



**Maina v Director, Physical and Land Use Planning, Kiambu County
Government & another (Environment & Land Case E005 of 2022)
[2023] KEELC 15781 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E005 OF 2022
JG KEMEL, J
FEBRUARY 23, 2023**

BETWEEN

SUSAN WANJIKU MAINA APPLICANT

AND

**DIRECTOR, PHYSICAL AND LAND USE PLANNING, KIAMBU COUNTY
GOVERNMENT 1ST RESPONDENT
PLANNING MUNICIPAL ADMINISTRATION & URBAN DEVELOPMENT,
KIAMBU GOVERNMENT 2ND RESPONDENT**

RULING

1. The Petitioner moved this Court vide a Petition dated the 16/5/2022 against the Respondents. The Petitioner averred that the Respondents had violated various provisions of the *Constitution* *inter alia* with the main being article 40 and 47 of the *Constitution* with respect to her right to property and the right to fair administrative actions. She sought declaratory orders that her rights to property and right to fair administrative actions have been violated; failure by the Respondents to make available a statutory forum for the adjudication of her appeal against the enforcement orders issued by the Respondents constitute a violation of her rights to fair administrative actions that is efficient, expedient and lawful; order of *certiorari* calling into this Court and quashing the entire decision issued by the Respondent's vide enforcement notice No 00776 dated the 11/1/2022 directing the Petitioner to stop further construction and seek reapproval of the development permissions; an order of *certiorari* quashing the entire decision to cancel existing development approvals and permits issued to the Petitioner; an order of prohibition restraining the Respondents from stopping or in any manner interfering with the ongoing construction works on Ruiru/Ruiru/Kiu Block3/2060 -plot No 955 Kahawa Sukari (suit land); damages for violation of the Petitioners Constitutional rights.



2. Alongside the Petition, the Petitioner filed the Notice of Motion dated the 16/5/2022 seeking *inter alia* interim conservatory orders staying the impugned enforcement notice No 00776 issued by the Respondents on the 11/1/2022 pending the hearing and determination of the Petition.
3. On the 24/5/2022 the Court directed the Petitioner to serve the application for hearing interpartes and in addition that the parties do address it on the question of jurisdiction of the Court to entertain the suit.
4. On the 22/6/2022 the parties elected to file written submissions. The Petitioner filed written submissions through the law firm of Mbugua Nganga & Co Advocates while the Respondents failed to do so despite directions from the Court to file by close of business of October 19, 2022.
5. The Petitioner submitted that the Respondents issued the Enforcement Notice No. 00776 on 11/1/2022 stopping further construction of the residential development on the suit land. That upon inquiry she was informed that the Kiambu County Physical and Land Use Planning Liaison committee (the Liaison Committee) was yet to be constituted for purposes of lodging an appeal against the action of the Respondents. That in the absence of the committee the Petitioner approached this Court through Pet. No. 1 of 2022 for the adjudication of her grievance. The Respondents raised a Preliminary Objection on grounds that the committee was operational and that the Court lacked the jurisdiction to entertain the Petition until the Petitioner exhausted the dispute resolution mechanism provided under statute. That the suit was remitted to the committee for adjudication vide the ruling of the Court issued on the 3/3/2022. That despite the directions of the Court the committee failed to adjudicate the matter forcing the Petitioner to withdraw the Petition vide its notice of withdrawal dated the 13/5/2022.
6. Following the failure of the committee to resolve the issue and the subsequent withdrawal of the suit, the Petitioner finding herself without a forum to ventilate her grievance filed the current Petition together with a motion under certificate on the 16/5/2022. That on the 13/6/2022 upon being served the county attorney acting for the Respondents sought and obtained 7 days to enable them file a Replying Affidavit together with submissions on the question of jurisdiction. Thereafter they failed to appear in Court nor comply with the directions of the Court.
7. On the question of jurisdiction, the Petitioner submitted that this Court's jurisdiction is derived from Article 162 (2) of the Constitution read together with Section 13 of the Environment and Land Court Act. That the Petitioners' case is that her rights under the Constitution have been violated and infringed by the actions of the Respondents in issuing her with the enforcement notice aforesaid. That during the hearing of Pet. No. 1 of 2022, the counsel for the Respondent informed the Court that the committee was operationalized and was fully functional and in the light of that the Court transferred the file to the Committee for adjudication. The Petitioner submitted that to date the committee has failed and or ignored to determine the said Petitioners' grievance as required and has directed by the Court necessitating the filing of the current application and Petition before this Court. The Petitioner submitted that it has not been disputed that the committee is not available, was never available before filing the previous Petition (now withdrawn) and neither was it availed despite directions issued by the Court in the previous Petition as the same is yet to be operationalized.
8. Relying on the case of Immaculate Gicuku Mugo vs Kiambu County Government (2021) eKLR the Petitioner submitted and agreed with the Court that the only instance when the Court may exercise its primary jurisdiction in disputes relating to enforcement notices is when a County does not have an operational liaison committee. This position it was submitted was reiterated in the case of Calvin Orina Obwogo Vs Nehemiah Agwenyi Ongeru & 3 others (2022) eKLR.



9. It was submitted that based on the peculiar circumstances of the case, the jurisdiction of the Court is properly invoked in a case like this one that the statutory body mandated to adjudicate over the grievance is unavailable or non-committal or simply out to frustrate a citizen or hide behind the doctrine of exhaustion, a position that the Court is in order to intervene as it cannot just sit back and watch the Petitioners rights being violated due to the continued unavailability of committee. See the case of *Fleur Investments Limited Vs Commissioner of Domestic Taxes & Anor* (2018) eKLR.
10. Relying on the case of *Night Rose Cosmetic (1972) Ltd Vs Nairobi County Government & 2 others* (2018) eKLR the Petitioner submitted that her case falls within the exceptions espoused in the Court as follows;

“At least two principles emerge from our jurisprudence in these cases:- First, 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. However, the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. ... The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the form which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provision s ousting Court’s jurisdiction must be construed restrictively It is also settled that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ... a remedy is considered available only if the Applicant can make use of it in the circumstances of his case.”
11. It was submitted that the committee despite the diligence and proactiveness on the part of the Petitioner as well as the directions of the Court requiring it to determine the grievance has been and is still unavailable hence inaccessible. That the Petitioner has suffered and continues to suffer prejudice and loss arising from the stoppage of the construction of the residential house. The Petitioner submitted that the circumstances of this case are such that the Petitioner should be exempted from the obligation to exhaust any remedy in the interest of justice. See the case of *Whitehorse Investments Ltd Vs Nairobi City County* (2019) eKLR.
12. The key issue for determination is whether the circumstances of this case pose a peculiar exception to the rule of exhaustion of remedies and whether the Court should exercise its jurisdiction to hear and determine the dispute.
13. A Court of law must first satisfy itself on the question of jurisdiction before embarking on hearing and determining a matter. It must satisfy itself that it has power to do so otherwise it should down its tools and take no further step if it is devoid of the power to act as in so acting its action shall be a nullity. This



was espoused in the case of *Phoenix of E.A. Assurance Company Ltd -vs- S.M. Thiga t/a Newspaper Services Ltd* (2019) eKLR, the Court of Appeal observed that:-

“It is a truism jurisdiction is everything and is what gives a Court or tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction” In common English parlance, jurisdiction denotes the authority or power to hear and determine the judicial disputes or to even take cognizance of the same. This definition clearly shows that before a Court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such Court will be amenable to being set aside ex debito justitiae.”

14. In the case of *Owners of Motor Vessel Lilian s vs Caltex Oil Kenya Ltd* 1989 KLR the Court was emphatic that;

“A question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court. A party who fails to question the jurisdiction of a Court may not be heard to raise the issue after the matter is heard and determined.”

15. In the same Court the Court adopting the wordings in the writings of John Bacroft Saunders in a treatise headed *Words and Phrases Legally Defined*-Volume 3: I-N said;

“By jurisdiction is meant the authority which a Court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

16. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings.

17. A Courts power flows from either the *Constitution*, Statute or both and in now should a party or a Court arrogate itself power that is does not flow from these sources. In the case of *Samuel Macharia Kamau vs KCB & Others* (2012) eKLR the Court held that;

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus a Court can only exercise jurisdiction as conferred by the *Constitution* or other written laws. It cannot arrogate to itself jurisdiction exceeding that which is confirmed upon it by law. The Court must operate within the Constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”



18. The jurisdiction of this Court is spelt out in the Constitution at Article 162 (2)(b) of the Constitution read together with Section 13 of the Environment and Land Court Act as follows;

“Jurisdiction of the Court

- (1) The Court shall have 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 this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”
19. Going from the above provisions of the Constitution and statute law evidently the Court enjoys both original and appellate jurisdiction in matters land use and planning.
20. The doctrine of exhaustion of existing remedies may be a complete bar to the jurisdiction of a Court if the exceptions thereto do not apply. In the case of William Odbiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR the Court stated as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

“This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly



followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

21. In the case of *Geoffrey Muthiga Kabiru & 2 Others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

22. In the case of *Benson Ambuti Adega & 2 Others v Kibos Distillers Limited & 5 others* [2020] eKLR the Apex Court pronounced on the doctrine of exhaustion otherwise called judicial restraint or judicial abstention as follows;

“It is a doctrine not founded in Constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal Courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal Court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal Court. If such a reservation is made, the parties can return to the federal Court, even if the State Court makes a ruling on the issue

23. Are there exceptions to the doctrine of exhaustion of remedies? This question was aptly discussed in the case of *R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (*supra*), where the Court stated as follows;

“What emerges from our jurisprudence in these cases are at least two principles: 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. As the Court of Appeal acknowledged in the *Shikara Limited Case* (*supra*), 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. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important Constitutional value is at stake.”

24. Flowing from the above, the Court finds that the gist of the Petitioners case as can be gleaned from the Petition revolves around allegations of constitutional violations.
25. In this case the Petitioner has explained the steps she took once she was served with the enforcement notice. That she enquired from the Respondents about the existence of the liaison committee and when she got no response she filed Pet. No. 1 of 2022. At the hearing the Respondents filed a Preliminary Objection challenging the jurisdiction of this Court on grounds that the Petitioner should exhaust the remedies available which was to appeal to the committee which was alleged to be operational. On that basis the Court directed the matter to be placed before the committee for determination but 6 months down the line the committee is yet to be operational. The Respondents did not rebut this evidence and the Court finds that the committee is unavailable, in operational and or just nonexistent. It is clear that the Petitioner will not get any remedies from an in operational committee. Should the Petitioner be left without a remedy? I find that this to be the exceptional circumstances of this case that call for this Court to exercise its original jurisdiction in the interest of justice.
26. Consequently I concur with the decision of the Court in Fleur Investments Limited Vs Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly Vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by by-passing the mechanism under Income Tax Tribunal. They observed as follows: -

“For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas Courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the Court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The Court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”
27. I find that this is a case whose exceptional circumstances call for the invocation of the original jurisdiction of this Court, which I hereby do.
28. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

