REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC PETITION NO. E003 OF 2021

JASON EDWARD MATUS...1ST PETITONER

CATHERINE ROSEMARY BOND...2ND PETITIONER

-VERSUS-

SUMMIT GEHLOT..1ST RESPONDENT

INTEX CONSTRUCTION LIMITED..2ND RESPONDENT

AND

NATIONAL ENVIRONMENT AUTHORITY...............................1ST INTERESTED PARTY

NAIROBI CITY COUNTYGOVERNMENT................................2NDINTERESTED PARTY

SPRING VALLEY RESIDENT ASSOCIATION..........................3RD INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. Vide Further amended Petition dated 22nd June 2021, the Petitioners herein have sought for the following Reliefs:

i) A declaration that the Respondents proposed development/construction activities(including but not limited to alterations and extensions to the existing house) on the property known as LR.No.7158/148, along Bendera lane, in Upper Spring valley estate in Nairobi city county, without prior licensing and/or compliance with provisions from Environment Management and Cooperation's Act 1999, particularly, failure to carry out environment in compliance with the said environment management and coordination Act, Physical Planning Act and Bylaws, is illegal, unlawful, unconstitutional, null and void.

ii) A conservatory order of injunction to prevent, stop, discontinue or restrain the Respondent and/or anyone claiming under him from proceeding, implementing, carrying out construction of the proposed double story dormitory block, comprising 10 bedrooms and 10 bathrooms and a double storey multi-dwelling comprising two apartments(one on the ground floor and the other on the first floor), with three bedrooms and two bathrooms each or any such development (including but not limited to alterations and extensions to the existing house) on 0.126Acres (0.0519Ha), portion of the property known as L. R. No.7158/148 along Bendera lane in Upper Spring valley estate in the city of Nairobi, without prior compliance with the legal public participation requirements

contrary to Nairobi city development ordinances and zone's regulation, 2004, developed under Physical Planning Act, part (vi) of the Environment Management and Coordination Act and the Constitution Of Kenya.

iii) An Order of certiorari to call, remove, deliver up to this Honorable Court and quash or revoke any decision, permits or EMCA License and/or order granted, if any, to approve the proposed double storey, multi-dwelling comprising of two apartments (one on the ground floor and the other on the first floor with three bedrooms and two bathrooms each or such development (including but not limited to alterations and extensions to the existing house) on 0.126 acres(0.0519Ha) portion of the property known as LR.No.7158/148, along Bendera lane in Upper Spring valley estate, within Nairobi City County, without prior Compliance with legal practice participation requirements contrary to Nairobi city Development Ordinance and zone's regulations, 2004, developed under Physical Planning Act, part (vi) of the Environment Management and Coordination Act and the Constitution Of Kenya.

iv) A conservatory Order be and is hereby issued directing demolition of the constructed double/single storey dormitory block comprising 10 bedrooms and 10 bathrooms, and a double storey multi-dwelling comprising two apartments (one on the ground floor and the other on the first floor) with three bedrooms and two bathrooms each or any such development (including but not limited to alterations and extensions to existing house) on 0.126 acres (0.0519Ha) portion of the property known as L.R. No.7158/148 along Bendera lane in Upper Spring valley estate in the city of Nairobi, without prior compliance with the legal public participation requirements contrary to Nairobi city development ordinances and zone's regulation, 2004, developed under physical planning Act, part (vi) of the environment management and coordination Act and the Constitution Of Kenya.

v) Cost of the further amended Petition.

vi) Any other relief that the Court may deem fit to grant in the circumstances of the Petition.

2. The Further Amended Petition is supported by the Affidavit of Catherine Rosemary Bond sworn on the 22nd of June 2021, but which Affidavit is stated to be in support of the Amended Petition and not otherwise.

3. On the other hand, the further amended Petition is similarly anchored and/or supported by various other Affidavits namely, The Affidavit sworn on the 1st of February 2021, 15th January 2021 and 16th of February 2021, respectively, being Affidavits, which were filed in the Petition.

4. Upon being served with the Further amended Petition, the Respondents herein, filed a Replying Affidavit, sworn by the 1st Respondent on the 22nd of October 2021 and to which the Respondents have attached a net total of 7 annextures, albeit, running into a total 121 pages.

5. On the other hand, the 2nd interested party filed Grounds of Opposition dated the 8th of March 2021, whereby same raised various, albeit numerous legal issues, including the jurisdiction of the Court to attend to/ handle the subject matter of the problem.

6. Though the rest of the interested parties were duly served, same do not appear to have filed any pleadings and/or Responses to the subjection Petition.

DIRECTIONS BY THE COURT

7. On or about the 11th of May 2021, this Honorable Court(differently constituted) delivered and rendered a Ruling pertaining to and/or concerning an Application for conservatory orders, whereby the Honorable Court proceeded to render a conservatory order of injunction to restrain the proposal of the continuation of the proposed project, pending the hearing and the determination of the subject suit.

8. On the other hand, on the same date, the Court proceeded to and issued directions towards the hearing and disposal of the Petition and in this regard, the Court gave directions as concerns the filing and exchange of written submissions, which were ordered to be exchanged within a specific timeline.

SUBMISSIONS BY THE PARTIES

SUBMISSIONS BY THE PETITIONERS

9. The Petitioners herein filed their written submission the 25th of November 2021, whereby same submitted as hereunder;

10. According to the Petitioners, the Honorable court herein is seized of the requisite jurisdiction to entertain and/or adjudicate upon the subject Petition, on the basis of the provisions of **articles 22,23,69,70 and 162 2(b) of the Constitution 2010,** which grant to this Honorable Court, the mandate to interrogate the Petition to and/or concerning violation of the right to clean and healthy environment.

11. It is the Petitioners further submission that the jurisdiction of the Court is further confirmed by the provisions of the Environment Act, 2011, **Sections 13(1) and (3)** which similarly underscore the scope of the Court, to hear and determine any matter related to the environment and land.

12. Owing to the foregoing, the Petitioners thus contended that any further submissions that alleged any further Court is seized of the requisite jurisdiction to hear and entertain the petition is misleading.

13. It was the Petitioners further submission that the extent and scope of this jurisdiction is well captured and stipulated under the Constitution of Kenya 2010 and therefore any Act of parliament, whether it be the Physical Planning Act, (now repealed) and replaced by Physical and Land Use Act, 2019 or the Environment Management and Coordination Act, 1999, can therefore not limit the jurisdiction of the Court.

14. Further, the Petitioners also submitted that this Court differently constituted, has rendered decisions, which have affirmed that this Court is seized of jurisdiction to hear and determine Petitions of this nature, where the right to clean and healthy environment, has been breached, violate and/or is otherwise threatened with violation.

15. Other than the foregoing, the Petitioners also submitted that the issue of jurisdiction had similarly been raised during the hearing of the Application for conservatory orders and that the Honorable court had occasioned to deal with and/or determine the jurisdictional question.

16. In the premises, it is the Petitioners humble request that the issue of Jurisdiction can no longer be reagitated before this Honorable Court and that to do so would amount to sitting on an Appeal on the decision of the Court, which granted the conservatory orders.

17. In support of the foregoing submissions, the Petitioners have quoted various cases of this Honorable Court, albeit differently constituted, including the following cases;

a) Ahmed Bashir Abdi & Another versus The County Government of Wajir and 2 others (2020) eKLR.

b) West Kenya Sugar Company Limited versus Busia Sugar Company Limited and 2 others (2017)eKLR.

c) Nakuru Constitutional Petition No. 13 of 2015 decision of Honorable Justice Munyao.

d) J. S. Muriu versus Tigoni Treasures Limited (2014) eKLR.

18. Based on the foregoing Petitions, the Petitioners have this invited the Court to follow the well beaten path by the various judges and to thus find and hold that this Honorable court has jurisdiction to hear and determine the subject matter.

19. Other than the foregoing submissions, the Petitioners have also submitted extensively on the issue that the impugned development and/or construction has been carried out and/or undertaken without compliance with various provisions of the law, namely, **Section 58 of the Environment Management and Coordination Act (1999),** the provisions of the **Physical Planning Act** and **Nairobi city Development Ordinances and Zones Cooperation 2004,** respectively.

20. Premised on the foregoing, the Petitioners have thus averred, that the disregard and/or violations of the provisions of the law by

the Respondents herein, poses a grave danger to the Petitioners rights to a clean and healthy environment and thus same ought to be averted.

21. Besides, the Petitioners have also submitted that the breaches and the violations of the provisions of the law have been aided by the 1st and 2nd interested parties, who have been complicit and therefore the 1st and 2nd interested parties are also guilty of the breach of the law, which same ought to be upheld.

22. The third aspect of the Petitioners submission relates to the fact that the Petitioners are entitled to the reliefs that have been sought at the foot of the further amended Plaints. Consequently, the Petitioners have implored the Court to grant the reliefs and therefore protect the Petitioner's plea and right to healthy environment.

23. It is also imperative to note that the Petitioners herein have also placed before the Court, a host of the case law, substantially emanating from the Environment and Land Court, on which the Petitioners seek to persuade the Court to grant the Reliefs sought.

RESPONDENTS SUBMISSIONS

24. On their part, the Respondents herein filed their submissions 25th October 2021 and in respect of which the Respondents have optimized three issues for determination.

25. First and foremost, the Respondents have submitted that towards and in respect of the proposed developments, the 2nd Respondent sought and obtained the requisite approvals, licenses and/or permits both from the Nairobi city County Government and National Environment Management Authority, respectively, which therefore allowed same to commence the proposed development.

26. It is the Respondents further submission that the issuance of the said Approval and License have not been challenged before the issuing authorities.

27. Secondly, the Respondents herein have submitted that this Honorable Court is not the first port of call, to deal with and/or attend to complaints relating to the regularity, legality and/or propriety of the approvals and licenses. In this regard, the Respondents have thus contended that this Honorable Court is not the appropriate forum to approve the approvals and licenses issued to the Respondents.

28. In support of the submissions that this Honorable Court is not the right forum to challenge the licenses and various approvals which were issued to and in favor of the Respondents, same have relied on the following authorities;

a) Michael Moragia Nyachae & Another versus Buddies Kisii Limited and 2 others (2016) eKLR.

b) Shiloah Investment Limited versus National Environment Tribunal and 7 others (2018) eKLR.

c) Kenneth Ngure Mwaura & Another versus Rubis Energy Kenya and 2 others (2021) eKLR.

d) Zoa Limited versus Arvind Mani and 2 others (2020) eKLR.

29. Thirdly, the Respondents have submitted that to the extent that the 2nd Respondent obtained the requisite approvals, licenses and permits, same should be allowed to proceed with the proposed development, which in any event, does not contravene and/or violate the Petitioners right to clean and healthy environment, either as alleged or at all.

30. Finally, the Respondents have submitted that the subject Petition is not meritorious and therefore same ought to be dismissed.

31. In any event, the Respondents have further submitted that the Petitioners herein have not exhibited and/or established the manner in which the proposed development, has interfered with and/or otherwise violated the Petitioners right to a clean and healthy environment in terms of **Articles 42 and 70 of the Constitution (2010).** Consequently, it has been submitted that the Petitioners have thus failed to meet and/or satisfy the burden of proof placed upon them under the law.

SECOND INTERESTED PARTIES SUBMISSIONS

32. On her part, the 2nd interested party herein has submitted that the issue pertaining to the approvals issued by her to and in favor of the 2nd Respondent is governed by the provisions of the Physical and Land Use Act (2019), and particularly the provisions of **Section 61** thereof, which provides and/or enumerates the procedure that must be complied with in the event that someone is aggrieved and/or dissatisfied by the grant and/or refusal to grant her approval.

33. In this regard, the 2nd interested party has therefore submitted that the Honorable Court is not seized of Jurisdiction to entertain and/or adjudicate upon the subject dispute, which essentially ought to have been filed before the bodies established under the provisions of **Section 61 of the Physical and Land Use Act, 2019** and **Section 129 of the Environment Management and Coordination Act, 1999.**

34. In support of the foregoing submissions, the 2nd interested party has invited the Court to take into account the decisions in the case of;

a. Republic versus The Attorney General & Another ex-parte Eart Konza Ranching and Farming Cooperative Society Limited (2018) eKLR.

b. Owners of Motor Vessel Lilian S versus Caltex Oil Kenya limited (1989) eKLR.

c. Equity Bank Limited versus Bruce Mutie Mutuku T/A Diani Tour Travels (2016) eKLR.

d. Phoenix of EA Assurance Company Limited versus S.M Thiga T/A Newspaper Service (2019) eKLR.

35. Based on the foregoing decisions, the 2nd interested party, has therefore contended that the Honorable Court has no jurisdiction to entertain and/or adjudicate upon the subject matter, either in the manner sought or at all.

ISSUES FOR DETERMINATION

36. Having reviewed and considered the totality of the pleadings, responses, documents as well as the submissions filed by and/or on behalf of the various parties, I am of the considered view that the following issues are germane for determination;

i) Whether the Petition herein is competent and/or supported by a competent Supporting Affidavit complaint.

ii) Whether this Court is the appropriate forum to interrogate and/or adjudicate on the subject dispute or better still whether this Court is seized of the requisite jurisdiction.

iii) ***Whether the Petitioners are entitled to the Reliefs sought at the foot of the further amended Petition.***

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE

Whether the Petition herein is competent and/or supported by a competent Supporting Affidavit complaint.

37. The subject Petition, namely, the further amended Petition dated the 22nd of June 2021, has been filed or amounted by and on the behalf of the two Petitioners, who have contended that the development by the Respondent within Upper Spring valley estate in the city of Nairobi, is bound to violate, infringe upon and/or otherwise breach their fundamental right to a clean and a healthy environment.

38. Having filed the Petition, it was incumbent upon the Petitioners herein to file a Supporting Affidavit to support the further amended Petition or otherwise have filed on behalf of the Petitioners, a sworn Affidavit, albeit, with the authority of the core

position.

39. In respect of the further amended Petition, it is common ground that the Supporting Affidavit and the various previous Affidavits were sworn by the 2nd Petitioner herein, allegedly and on behalf of the 1st Petitioner.

40. Suffice it to say that where an Affidavit is sworn for and on behalf of the core Petitioner and/or core Plaintiff, the core Petitioner on whose behalf the Affidavit is said to be sworn, is obligated to execute and/or assign an authority to that effect and that authority ought to be filed with the pleadings, in this case, the Petition or the further amended Petition.

41. However, in respect of the further amended Petition, it is important to note that though the Affidavit attached thereto is said to have been sworn with the authority and on the behalf of the 1st Petitioner, but such authority has not been exhibited, attached and/or filed in accordance with the law.

42. Consequently, and in this regard, I find and hold that the Affidavit of the further amendment **(*which itself refers to the amended plaint and not otherwise*),** has only been sworn on behalf of the 2nd Petitioner and not otherwise. In this regard, the Petition by and/or on behalf of the 2nd Petitioner is therefore devoid of any supporting Affidavit or at all.

43. In view of the foregoing, it is my humble finding and holding that the Petition and/or the further Petition, on behalf of the 2nd Petitioner is incompetent then thus a nullity *ab initio.*

44. In support of the foregoing holding, it is imperative to take recognizance of the provisions of **Order 1 Rule 13 of the Civil Procedure Rules 2010** which provide as hereunder:

*"**<u>13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]</u>***

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

*(2) **<u>The authority shall be in writing signed by the party giving it and shall be filed in the case."</u>***

45. The foregoing provisions of the law speaks to and/or concerns an instance and/or instances where there are several Plaintiffs and/or Defendants, but suffice it to note that the said provisions are also relevant to constitutional Petitions and same have been embodied in the **<u>Constitution Of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013.</u>**

46. Consequently, it is my further holding that the said provisions apply to and should therefore be complied with while filing constitutional Petition where there are one or more Petitioners and Constitutional parties, while the subject case not exempted.

47. In any event, compliance with the foregoing provisions of the law is meant to ensure that any party whose name is added and/or contained in legal proceedings is duly aware of the institution and/or commencement of the said civil proceedings and/or Petition.

48. On the other hand, compliance with the said provisions of the law is also meant to avert and/or obviate, instances where names of parties are added into proceedings, in this case the Petition, albeit without the knowledge and/or the blessings of the party whose name has been added.

49. Secondly, it is also common ground that the Affidavit in support of the further amended Petition as well as the previous Affidavits which have been relied upon by the 2nd Petitioner herein, were all sworn and/or taken and/sworn at Montgomery County, Maryland in the United States of America, which is not a commonwealth country.

50. Owing to the fact that the said supporting Affidavit was taken outside the commonwealth, the provisions of **Section 88 of the Evidence Act chapter 80 Laws of Kenya,** therefore ought to have been complied with.

51. My reading of the foregoing provision of the law drives me to the conclusion that, any document that is taken or made and sworn in the United Kingdom and which is generally subvisible before the England Court of Justice, would be admissible in the court of Kenya without proof of authentication or submission of the public body or the Commissioner of Oath from whom the document was taken.

52. To the contrary, where the document or Affidavit was not sworn in the commonwealth countries, the United States of America not being a common wealth country, the proof of such Affidavit and/or declaration in the United States of America must therefore be verified by an Affidavit and/or signature of the notary public must be legalized.

53. Be that as it may the Affidavit in support of the further amended Petition though taken and/or sworn at Montgomery County, Maryland, United States of America, the execution thereover has not been verified by an Affidavit, certificate or otherwise.

54. On the other hand, the signature of the notary public, before whom the Affidavit was taken and/or sworn has similarly not been legalized, either as required under the law or at all.

55. Consequently, it is my finding and holding that the Affidavit in support of the further amended Petition, is therefore invalid and unlawful, to the extent that same is in breach of a substantive position of the law, namely, the provisions of **Section 88 of the Evidence Act chapter 80 of the Laws Of Kenya.**

56. For clarity, the provisions of **Section 88 of the Evidence Act, Laws Of Kenya** provides as hereunder:

"88. When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed–

(a) the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and

(b) the document shall be admissible for the same purpose for which it would be admissible in England."

57. In support of the foregoing legal provision, I am minded to adopt and reiterate the position of the law as captured in the case of **Techno Service Ltd vs Nokia International Oy-Kenya & 3 others [2020] eKLR** where the Court observed as hereunder;

"18. Techno further opposed the application on the ground that the affidavit in support of the application was sworn before a Notary but that there was no evidence before court that the said Notary had the power to carry out the purported notarial act, in other words the notary's signature was not legalized.

19. Justice A. G. Ringera (as he then was) in the case Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another (2001) eKLR considered affidavits sworn outside the Commonwealth and stated:

"...it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position."

20. The learned judge made the above statement after finding that Section 88 of the Evidence Act permitted, as admissible in the Kenyan Court, documents which were admissible in the English court. The learned judge proceeded to find, as stated above, that for any documents from a non-commonwealth country, such as the subject affidavit in this matter, needed to have the Notary's signature and seal attesting proved or authenticated by affidavit or otherwise.

Techno was right to argue that the affidavit of Cynthia Randall was sworn before a Notary public, Amber L. Brazier, in the state of

Washington but there was no authentication of that Notary. That objection by Techno is accordingly upheld."

58. Thirdly, it is also imperative to note that the annextures in support of the three sets of Affidavits which the 2nd Petitioner has adopted and relied upon in terms of paragraph 2 of the Affidavit sworn on the 22nd of June 2021, have not been serialized with the annextures and stamp of the Advocate and/or notary public before whom the Affidavit was notarized or at all.

59. Suffice it to say, that there has been an attempt to comply with the serialization, before one George Wandati, Advocate and Commissioner for Oaths, but it is also important to note that the said Advocate did not attest and/or commission the relevant Affidavit to which the annextures are attached, and neither were the purported annextures introduced to him by the deponent, who was resident at Montgomery County, Maryland as at the 22nd of June 2021.

60. In my humble view the annextures and/or exhibits attached to an Affidavit, for purposes of use in judicial proceedings, are to be serialized under the seal of the Commissioner and/or notary public, before whom the Affidavit is sworn/notarized and not otherwise.

61. It is similarly my finding and holding that where the Affidavit and/or declaration is taken and/or sworn before a particular Commissioner for Oaths and/or notary public, a different Advocate before whom the Affidavit was not sworn cannot seal the annextures.

62. In view of the foregoing, it is my finding and holding that the annextures that have been attached to the Affidavit in support of the further amended Petition, are therefore incompetent. Consequently, same be and are hereby expunged.

63. In support of the foregoing position, it is imperative to revisit and take cognizance of the provisions of **Rule 9 of the Oaths and Statutory Declaration rules,** made pursuant to the **Oaths and Statutory Declarations Act, Chapter 15 Laws Of Kenya.**

64. For ease of reference the provisions of Rule 9 (Supra) are as hereunder:

"All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."

65. On the other hand, I also beg to adopt the decision in the case of **Bosongo Medical Hospital & Another versus Mainstream Welfare Association and others [2016] eKLR** whereby the Honorable Court observed as hereunder;

"Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annextures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits" I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annextures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence."

66. In view of the foregoing tripartite observations, in terms of the foregoing paragraphs, I am disposed to and do hereby strike out the Affidavit in support of the further amended Petition. Consequently, the further amended Petition would remain bare and same therefore becomes incompetent, invalid and void.

67. In coming to the foregoing conclusion, I am alive to the provisions of **Article 159(2) of the Constitution,** but nevertheless it is imperative to take cognizance of the Decision of the Five- bench court of Appeal in the case of **Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 [2013]eKLR** whereby the Honorable Court of Appeal observed as hereunder;

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

ISSUE NUMBER TWO

Whether this Court is the appropriate forum to interrogate and/or adjudicate on the subject dispute or better still whether this Court is seized of the requisite jurisdiction.

68. As pertains to the second issue herein, I propose to breakdown same into three subheadings as hereunder:

a. Whether the issue of jurisdiction was dealt with by the Court at the time of rendition and/or delivery of the Ruling in the respect of the Application.

b. Whether this Honorable Court has jurisdiction to entertain the subject Petition.

c. Whether this Honorable Court is the correct forum to deal with and/or attend to the Petitioners' Complaints.

a.) Whether the issue of jurisdiction was dealt with by the Court at the time of rendition and/or delivery of the Ruling in respect of the Application.

69. The Petitioners' Advocate has contended and/or submitted that the issue of jurisdiction before this Honorable Court to entertain and/or Adjudicate the subject Petition was raised and was canvassed before the Court during the hearing of the Application for conservatory orders.

70. It is the Petitioners further submission that the said issue having been raised before the said Court, same is therefore assumed to have been dealt with and/or disposed of at the interlocutory stage.

71. In the premises, it is the Petitioners submission that the issue of jurisdiction cannot be gone into and/or reagitated afresh before this Honorable Court at this stage.

72. To the contrary, the Respondent has submitted that the issue of jurisdiction, though raised before the Court during the hearing of the Application for conservatory orders, same was not dealt with and/or disposed of by the Court in terms of the Ruling delivered on the 11th of May 2021.

73. Owing to the divergent positions taken by the Advocates for the respective parties, I was obligated to peruse and indeed perused the Ruling of the Honorable Court delivered on the 11th of May 2021.

74. In the course of reading the Ruling under reference, I established that indeed the issue of jurisdiction was raised before the said Court and indeed the Court mentioned the issue of jurisdiction in terms of paragraph 2, which is a reproduction of the Respondents submission but the Court however did not render itself on the said jurisdictional question.

75. To my mind, the Honorable Court remained silent on the critical issue of jurisdiction and in this regard, I find and hold that the silence of the Court does not constitute nor is it tantamount to admission of such a central issue.

76. Besides, I further find and hold that silence on an issue of jurisdiction or failure to determine such an issue, does not by itself confer the Court with jurisdiction.

77. In support of the foregoing pronouncement, I adopt and restate the position elucidated in the decision in the case of **Francis Ndahebwa Twala versus Ben Nganyi [2018] eKLR** where the Court confronted with a similar scenario held as hereunder;

"Accordingly, I come to the conclusion that I have no jurisdiction to hear and determine this appeal. I down my tools and proceed to strike out the appeal herein for being fatally incompetent, with an order that each party shall bear their own costs of this appeal. This order on costs is informed by the fact that this important point that has led to the striking out of the appeal and which ought to have been canvassed by the parties was never mentioned by either of the parties' Advocates yet it is a jurisdictional issue and as jurisdiction cannot be conferred on the court by the parties' silence or ignorance, this court was duty bound to determine it."

78. I come to the conclusion that, the issue of jurisdiction though ventilated before the Court at the interlocutory stage, same was not disposed of and/or determined.

79. Consequently, and in view of the foregoing, the question of jurisdiction remains alive, potent and thus deserving of determination by this Honorable Court.

80. In support of the foregoing proposition, I adopt and restate the position of law as enunciated in the decision in the case of **Kakuta Maimai Hamisi versus Peris Pesi Tobiko and two others [2013] eKLR** where the Court observed as hereunder;

*"Having already found that jurisdiction stands on a higher, firmer and more peremptory position than procedural rules, we can only reiterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance-procedure dichotomy of **Article 159** of the Constitution."*

b.) Whether this Honorable Court has jurisdiction to entertain and/or adjudicate upon the subject Petition.

81. As pertains to whether or not this Honorable Court has jurisdiction to address and/or attend to the subject dispute, it is important to take note of the following provisions, namely;

i. Article 42, 69, 70 & 162 (2)(b) of the Constitution of Kenya, 2010.

ii. Section 13 of the Environment and Land Court Act, 2011.

iii. Section 3(3) & 3(5) of the Environmental Management & Coordination Act, 1999 (2015).

82. I must say that from the reading of the fore-cited provisions, this Honorable Court is conferred and/or vested with both Original and Appellate Jurisdiction to hear all disputes pertaining to and/or concerning Environmental Planning and Protection, Climate Issues, Land use Planning, Title, Tenure, Boundaries, Rates, Rents, Valuation, Minerals and other Natural Resources.

83. It is also imperative to take cognizance of the provision of **Section 13 (3) of the Environment and Land Court Act, Number 19 of 2011,** which provides as hereunder;

"(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution."

84. In my humble view, this Honorable Court has and is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject dispute. In this regard, I share the sentiments of the learned Judges of the Environment and Land Court, whose decisions I have alluded to and which form part of the forceful and indeed persuasive submissions that were rendered by and on behalf of the Petitioners Counsel herein and which submissions I have reproduced extensively herein before.

85. Suffice it to say, that as pertains to the Jurisdiction, I can do no better than to reproduce the decision of the Supreme Court in **Samuel Kamau Macharia vs Kenya Commercial Bank (2012) eKLR,** the import of which I have referred to in the earlier paragraphs.

86. On the other hand, I also beg to echo the sentiments of the Court of Appeal in the decision in the case of **Esther Gachambi Mwangi vs Samuel Mwangi Mbiri (2013) eKLR,** where the Court observed as hereunder;

*"As was stated in the **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya)** Ltd 1989 KLR 1**,** jurisdiction is everything. Without it, a court has no power to take one more step. **In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution,** Constitutional Application No. 2 of 2011; the Supreme Court noted that **The Lillian 'S' case [1989] KLR 1]** establishes that "**jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no***

ambiguity…"

c.) Whether this Honorable Court is the correct forum to deal with and/or attend to the Petitioners complaints.

87. Having found and held that this Honorable Court is conferred and/or clothed with both Original and Appellate Jurisdiction in respect of all, if not, most of the Reliefs sought, the critical question that should therefore be answered, is whether in such a scenario the Honorable Court should exercise and/or assume original jurisdiction.

88. On the other hand, the flipside question would thus be what happens to the Appellate jurisdiction of this Honorable Court, in the event the Honorable Court assumes Original Jurisdiction. Clearly, the Court cannot exercise both jurisdictions, that is, Original and Appellate, simultaneously, and in my humble view, one aspect of Jurisdiction must no doubt give way for the other.

89. Further, it is my humble opinion that like in disputes under the Environmental Management and Coordination act, 1999 (2015), where this Honorable Court is the final Appellate Court, it would deprive any aggrieved party of the undoubted Right of Appeal. In this regard, this Honorable Court would have restricted and/or otherwise diminished the Claimants' Constitutional Rights of access to justice, particularly, the Right of Appeal.

90. I further hold the opinion, the right to access to justice, under Article 48 of the Constitution, 2010, envisages a scenario where a litigant or a citizen, can be able to exhaust all the level of appeals provided for and/or sanctioned under the law. Consequently, this Court while exercising the choice whether to assume the original Jurisdiction or defer same to a statutory body so established, the Honorable Court should be minded to provide the latitude for Appeal.

91. In any event, I wish to state that even where the Honorable Court has both the Original and Appellate Jurisdiction, it does not mean that the Honorable court therefore must render the established statutory agencies and/or bodies irrelevant and/or dysfunctional.

92. In my humble view, a balance must be struck so as to facilitate ordered functioning within the bodies that are conferred with certain statutory mandates and to ensure that same achieve the purpose of their creation and existence.

93. In this regard, I adopt and rely on the Decision of the Court of Appeal in the case of **Kibos Distillers Limited & 4 Others vs Benson Ambuti & 3 Others (2020) eKLR,** where the Honorable Court held as hereunder;

"Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition. It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court."

94. In my humble view and guided by the foregoing decision, I must advocate for exercise of judicial restraint by this Honorable Court in this kind of matters and thus allow the established constitutional and statutory bodies, if any, to appropriate, exercise and carry out their extensive mandate in accordance with enabling statutes, before assuming Jurisdiction in the event upon the lodgment of Appeals, where appropriate.

95. As pertains to the second limb of this issue, which is essentially grounded on the Doctrine of Exhaustion, it is important that Claimants and/or litigants knowing of the existence of alternative dispute resolution mechanism, should proceed to and exhaust same before approaching the Honorable Court.

96. In this regard, I share the strong position that the Honorable Court must be the Forum of the last call and not the Port of first call. Consequently, I beg to exercise deference to the other statutory bodies which have been created with other Statutes and other as pertained to specific instances.

97. In support of the foregoing position, I am compelled to take guidance in the case of **Geoffrey Muthinja Kabiro v Samuel Muguna Henry (2015) eKLR,** where the Honorable Court held as hereunder;

"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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

98. On the other hand, an argument may well be raised, and indeed same has previously been raised that under the provisions of Articles 22, 48 and 258 of the Constitution, 2010, any aggrieved party has a right or access to court and that the said rights are unlimited and thus the Doctrine of Exhaustion constitutes a clog and/or fetter to the enjoyment of the constitutional rights.

99. But, it must remembered that Alternative Dispute Resolution Process, is anchored in the Constitution. Consequently, it behooves all and sundry to read the Constitution in a harmonious manner, and thus ensuring that the Constitutional provisions complement each other and not otherwise.

100. In support of the foregoing observation, I am fortified by the decision of the Supreme Court in **Re The Matter of Kenya National commission of Human Rights, Supreme Court Ref. No. 1 of 2012 [2014] eKLR** where the Supreme Court underscored the Principle of harmonious and/or wholistic interpretation of the Constitution and held as hereunder;

"But what is meant by a 'holistic interpretation of the Constitution"' It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

101. Be that as it may, to the Proponents of the said school of thought, it is sufficient to take note of the observation by the Court of Appeal in the Decision in the case of **Bethwel Allan Omondi Okal vs Telcom (K) Limited (founder) & 9 Others (2017) eKLR,** where the Court held as hereunder;

"The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425."

102. In my humble view, despite the fact that this Court has jurisdiction in terms of the provisions of **Sections 13(1) and (3) of the Environment and Land Court act (2011) Act** as read together with **Section 3(3) of the Environment Management and Coordination Act (1999),** however I find and hold that this Court is not the appropriate forum to challenge the approvals, licenses and the permits issued by the 1st and 2nd interested parties.

ISSUE NUMBER THREE

Whether the Petitioners are entitled to the Reliefs sought at the foot of the further amended Petition.

103. Vide the Further Amended Petition, the Petitioners herein have sought for various reliefs and same were reproduced at the onset of the subject judgment.

104. In view of the foregoing, I am not minded to produce the Reliefs again, but it is important to note that Reliefs (i) and (iii) are reliefs which are well provided for and captured vide the provisions of **Sections 61 (3) and (4) of the Physical and Land Use Planning Act 2019** which provides as hereunder;

"(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."

105. The other relevant provisions are found in **Section 129 of the Environment Management and Coordination Act, 1999,** which provide as hereunder;

"129. Appeals to the Tribunal

(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.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined."

106. Finally, as pertains to the Reliefs seeking Conservatory orders of injunction in line with prayer (ii) and (iii)(aa) of the Further Amended Petition, I wish to point out that conservatory orders are granted during the interlocutory proceedings and not after plenary trial and/or in the final determination, in the manner sought by the Petitioners herein. For clarity, the Ruling of this Court rendered on the 11th of May 2021, disposed of the claim for conservatory orders.

107. In the premises, the conservatory orders which have therefore been sought at the foot of the Further amended Petition are therefore misconceived, ill advised and thus legally untenable.

108. In support of the foregoing observation, I adopt and re-echo the decision of the Supreme Court in the case of **Gitareu Peter Monya versus Dickson Mwenda Kithinji [2014] eKLR,** where the Court observed at paragraph 86 as hereunder;

"Conservatory orders" *bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*

FINAL DISPOSITION

109. In conclusion, I make the following orders;

i. The further amended Petition dated the 22nd of June 2021, be and is hereby Struck out.

ii. Costs of the Petition be and are hereby awarded to the Respondents and the 2nd interested party only.

iii. The conservatory orders of injunction which were issued vide the ruling dated the 11th of May 2021 be and are hereby Vacated and or Discharged.

106. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Mr. Oscar Litoro for the Petitioners

Ms. Impano for the Respondents

Ms. APolot h/b for Mr. Kithi for the second Respondent

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer