



**Waithaka & 7 others v Kimani & 3 others; Kahawa Sukari Limited (Interested Party)
(Environment & Land Case E090 of 2022) [2023] KEELC 17004 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E090 OF 2022**

**JG KEMEI, J
APRIL 20, 2023**

BETWEEN

**SAMUEL MWANIKI WAITHAKA 1ST PLAINTIFF
EDWARD KIGANJO (SUING AS THE OFFICIALS OF KAHAWA SUKARI
RESIDENTS & PLOT OWNERS ASSOCIATION) 2ND PLAINTIFF
MURIITHI KANANUA 3RD PLAINTIFF
PETER KARANJA 4TH PLAINTIFF
MATIAS NDONGA 5TH PLAINTIFF
CHARLES NJOROGE 6TH PLAINTIFF
MWANGI MUNYUGA 7TH PLAINTIFF
STTEPHEN MANEGENE 8TH PLAINTIFF**

AND

**JIM KENNY KIMANI 1ST DEFENDANT
ALICE MUTHONI 2ND DEFENDANT
ELIVIC HOLDINGS LIMITED 3RD DEFENDANT
COUNTY GOVERNMENT OF KIAMBU 4TH DEFENDANT**

AND

KAHAWA SUKARI LIMITED INTERESTED PARTY



RULING

1. This Ruling relates to the Plaintiff's Notice of Motion dated 29/7/2022 and the 1st, 2nd and 3rd Defendants' Preliminary Objection dated 30/8/2022.
2. In the Motion dated 29/7/2022 the Defendant seeks Orders That;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending the hearing and determination of this suit, a temporary injunction does issue restraining the Defendants, agents, proxies, employees or whomsoever acting under their instructions from continuing with the construction in land title number RUIRU KIU Block3/1644.
 - e. The Officer Commanding Station, Kahawa Sukari Police station be directed to aid in enforcing the order herein.
 - f. The costs of this application be awarded to the Plaintiff/Applicant.
3. The Application is based on the grounds on the face of it that the Defendants are residents of Kahawa Sukari Estate, a single occupancy residential controlled development; on 9/11/2021 the 4th Defendant visited the suit premises and found that the 1st and 2nd Defendants are constructing a multi-dwelling development contrary to the development permissions/approved plans; the 4th Defendant issued an enforcement notice of even date stopping the said construction but the Defendants have continued to defy it by continuing with the construction. That the Plaintiffs have raised a complaint with the County Physical and Land Use Planning Committee pursuant to Section 78 PLUPA in vain hence the Application.
4. The Application is supported by the Affidavit of even date sworn by Samuel Mwaniki Waithaka, the 1st Plaintiff in his capacity as Chairman of Kahawa Sukari Plot Owners & Plot Residents Association, an association registered under the *Societies Act* as per certificate annexed as SMW1. He deponed that Kahawa Sukari estate is a single occupancy-controlled development with the 1st Interested Party having sold the plots for single dwelling purposes as per the terms contained in annexure SMW3. That as per the Association by laws, any resident wishing to develop their property must have building plans approved by the Interested Party and the 4th Defendant. That attempts to resolve the instant dispute amicably have been futile and the 1st and 2nd Defendants have ignored the enforcement notice dated 9/11/2021 (SMW6) issued by the 4th Defendant stopping the illegal construction. That despite the said notice, the Defendants continue with the construction as shown by a bundle of photos marked SMW7&8 and the Plaintiffs went ahead to file their complaint (SWM9) with the Defendant but they were informed that the Liaison Committee (LC) is not operational.
5. The Application is primarily opposed vide the 1st – 3rd Defendants' Preliminary Objection dated 30/8/2022 on the following grounds:-
 - a. This Honorable Court does not have jurisdiction to determine this suit at this stage as the same is the preserve of the County Physical and Land Use Liaison Committee.



- b. This suit is premature, misconceived and craving to be struck out ex debito justiae.
 - c. This suit is an utter abuse of the due Court process.
6. The 4th Defendant did not contest the Application.
 7. The Interested Party supported the Motion vide its Replying Affidavit sworn on 31/10/2022 by Edward Rurii Kanjabi, one of its Directors. The deponent avowed that the Interested Party sold all the plots at Kahawa Sukari Estate to all purchasers as single occupancy residential houses as per offer letter annexed as ERK1. That at the time of purchase, the Interested Party issued construction guidelines while building plans approvals are done initially by the Association and by the 4th Defendant. That all properties in the estate are subject to the special conditions contained in the lease and copy of the grant is annexed as ERK3.
 8. On 24/10/2022 directions were taken to canvass both the Application and Preliminary Objection by way of written submissions.
 9. The Plaintiffs through the firm of Nyakundi & Co. Advocates filed submissions dated 27/10/2022. They submitted on the principles for grant of interlocutory injunction as enunciated in the case of *Giella v Cassman Brown* [1973] EA 358 that require an Applicant to establish a prima facie case, to demonstrate that he will suffer irreparable injury if a temporary injunction is not granted and in case of doubt, the balance of convenience tilts in his favor.
 10. On the first limb, the Plaintiffs reiterated the averments in the Supporting Affidavit to demonstrate violation of their rights and argued that the Defendants have refused to comply with enforcement notice dated 9/11/2021 requiring them to stop further construction; seek development permissions and failure to do so, reinstate the ground to the original state.
 11. Secondly, the Plaintiffs maintained that they stand to suffer irreparable injury if the Defendants are not restrained by this Court as the value of their properties will diminish thus infringing on their right to own property as anchored in Article 40 *Constitution of Kenya*. That the Defendants' permanent house will violate the Plaintiffs' rights forever and such injury cannot be quantified in monetary terms.
 12. Lastly that the balance of convenience tilts in favor of issuing injunctive orders as the Plaintiffs' claim has high chances of succeeding.
 13. Opposing the Preliminary Objection, the Plaintiffs submitted that the Preliminary Objection is devoid of merit as it is shrouded in contested issues and not a pure point of law as defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969)EA 696. That taking into account that the Liaison Committee is not sitting to determine their appeal as outlined in para. 24 of their plaint, the LC lacks jurisdiction to hear this suit as it touches on violation of constitutional rights. That Section 78 *PLUPA* does not apply to them as they are not aggrieved by any enforcement notice to invoke the Liaison Committee's jurisdiction. That even if the LC was to hear the instant dispute, the same is not sitting and thus the Court should dismiss the Preliminary Objection.
 14. In similar fashion the Interested Party filed brief submissions dated 31/10/2022 through the firm of Chebigio & Associates Advocates. The principles for grant of interim injunction in the case of *Giella* (supra) were recited and the Court urged to allow the Plaintiff's Application.
 15. On the other hand, the firm of V. N. Aminga & Co. Advocates filed submissions dated 17/11/2022 on behalf of the 1st, 2nd and 3rd Defendants. They submitted on the strictures and purpose of a valid Preliminary Objection as elaborated in the case of *Mukisa* (supra) and the Supreme Court's case in *Hassan Ali Jobo & Anor. Vs Suleiman Said Shabal & 2 Others* [2014] eKLR. That a Court's



jurisdiction goes to the heart of any matter and without it a Court must take no further step. That the *PLUPA* elaborately provides procedure for development permission applications and dispute resolution mechanisms that may arise thereto. That the Plaintiffs herein filed their complaint to the Liaison Committee on 28/7/2022 and the next day filed this suit and admit at para. 10 of their Supporting Affidavit that this dispute ought to be heard by the Liaison Committee. To that end they contended that this Court's jurisdiction was invoked prematurely.

16. Opposing the Motion, the Defendants stated that temporary injunction is discretionary equitable remedy and the Plaintiffs have not established a prima facie case in their favor. That the special grant annexed does not sufficiently spell the special conditions are the same as those in the registered lease. Further that they have complied with the enforcement notice dated 9/11/2022 and this Court's order issued on 19/8/2022 requiring them to stop any further construction in compliance of the said Notice. They beseeched the Court to be guided by the Court of Appeal decision in the case of *Kibos Distillers Limited & 4 Others Vs Benson Ambuti & 3 Others* [2020]eKLR for the position that where parliament has enacted a statute establishing other adjudicatory organs, the Courts should let such organs exercise their primary jurisdiction over disputes.
17. In conclusion, the Defendants were emphatic that the Plaintiffs have not established any irreparable injury that they stand to suffer had that the Application is unmerited.
18. Considering the nature of the Preliminary Objection the Court will determine it first before delving into the merits of the Application.
19. The parameters of 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 v 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.”
20. 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...”
21. 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.
22. The subject of the Preliminary Objection is not novel to this Court to wit this Court's jurisdiction vis-à-vis the Liaison Committee mandate as provided under PLUPA. This Court is established pursuant



to Article 162(2)b Constitution of Kenya and exercises its jurisdiction as stipulated in Section 13 *Environment and Land Court Act* that;

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (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.”

23. The County Physical & Land Use Planning Liaison Committees for each County are established under Section 76 *PLUPA*. Section 78 *PLUPA* inter alia provides for functions of the Liaison Committee to include hearing and determining complaints and claims made in respect to applications submitted to the planning authority in the County and to hear applications against decisions made by the planning authority

24. Section 78 of the *PLUPA* states as follows;

“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.”

25. 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.”

26. 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.”

27. The Court of Appeal in *Kibos Distillers Limited & 4 Others v Benson Ambuti & 3 Others* [2020] eKLR laid down the following principle relevant to these objections: “Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legitimately been mandated to hear and determine a dispute.”

28. The Supreme Court of Kenya in *Benson Ambuti Atega v Kibos Distillers Ltd & 5 others* [2020] eKLR emphasized that, where appropriate, the superior Courts should remit the dispute to the relevant bodies for adjudication.

29. Earlier on the Supreme Court of Kenya in *Benard Murage v Fine Serve Africa Limited & 3 others* [2015] eKLR outlined this principle in the following words

“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.”

30. In this case the Plaintiffs filed a complaint vide the letter dated the 27/7/2022 worded as follows;

“27th July 2022

The County Physical and Land Use Planning Liason Committee,

County Government of Kiambu,

Kiambu

Dear Chairman,

Re: Statement Of Complaint

The Kahawa Sukari Plot Owners and Residents Welfare Association makes this statement as follows:-

1. Name and Address of Complainant: Kahawa Sukari Plot Owners and Residents Welfare Association P.O. Box 16559-00620, Nairobi. Tel 0715021949,
2. Name and Address of authorized representatives of complainant: Samuel Mwaniki Tel 0727887728.
3. Compliant made against: Jim Kenny Kimani & Alice Muthoni Kimani, Plot number Ruiru/ Ruiru KIU Block 3/1614 Tel. 0722849746/0733738336.
4. Name of Complaint: Carrying out development contrary to approved plans. The



developer applied and duly got approval to construct a single dwelling building. On commencement of construction, developer constructed a multi-dwelling, building different from plans presented for approval.

5. Reliefs Sought: Committee to order for an inspection report by a Building Inspector to establish whether developer carried out construction as per approved architectural plans. Developer be compelled to comply with the law. Developer be penalized as per provision of the law.
6. Principles on law relied on: The provisions of *Physical and Land Use Planning Act* No. 13 of 2019 and the Physical and Land Use Planning Regulations. In particular Part IV: Development Control Section 67.
7. List of witnesses: Ruiru Sub-County Planner & Arch. Edward Nduati. Tel. 0715021949.
8. List of supportive documents to be filed: Copy of enforcement notice issued by the County Government, copies of Developer's approved plans, copies of correspondence letters to the Developer urging compliance, photographs at various states of construction and payment of fees as prescribed."
31. Along with the complaint they filed the complaint/claim/appeal form which was received at the County of Kiambu on the 28/7/2022 with similar grievance which was that the developer was constructing multidwelling houses contrary to the County Government's approval of single dwelling houses.
32. The Plaintiff's complaint is consistent with the enforcement orders issued by the 4th Defendant on the 9/11/2021.
33. I find that the cause of action raised in the suit is such action that *PLUPA* is mandated under the legal dispute mechanism existing under the Act to hear and determine. This Court being guided by the decision of the Supreme Court of Kenya in the Kibos Case hereby exercises judicial restraint to allow the Liaison Committee to exercise its mandate.
34. The Court finds that the original jurisdiction of this Honourable Court was prematurely invoked.
35. The Notice of Motion dated 29/7/2022 and the entire suit be and is hereby struck out to allow parties to ventilate their case in the Liaison Committee.
36. The Preliminary Objection is upheld.
37. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of; 1st, 2nd, 3rd, 4th, 5th, 6th 7th and 8th Plaintiffs – Absent

Ms. Nyakara HB Aminga for 1st, 2nd and 3rd Defendants

4th Defendant - Absent

Interested Party – Absent



Court Assistants – Kevin/Lilian
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