



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC APPEAL NO. 15 OF 2020**

**BENARD OMBACHI NYASIMI.....APPELLANT**

**-VERSUS-**

**JAMES MUHIDA KIMUHU.....RESPONDENT**

**COUNTY GOVERNMENT OF KAJIADO.....1<sup>ST</sup> INTERESTED PARTY**

**WYKLIFFE MAKOKHA.....2<sup>ND</sup> INTERESTED PARTY**

**TINDIH HESBORNE.....3<sup>RD</sup> INTERESTED PARTY**

**LEONIDA ALUOCH ADIMO.....4<sup>TH</sup> INTERESTED PARTY**

**MARGARET AJIAMBO MOKOKHA.....5<sup>TH</sup> INTERESTED PARTY**

**NDEGWA MWANIKI.....6<sup>TH</sup> INTERESTED PARTY**

**GRACE KATHUSI.....7<sup>TH</sup> INTERESTED PARTY**

**ZEPHANIAH CHESIRE.....8<sup>TH</sup> INTERESTED PARTY**

**ROBERT WAWERU.....9<sup>TH</sup> INTERESTED PARTY**

**EDNA SHADRACK OUMA.....10<sup>TH</sup> INTERESTED PARTY**

**ROBERT NDUNG’U.....11<sup>TH</sup> INTERESTED PARTY**

(being an Appeal from the Ruling and order delivered on 16<sup>th</sup> July, 2020 in Kajiado

Chief Magistrates Court ELC Case No.18/2020)

**RULING**

1. This ruling is on the amended Memorandum of Appeal dated 3<sup>rd</sup> June, 2021.
2. The Appeal seeks to set aside the ruling of Hon. S.M. Shitubi, Chief Magistrate Kajiado dated 16<sup>th</sup> July, 2020 in Kajiado Chief Magistrates’ ELC Case No. 18 of 2020.
3. In the said ruling, the learned Magistrate ruled that she had no jurisdiction to entertain the matter. According to her, such jurisdiction lay with County Physical and Land use Planning Liaison Committee.
4. Secondly, the learned Magistrate found that the Appellant had not made out a case for the grant of an injunction. She therefore dismissed the Appellant’s notice of Motion dated 9<sup>th</sup> April, 2020 which had sought to restrain the Respondent from installing a commercial –cum-

multi-dwelling structure on L.R. Kajiado/Kitengela/14734.

5. The Amended Memorandum of Appeal contains twelve (12) grounds of appeal as follows;

The learned trial Magistrate erred in law and in fact in;

- a. Determining the suit on jurisdiction which was not pleaded.
- b. Applying part 10 of the **Physical Planning Act 2019** retrospectively and/or misconstrued the same.
- c. Making conclusions on disputed evidence at an interlocutory stage before proof.
- d. Making an assumption that a County Physical and Planning Land use Planning Liaison Committee existed without proof.
- e. Failing to appreciate that the Respondent did not display a board on the suit land explaining the scope of the development to enable the Appellant know and take necessary action.
- f. Failing to take into account the Appellant's evidence that the particulars of the Respondent's allegedly approved plan had not been displayed at the site and only came to fore on the Respondent's response to the Appellant's Application dated 9<sup>th</sup> April, 2020.
- g. Failing to appreciate that only an Applicant whose application for development plan has been denied by the Director of Physical Planning could Appeal to the County Liaison Committee under **Section 33 (3)** of the **Physical Planning Act, 2019** and the Appeal did not have, could not have and cannot have scope to Appeal to the Liaison Committee.
- h. Failing to appreciate that in the circumstances the Court had jurisdiction to entertain the suit.
- i. Failing to evaluate the Appellant's evidence in the ruling and its implication to the Respondent's convenient refuge in the provisions of the Physical Planning Act which he failed to comply with.
- j. Finding that the Respondent's development was at an advanced stage and that it would not have been convenient to stop it yet there were interim orders restraining such development.
- k. Finding that developing a property of a character inconsistent with the County zoning development regulations was in itself not a reason to grant an injunction and
- l. Dismissing the Appellant's application for injunction.

6. For the above reasons, the Appellant seeks the following orders from this Court;

- a. That the Ruling dated 16<sup>th</sup> July, 2020 be substituted with an order granting the Appellant's application for injunction.
- b. An order that the Magistrate's Court has jurisdiction.
- c. Setting aside of the order that the Appellant bears costs of the Application dated 9/4/2020.
- d. That the case proceeds before another Magistrate other than Hon. Shitubi.
- e. That the costs of this Appeal be borne by the Respondents.

The Respondent was expected to file and serve written submissions by 14/2/2022. No such submissions have been filed as of 25/3/2022.

Counsel for the second to eleventh interested parties filed written submissions on 28/10/2021 while the one for the Appellant filed his on 28/1/2022. Both of them support the Appeal.

Firstly, on jurisdiction, Counsel are unanimous that in the case of ***Hardy Residents Association –vs- Andrew Ng'ng'a (2013) eKLR***, it was held that the Court will always assume jurisdiction where the Liaison Committee under the Physical Planning Act has not made a decision.

Secondly, on the issue of maintaining the status quo, both the Appellant and the Interested Parties are again unanimous that the order for the same ought to have been maintained. They add that the maintenance of the status quo was all the more necessary because of the many failures by the Respondent to comply with *County Land Use and Planning Guidelines*.

I have carefully considered the Appeal in its entirety including the record, the grounds and the submissions by the Appellant and the Interested Parties. I find that there are only two issues to be decided in this Appeal;

1. Whether the Magistrates' Court has jurisdiction?

2. Whether an injunction ought to have issued in all the circumstances of the land?

On the first issue of jurisdiction, I am persuaded by the submissions by the Counsel for the Appellant and the Interested Parties that in the absence of any decision by the Liaison Committee under the Physical Planning Act, then the Magistrates' Court has jurisdiction. The authority of *Hardy Residents Association (Supra)* is good law on this aspect.

On the second issue, I find that the Appellant who was Plaintiff/Applicant in the Lower Court made out a prima facie case with a probability of success. He also proved that the construction by the Respondent on the suit land without proof of the necessary approvals was detrimental to him.

The County Government of Kajiado which is the authority that was to approve the construction is also in support of the Appeal. This is the best evidence that the construction is not approved and ought to be stopped.

For the above stated reasons, I allow the Appeal and order as follows;

- a. The Ruling by the Learned Magistrate dated 16<sup>th</sup> July, 2020 is set aside and substituted with an order allowing the Appellants' Application for injunction.
- b. The Magistrates' Court has jurisdiction to hear and determine the dispute. Consequently case to proceed from where it has reached before a different Magistrate.
- c. Costs of this Appeal to abide the outcome of the cause pending in the lower court.

Order accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 4<sup>TH</sup> DAY OF APRIL, 2022**

**M.N. GICHERU**

**JUDGE**