basis of my finding that there was no application that has been placed before the 1st defendant for consideration with regard to the approval for extension. Secondly in my view a process of appeal had begun. The appeal is still pending before the liaison Committee which is better placed to adjudicate on the technical issues with regard to the extension as well as the enforcement notices. As it is the 5th floor is already on albeit unfinished. The fate of this extension albeit incomplete needs to be looked at from a technical perspective at the county level as against the approval granted by the KAA and KCAA as well as the plaintiffs' claims of the existence of taller buildings in the same vicinity (albeit without giving proof). By and large the fate of the 5th floor needs to be addressed and this will be best achieved under the appeal on the enforcement notice related thereto since this court lacks the requisite expertise. I have also noted that the Liaison Committee has wide powers of review of the decision of the physical planner including making modifications considering that the plaintiff has acceded in his correspondence that he is willing to abide by any conditions. The plaintiff has an opportunity to exhaust the structures given under the Act provided that Mr. Ali A. Budzuma does not participate in the process in view of his categorical statement in re-examination that the extension cannot be approved. I'm also minded of the doctrine of exhaustion since a statutory remedy has been provided under the Act. I'm guided by

The Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992]eKLR put it in the following words;-

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed."

33. The plaintiff also prays for an order directed at the 1st defendant, its servants and agents, prohibiting them from denying the plaintiff/Applicant, the right to develop the already approved floors of his building on the land parcel No. Kwale/Ukunda/3610. It is a legal requirement under both the repealed Act and the Physical Planning and Development Act 2019 that for any development to be undertaken, the development permission should be obtained and this will be assessed in accordance with the Act. While there may be works that may not necessarily require the development permission it would be inappropriate for this court to give a blanket order as couched. I decline to issue the said order. It is also on this basis that the reliefs sought in prayer (c) and (d) of the amended plaint cannot issue.

34. In light of the courts discussions and the various findings I have made this court declines to issue the orders sought in the plaint and makes the following orders; -

    a. That an order be and hereby issues directed at the 1st Defendant to convene the relevant Liaison Committee for the determination of the Plaintiffs appeal herein and decide within a period of 6 months from the date of this judgement.

    b. That in view of the findings herein each party shall bear its own costs.

    It is so ordered.

DELIVERED AND DATED AT KWALE THIS 23RD DAY OF JANUARY, 2023

A.E. DENA

JUDGE

JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

Mr. Wasilwa for the Plaintiff

Mr. Muliro HB for Bwire for the 1st defendants.

N/A for the 2nd defendant

Mr. Daniel Disii Court Assistant.