



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO E071 OF 2021

EDWARD NDUATI HIUHU.....1ST APPLICANT/ PLAINTIFF

JONES ONGIGE MACHOGU.....2ND APPLICANT/PLAINTIFF

NICHOLAS KOMU NJOROGE.....3RD APPLICANT/PLAINTIFF

(suing as a representative and on behalf of Kahawa Sukari Residents &

Plot Owners Welfare Association)

VERSUS

JOHN K WAMBUGU & MRS EUNICE W. KIUMI.....1ST RESPONDENT/DEFENDANT

STEPHEN KIGIMA GITIMU.....2ND RESPONDENT/DEFENDANT

DANIEL MBUGUA KAMAU.....3RD RESPONDENT/DEFENDANT

SOLOMON WANJEMA NGUGI.....4TH RESPONDENT/DEFENDANT

AND

COUNTY GOVERNMENT OF KIAMBU.....1ST INTERESTED PARTY

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2ND INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY.....3RD INTERESTED PARTY

KAHAWA SUKARI LIMITED.....4TH INTERESTED PARTY

RULING

1. Vide a Plaint filed on the 19/7/2021 in this Court the Plaintiffs sued the Defendants alongside the Interested Parties seeking interalia orders as follows;

a. An order of permanent injunction do issue restraining the 1st-4th Respondents/Defendants their agents, proxies employees workers undertaking or whomsoever acting under their instructions from undertaking proceedings and or continuing with the construction works and development of multi dwelling apartment on their parcel of lands known as plot Nos 2298,1760,1754 and 2216 belonging to the 1st -4th Defendants respectively situated at Kahawa Sukari Mwhoko Scheme Ruiru Sub County within Kiambu County and have each and every Defendant regularize development in his plot according to the set rules and regulations.

b. A declaration that the 1st -4th Respondents are in breach of the Kahawa Sukari Residents and plot owner's welfare association bye laws and immediate and should demolish the structures and buildings and realign all the developments with

the welfare association guideline and bye laws.

2. It is the case of the Plaintiffs that they and the Respondents are plot owners in Zone 16 within Kahawa Sakari with a restricted controlled estate development plan for a single residential dwelling house government by the Kahawa Sukari residents & Plot Welfare Association byelaws. That the 1st -4th Respondents have constructed multi dwelling houses on their plots namely 2298,1760,1754 and 2216 breached the bye laws set up by the welfare as well as the County Government of Kiambu which provide for single dwelling developments per plot. That the Respondents are in high gear in preparations of running a preschool within the estate, which venture is commercial in nature. That there was no change of user from single dwelling to multiple dwelling; value of their land is deteriorating; that the Respondents have ignored an enforcement notice directing them to stop any further development to no avail; that no environmental assessment report from the 2nd Interested Party was obtained.

3. Simultaneously, the Plaintiffs/Applicants filed a notice of motion dated the 16/7/2021.

4. The motion is brought under section 13(3), (4), (7), 14, 16 and 19 of the ELC Act, Section 5 (1) of the Judicature Act, Order 1 rule 8, Order 40 rule 1-4 & 6, Order 42 rule 6(1) and order 51 Rule 1 of the CPR, Section 1A, 1B, 3A and 63 € of the CPA and Articles 19, 22, 23, 31, 42 159(1), 165 of the Constitution, Section 41 of the Society Act and any other enabling laws.

5. The Application sought the following orders;

a. Spent

b. Spent

c. That an order of temporary injunction do issue restraining the 1st, 2nd, 3rd and 4th Respondents their agents, proxies, employees, workers undertaking or whomsoever acting under their instructions from undertaking, proceeding and / or continuing with the construction works and development of multi dwelling apartment on their parcel of land known as plot numbers 2298, 1760, 1754 and 2216 belonging to 1st, 2nd, 3rd and 4th Defendants / Respondent respectively, situated at Kahawa Sukari Mwhoko Scheme, Ruiru Sub County within Kiambu County, pending the hearing and determination of this suit.

d. That an order of temporary injunction do issue restraining the 1st, 2nd, 3rd and 4th interested parties from issuing approvals, permits and licenses to the 1st, 2nd, 3rd and 4th Defendants/Respondents for development of multi dwelling apartment erected on plot numbers 2298, 1760, 1754 and 2216 belong to 1st, 2nd, 3rd and 4th Defendants / Respondents respectively, situated at Kahawa Sukari Mwhoko Scheme, Ruiru Sub County within Kiambu County, pending the hearing and determination of this suit.

e. An order is hereby issued to the 1st, 2nd, 3rd and 4th Respondent to allow the Plaintiff/Applicant through its leadership and the 1st, 2nd, 3rd and 4th Interested Parties to enter and inspect the premises / construction/ development in plots number 2998, 1760, 1754 and 2216 belonging to 1st, 2nd, 3rd and 4th Defendant's / Respondent respectively, situated at Kahawa Sukari Scheme Zone 16, Ruiru Sub County within Kiambu County to ensure that construction / development is as per the standard set and approved by the Plaintiff, 1st, 2nd, 3rd and 4th Interested Party.

f. An order is hereby issued restraining the 1st, 2nd, 3rd and 4th Respondent from occupying / letting to third parties the multiple dwelling buildings/ premises/ construction/ development in plots number 2998, 1760, 1754 and 2216 belonging to 1st, 2nd, 3rd and 4th Defendants/Respondent, respectively until and when the correction for re-alignment is approved by the Plaintiff, 1st, 2nd, 3rd and 4th Interested Parties and is effected in that only single dwelling is in each plot.

g. That costs of this application be provided for in the cause.

h. Officer Commanding Station (OCS) Mwhoko Police Station and the 1st, 2nd and 3rd Interested Parties to implement the orders.

i. Any other order that the Court deems fit.

6. The Application is supported by the grounds annexed together with the Supporting Affidavit of Edward Nduati Hiuhu sworn on the 16/7/2021. That the Applicants are owners of plot Nos 1818, 1947 and 2207 respectively situate in Zone 16 of the Kahawa Sukari Mwhoko Scheme just like the Respondents. Whilst rehearsing the contents of the plaint he averred that the Respondents have constructed multiple dwelling houses on their plots contrary to the rules and regulations of the estate and the County Government bylaws which permit a single dwelling house. That the area is zoned for a single dwelling house development. That allowing the development of multi dwelling houses will disentitle the residents of their quiet and peaceful enjoyment of their properties. That the influx of many visitors will interfere with their privacy and security. They accuse the Respondents of not obtaining any change of user and that the process of change of user was not followed at all; the Plaintiffs were not consulted in the process; the Respondents have ignored the enforcement notice issued by the 1st Interested Party directing them to stop any further development; that the development approval for the area is for single dwelling while the Respondents have constructed multi-dwelling structures thereon contrary to the planning regulations; no environmental assessment by the 2nd Interested Party was obtained; That allowing the multi dwelling structures will set a bad precedent and moreover going contrary to their legitimate expectation of a quiet and peaceful environment they envisaged to live when they purchased and constructed their plots.

7. In opposing the application above, the 1st Defendant, John K Wambugu in his Replying Affidavit dated the 9/9/21 filed against the application dated the 16/7/2021 deponed that the Plaintiffs do not have locus to file the suit against the 1st Defendant; that the reliefs being sought are final in nature and that they cannot be granted in the interim stage without the parties being afforded a full hearing.
8. Interalia, the deponent states that the application has been overtaken by events on grounds that; the 1st Defendants house is complete; the development of the house was completed in line with the approvals from the 1st -4th Interested parties; the 4th Interested Party too approved the construction on payment of the requisite fees in the sum of Kshs 5000/-; that the 1st Interested Party issued him with the occupation certificate upon completion of the house;
9. That the Plaintiff has not presented this Court with any probability of success as it is seeking to permanently restrain the 1st Defendant from utilizing his own property. That the Plaintiff has not demonstrated how it will suffer irreparable loss as they will be unjustifiably barred from accessing their newly built matrimonial home.
10. On the 9/9/2021 the 1st Defendant filed a motion seeking orders that a declaration be and is hereby made that this suit so far as it relates to the 1st Defendant is frivolous vexatious and an abuse of the process of the Court; the suit be struck out; in the alternative and without prejudice to the above the names of the 1st Defendant be struck out of these proceedings; the 1st Defendant be awarded the costs of this application and the costs of the entire suit together with interest.
11. The Application is supported by the grounds annexed thereto and the Affidavit of John K Wambugu. The deponent states that the present suit has abated on account that the Plaintiffs failed to take out summons within the statutory period and further that the Plaintiffs have no legal capacity to institute the present suit on behalf of the welfare Association; there is no privity of contract between the Plaintiffs and the 1st Defendant as the 1st Defendant is not a member of the Association. The 1st Defendant faulted the Plaintiffs for enjoining two individuals as 1st Defendants thus making it difficult to defend themselves in the suit. That their names should be struck off for misjoinder and want of form. In rebuttal he stated that his project is fully compliant with the statutory laws and zoning guidelines put in place by the 1st Interested Party making the Plaintiffs suit totally uncalled for hence its frivolity and vexing in nature. [where are the approvals?]
12. In objecting to the Plaintiffs' suit, the 2nd - 4th Respondents/Defendants raised a Preliminary Objection dated the 15/9/2021 on the ground that the Court is bereft of jurisdiction to preside over these proceedings in light of the fact that the Plaintiffs in their individual capacities lack of locus standi to institute suit in the name of Kahawa Sukari Resident & Plot owner's welfare Association. That the suit ought to be dismissed.
13. Similarly, the 2nd Defendant/Respondent raised a Preliminary Objection on grounds that the Court is bereft of jurisdiction over the proceedings on account of lack of locus. However, on the 12/10/2021 the 2nd Defendant abandoned this objection midway.
14. In opposing the Application of the Plaintiffs/Applicants, the 1st Interested Party raised a Preliminary Objection dated the 8/10/2021 on the following grounds; the Plaintiffs claims are premised on the question of planning use and development which matters are regulated under the Physical and Land Use Act 2019; under section 61(3) of the said Act, an aggrieved party on matters development permission has a right to appeal against the said decision to the County Physical and Land Use Planning Committee; further that this Court is not the right forum to determine matters relating to environmental impact assessment (EIA) licence which is the province of the National Environmental Tribunal (NET) as provided for under section 129 (1) of the EMCA; finally that the Plaintiffs have failed to exhaust the alternative means of dispute resolution as provided for by legislation. It urged the Court to uphold the objection and dismiss the suit.
15. Alongside the Preliminary Objection, the 1st Respondent filed grounds of opposition dated the 8/10/2021 and reiterated that the 1st Interested Party is mandated in law to grant development permission, approve change of user applications and building plans as outlined under the Physical and Land Use Planning Act No 13 of 2013.
16. The 1st Interested Party joined issues with the Plaintiffs and averred that the Respondents failed to seek change of user from single dwelling house to multi-dwelling house as required by law. Further the Respondents failed to procure the EIA licence in consultation with the adjacent land owners and in compliance with the zoning policy of the area. That because of lack of development permission for multi dwelling units, change of user, approved plans, EIA licence, the 1st Respondent has issued an enforcement notice to stop the ongoing construction.
17. It was the case of the 1st Respondent that the suit properties being parcel Nos 2298,1760,1754 and 2216 are located in zone 16 within Kahawa Sukari Residential area which is a controlled estate for a single dwelling and the construction of a multi dwelling by the Respondents is contrary to the zoning regulations. That the procedure followed by the Respondents in obtaining the alleged approvals in contravention of the terms and conditions of the zoning regulations was tainted with fraud and illegality. In addition, that allowing the construction to stand would hurt public interests and the interests of the other residents in the zoned area.
18. The Plaintiffs/Applicants vide a Replying Affidavit dated the 5/11/2021 deponed by Edward Nduati Hiuhi joined issues with the 1st Interested Party and reiterated their position that the approvals obtained by the Defendants allowed for single dwelling units and not multi-dwelling structures contrary to law. In distinguishing their case the Plaintiffs insist that this Court is the right forum to hear and determine the dispute as the gist of the suit is the illegal constructions contrary to the approvals given by the 1st Interested Party. On that ground they urged the Court to dismiss the Preliminary Objection.
19. In a further Replying Affidavit sworn on the 22/11/2021 deponed by Stephen Kigima Gitimu, the 2nd Respondent/Defendant, he stated that he is not a member of the Association and cannot be bound by the bye laws of the society nor seek building approval from it. That in any event the Plaintiffs have no mandate to regulate development permissions as the same is the mandate of the 1st Interested Party. That his

development of a single dwelling house was approved by the 1st Interested Party and the same has not been challenged not even by the Plaintiffs. That the enforcement notice was issued in error and later withdrawn by the 1st Interested Party. Where is the withdrawals? With respect to NEMA approvals, the deponent stated that due to the nature of his development he was exempted from the requirements of the EIA assessment. That all in all he took every precaution to ensure that the development complied with the relevant regulations and laws, including but not limited to good environmental management. He termed the Plaintiffs as non bonafides representatives of the association but a rather busy bodies masquerading as elected officials whose sole aim is extortion of plot owners. That the bonafide officials of the Association are Mary Ngugi Mwaniki, Julius Wakobi and Dickson Maina Miano who have not been enjoined to the suit.

20. Daniel Mbugua Kamau, the 3rd Respondent/Defendant in his Replying Affidavit sworn on the 30/12/2021, in response to the Plaintiffs Notice of Motion dated the 16/7/21 deponed and reiterated the averments of the 2nd Respondent word for word. I see no need to regurgitate them.

21. Parties elected to file written submissions which I have read and considered. The Plaintiff through the law firm of **Charles Kimathi & Co Advocates** filed written submissions dated the 5/11/2021. The firm of **Wambugu & Muiruri & Company Advocates** filed submissions on behalf of the 1st Defendant on the 10/11/2021. The submissions of the 1st Interested Party were filed by **Ms J J Cheserek**, Learned Counsel for the County Attorney on the 4/10/2021.

22. The 2nd -4th Defendants and the 2nd – 4th Interested Parties chose not to file any submissions.

23. The Plaintiffs raised two key issues; whether the Plaintiffs have locus to file suit and secondly whether the Court has jurisdiction to hear and determine the matter.

24. On the issue of locus, it was posited that they are members of the association and therefore have capacity to file the suit as such. That the association is registered with a constitution and recorded minutes produced before the Court resolving to institute the suit herein. That clause 3 of the said constitution obligates all plot owners to be members of the association, the Defendants included. That their main borne of contention is the noncompliance of the Defendants with the bye laws of the County Government of Kiambu. Relying on the case of **Jared Nyauma Ondieki & 6 others Vs Football Kenya Federation (2019) eKLR** they submitted that the threshold for locus in Kenya is the minimal person interest which interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. They posit that the fact of being plot owners in Zone 16 gives them the locus to protect their neighborhoods against the Defendants who are constructing structures contrary to the regulations in the zone, which will have a negative effect to their properties.

25. Citing the case of **Kashbhai Vs Sempagawa (1976) EA 16**, the Plaintiffs faulted the 2nd -4th Defendants for raising a Preliminary Objection without stating the particulars of the statutory provision which they are basing the objection. They opined that the objection is frivolous and should be dismissed.

26. On the issue of jurisdiction of the Court to hear and determine the suit, the Plaintiffs aver that County Physical and land use planning liaison Committee had not been established hence falls for this Court to hear the matter. Further the Plaintiffs submit that their case has nothing to do with the environmental matters at all and it is purely challenging the illegal construction of a multi dwelling units instead of a single dwelling house. Relying on section 13 of the Environment and Land Act the Plaintiffs claim that the Court has original and appellate jurisdiction to determine the matter and in the absence of the committee, the Court is the right forum.

27. On the issue of misjoinder of the 1st Defendant the Plaintiffs admitted that the same has been redressed through a formal application to amend the pleadings.

28. The 1st Defendant argued that he has been sued together with another party thus making it impracticable for them to frame their defence to the suit. Either the Plaintiffs lack the locus to file suit as they have not demonstrated that they are officials or trustees of the association. That the suit is an abuse of the process of the Court.

29. The 1st Defendant submitted that the suit has therefore abated for failure to serve summons within the requisite 30 days. Relying on the case of **Skair Associates Architects Vs Evangelical Lutheran Church of Kenya & 4 others (2015) EKLR** the 1st Defendant submitted that the Plaintiffs are not officials nor trustees of the association and therefore have no locus to file the suit. In this case the Court held that the person instituting the suit on behalf of an unincorporated entity must be authorized by the constitution of the said society. That the letter relied on by the Plaintiffs did not show any evidence that the authors were officials of the association.

30. The 1st Defendant argued that the application dated the 16/7/2021 should fail for reasons that the Plaintiffs have not presented any admissible material to support the allegation that the construction is illegal. That the building is complete and therefore any injunction granted would be in vain. The development having been completed, there is no irreparable loss that the Applicants stand to suffer if the application is denied. Lastly that the balance of convenience tilts in refusing the injunction.

31. Supporting the Preliminary Objection, Legal Counsel J.J Cheserek filed submissions dated 3/11/2021 on behalf of the 1st Interested Party. Four issues were drawn for determination to wit; whether this Honorable Court has requisite jurisdiction; whether the issues for determination herein fall under the ambit of the County Physical and Land Use Planning Liaison Committee (hereinafter the County Committee); whether Environmental Impact Assessment license issues can be determined by this Court and lastly whether the Petitioners are entitled to the prayers sought.

32. The 1st Interested Party submitted that this Court lacks jurisdiction to determine this suit pursuant to the Constitution, the County Government Act and Section 61(3) of the Physical and Land Use Planning Act, 2019 empowering the County Committee to hear an appeal

against a decision by the County Executive Committee. That if a party is dissatisfied with the County Committee determination, s/he can then move this Court as provided under Section 61(4) of the Act. Accordingly therefore this Court's jurisdiction has been invoked prematurely. Reliance was placed on the case of **Owners of Motor Vessel Lilian s vs Caltex Oil Kenya Ltd 1989 KLR** and **Nairobi Petition No. 117 of 2019 KO Holdings Ltd vs County Government of Kiambu & Another** where the Court held that it lacked jurisdiction to entertain a Petition that fell under the Liaison Committee purview.

33. Additionally, that the appropriate forum for issues relating to Environmental Impact Assessment license is the National Environmental Tribunal as provided by Section 129(1) of the EMCA. The Interested Party cited the CoA decision in **Kibos Distillers Ltd & 4 others Vs Benson Ambuti Adega & 3 others [2020] eKLR** that in an alleged pollution dispute and lawful issuance of EIA license, the competent organ with original jurisdiction to entertain such an issue is the National Environmental Tribunal. The Interested Party was emphatic that the Applicants herein have failed and ignored to exhaust the alternative dispute resolution as stipulated in law and therefore were not deserving of the Orders sought and urged the Court to uphold its Preliminary Objection and dismiss the entire suit with costs as was held in **Thika ELC No. 81 of 2020 Angela Mbugua & 4 Others v KO Holdings Ltd & 2 others [2020] eKLR**.

34. The issues for determination are; whether the Court has jurisdiction to hear and determine the suit before me; Whether the Plaintiffs have locus to file this suit; Whether the suit against the 1st Defendant should be struck out; whether the Applicants are entitled to the orders of interim injunction against the Defendants; Who meets the costs.

35. It is not in dispute that the jurisdiction of this Court has been assailed by the 2nd 3rd and 4th Defendants vide their Preliminary Objection dated the 15/9/2021 and the 1st Interested Party's Preliminary Objection dated the 8/10/2021.

36. Jurisdiction being everything to a Court, I shall start with this issue and if it succeeds there will be no necessity to delve into the other issues drawn for determination.

37. In the case of **Phoenix of E.A. Assurance Company Ltd –vs- S.M. Thiga t/a Newspaper Services Ltd (2019) eKLR**, the Court of Appeal observed that:-

“It is a truism that jurisdiction is everything and is what gives a Court or tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction” in common English parlance, jurisdiction denotes the authority or power to hear and determine the judicial disputes or to even take cognizance of the same. This definition clearly shows that before a Court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such Court will be amenable to being set aside *ex debito justitiae*.”

38. Jurisdiction is defined in Black's Law Dictionary, 9th Edition as the power of the Court to decide a case or an issue. It means the authority which the Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or Commission under which the Court is constituted, and may be extended or restricted by the like means. If no restrictions or limits is imposed, the jurisdiction is said to be unlimited. A limited jurisdiction may be either as to the nature of actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decisions amounts to nothing. Jurisdiction must be acquired before Judgment is given. **See the writings of John Bacroft Saunders in a treatise headed Words and Phrases Legally Defined- Volume 3: I-N**

39. In any litigation, jurisdiction is the heart beat or the engine that drives the Court. A Court of law cannot validly take any step without jurisdiction. The Supreme Court stated in **the Matter of Interim Independent Electoral Commission [2011] eKLR** as follows:

“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. 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. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

40. 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.”

41. 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 ELC 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.”

42. It is evident that the Court enjoys both original and appellate jurisdiction in matters land use and planning.

43. It is our law that where there is a clear procedure for the redress of a particular grievances prescribed by the constitution or an act of Parliament that procedure should be strictly followed. See the case of **The speaker of the National Assembly Vs Karume (1992) KLR 22**.

44. In the case of **Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR** the apex Court pronounced itself at length on the doctrine of judicial abstention in such circumstances. The Court was of the considered view that the key dispute in the petition before the trial Court was whether the three appellants were polluting the environment and whether the three appellants’ EIA licenses were fully processed. It went further to determine that the competent organ in the dispute with original jurisdiction to hear and determine the dispute was the tribunal or the NEEC and not the ELC Court.

45. On Judicial abstention, as with judicial restraint, the Court stated that;-

“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 the requisite and 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.

[52] The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal Courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal Court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal Court. If such a reservation is made, the parties can return to the federal Court, even if the State Court makes a ruling on the issue.

46. It is also true that the gist of the Plaintiffs case is that the Defendants have constructed a multi dwelling house contrary to the approved single dwelling unit which is against the planning laws and regulations of the County. To a lesser extent they questioned whether the process received approval of NEMA, the 2nd Interested Party as regards the environmental soundness of the project.

47. Although the Defendants have spent much ink on the averments that their developments were approved both by the estate welfare association, (although some of them are non-members) as well as the County Planning Committee for a multi dwelling house, the documents presented before this Court are for a single dwelling house. It is the case of the 1st Interested Party that the right forum to address the issues of whether or not the approvals related to a single dwelling units or multi dwelling units is the county Physical Planning and Land Use Planning Committee and not this Court. It is commonly accepted that this Court enjoys appellate jurisdiction on the matter.

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 mechanisms 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 Committee 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 therefore 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 I order that the matter be remitted to the County Physical and Land Use Liaison Committee and the National Environment Tribunal (NET) (if applicable) for hearing and determination.

54. In the upshot the suit dated the 16/7/2021 and the application of even date herein are struck out.

55. The Preliminary Objection dated the 8/10/2021 is merited and is hereby upheld.

56. I find that the Preliminary Objection dated the 15/9/2021 is spent. It is dismissed.

57. The costs shall be borne by the Plaintiffs in favour of the 1st Interested Party.

58. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff/Applicant 1, 2, 3 & 4 – Kimathi

Defendant/Respondent 1 – Eredi

Defendant/Respondent 2, 3 & 4 – Gikaria

Interested Party 1 & 2 – Absent but served

Interested Party 3 – Ms. Ogola

Interested Party 4 – Absent but served

Court Assistant - Phyllis