



Kahawa Sukari Residents & Plot Owners Welfare Association & 7 others v Kamau & another; County Executive Committee Member (CECM) Lands, Housing Physical Planning Municipal & Urban Development, Kiambu County Government & 5 others (Interested Parties) (Environment & Land Case 103 of 2022) [2023] KEELC 17154 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 103 OF 2022**

**JG KEMEI, J
APRIL 27, 2023**

BETWEEN

KAHAWA SUKARI RESIDENTS & PLOT OWNERS WELFARE ASSOCIATION 1ST PLAINTIFF
SAMUEL MWANIKI WAIHAKA 2ND PLAINTIFF
EDWARD KIGANJO 3RD PLAINTIFF
MICHAEL MWITI 4TH PLAINTIFF
JOSPEH KARIUKI 5TH PLAINTIFF
MARY MUTHECHI 6TH PLAINTIFF
DENIS MUGENDI 7TH PLAINTIFF
JAMES CHUMBA 8TH PLAINTIFF

AND

DAVID NGOGE KAMAU 1ST DEFENDANT
ANNE WANJIRU 2ND DEFENDANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER (CECM) LANDS, HOUSING PHYSICAL PLANNING MUNICIPAL & URBAN DEVELOPMENT, KIAMBU COUNTY GOVERNMENT INTERESTED PARTY
CHIEF OFFICER LANDS, HOUSING PHYSICAL PLANNING, MUNICIPAL & URBAN DEVELOPMENT KIAMBU COUNTY GOVERNMENT INTERESTED PARTY



CHIEF OFFICER ADMINISTRATION & HEAD OF PUBLIC SERVICE KIAMBU GOVERNMENT INTERESTED PARTY
DIRECTOR PHYSICAL PLANNING & URBAN DEVELOPMENT, KIAMBU COUNTY GOVERNMENT INTERESTED PARTY
COUNTY GOVERNMENT OF KIAMBU INTERESTED PARTY
KAHAWA SUKARI LIMITED INTERESTED PARTY

RULING

1. The Plaintiffs moved this Court *vide* a plaint filed on the 14/9/2022 seeking inter alia the following orders;
 - a. A temporary injunction do issue restraining the Defendant, their agent, proxies, employees or whomsoever acting under their instructions from continuing with the construction in land title number Ruiru Kiu Block 3/3019 pending the hearing and final determination of this suit.
 - b. A permanent injunction do issue restraining the Defendants, their agent, proxies, employees or whomsoever acting under their instructions from developing multi dwelling houses in land title number Ruiru Kiu Block 3/3019.
 - c. A declaration that the development by the Defendants of multi dwelling premises in the suit property is in violation of the building regulations and infringes or are likely to infringe the Plaintiffs' right to property as protected by Articles 40 of the Constitution of Kenya.
 - d. An order directed at the 1st and 2nd Defendants to demolish all illegal and/or irregular structures in land title number Ruiru Kiu Block 3/3019 and to ensure that construction work in the said suit premises comply with the law.
 - e. An order directed at the 1st to 5th Interested Parties to demolish all illegal and/or irregular structures in land title number Ruiru Kiu Block 3/3019 and to ensure that construction work in the said suit premises comply with the law.
 - f. An order do issue against the 1st to 5th Interested Parties and any person working under them from regularizing the irregular and illegal construction in land title number Ruiru Kiu Block 3/3019 and/or issuing an occupational certificate.
 - g. The Officer Commanding Station, Kahawa Sukari Police Station be directed to aid in enforcing the orders issued by this Honourable Court.
 - h. Costs of this suit from the date of filing the same until full payment.
 - i. Any other relief that the Court may deem fit to grant.
2. The case of the Plaintiffs is that the 1st and 2nd Defendants are the registered owners of the RUIru Kiu/ Block 3/3019 (suit land). That the suit land is within Kahawa Sukari estate, which is a single occupancy residential controlled development estate. That the Defendants are constructing multi-dwelling houses on the suit land in violation of the zoning regulations and without approval of the 1st – 6th Interested Parties. That the Defendants were issued with an enforcement notice under Section 72 (1) and (2) of The Physical Land Use and Planning Act (PLUPA) on the November 17, 2021 asking them to stop



- further constructions immediately, seek development permission and failure to which they reinstate the land to its original state.
3. That the Defendants did not appeal against the said enforcement notice to the County Planning & Land Use Planning Liaison Committee within 14 days as required under Section 72(3) of the PLUPA nor adhered to the notice and have continued the construction of the multi dwelling units exposing the Plaintiffs to harm and prejudice. That despite writing to the 4th Interested Party notifying her of the breach of the enforcement notice and asking her to act under Section 57(4) of the PLUPA, the said 4th Interested Party has failed to do so.
 4. The Plaintiffs aver that though they have filed an appeal with the County Physical Land Use Planning Liaison Committee, the provisions of Section 72(3) & 4, 78, 79 & 80 of the PLUPA do not apply to them. In addition, the Plaintiffs aver that the Liaison Committee though constituted is yet to be operationalized and has not been able to deal with complaints as required under Section 78, 79 and 80 of the PLUPA. As a result, this Court was urged to invoke its original jurisdiction and issue appropriate orders.
 5. The Plaintiffs aver that their rights under Article 47 of the Constitution of Kenya. Article 26 of the Constitution of Kenya will be infringed unless the 1st and 5th Interested Parties are compelled to perform their mandate as donated by PLUPA.
 6. Simultaneously, the Plaintiffs filed a Notice of Motion dated the 14/9/2022 seeking the following orders;
 - a. Spent.
 - b. That pending the hearing and determination of this Application inter-partes a temporary injunction does issue restraining the Defendant, their agent, proxies, employees or whomsoever acting under their instructions from continuing with the construction in land title number Ruiru Kiu Block 3/3019.
 - c. That pending the hearing and determination of this suit, a temporary injunction does issue restraining the Defendant, their agent, proxies, employees or whomsoever acting under their instructions from continuing with the construction in the land title number Ruiru Kiu Block 3/3019.
 - d. That the Officer Commanding Station, Kahawa Sukari Police Station be directed to aid in enforcing the order herein.
 - e. That the costs of this Application be awarded to the Plaintiff/Applicant.
 7. In supporting the Plaintiffs' Motion, the 6th Interested Party filed a Replying Affidavit on the 1/11/2022 sworn by one Edward Rurii Kanjabi who deponed that he is one of the Directors of the 6th Interested Party and has the authority of the other Directors to so swear the Affidavit on their behalf.
 8. The deponent averred that all the plots in Kahawa Sukari were sold by the 6th Interested Party with covenants of a single occupancy residential house in the agreements and addendums.
 9. That the purchasers were issued with construction guidelines by the 6th Interested Party at the time of purchase of the plots. The guidelines stipulate that developers are to build single dwelling units. These guidelines comprised the special conditions contained in the leases. The approvals for development are approved by the 5th and 6th Interested Parties in line with the said guidelines.



10. In response, the Defendants filed a Preliminary Objection dated the October 31, 2022 and another on the 21/2/2023 on the following grounds;
 - a. The Court lacks jurisdiction to entertain the suit at this stage as the same is the preserve of the County Liaison Committee.
 - b. The suit is resjudicata, this Court having pronounced itself in ELC No 148 of 2021 and ELC 135 of 2021.
 - c. The suit is premature and an abuse of the process of the Court.
11. On the 27/2/2023 the parties elected to have the Notice of Motion and the Preliminary Objection determined together and undertook to file written submissions. By the time of writing this Ruling only the Plaintiffs and the 6th Interested Party had complied.
12. I have read and considered the written submissions on record. I thank counsel for their highlights contained therein.

Analysis and Determination

13. I shall determine the Preliminary Objection first for obvious reasons. If it succeeds there will be no need to determine the Application. Conversely if it fails I shall then embark on the Application.
14. The parameters for consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
15. At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”
16. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
17. The Defendants have challenged the jurisdiction of this Court to hear and determine this matter on two grounds; that the matter should be referred to the Liaison Committee and that the suit is resjudicata going by the previous decisions of the Court on the issue. I concur that resjudicata is a bar to jurisdiction of a Court. Jurisdiction is a matter of law and I therefore find that the Preliminary Objection raises a pure point of law.



18. The next issue is whether the Preliminary Objection is merited.
19. Jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the Court to pause and determine the issue before proceeding with the case.
20. The Supreme Court of Kenya in the cases of *In Re The Matter of the Interim Independent Electoral Commission* S.C., Constitutional Application No. 2 of 2011 [2011] eKLR and in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* SC Application No 2 of 2012; [2012] eKLR, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the *Constitution*, statute law or both. It stated:

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. 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.”

21. This Court’s original and appellate jurisdiction flows from Article 162 (2)(b) of the *Constitution* of Kenya read together with Section 13 (2) of the *Environment and Land Court Act* as follows:-

“(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.”

22. Under the above provisions this Court enjoys original jurisdiction with respect to matters land use and planning.

23. Section 61(3) of the *Physical and Land Use Planning Act* provides that the primary adjudicatory body vested with jurisdiction to adjudicate disputes of this nature is the County Physical and Land Use Planning Liaison Committee. It states;

“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.”



24. Section 61(4) of PLUPA states as follows on the jurisdiction of this Court in disputes relating to the development and land use planning:
- “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.”
25. Section 72 (3) of PLUPA provides as follows;
- “Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.”
26. Further Section 78 of the said PLUPA sets out the functions of the Liaison Committee as follows;-
- “Functions of the County Physical and Land Use Planning Liaison Committee
- The functions of the County Physical and Land Use Planning Liaison Committee shall be to—
- a. hear and determine complaints and claims made in respect to Applications submitted to the planning authority in the County;
 - b. hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the County;
 - c. advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
 - d. hear appeals with respect to enforcement notices.”
27. From the foregoing it is evident that the functions of the Liaison Committee have been set out clearly. In this case the Plaintiffs filed a complaint with the said committee vide their letter dated the 5/9/2022 and followed with an appeal form received by the County Department on the 12/9/2022. In the two documents the Plaintiffs complaint was with respect to the Defendants’ carrying out developments without approvals and cited the enforcement notice issued by the County to the Defendants.
28. I hold that the Plaintiffs’ complaint falls within the functions of the Liaison Committee as set out in Section 78 (a) of the PLUPA.
29. Although I hold the view that this Court enjoys original jurisdiction, I am guided by the Supreme Court of Kenya decision in Kibos Distillers Limited & 4 Others Vs Benson Ambuti & 3 Others [2020] eKLR where the Court held that even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other organs that have been given mandate to determine disputes.
30. The Preliminary Objection succeeds and therefore I find no necessity in determining the issue of *resjudicata* and the Application dated 14/9/2022 as they are now moot.
31. Each party to meet their own costs. Consequently the suit be and is hereby struck out.
32. Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of ;

Ms. Maina HB Nyakundi for 1st – 8th Plaintiffs

1st and 2nd Defendants – Absent

1st – 5th Interested Parties – Absent

Ms. Maina HB Chepyego for 6th Interested Party

Court Assistants – Kevin/Lilian

