



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kahawa Sukari Residents & Plot Owners Welfare Association & another v Ngonge & another  
(Environment & Land Case 135 of 2021) [2022] KEELC 3052 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3052 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 135 OF 2021**

**JG KEMEI, J  
MAY 19, 2022**

**BETWEEN**

**KAHAWA SUKARI RESIDENTS & PLOT OWNERS WELFARE  
ASSOCIATION ..... 1<sup>ST</sup> PLAINTIFF**

**RESIDENTS OF TAVETA ROAD 1ST AVENUE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID NJAGE NGONGE ..... 1<sup>ST</sup> DEFENDANT**

**ANNE WANJIRU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The defendants filed the instant preliminary objection dated 24/11/2021 on grounds THAT;
  - a. This honorable court lacks jurisdiction to entertain the suit at this stage as the same is the preserve of the County Liaison Committee.
  - b. The plaintiffs herein lack the locus standi to bring this cause of action against the defendants.
  - c. The suit is premature and an abuse of Court process.
2. On 7/12/2021, the plaintiffs were granted 7 days to file their response to the Preliminary Objection but none is on record. Further directions were taken to canvass the Preliminary Objection by way of written submissions.
3. The firm KMK Law LLP filed submissions dated 15/2/2022 on behalf of the defendants. On the court's jurisdiction, they submitted that the plaintiffs filed the instant suit despite the existence of physical planner's direction that the defendants stop further construction; seek development permission failing which the building would be demolished. That section 78 of the *Physical and Land Use Planning Act* (PLUPA) provides for the functions of the County Physical and Land Use Planning



Liaison Committee inter alia to hear and determine complaints in respect to applications submitted to the planning authority and that section 72(4) that where a party is aggrieved by the Liaison Committee determination, he can appeal to court within 30 days on a matter of law only. That in the instant case the defendants readily complied with enforcement notice and remedied the issues raised by the physical planner. The defendants impugned the plaintiffs for raising questions of fact before this court hence the lack of jurisdiction. Reliance was placed on the case of *Immaculate Gicuku Mugo v Kiambu County Government* [2021] eKLR whereby the court struck out a suit before it despite the laydown procedure in section 72 *PLUPA*.

4. On the issue of locus standi, the Defendants maintained that the 1<sup>st</sup> Plaintiff describes itself as an association registered under the *Societies Act* and such a Society under cap 108 lacks capacity to institute a suit on its own but can only do so through its officials. The case of *Trustees Kenya Redeemed Church & another vs. Samuel M'Obiya & 5 others* [2011] eKLR was cited in support of that proposition. The 2<sup>nd</sup> plaintiff's legal capacity was assailed as an amorphous body and that there was no evidence of any authority to sue by the residents of Taveta Road 1<sup>st</sup> Avenue.
5. Lastly, the defendants submitted that mandatory injunctions are not to be issued at the interim stage unless special conditions are demonstrated as was held by the CoA in *Kenya Breweries Ltd & anor v Washington O Okeya* [2002] eKLR. That the plaintiffs in this case have not sought a mandatory interlocutory injunction but a mandatory injunction that is final in nature and disposes the entire suit.
6. Conversely, the plaintiffs through the firm of Mutwiri & Mwongera & Co. Advocates filed submissions dated 20/12/2021. They reiterated that this court is rightly clothed with jurisdiction to hear the suit pursuant to article 162(2) (b) & (3) of *Constitution of Kenya* and Section 13 of the ELC Act. That the defendants move to construct multi dwelling/residential houses contravenes the By Law 242 of Kahawa Sukari Estate; a controlled development area. That such contravention affects the residents' right to live in a clean and healthy environment and any violation entitles them to seek redress as provided for under article 70(1) *Constitution of Kenya*. That accordingly, this court has requisite jurisdiction to hear and determine this suit.
7. Regarding their locus standi to sue, the plaintiff admitted that while the *Societies Act* does not expressly provide for such entities to sue, neither does it expressly prohibit them from suing or being sued. That in any event article 22 and 258 *Constitution of Kenya* addresses that lacunae by allowing proceedings by a group of persons or such association acting in the interest of one or more of its members. They urged the court to maintain that their suit is not an abuse of the court process.
8. The main issues for determination are whether this court has requisite jurisdiction over the matter and whether the plaintiffs have capacity to sue.
9. 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.”



10. 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...”

11. 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.

12. The defendants contend that this court’s jurisdiction on matters of this nature is only appellate in accordance with section 72 (4) PLUPA. The Plaintiffs’ submissions are silent on that particular provision. Section 72 (1)-(4) of the PLUPA provides as follows;

“72.(1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—

(a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or

(b) any condition of a development permission granted under this Act has not been complied with.

(2) An enforcement notice shall—

(a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;

(b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

(c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(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.

(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.”



13. Under section 78 (b) of the *PLUPA* the functions of the County Liaison Committee include hearing appeals against decisions made by the planning authority with respect to physical and land use development plans in the county. Appeals from the County Liaison Committee lie to the National Liaison Committee as provided for under section 75 (1) (b) of the *PLUPA*; to hear and determine appeals under the Act or as may be provided for under any other written law.

14. Further this court’s original and appellate jurisdiction flows from article 162 (2)(b) of the *Constitution* of Kenya and section 13 (2) of the *ELCA* that;

“(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.”

15. That said, such jurisdiction is exercised judiciously within the law and having regard to the laid down mechanisms. What is the legal position on exhaustion of legal mechanisms? The Court of Appeal in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR observed that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

16. Similarly the Court of Appeal in *Geoffrey Muthinja & another vs. Samuel Muguna Henry & 1756 others* [2015] eKLR in dismissing the appellants’ appeal against the High Court decision directing them to inter alia refer their dispute to the appropriate church organ for determination held;

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and



quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

17. On 7/12/2021 Learned Counsel for both parties conceded that there are temporary injunctive Orders by the Kiambu County Liaison Committee stopping the impugned Defendants’ construction. Pursuant to that concession this Court ordered that the interim orders that had been issued herein on 18/11/2021 were vacated.
18. This court is of the firm view that the outlined mechanism for legal redress set out in the [PLUPA](#) above are applicable. I find that the Preliminary Objection is merited. It is upheld.
19. As a result, the issue on locus is now moot for consideration.
20. The costs shall be in favour of the respondents.
21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF MAY 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Muinduko for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Respondent

Irungu for 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Applicant

Court Assistant - Phyllis

