



**Sikalieh (Suing as Chairman of KLDA) v Nairobi City County
Government & 3 others (Environment & Land Petition
E001 of 2023) [2023] KEELC 16996 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E001 OF 2023
EK WABWOTO, J
APRIL 27, 2023**

BETWEEN

SAMORA SIKALIEH (SUING AS CHAIRMAN OF KLDA) PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

HAS INVESTMENTS LIMITED 3RD RESPONDENT

**ENERGY PETROLEUM REGULATORY AUTHORITY (EPRA) 4TH
RESPONDENT**

RULING

1. This ruling is in respect to the 1st Respondent's Notice of Preliminary Objection dated January 25, 2023 and the 3rd Respondent's Notice of Preliminary Objection dated January 31, 2023. The preliminary objection dated January 25, 2023 sought that the Petition be struck out with costs on the following grounds: -
 - i. That his Honourable Court lacks original jurisdiction to entertain the Plaintiff/Applicant's Application and Petition both dated January 9, 2023 by dint of Section 61(3) and 61(4) of the *Physical and Land Use Planning Act*, 2019 which stipulates any person aggrieved by the decision of the County Executive Committee Member regarding an application for development permission to first file appeal against that decision to the County Physical and Land Use Planning Liaison Committee.



- ii. That this Honourable Court lacks original jurisdiction to entertain the Plaintiff/Applicant's Application and Petition both dated January 9, 2023 by dint of Section 129(1) and 130(1) of the *Environmental Management and Co-ordination Act* 2012 which stipulates that any person aggrieved by the issuance of an approval or license by the 2nd Defendant to file an appeal to the National Environmental Tribunal.
 - iii. That in the circumstance, the Plaintiff/Applicant's application and petition is premature as the plaintiff has failed to exhaust the alternative means of dispute resolution provided under Section 61(3) of the *Physical and Land Use Planning Act*, 2019, Section 129(1) of the *Environmental Management and Co-ordination Act* 2012 thus an abuse of the court process.
2. The preliminary objection dated January 31, 2023 similarly sought that the Petition be struck out with costs to the Respondents on the following grounds: -
 - i) That this Court lacks jurisdiction to hear and determine the Plaintiff/Applicant's Application and Petition, both dated January 9, 2023
 - ii) That the Plaintiff/Applicant instituted its Application and Petition without exhausting the relevant statutory dispute resolution mechanisms.
 - iii) The Application and Petition offend and contravene Section 61(3) and(4) of the Physical Planning and Land Use Planning Act No 13 2019
 - iv) The Application and Petition offend and contravene Section 129(1) ad (2) of the Environment Management and Co-ordination Act No 8 of 1999
 - v) The Application and Petition offend and contravene Section 24 and 36 of the *Energy Act* No 1 of 2019
 - vi) The Application is frivolous, vexatious, scandalous and only calculated to waste the limited time of the Honourable Court.
 3. The 1st Respondent filed submissions dated February 7, 2023, in which it was averred that the Petitioner should have lodged the initial complaint at the County Physical and Land Use Planning Liason Committee. It was further submitted that the Court's jurisdiction is appellate and should remain so. Relying on the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR, it was submitted that the Petitioner had bypassed the National Environmental Tribunal and as such the Petition should be struck out.
 4. The 3rd Respondent filed submissions dated February 7, 2023 and echoed the position of the 1st Respondent. It was also their submission that Under Section 36 of the *Energy Act*, the Energy and Petroleum Tribunal was also an available avenue to seek redress prior to filing the Petition.
 5. The Preliminary Objections were opposed by the Petitioner's submissions dated February 14, 2023 in which it was reiterated that the issue for determination is whether the Respondents' actions have infringed on their right to a clean and healthy environment. The Petitioner relied on Articles 42, 69(1) & (2) and 70 of the *Constitution* and Section 13(3) of the *Environment and Land Court Act* to submit that they were entitled to the remedies sought.
 6. Having perused the written submissions, rival affidavits and supporting documents, it is evident that the issues for determination before this Court are;
 - i) Whether this Court has jurisdiction to hear and determine the Application and Petition dated January 9, 2023.



- ii) Whether the Petitioner has acted contrary to the doctrine of exhaustion of remedies?
7. It is a well- established principle that jurisdiction is the anchor of any suit. This is outlined in the landmark case of *Owners of Motor Vessel “Lillians” v Caltex Oil Kenya Ltd* [1989] KLR I where it was held;
- “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 pending other evidence. A court of law downs its tools in respect of the matter before it, the moment it held the opinion that it is without jurisdiction.”
8. This Court is guided by the provisions of Article 162 (2) (b), as read with Articles 165 (5) (b) of the *Constitution*, 2010, and Section 13 of *Environment and Land Court Act* No 19 of 2011 which confers unlimited original and appellate jurisdiction in disputes relating to “the environment and the use and occupation of, and title to land.”
9. In this instance of the suit being a petition, the Court is further guided to apply the provisions under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules 2013*. Where its scope provides that:
- “(4)The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases. (5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the— (a) just determination of the proceedings; (b) efficient use of the available and administrative resources; (c) timely disposal of proceedings at a cost affordable by the respective parties; and (d) use of appropriate technology.”[Emphasis Mine]
10. It is undisputed that the issues raised are hinged upon the use of land on Plot LR No 1159/318/ Nairobi, Dagoretti Road in Karen Area. For this reason, I find that Court has inherent jurisdiction and equally proceed to determine issues placed before it under the Preliminary Objection.
11. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukhisa Biscuits Manufacturing Co Ltd v West-End Distributors Limited* [1969] E A 696 and the case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR where the Court of Appeal held that:
- “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.”
12. A perusal of the orders sought in the Petition clearly enumerates the Petitioner takes issue first with approvals granted by the Respondents. Paragraph 14 and 21 of the Petition outlines the crux of the matter as follows:
- “...the 1st Respondent without the knowledge and participation of the Petitioner issued a Notification of Approval of Development to the 3rd Respondent to construct a petrol station within a residential area in Pollmans Court on Plot LR No 1159/318/Nairobi, Dagoretti Road in Karen area...”



“...The Construction/installation of the petrol station within a residential area violates the Physical Planning Act and Zoning Policy set out in Karen Lang’ata Physical Development Plan which designates the zone as a high quality low density residential area...”

13. Section 61(3) and (4) of the [Physical and Land Use Planning Act](#) (No 13 of 2019) establish an appeal mechanism for aggrieved:

(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. Section 129 (1) of the [Environmental Management and Co-ordination Act](#) provides that: -

1. Any person who is aggrieved by—
 - (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
 - (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder
 - (c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
 - (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
 - (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

15. Section 36 of the [Energy Act](#) establishes the Energy and Petroleum Tribunal that:

“...shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act”

16. The aforementioned provisions set out the jurisdiction of both the County Physical Liaison Committee and the National Environment Tribunal. It is apparent that the two bodies exercise a limited jurisdiction as set out in their respective statutes.



17. In this instance the 1st Respondent and 3rd Respondent allude to fact that the Petitioner has failed to exhaust the dispute resolution mechanism under the Physical Planning, the *Environmental Management and Co-ordination Act* and the *Energy Act* which is nearly mirrored as the main point of contention in the Petition.
18. I align myself with the position of the Supreme Court Kenya in *Communications Commission of Kenya and 5 Others v Royal Medical Services & 5 Others* where it was held that the principle of constitutional avoidance ensures that a Court will not determine a constitutional issue when a matter may properly be determined on another forum.
19. In my opinion, the proper dispute resolution mechanism ought to have been exhausted at first instance vide the available channels at the County Physical Liaison Committee and the National Environment Tribunal respectively. In the alternative, the Petitioner equally ought to have sought for intervention at the Energy and Petroleum Tribunal.
20. Consequently, this Court makes the following disposal orders: -
 - a. The Preliminary Objection dated January 25, 2023 and January 31, 2023 are merited.
 - b. The Petition dated 9th January 2023 is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023

E K WABWOTO

JUDGE

In the presence of: -

Ms Washika for the Petitioner.

Mr Kusow for the 1st Respondent.

N/A for the 2nd Respondent.

Ms Khizi for the 3rd Respondent.

N/A for the 4th Respondent.

Court Assistant; Caroline Nafuna.

