



**Kahawa Sukari Residents & Plot Owners Welfare Association & 5 others v Ngugi;
CECM, Lands Housing Physical Planning Municipal & Urban Development
County Government of Kiambu & 5 others (Interested Parties) (Environment &
Land Case E101 of 2022) [2023] KEELC 17676 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E101 OF 2022**

**JG KEMEI, J
MAY 31, 2023**

BETWEEN

**KAHAWA SUKARI RESIDENTS & PLOT OWNERS WELFARE
ASSOCIATION 1ST PLAINTIFF
SAMUEL MWANIKI WAITHAKA 2ND PLAINTIFF
EDWARD KIGANJO 3RD PLAINTIFF
SAMUEL MWENDA 4TH PLAINTIFF
CHRISTINE KARIUKI 5TH PLAINTIFF
ANTONY KARIUKI 6TH PLAINTIFF**

AND

SOLOMON WANJEMA NGUGI DEFENDANT

AND

**CECM, LANDS HOUSING PHYSICAL PLANNING MUNICIPAL
& URBAN DEVELOPMENT COUNTY GOVERNMENT OF
KIAMBU INTERESTED PARTY
CHIEF OFFICER LANDS, HOUSING PHYSICAL PLANNING,
MUNICIPAL & URBAN DEVELOPMENT, KIAMBU COUNTY
GOVERNMENT INTERESTED PARTY
CHIEF OFFICER ADMINISTRATION & HEAD OF PUBLIC SERVICE,
KIAMBU COUNTY GOVERNMENT INTERESTED PARTY
DIRECTOR PHYSICAL PLANNING & URBAN DEVELOPMENT, KIAMBU
COUNTY GOVERNMENT INTERESTED PARTY**



RULING

1. The Plaintiffs filed suit on 12/11/2022 seeking the following Orders:-
 - a. A temporary injunction do issue restraining the Defendants, their agent, proxies, employees or whomsoever acting under their instructions from continuing with the construction in land title number Ruiru Kiu Block 3/3228 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 3/3228.
 - 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 to 5th Interested Parties to demolish all illegal and/or irregular structures in land title number Ruiru Kiu Block 3/3228 and to ensure that construction work in the said suit premises comply with the law.
 - e. The officer Commanding Station, Kahawa Sukari Police Station be directed to aid in enforcing the orders issued by this Honourable Court.
 - f. Costs of this suit from the date of filing the same until full payment.
 - g. Any other relief that the Court may deem fit to grant.
2. It is averred that the Defendant is the registered owner of the suit land Plot No. 2216, Flame Court situated in New Kahawa Sukari Estate, a single occupancy residential controlled development, planned zoned and developed as such under the Ruiru Integrated Strategic Plan 2022 - 2030.
3. It is contended that the Defendant is constructing multi-dwelling houses on the suit property in violation of the zoning regulations and without approvals from 1st – 6th Interested Parties and contrary to the *Physical and Land Use Planning Act* (PLUPA) and the Building code.
4. That consequently the Enforcement Notice No. 005209 dated 16/6/2021 was served upon the Defendant requiring him to stop construction immediately, seek development permission in default reinstate the ground to its original state. It is averred that the Defendant has failed to adhere to the notices and has continued construction hence exposing the Plaintiffs to great harm and prejudice by diminishing the value of their properties and further infringing on their constitutional right to ownership of property.
5. That despite notifying the Interested Parties of the Defendant's breach of the enforcement notice, the Plaintiffs have faulted the 1st Interested Party for failing, neglecting and refusing to perform their statutory duty under Section 57(4) of PLUPA.
6. It is the Plaintiffs' plea that their rights to fair administrative action under Article 47 of Constitution of Kenya and Section 4 of *Fair Administrative Action Act* are being breached or threatened to be violated unless the 1st and 5th Interested Parties are compelled to perform their duties under PLUPA.



The Notice of Motion dated 12/9/2022

7. In this Motion the Plaintiffs contend that although they have filed an appeal with the Liaison committee the provisions of Section 72 (3)(4), 78, 79 & 80 of PLUPA do not apply to them. Alongside the Plaintiff, the Plaintiffs filed a Notice of Motion dated 12/9/2022 brought under Order 40 Rule 1(a), 2(i) and (iv), Order 51(1) & (4) of the Civil Procedure Rules, Section 1(a), 3(a) and 63 of the Civil Procedure Act, Article 40 of Constitution of Kenya and all enabling provisions of the law.
8. The Applicants/Plaintiffs sought the following orders: -
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendants, their agents, proxies, employees or whomsoever acting under the instructions from continuing with the construction in the suit land.
 - d. That the Officer commanding Kahawa Sukari Police Station be directed to aid in enforcing the order herein.
 - e. Cost of the Application be provided for.
9. The Application is supported by the grounds annexed therein and the Supporting Affidavit of Samuel Mwaniki Waithaka, the 2nd Plaintiff herein.
10. The grounds are a replica of the pleadings set out in the introduction above. The deponent is the Chairman of the 1st Plaintiff. He deponed that all the properties in the Kahawa Sukari Estate are subject to special conditions contained in the grant (mother title). The plots were sold for construction of single dwelling houses. Construction approvals are given first by the 1st Plaintiff and consequently by the 5th Interested Party before commencement of construction of houses. In this case the Defendant is in breach of the bylaws of 1st Plaintiff, the provisions of PLUPA and the building code for which the responsibility to supervise and enforce vests with the 5th Interested Party.
11. That despite issuance of the notice to stop construction and seek development permission, the Defendant has continued with the construction in total disregard of the provisions of the law and has ignored to file an appeal with the Liaison Committee for determination of the question of compliance or otherwise of the law and the regulations.

The Responses

12. In a quick response to the Motion, the Defendant filed a Notice of Preliminary Objection dated 22/9/2022 on the following grounds:-
 - a. That this Honourable Court lacks jurisdiction to entertain the present suit as the issues revolving around development planning and land use including granting of developmental approval and issuance of Enforcement Notices squarely falls under the mandate of the County Physical & Land Use Liaison Committee, which the 1st Plaintiff has already approached by filing an appeal against the Defendant and which appeal is still pending hearing and determination.
 - b. That this suit is res judicata and must fail for being an abuse of the Court process as this Honourable Court had previously dealt with a similar suit commenced by the 1st Plaintiff in



Thika ELC Case Number E071 of 2021 involving the same parties, same issues and seeking similar injunctive reliefs against the Defendant, but which suit was struck out on the 28th march 2022 by Honourable Lady Justice J. .G. Kemei.

- c. In the circumstances the Notice of Motion Application dated the 12th September, 2022 is not only premature but also an abuse of the Court process and ought to be dismissed with costs to the Defendant/Respondent.
13. In addition, the Defendant filed a Replying Affidavit dated 22/9/2022. The deponent averred that the duty to regulate development falls under the docket of 1st Interested Party who has the mandate to approve the development plans. The 1st Plaintiff does not have the legal mandate to undertake such approvals. That said, he admits to have submitted his development plans to the 1st Plaintiff for recommendation for approval by the 1st Interested Party.
14. He avowed that he has complied with development conditions and approval issued to him on 1/3/2021 where he has constructed a single dwelling residential development on the suit land in compliance with the provisions of PLUPA and the zoning policy of the 5th Interested Party.
15. He accused the Plaintiffs of raising complaints which lack specific particulars and evidence with respect to construction of a multi dwelling development. He is categorical that the Plaintiffs have not demonstrated any danger posed by his project nor the prejudice that they stand to suffer. In contrast the deponent states that his construction is at an advanced stage and he stands to suffer prejudice on account of damages for loss if the injunction is granted.
16. With respect to the enforcement notice of 26/6/2021, the deponent avers that the same was withdrawn by the 1st Interested Party upon being satisfied that he had obtained development approvals for his project. That being the case, it was not necessary for him to appeal to the Liaison Committee.
17. With respect to the suit being res judicata the deponent was emphatic that this Court lacks jurisdiction to entertain this matter which falls under the docket of the Liaison Committee.
18. In the end the Court was urged to dismiss the Plaintiffs' Application.
19. Vide a Replying Affidavit dated 25/10/2022, Edmund Njihia, the Chief Officer in the department of lands, housing, physical planning, municipal and urban development in the County Government of Kiambu deponed as follows; That on 16/6/2021 the County Inspection Officers found the Defendant carrying out construction contrary to the law and issued him with an enforcement notice No. 005209 requiring him to stop further development, seek regularization failure to which restore the ground to its original state; On 31/8/2022, a notification of a breach of the said notice was received from the Plaintiffs being further evidence of the breach of the law and building procedures by the Defendant; Single dwelling unit approval was granted by the 5th Defendant; The Defendant is in contravention of the approvals given; The Defendant has not explored the avenues of appealing to the Liaison Committee under Section 72(3) of PLUPA and finally the Liaison Committee is operational.
20. The 6th Interested Party filed its response to the Plaintiff's Motion vide the Replying Affidavit sworn by Edward Rurii Kanjabi on the 31/10/2022. He introduced himself as the Director of the 6th Interested Party with full authorization to swear the Affidavit. He stated that all plots at Kahawa Sukari Estate plots were sold by the 6th Interested Party for development of single occupancy residential houses and construction guidelines were issued to all the purchasers stipulating that the developers are to build single dwelling units. The 6th Interested Party is part of the approval eco-system which includes the 5th Interested Party before anyone is allowed to construct a house. In addition, all the houses in Kahawa



Sukari are subject to special conditions contained in the mother title. He urged the Court to restrain the Defendant from developing a multi-dwelling house in the suit land.

Conservatory orders

21. On 19/10/2022 this Court on Application by the Plaintiffs granted conservatory orders for a period of 30 days which orders lapsed on the 20/11/2022. There is no evidence that the same were extended.

written submissions

22. With the leave of the Court granted on 8/11/2022 the parties elected to file written submissions. The law firm of Nyakundi & Co. Advocates filed written submissions on 1/11/2022 on behalf of the Plaintiffs. Ms Sylvia Muchiri the Hon. County Legal Counsel filed written submissions on behalf of the 1st – 5th Interested Parties on 5/11/2022. Chebiego & Associates filed written submissions on behalf of the 6th Interested Party on 1/11/2022.
23. It was submitted by the Plaintiffs that their rights to property have been violated and that a prima facie case has been made out on the following grounds; the area is a single occupancy controlled residential development subject to mandatory compliance with Section 36, 41, 52 of PLUPA and zoning policy of the 5th Interested Party; the building approvals issued by the 5th Interested Party are for single dwelling units which conform to the 6th Interested Party's controlled development and the Kiambu County Regulations and *Physical and Land Use Planning Act*; the Defendant's project/building does not conform with the building plans of the 6th Interested Party as the same is a multi-dwelling house. Enforcement notice was issued against the Defendant which notice was ignored on the pretext that it was withdrawn immediately; the averment of withdrawal is not supported by evidence; the Defendant is guilty of material non-disclosure which is failure to produce building plans before the Court allegedly approved by the 1st Interested Party; the Defendant is admittedly constructing the third floor despite the stoppage order by the County. The 1st – 5th Interested Parties are in support of the Plaintiffs Application. Reliance was placed on the decision of the case of Mrao Limited -Vs- First American Bank Ltd (2003)eKLR to support the proposition that the Plaintiff has established a prima facie case.
24. On irreparable injury the Plaintiffs contend that allowing the development of multi-dwelling houses in a single dwelling residential area devalues their properties and infringes on their right to ownership under Article 40 of *the Constitution* of Kenya. The injuries that shall be visited upon the Plaintiffs cannot be compensated in monetary terms. The case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai [2018] eKLR was relied on.
25. On the balance of convenience, the Plaintiffs submitted that the inconveniences to be suffered are greater compared to that of the Defendant unless the Court restrains the Defendant.
26. On the Preliminary Objection, it was submitted that the Defendants Objection is not a pure point of law given that the suit raises contested issues.
27. It was admitted that although the Plaintiffs have filed an appeal with Liaison Committee, the Liaison Committee is yet to be operationalized. Inter alia, it was submitted that the Liaison Committee has no jurisdiction over the matters raised in this suit seeing that the Plaintiff has alleged violation of constitutional rights which are outside the purview of the Liaison Committee.
28. It was submitted that Section 56 and 57 of PLUPA do not contain any framework or alternative dispute resolution mechanisms. This was the holding in the case of Francis Mugarami Kamau & 6 others v Sycamore Pine Limited & 2 Others; National Environment Management Authority & Another (Interested Parties) [2021] eKLR. Further under Section 72 of PLUPA the dispute resolution



framework in that Section applies to a party aggrieved by a party issued and served by the approving authority.

29. The Plaintiffs have not been served with any enforcement notice neither are they aggrieved by the enforcement notice. It will be illogical therefore to require them to appeal against an enforcement notice which they are in support and seeking this Court to enforce. The Plaintiffs therefore submit that Section 78 of PLUPA does not apply to them.
30. On the question of res judicata the Plaintiffs were of the view that the suit is not res judicata for the reasons advanced. Finally, as to the question whether the Environment and Land Court can assume jurisdiction in the absence of Liaison Committee, the Plaintiffs have urged the Court to invoke its original jurisdiction and hear the matter as the Liaison Committee is not operational.
31. The 1st – 5th Interested Parties submitted that construction approvals were issued for a single dwelling unit under Section 57 of PLUPA and an enforcement notice was issued under the provisions of Section 57 of PLUPA. It is their contention that they have discharged their duties under the relevant laws.
32. Secondly that the Defendant has failed to invoke provisions of Section 72(3) and 78(d) of PLUPA and is therefore deemed to have forfeited his right to explore that right in law.
33. With respect to jurisdiction it was submitted that this Court has jurisdiction to determine the matter in the absence of an operational Liaison Committee.
34. On prima facie case, the 6th Interested Party submitted that the enforcement notice is still in force since no evidence has been produced showing that the notice has been withdrawn and further this Court has power under Section 13(2) of the *Environment and Land Court Act* to prevent any party from undertaking developments in violation of the law and the building code.
35. On irreparable injury, the 6th Interested Party submitted that a construction contrary to approved plans or without approved plans will be in violation of building plans and PLUPA. On balance of convenience, it was submitted that the construction of a multi-dwelling house in an area designated by the 5th Interested Party for single dwelling will strain the physical facilities in the area and cause more harm to the residents if the orders sought are denied than the harm caused by the Defendants should the orders sought are issued.

Determination

36. The issues for determination are;
 - a. Whether the Preliminary Objection is a pure point of law.
 - b. Whether the Notice of Motion has merit
 - c. What orders should the Court issue
 - d. Costs of the Application

Jurisdiction

37. In the case of Samuel Macharia Kamau Vs KCB & Others (2012) eKLR the Court held that;

“ A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus a Court can only exercise jurisdiction as conferred by *the constitution* or other written laws. it cannot arrogate to itself jurisdiction exceeding that which is confirmed upon it by law. The Court



must operate within the constitutional limits. it cannot expand jurisdiction through judicial craft or innovation.”

38. The jurisdiction of this Court is spelt out in *the constitution* at Article 162 (2)(b) of *the Constitution* read together with Section 13 of the *Environment and Land Court Act* as follows;

“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.”

39. The jurisdiction of the Liaison committee is set out in the PLUPA. 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.”

40. The role of the Liaison Committee has been clearly scoped under Section 78 of the Act as thus;

- “78. 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.”

41. The Plaintiffs case is that the Defendant is in contravention of the estate bye laws, the Building code and the PLUPA by constructing a multi dwelling building instead of a single dwelling house permitted in the approval granted to him by the county. The Interested Parties have joined issues with the Plaintiffs and are in agreement that the Defendant is in contravention of the law hence the issuance of the enforcement notice. The Defendants response is that the enforcement notice was withdrawn and hence no need to appeal to the Liaison committee.
42. The above set of facts raise contested issues between the parties and for the Court to determine the objection it will be called upon to inquire about the approvals, the enforcement notice and whether or not the same was withdrawn or if not whether or not the Defendant has complied with the conditions accompanying the enforcement notices.
43. For that reason, the Court holds that the Preliminary Objection is not a pure point of law hence should fail.
44. There is another fundamental reason why the Preliminary Objection cannot succeed and that is the multifaceted claims brought by the Plaintiffs which in the view of the Court cannot be determined by the Liaison committee. Such claims are the alleged infringement of property rights and the orders seeking for the demolition of the building which fall for determination within the ambit of this Court.

The Notice of Motion dated the 12/9/2022

45. The principles guiding the determination of an Application for injunction are set out as follows:
 - a. An Application must show a prima facie case with a probability of success;
 - b. An Application will not normally be granted unless the Applicant might otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages; and
 - c. When the Court is in doubt, it will decide the Application on the balance of convenience. See the case of *Giella v Cassman Brown* (1973) EA 358
46. On prima facie case the Court concurs with the submissions by both the Plaintiffs and the Interested Parties that the area is a single dwelling area and not a multi dwelling zone as per the bye laws and the Building code. Admittedly in addition, the Defendant contended that the enforcement notice was not withdrawn. In the absence of the evidence on withdrawal of the enforcement notice, the Court is satisfied that the Plaintiffs have established a prima facie case.
47. On irreparable damage, the Court takes note that the claim of the Plaintiffs include devaluation of their properties, the Controlled designated living areas and general ambiance of the built environment. The Court is of the view that this may not be compensated in monetary terms. I rely on the case of *Waithaka v Industrial and Commercial Development Corporation* [2001] eKLR, the Court held;

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule, that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust, but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms, by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word 'normally' the Court was recognizing that there are instances where an injunction can issue even if damages would



be an adequate remedy for the injury, the Applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind include the strength or otherwise of the Applicant's case for a violation or threatened violation of its legal rights, and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the Applicant this may move a Court of equity to say: "money is not everything at all times and in all circumstances and don't think you can violate another citizen's rights only at the pain of damages."

48. On a balance of convenience, the Court noted that the Defendant has not led any evidence to show compliance with the enforcement notice nor its withdrawal. Doing the best I can in the circumstances, this Court has considered the prejudice that both parties will suffer. I am persuaded that allowing status quo is in the best interest of justice so that the rights of the parties may be determined in finality.

Resjudicata

49. I agree with the Plaintiffs that the suit is not resjudicata. I say so because the parties are not similar; the subject matter is different; the claims of the parties in ELC 71 OF 2022 are different as earlier alluded to the claims in this case are multifaceted and cannot be determined by the Liaison committee in finality. In addition, the suit in ELC 71 of 2022 was not determined in finality. By striking out the suit, the parties are at liberty to approach the Court should the need arise. This case therefore is distinguishable from the ELC 71 of 2022.

The Complaint/Appeal

50. It is not in dispute that the Plaintiffs filed an appeal dated the 12/9/2022 before the Liaison committee which complaint/appeal remains undetermined. This Court takes cognizance that the issue of compliance with by laws and the Building code is central to this dispute. To enable the Plaintiffs exercise their liberty to prosecute their appeal/complaint before the Liaison Committee, this suit shall be stayed pending the hearing and determination of the complaint. Thereafter the remaining issues will be heard and determined by this Court.
51. Final orders for disposal;
- a. The Preliminary Objection is not a pure point of law. It is dismissed.
 - b. Status quo be and is hereby issued in terms of prayers Nos. (c) and (d) pending the hearing and determination of the suit.
 - c. This suit be and is hereby stayed pending the hearing and determination of the complaint by the Liaison committee.
 - d. Costs shall be in favour of the Plaintiffs payable by the Defendant.
52. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Nyakundi for 1st – 6th Plaintiffs



Defendant – Absent

1st – 5th Interested Parties – Absent

Ms. Maina HB Chebiego for 6th Interested Party

Court Assistants – Kevin & Lilian

