



**Sheth v Ahmaduna Housing Properties Limited (Environment & Land  
Case E010 of 2023) [2023] KEELC 16932 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E010 OF 2023**

**SM KIBUNJA, J**

**APRIL 26, 2023**

**BETWEEN**

**DEVENDRA JAKUMAR SHETH ..... PLAINTIFF**

**AND**

**AHMADUNA HOUSING PROPERTIES LIMITED ..... DEFENDANT**

**RULING**

[Notices Of Motion Dated The 13<sup>th</sup> And 17<sup>th</sup> February 2023 And Notice Of Preliminary Objection Dated 16<sup>th</sup> March 2023]

1. The plaintiff moved the court vide the notice of motion under certificate of urgency dated the February 13, 2023 seeking for orders inter alia that pending the hearing and determination of this suit, an order of injunction do issue to restrain the defendant from continuing with the construction on Mombasa/Block XV11/70; mandatory injunction compelling the defendant to cause repairs to the plaintiff's damaged perimeter wall, main gate, water pipes, sewer, electricity wiring and garage using good workmanship and materials; and mandatory and prohibitory injunction orders be issued compelling the defendant to remove all the construction materials from the plaintiff's property and or from the points of access to the plaintiff's property, and prohibiting the defendant from placing construction materials within the plaintiff's property and or at the points of access to the plaintiff's property. The application is based on the thirteen (13) grounds marked (a) to (m) on its face and supported by the affidavit sworn by Devendra Jakumar Sheth on the February 13, 2023. It is the plaintiff's case that he owns, jointly with his mother and brother, Mombasa/Block XV11/69 that borders Mombasa/Block XV11/70 that belongs to the defendant. On their plot is a one storied building with the upstairs rented out to tenants and the ground floor being used by his family. That the defendant is constructing a high rise building on his plot without proper approvals from NEMA and the County Government of Mombasa. That further, the defendant has dug deep excavations close to his plot weakening his property, destroyed water pipes and sewerage system, and damaged the perimeter fence



thereby compromising the security of his property among others. The plaintiff's family and tenants have been forced to seek accommodation elsewhere due to the noise, dust and debris emanating from the construction activities at the defendant's plot. The plaintiff has attached a copy of the title deed, surveyor's report dated February 7, 2023 and five photographs to the supporting affidavit. The duty judge gave directions on the February 14, 2023 inter alia that the application be served for inter partes hearing on the March 1, 2023 before this court. However, the plaintiff filed another notice of motion under certificate of urgency dated the February 17, 2023 primarily seeking for review of the orders of February 14, 2023 and for grant of temporary orders of the prayers sought in the earlier application pending the inter partes hearing of that application. The application came before me on the February 20, 2023 and I declined to issue any interim orders and instead directed that the orders of February 14, 2023 be complied with and that the two applications be dealt with together.

2. When the applications came up for hearing inter partes on the March 1, 2023, the counsel for the defendant sought and was granted more time to file and serve a reply to the application. The court also granted temporary injunction in terms of prayer 2 of the notice of motion dated the February 13, 2023 till the next hearing date.
3. The application is opposed by the defendant through the replying affidavit sworn by Sheikhnur Muhumed Mohamed, one of the directors of the defendant, on the March 3, 2023. It is the defendant's case that it had obtained the necessary approvals for the development being carried out on its plot, and that the plaintiff had vacated his plot by the time the construction commenced. That the deep excavations have now been covered and the perimeter wall reconstructed. The defendant denied having destroyed water pipes, sewerage system or stock piling materials on the road reserve. That the defendant has undertaken to restore the damaged wall as per the agreement of December 7, 2022 and this suit was prematurely filed. The defendant also filed the notice of preliminary objection dated the 16<sup>th</sup> March 2023 raising three grounds that the court is without jurisdiction in light of sections 57 to 61 of the [Physical and Land Use Planning Act](#), 2019 as read together with the County Government Act, 2012, section 129 of the [Environment Management and Co-ordination Act](#), and section 8 of Part 2 of the Fourth Schedule of the [Constitution](#) of Kenya, 2010 as read with section 29 of the [Physical Planning Act](#) No. 6 of 1996. That filed with the notice of preliminary objection is a list of authorities dated the March 16, 2023 to which is annexed a copy of the case of [Edward Nduati Huhu & 2 others v John K Wambugu & others](#) [2022] eKLR, and [Lenkishon Kimirei Maika & 2 others v AM Kalio](#) [2018] eKLR.
4. The matter came up again for hearing on the March 27, 2023, when the counsel for both parties agreed to have the preliminary objection and the applications be dealt with together. The directions on filing and exchanging submissions were then given.
5. The learned counsel for the plaintiff filed their submissions dated the April 4, 2023, but as I prepare this ruling today the April 12, 2023, none has been filed by counsel for the defendant and the timeline has long passed.
6. In their submissions, the learned counsel for the plaintiff indicated that the application dated the February 17, 2023 is subsumed by the application dated the February 13, 2023, that he will submit on. The counsel pointed out that it has not been contested that the plaintiff's property was well secured with a permanent perimeter fence with a metallic gate accessing Narok Road. The counsel pointed out that the plaintiff's complaints over the defendant's construction for not being consulted when the EIA was being prepared, yet he owns the neighbouring plot. That though the defendant has availed a copy of the NEMA license, he has cunningly left out the EIA report that would have shown that he and other neighbouring plot owners were not consulted, and therefore the NEMA license was fraudulently obtained. That the photographs attached to the plaintiff's affidavits shows the building materials stock piled by the defendant in the plaintiff's property resulting to damages to the building



and making it inhabitable. The counsel submitted that though the defendant has a right to enjoy the use of his plot, he has failed to take enough care and attention in his development thereby adversely affecting the plaintiff's right to quiet enjoyment and peaceful occupation of his property, as enshrined under article 40 of the Constitution and section 26 of the Land Act. Pointing out that development must proceed on the basis of sustainability, counsel submitted that the defendant's construction could only have taken place after a proper public participation in the procurement of NEMA license, and shielding of the development on the defendant's plot to control the dust and other debris likely to adversely affect neighbouring properties. The learned counsel cited the decisions in the cases of John Rylands v Thomas Fletcher and Giella v Cassman Brown & Co Ltd (1973) EA 358. On the preliminary objection, the counsel submitted that it was misconceived as this suit is about the plaintiff's use of and enjoyment of his property and under article 162 (2) (b) of the Constitution, jurisdiction lies with this court. That Constitutional provision on jurisdiction cannot be negated by sections 57 to 61 of the Physical Planning & Land Use Act. That had the case been about the development on the defendant's plot, jurisdiction would have been with the Liaison Committee and or the National Environment Tribunal. That as the procedure set out in the Physical & Land Use Planning Act would only apply to the developmental works on the defendant's plot, and not the damages and suffering occasioned to the plaintiff's property and occupants, then the preliminary objection is without merit. That the remedies under the Physical & Land Use Planning Act do not include general damages and mandatory injunction, which can only be issued by this court. The counsel cited the decision in the case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1, where the Court of Appeal stated that jurisdiction is everything, and submitted that improper denial of jurisdiction amounts to a grave injustice for citizens are entitled under articles 10,47, 50, 159 and 165 of the Constitution to have a reasonable and legitimate expectation that when they present grievances to the court, that those courts will not divest themselves of the jurisdiction that the people of Kenya gave them, as that would amount to an abdication of duty contrary to articles 10 and 47 of the Constitution. That the defendant has not controverted any part of the photographic evidence presented. The learned counsel cited the decision in the case of Timsales Limited v Harun Thuo Ndungu [2010] eKLR, where it was held that where a party fails to rebut evidence tendered by the other party, such failure gives rise to a presumption in law that the evidence given represents the true position in the matter. The counsel submitted that the true position is that the defendant's construction works amounts to a tort known as nuisance. The counsel cited the case of Hurlingham Park Ltd v Kings Developers Ltd & another [2020] eKLR, with similar facts to the instant case where damages for nuisance were granted as the development had been completed.

7. The issues for the determination by the court are as follows;
  - a. Whether the court has jurisdiction to hear and determine the issues raised in the suit.
  - b. Whether the plaintiff has met the threshold required for any of the injunction orders sought to issue.
  - c. Who pays the costs of the applications.
8. The court has carefully considered the grounds on the notice of motion, preliminary objection, affidavit evidence, submissions by counsel, superior courts decisions relied on and come to the following determinations;
  - a. The plaintiff commenced this suit through the plaint dated the February 13, 2023 that among others seeks for declaration that the defendant's construction on Mombasa/Block XV11/70 infringes on the plaintiff's rights of access, privacy, quiet possession and enjoyment of their property Mombasa/Block XV11/69; injunction restraining defendant from further



construction on Mombasa/Block XV11/70 until and unless proper approvals and permissions are obtained from NEMA and County Government of Mombasa after public participation; mandatory injunction compelling the defendant to cause repairs to the plaintiff's main gate, boundary wall and garage and or compensate the plaintiff upon assessment of the damage; general damages to be assessed by the court; costs of the suit plus interest on costs and damages at court rates. Filed contemporaneously with the plaint is the notice of motion dated the February 13, 2023 seeking for the prayers set out in (1) above that is the subject matter of this ruling.

- b. The defendant has questioned the court's jurisdiction through the notice of preliminary objection dated the March 16, 2023, and it is imperative that issue be decided first, for reason that if upheld, then the court would not need to consider the other issues of whether or not to grant any or all the injunction orders sought. Though the defendant did not file any submissions, they had filed a list of authorities in support of the preliminary objection attaching copies of the two decisions. In the case of *Edward Nduati Hubu & 2 others v John K Wambugu & others* [supra], the court upheld the preliminary objection raised on jurisdiction and remitted the matter to the County Physical and Land Use Liaison Committee and NET, while in *Lenkishon Kimirei Malka & 2 others v AM Kalio* [supra] the court made several findings among them that where the terms of the approvals have not been complied with, then there are remedies for addressing such a situation under the *Physical Planning Act*, and declined to grant the prayer for injunction.
- c. The plaintiff's counsel has submitted that this court has jurisdiction as the suit is about the use of and enjoyment of his property, which he and his family have enjoyed for more than 50 years and now being jeopardized by the development on the defendant's plot. That the remedies sought by the plaint can only be dealt with by this court, and that the defendant has already submitted itself to the court's jurisdiction by filing a replying affidavit and unconditional memorandum of appearance. That having considered the matters of facts as presented by both sides, and the pleadings filed especially paragraphs 9 to 23 of the plaint dated the February 13, 2023, it is apparent the genesis of this suit is the development being carried out by the defendant on plot number Mombasa/Block XV11/70. The plaint shows that the plaintiff's complaints are inter alia that;
  - i. The construction is illegal as it is being undertaken in breach of the law;
  - ii. Is being done without proper authorizations and permissions from NEMA and County Government of Mombasa;
  - iii. Was commenced without public participation and the plaintiff was not consulted yet his property is next to the construction site;
  - iv. No site board giving the particulars of the architect, quantity surveyor, contractor and approvals has been erected;
  - v. Failed to take building precautions to prevent dust, debris and machinery noise from interfering with his use of his property;
  - vi. The construction works is being is causing damages to his property and promises to repair are not honoured; and
  - vii. Materials are being placed on his property and in a manner hindering his access.

The plaintiff's first two prayers (a) and (b) at paragraph 24 of the plaint are for the defendant's construction on Mombasa/Block XV11/70 to be declared unauthorized, illegal and an infringement



to his property rights; and permanent injunction restraining the defendant from further construction on the said plot unless and until proper approvals and permissions are obtained from NEMA and County Government of Mombasa after public participation. The next three prayers (c) to (e) are for mandatory injunction, damages, costs and interests. That noting that the parties have had some engagements to discuss on the issue of damages caused to the plaintiff's property, then the court has no difficulty in finding that the plaintiff's primary prayers are (a) and (b) and the others are ancillary. That it follows that the main issues for determination in this suit undoubtedly includes whether or not the defendant's development on Mombasa/Block XV11/70 has, before commencement, received all the necessary statutory approvals and or permissions from NEMA and County Government of Mombasa; and whether the construction is being undertaken in compliance with the law.

d. In the cases of *Edward Nduati Huhu & 2 others v John K Wambugu & others* [supra], the plaintiffs had in their plaint among others sought for injunction restraining the defendants from continuing with the construction works on their premises until after they regularize the development in accordance with the set rules and regulations. The plaintiffs had also filed an application for orders inter alia that the defendants be restrained from continuing with the construction, and interested parties be restrained from issuing approvals to the defendants pending the hearing and determination of the suit. The 1<sup>st</sup> defendant had also filed an application to be struck out of the suit, while the 2<sup>nd</sup> defendant raised preliminary objection on the court's jurisdiction that was reportedly later abandoned. The 1<sup>st</sup> interested party raised their preliminary objection that the plaintiffs' claims relates to matters regulated under the Physical *Planning and Land Use Act* 2019, and that matters to do with EIA license should be raised with the NET. The applications and preliminary objections were heard inter partes, and in its ruling, the court made reference to several superior courts decisions and among others held that;

- “48. The power to undertake development permission is given to the County Governments under the *County Governments Act*, 2012. Section 57 of the *Physical and Land Use Planning Act* 2019 prohibits a person from carrying out any development without development permission and goes ahead to prescribe sanctions.
49. the Act provides an elaborate procedure to be followed by anyone applying for development permission including dispute resolution mechanism in sections 58 – 61 of the Act.
50. section 61 (3) of the *Physical and Land Use Planning Act* 2019 provides that an Applicant aggrieved by the decision of a County Executive member regarding an application for development permission may appeal against the decision to the County Physical and Land Use Liaison Committee. If dissatisfied the Applicant may appeal to the ELC Court.
51. The plaintiffs have admitted that they did not follow, albeit being the law, citing the reason that the said committee had not been established. The court has taken judicial notice that the Planning and Liaison Committee is in place see the Kenya Gazette notice dated the 28/7/2021. There is no reason why the dispute should not be submitted to the committee for hearing and determination.



52. Applying the above principles of judicial abstention as expounded by the Supreme Court of Kenya above, I find that this court has no jurisdiction to hear and determine the dispute in the first instance and I therefore down my tools and take no further step.

53. The preliminary objection is upheld .....

And in the case of *Lenkishon Kimirei Maika & 2 others v AM Kalio* [*supra*], the court declined to grant the plaintiffs' application for injunction to restrain the defendant from continuing with construction said to be carried out contrary to the building rules, laws and regulations. The court found that;

“ 19. From the material placed before the court, it is not disputed that approval for development permission was granted to the defendant by the County Government of Nakuru on October 24, 2017. Prior to that, a building plan submitted by the defendant was approved at a meeting of the Technical Committee of the County Government on the October 11, 2017. If the terms of the approvals have not been complied with then there are remedies for addressing such a situation under the *Physical Planning Act*. There is no allegation by the plaintiffs that such remedies have been exhausted or have failed.

20. The court cannot substitute itself for the County Government so as to determine the technical aspects of compliance or non-compliance with approvals. Other than their letter dated July 13, 2017, I have also not seen any evidence from the plaintiffs indicating that they made any follow up on their complaint with the County Government. the same applies to NCA. I have not seen any follow up to the letter dated September 11, 2017 to NCA. In these circumstances, the court is left to draw the conclusion that both the County Government and NCA have not seen or have not been shown any reason to pursue the matter further. If that be the case, there would be no reason for the court to impeach the defendant's project. ....”

In the instant application, the facts presented to the court show that the plaintiff's complaints are matters that should in the first instance be processed through the institutions or systems set out in the National *Environment and Coordination Act of Kenya*, 1999 [EMCA], and or the *Physical and Land Use Planning Act* No. 13 of 2019. That thereafter, the party that may be dissatisfied with the decision thereof would then be at liberty to approach this court through an appeal or judicial review application.

e. That had the plaintiff's complaints been primarily over the nuisance and or damages caused to his property on plot Mombasa/Block XV11/69 by the defendant's activities, then under the provisions of article 162 (2) (b) of the *Constitution* and section 13 of the Environment and Land Court Act No.19 of 2011, then there would have been no doubt that the issues for determinations would have squarely been within the jurisdiction of this court. The aspect of the plaintiff's claim on damages should therefore await the determinations of the other issues through the statutory processes established under the relevant legislation, and thereafter the plaintiff may be at liberty to move the court as appropriate. This is not to say that the court has no jurisdiction on all the issues raised herein, but rather that there is need for parties who are aggrieved like the plaintiff appear to be, to exhaust the statute set systems of dispute resolution before coming to the mainstream courts of law. Where parties fail to do so, then the court is



obligated to exercise restraint in assuming jurisdiction prematurely, merely because a suit has been presented before it. That does not mean the court would be divesting itself of jurisdiction or abdicating its duty contrary to article 10 and 47 of the *Constitution* as the plaintiff's learned counsel appeared to suggest at paragraph 16 of their submissions, but rather ensuring parties indeed exhaust the lawfully laid down processes before coming before it. The Supreme Court of Kenya decision in the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others* [2020] eKLR, is instructive on this position. The suit from which the appeal arose from had initially been heard and decided by this court. The first appeal was heard before the Court of Appeal and thereafter a second appeal was lodged before the Supreme Court, which had the following to say on judicial restraint;

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

That having found merit in the defendant's preliminary objection on the ground of jurisdiction, then the court does not need to consider whether or not the plaintiff has met the threshold required before the injunctive orders he seeks can be issued. That as was decided in the case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil [Kenya] Ltd* (1989) KLR 1, that where the court has no jurisdiction, it should down its tools, this court will do exactly that.

f. That the defendant having succeeded in their preliminary objection that has effectively determined the suit, it is under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya entitled to costs of the application and suit.

1. Flowing from the foregoing determinations, the court finds and orders as follows;
  - a. That the defendant's preliminary objection dated the March 16, 2023 on jurisdiction is upheld.
  - b. The plaintiff's applications dated the 13<sup>th</sup> and February 17, 2023 and suit commenced through the plaint dated the February 13, 2023 are hereby struck out with costs.

9 It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 26<sup>th</sup> DAY OF APRIL 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of;

Plaintiff : Absent

Defendant: Absent

Counsel: Mr Gikandi for the Plaintiff

Mr. Mwanzia and M/s Hamid for Hamza for Defendant.

Wilson – Court Assistant.

