



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 22 OF 2021

CALVIN ORINA OBWOGO.....PLAINTIFF/APPLICANT

VERSUS

NEHEMIAH ANGWENYI ONGERI.....1<sup>ST</sup> DEFENDANT/RESPONDENT

AGNES KWAMBOKA OCHAKO.....2<sup>ND</sup> DEFENDANT/RESPONDENT

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3<sup>RD</sup> DEFENDANT/RESPONDENT

THE NATIONAL CONSTRUCTION AUTHORITY.....4<sup>TH</sup> DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff/Applicant herein filed this suit vide a plaint dated 19<sup>th</sup> October, 2021 seeking to stop the construction of a hospital on land Parcel **CENTRAL KITUTU/MWABUNDUSI/2690** (hereinafter referred to as *the suit property*).
2. Together with the Plaint the Plaintiff filed a Notice of Motion dated 19<sup>th</sup> October, 2021 seeking an order of temporary injunction or in the alternative an order for maintenance of status quo pending the hearing and determination of the suit.
3. In support of the application the Plaintiff swore an affidavit in which he averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the registered owners of the suit property. He averred that he is the registered owner of land parcel Number **CENTRAL KITUTU/MWABUNDUSI/2088** which is adjacent to the Defendant's property. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents had started constructing a hospital at a cost of Kshs. 40,000,000 next to his residential house. He contended that the construction was commenced without public participation and before approval by the third Defendant/Respondent and that construction was taking place at night.
4. The Plaintiff avers that he reported the matter at Nyanchwa Police Station under OB NO.19/2/10/2021. He complained that the 4<sup>th</sup> Defendant who approved the plan of the house has refused to share the same with him. He contends that the balcony of the said construction leans towards his house and if the construction is allowed to proceed, the area will become uninhabitable. He also expressed fear that the construction could easily collapse and cause damage to his house since it is merely reinforced by iron beams.
5. In response to the application, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents filed a Replying Affidavit sworn by the 1<sup>st</sup> Defendant on 8<sup>th</sup> November, 2021. The 1<sup>st</sup> Defendant claimed that contrary to the claims by the Plaintiff/Applicant, they had obtained requisite approvals prior to commencing the impugned project which was initially a two storey building and subsequently modified to a four storey building.
6. He deponed that prior to the commencement of the construction, he had caused an Environment Impact Assessment audit to be carried out culminating in the preparation of a report that was submitted to the 3<sup>rd</sup> Defendant/Respondent. The report was acknowledged by the 3<sup>rd</sup> Defendant/Respondent on 28<sup>th</sup> January, 2020. The 3<sup>rd</sup> Defendant undertook a review of the report as legally required and communicated its findings to the Applicant. He averred that prior to the preparation of the project report, public participation was undertaken and the views of the members of the public were collected through questionnaires that he attached together with minutes detailing the members who participated in the process. He deponed that the 3<sup>rd</sup> Respondent considered their report and being fully satisfied that the project was in compliance with all relevant regulations and laws, issued an Environment Impact Assessment (EIA) License giving them a go ahead with the project.

7. The 1<sup>st</sup> Defendant deponed that upon conclusion of the two floors of the hospital, the Respondent in 2021 once again followed the process explained hereinabove and he was issued with a second EIA certificate by the 3<sup>rd</sup> Respondent to construct 2 additional floors. He further averred that the variation to include the additional floors was sanctioned by a structural engineer who certified that the structure was sound and the additional floors would not compromise the building in anyway whatsoever. He contended that it was thus not factually correct that the construction of the said building was undertaken without public participation, illegally or unprocedurally.

8. The Respondent averred that the Plaintiff is not an immediate neighbor to the suit property since he only shares a boundary with the Plaintiff in one corner of the suit property. He claimed that no immediate neighbor had complained about the project. It was his deposition that the Applicant did not have any proprietary interest in the suit property and thus lacked the *locus standi* to stop the on-going developments on the suit property. He averred that there has never been any damage suffered or occasioned to the adjacent houses since the project commenced, as it had been carried out strictly in line with the County zoning laws and regulations. He denied the Plaintiff's allegation that the construction was being undertaken at night and that the construction was in danger of collapsing.

9. The Respondent further argued that the instant matter and complaint by the Plaintiff was premature since the Applicant had not exhausted the available mechanisms in law. He contended that the licensing by the 3<sup>rd</sup> Defendant/Respondent is statutory and is regulated under the Environment Management Coordination Act (EMCA), which provides for a mechanism for challenging any EIA license issued under the said Act. He averred that any challenge of an EIA license or against a variation of the same should be ventilated through the National Environment Tribunal, created pursuant to section 129 of the EMCA Act. The Respondent further contended that the Applicant's complaint touching on the building approvals by the Physical Planning Regulator is one that ought to have been ventilated through the Liaison Committee established under the Physical Planning Act.

10. The 1<sup>st</sup> Respondent deponed that the impugned project is nearing completion and it would be prejudicial to him and the 2<sup>nd</sup> Respondent if the court grants an order restraining them from proceeding with the construction.

11. The 1<sup>st</sup> Respondent finally contended that it was evident that the Plaintiff's application for injunction did not satisfy the conditions for grant of an order of injunction as espoused in the celebrated case of **Giella versus Cassman Brown & Company Ltd (1973 E.A 358**

12. In response to the Replying Affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Plaintiff/Applicant filed a Further Affidavit sworn on 15<sup>th</sup> November, 2021 wherein he insisted that there was no public participation carried out and that no approval was obtained for the structural changes to the Respondent's building. He also denied the allegation that he lacked the *locus standi* to file the instant suit and substantiated that he filed the suit since his own property was going to be affected by the construction.

13. The 1<sup>st</sup> Respondent also filed a Further Affidavit sworn on 3<sup>rd</sup> December, 2021 in response to the Further Affidavit by the Plaintiff/Applicant wherein he reiterated his averments in his Further Affidavit. He annexed a copy of a newspaper advertisement to prove that he had applied for change of user of the suit property and the same was approved as required by the law.

14. The 4<sup>th</sup> Respondent entered appearance and filed its Grounds of Opposition on 19<sup>th</sup> November, 2021. The 4<sup>th</sup> Respondent contended that the suit was bad in law as it was wrongfully joined as a party to the suit. It contended that the issues raised in the application and the suit constitute matters that are covered under the Physical and Land Use Planning Act, 2019 to which the 4<sup>th</sup> Respondent is not a regulator. It argued that the approval process of any construction project is undertaken by the relevant County Government and that it only registers the construction works once the relevant County Government has approved the construction project and ensures that the construction complies with quality assurance at the construction site.

15. The court directed that the application be disposed of by way of written submissions and both Applicants together with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents complied with the directions by filing their submissions.

## **ISSUES FOR DETERMINATION**

16. Having considered the application, the Supporting and Replying Affidavits by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents and the 4<sup>th</sup> Defendant's Grounds of Opposition as well as the rival submissions of Applicants and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the following issues fall for determination;

- i. Whether this court has jurisdiction to entertain the application for injunction and by the extension the entire suit.
- ii. Whether the Applicant has met the threshold for grant of an order of injunction.
- iii. Whether the 4<sup>th</sup> Defendant/Respondent was wrongfully sued.

## **ANALYSIS AND DETERMINATION**

**Whether this court has jurisdiction to entertain the application for injunction and by the extension the entire suit.**

17. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

18. In the instant suit learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that this Honourable Court lacks jurisdiction to hear and determine the application as the Plaintiff/Applicant has failed to demonstrate that he has explored other available legal mechanisms of dispute resolution provided in the law before filing this suit.

19. Counsel submitted that a complaint regarding a building approval by the Physical Planning Regulator is ventilated through the Liaison Committee established by the Physical Planning Act by way of an appeal.

20. Counsel further submitted that a complaint concerning decisions by the 3<sup>rd</sup> Defendant/Respondent especially where one is claiming that public participation was not carried out or where one is claiming that the procedure for issuing licenses was faulty, ought to be filed as an appeal at the National Environment Tribunal established under section 125 of the Environmental Management and Co-ordination Act (EMCA) in line with section 129 of EMCA. He further submitted that incase the Plaintiff/Applicant was dissatisfied with the decision of the Tribunal, section 130 granted him an opportunity to file an appeal in this court.

21. In support of his submissions counsel relied on the case of **Michael Moragia Nyachae & another v Buddies Kisii Limited & 2 others [2016] eKLR** where the court held that;

“17. In the instant matter, it is my view that the **Environmental Management and Co-ordination Act (EMCA)** has prescribed a procedure for handling of grievances and/or disputes which arise from its application and/or the application of the regulations made under it. In the words of the Court of Appeal in the case of the **Speaker of the National Assembly –vs- The Hon. James Njenga Karume** (supra) the procedure set out thereunder should be strictly followed.

18. Thus in my view, the petitioners ought to have lodged an appeal before the NEMA Tribunal against the decision of the 2<sup>nd</sup> respondent permitting the 1<sup>st</sup> respondent to set up its business on parcel **Block III/198 Kisii Municipality**. I uphold the preliminary objection by the 1<sup>st</sup> respondent and the result is that the petitioners’ application and the petition are struck out with costs to the 1<sup>st</sup> respondent.”

22. Counsel further relied on the case of **Joseph Ojwang’ Oundo vs National Environment Management Authority and 8 others [2015] eKLR** where the court held that;

“In this case there was a decision made by NEMA of granting the Respondents license to carry on with activities of constructing the Sugar Company at Busia. The Plaintiff came to question the authenticity of the license and the procedure of issuance. In this case therefore, the right arena to air the dispute was in the National Environment Tribunal which under Section 129 of the EMCA is accorded power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.

[25] To my mind therefore, it would be inappropriate for the plaintiffs to address issues of license in this court whereas they have not exhausted the available statutory remedy which is provided under section 129 of the EMCA.

[26] In **Jeremiah Nyandusi Abuga & 17 others vs City Council of Nairobi ELC Case No. 145 of 2012** court held:

“While section 38 of the Physical Planning Act which requires appeals to be made to the liaison committee in the first instance cannot oust the original jurisdiction of the High court granted by the Constitution under Article 165(3), the Court of Appeal in **Speaker of the National Assembly vs Njenga Karume (2008) 1KLR 425**, held that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed...It is thus my finding that the plaintiffs have not exhausted the available procedural mechanism for the resolution of the dispute herein, before moving this court.” (Emphasis and underlining supplied)

[27] In the present case whereas section 129 cannot oust the exclusive jurisdiction of ELC to deal with issues of license which is an issue of use and occupation of land, redress should first be sought in the National Environment Tribunal.

[28] The National Environment Tribunal is established under section 125 of the EMCA Act. Section 126 provides for proceedings of the tribunal. Section 126(2) provides that;

“The Tribunal shall, upon an appeal made to it in writing by any party or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Authority or any relevant committee thereof, as the case may be.” (Emphasis and underlining supplied)

[29] Any matter relating to the EMCA Act is therefore dealt with by the tribunal and since the allocating of the impact assessment license is a matter falling under this Act [6] the best forum to address it is in the National Environment Tribunal. Section 129 of the EMCA accords the National Environment Tribunal power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.

23. On his part, learned counsel for the Applicant argued that it would defeat logic for the Applicant to go before a Tribunal of National

Environment Management Authority (NEMA) because his clients had a dispute with NEMA who had not filed any document on what they approved.

24. Having considered the pleadings, the application, the submissions of both parties and the authorities cited to me as well as the law, it is my finding that this court does not have jurisdiction to hear and determine this matter. This is because the main issue raised by the Applicant is the process that led to the issuance of the EIA License by the 3<sup>rd</sup> Respondent and the approval of construction building by the Physical Planning Regulator. As correctly submitted by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the first port of call that has the mandate to address this issue is in the National Environment Tribunal.

27. Section 129 of the EMCA accords the National Environment Tribunal power to hear and determine appeals arising from the decisions made by authorities given powers under the Act including the 3<sup>rd</sup> Respondent herein. The Tribunal that is created under section 125 of the EMCA and given mandate under section 126 of the Act is independent from the 3<sup>rd</sup> Respondent. The Tribunal is not a branch of or subordinate to the 3<sup>rd</sup> Respondent.

26. Further, Section 72 (3) and (4) of the **Physical and Land Use Planning Act, 2019 (the PLUPA)** bars this court from entertaining complaints relating to approval of structures and change of user in the first instance. The said section provides as follows;

**“72. (3) 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.**

**72.(4) Any party aggrieved with the determination of the County Physical and Land Use Planning Liaison Committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.”**

27. It is clear from the above legal framework in Section 72(3) and (4) that the organ mandated by Parliament to exercise original jurisdiction in disputes such as the one raised by the Applicant is the **County Physical and Land Use Planning Liaison Committee**. This court is solely mandated under Section 72(4) of the Act to exercise appellate jurisdiction. The only instance when this court may exercise its primary jurisdiction in disputes relating to enforcement notices is when a County does not have an operational Liaison Committee, something the Applicant ought to have established before approaching this court.

28. Having determined that this court lacks jurisdiction to hear and determine the matter, it will not be necessary to consider the other two issues. The only option I have is to down my tools.

29. Accordingly, the application is dismissed and the suit is struck out for lack of jurisdiction. The costs of this application shall be borne by Plaintiff/Applicant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 9<sup>TH</sup> DAY OF MARCH, 2022**

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**J.M ONYANGO**

**JUDGE**