



**Bayusuf & 4 others v Marble Inn Developers Limited & another (Tribunal
Appeal 43 of 2022) [2023] KENET 1367 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KENET 1367 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 43 OF 2022
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
NOVEMBER 6, 2023**

BETWEEN

**ABDULHAKIM AHMED BAYUSUF 1ST APPELLANT
KUTBUDIN SADIQALI DUNGARAWALLA 2ND APPELLANT
SALIM HASSANALI BHALLOO 3RD APPELLANT
KISHOR MEGHJI GUDKA 4TH APPELLANT
FARHIYA ABDI YUSUF 5TH APPELLANT**

AND

**MARBLE INN DEVELOPERS LIMITED 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 2ND
RESPONDENT**

RULING

1. On the 5th October, 2023 the Appellants herein filed an application under urgency dated the 3rd October, 2023. The same was accompanied by a motion application and supported by the affidavit of Abdulhakim Ahmed Bayusuf drawn and deponed upon the even date respectively.
2. The said application is seeking the following reliefs:
 1. Spent
 2. THAT pending the hearing and determination of this motion or until further orders, this Honourable Tribunal be pleased to issue an order of temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and/or



anyone claiming under her from proceeding with or carrying out construction on property known as L.R No. 7812/Section 1/Mombasa Mainland without prior compliance with Articles 10, 40, 42 and 69 of the Constitution of Kenya;

3. THAT pending the hearing and determination of the appeal or until further orders this Honourable Tribunal be pleased to issue an order of temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and/or anyone claiming under her from proceeding with or carrying out construction on property known as L.R No. 7812/Section 1/Mombasa Mainland without prior compliance with Articles 10, 40, 42 and 69 of the Constitution of Kenya;
 4. THAT any other or further interim relief or reliefs pending petition as deemed just and expedient by the Court in the circumstances;
 5. Costs of this Application be provided for.
3. The 1st Respondent has opposed the application in its entirety by way of the replying affidavit sworn by Nasir Ali Osman deponed on the 19th October, 2023 and lodged with the Tribunal on the 23rd October, 2023.
 4. The application was canvassed orally on the 2nd November, 2023 by Counsel Mr. Bwire for the Applicants, although Mr. Bwire was appearing alongside Ms Githuku. Mr. Bwire largely restated the grounds set out in the certificate of urgency, motion application and the supporting affidavit of the 1st Applicant. In the end he urged the Tribunal to allow the motion application dated the 3rd October, 2023 by ostensibly stopping the construction on the subject site until the appeal herein is heard and determined.
 5. On the part of the Respondents, there was no appearance on the part of the 2nd Respondent, however the 1st Respondent was represented by Learned Counsel Miss Jullu, who passionately argued against the issuance of the orders sought by the Applicants and similarly her arguments mirrored those set out in the affidavit sworn by Nasir Ali Osman on the 19th October, 2023
 6. The Tribunal has considered the application, the supporting affidavit and the annexures thereto, the response by the 1st Respondent, the rival arguments by respective Counsels and has distilled the following as the issues for determination-
 - a. Whether the Tribunal is clothed with the Jurisdiction to hear and determine constitutional issues raised under Article 10, 40, 42 and 69 of the Constitution of Kenya;
 - b. Whether the Applicant has established a case for granting the orders sought in the application dated the 3rd October, 2023; and
 - c. What should be the appropriate orders to issue in the circumstances.Whether the Tribunal is clothed with the Jurisdiction to hear and determine constitutional issues raised under Article 10, 40, 42 and 69 of the Constitution of Kenya
 7. The crux of the application and indeed the orders sought by the applicants is premised on several constitutional provisions that is to say Article 2, 3, 10, 20, 21, 22, 23 ,24 , 40, 42, 47 and 69 of the constitution. The applicants also cited the constitution of kenya (protection of rights and fundamental



freedom) practice and procedure rules, 2013. This are famously referred to as Mutunga rules, Section 126 and 129 (4) of the Environment Management and Coordination Act (hereinafter referred to as 'EMCA') and Section 55 of the physical planning act. In the prayers the applicants are more succinct, to wit -

THAT pending the hearing and determination of this motion or until further orders, this Honourable Tribunal be pleased to issue an order of temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and/or anyone claiming under her from proceeding with or carrying out construction on property known as L.R No. 7812/Section 1/Mombasa Mainland without prior compliance with Articles 10, 40, 42 and 69 of the Constitution of Kenya;

THAT pending the hearing and determination of the appeal or until further orders this Honourable Tribunal be pleased to issue an order of temporary injunction to forthwith prevent, stop, discontinue or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and/or anyone claiming under her from proceeding with or carrying out construction on property known as L.R No. 7812/Section 1/Mombasa Mainland without prior compliance with Articles 10, 40, 42 and 69 of the Constitution of Kenya (emphasis our);

8. The 1st Respondent vehemently opposed the premises of the application on the constitutional provisions cited hereinabove. In particular, the 1st Respondent through Learned Counsel Miss Jullu argued that the Tribunal has no jurisdiction to hear and determine questions as to the alleged breach of constitutional rights and freedoms as doing so will be ultravires, irregular, unlawful and bereft of any legal consequences.
9. To answer to this issue, this Tribunal is guided by the Court of Appeal in the case of Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others, held as follows:

'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.'
10. Along the same breadth, in the case of Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR, it was held that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.
11. Gleaning from authorities cited hereinabove, our view is that the Tribunal as a creature of a statute must, in discharging its mandate, uphold and defend the constitution and the law. That calling is expressly so provided for in Article 3 of the Constitution to the extent that every person, as defined in Article 260 of the Constitution, has an obligation to respect, uphold and defend the constitution. We are also in agreement and bound by the decision of Mrima J. in the case of Stephen Moseto Mirambo & another vs. IEBC & others constitutional Petition No. E488 of 2021 Consolidated with Petition No. E465 of 2021, where the Learned Judge held as follows:

'This Court, therefore, takes great exception to the position that Tribunals, quasi-judicial bodies, state organs or any other person, except Courts of law, cannot determine whether the Constitution and the law is infringed. That cannot, by any shred of imagination, be correct. The reason is simple. Article 3 of the Constitution and in mandatory terms, obligates every person, as defined in Article 260 of the Constitution, to respect, uphold and defend the constitution.

In discharging the said constitutional-calling, the persons, which include Tribunals and quasi-judicial bodies, must apply the Constitution and the law. A body which applies the Constitution and the law



definitely has the capacity to understand and ascertain whether the very Constitution and the law it is supposed to uphold it is infringed. That can only be the reasonable rationale since the converse is to suggest that the persons do not understand and cannot therefore respect, uphold and defend the Constitution and the law. Such a finding will be in itself unconstitutional. (emphasis ours')

Consequently, it is our finding that the jurisdiction of the Tribunal cannot be ousted merely because the Appellant has alleged violation of their rights under Articles 10, 40, 42 and 69 of the Constitution of Kenya.

12. Granted, the appellant has set out the various constitutional breaches and of which they call upon the Tribunal to interrogate and remedy with appropriate reliefs. Curiously, the main appeal dated the 7th November, 2022 is neither premised on the said provisions of the Constitution or remotely mentioned. It is trite law that an application must be premised on a suit. We also add that a golden thread must be established as to the law forming the substratum of the suit and the law upon which a subsequent application is premised. Indeed, the main suit are the legs upon which an application stands on. Accordingly, introducing an application founded on the constitutional breaches which in itself is not founded in the main appeal is untenable. We therefore decline an invitation at the interlocutory stage to entertain the constitutional issues raised therein although for the record we have established that we would be possessed with the jurisdiction to consider and determine the same.

Whether the Applicant has established a case for granting the orders sought in the application dated the 3rd October, 2023

13. The applicants herein have presented their application in a rather convoluted manner, on one hand they have made averments touching on a nonexistent 3rd Respondent, yet there is no such a party impleaded in the main appeal and/or application. The Tribunal read through the application with some difficulty. Nonetheless, it can be deciphered that the applicants are seeking a temporary injunction restraining the 1st Respondent from continuing with construction. In order to determine this issue, this Tribunal is enjoined to consider the well settled principles governing the grant of interlocutory injunctions as stated in the case of *Giella –vs- Cassman Brown* (1973) EA 358:

‘The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, a Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiff might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.’

14. Further, in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR; the Court of Appeal explained that all the three conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially. The Court held as follows:

‘..If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.’



15. In determining whether the Appellant has established a prima facie case with a probability of success, we shall be guided by the holding of the Court in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where ‘a prima facie case’ was defined as:
‘a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.’
16. We note that the Appellant contends that 1st Respondent is inter alia putting up 42 apartments without proper social amenities including sewer system, water supply, access road and proper drainage, the applicants further allege that the 1st Respondent has not provided proper mechanism to caution the appellants from the noise and air pollution as a result of the mega development. The applicants also question the approval process and allege that effective public participation was not conducted prior to the issuance of the approvals and commencement of the development of the project.
17. The issues sited in paragraph 16 inter alia, form the basis of the 1st Respondent’s response. However, a careful analysis of the 1st Respondent’s rely, the Tribunal notes that the 1st Respondent did not annex any material to support the averments therein. We would have expected that at the very least the 1st Respondent would have provided material on the steps taken in obtaining the impugned approval from the 2nd Respondent, the measures taken to disabuse the notion that there shall be strain on social amenities or to even deny and indeed demonstrate that there is no noise and air pollution as a result of the mega development or mechanisms of cautioning the applicants from the vagaries of the same.
18. At this stage the Tribunal ought not to go into the merits of the issues raised as that’s the preserve of the main appeal but on the material presented before us we are persuaded that a prima facie case with a probability of success has been established.
19. Along the same lines, this Tribunal forms the view that environmental degradation and /or damage cannot adequately be compensated by an award of costs or damages. And even in the face of uncertainty the scales of environmental justice tilt towards caution and/or prevention and therefore the balance of convenience favours the applicants.

What should be the appropriate orders to issue in the circumstances

20. In view of the above analysis and findings, the conclusion becomes irresistible that the Appellants’ Notice of Motion Application dated 3rd October, 2023 is merited.
21. In our view, the Tribunal in the circumstances is empowered by Section 129(3) to determine the nature of orders to issue.
22. Section 129 (3) of the Act confers power upon the Tribunal to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. While interrogating the powers of the Tribunal under the said provision, the Court of Appeal in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR, held as follows:
‘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’
23. Accordingly, we ORDER and DIRECT as follows-



- a. Pending the hearing and determination of the instant appeal that shall be a temporary injunction to forthwith prevent, stop, discontinue, or restrain the 1st Respondent, whether by itself, servant, agents, officers, contractors and/or anyone claiming under its name from proceeding with or carrying out construction on property known as L.R No. 7812/Section 1/Mombasa Mainland;
- b. The Respondents are hereby directed to file their responses and trial bundles within 14 days;
- c. The matter to be heard and determined within 45 days failure of which the orders in (a) shall automatically lapse.
- d. The matter to be mentioned within 14 days to confirm compliance and fix a hearing date.

DATED AND DELIVERED AT NAIROBI, THIS 6TH DAY OF NOVEMBER 2023

EMMANUEL MUMIA.....CHAIRMAN

WINNIE TSUMA.....VICE-CHAIR

KARIUKI MUIGUA.....MEMBER

DUNCAN KURIA.....MEMBER

RONALD ALLAMANO.....MEMBER

