



**Karanja v County Government Of Kilifi (Environment & Land Case
92 of 2021) [2022] KEELC 3599 (KLR) (18 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 92 OF 2021**

**MAO ODENY, J
JULY 18, 2022**

BETWEEN

PETER NJOROGE KARANJA APPLICANT

AND

COUNTY GOVERNMENT OF KILIFI RESPONDENT

RULING

1. This ruling is in respect of a notice of a preliminary objection dated October 29, 2021 by the defendant on the following grounds: -
 - a) That this honourable court lacks jurisdiction to entertain the present suit.
 - b) That the plaintiff/applicant herein has failed and/or neglected to exhaust the alternative means of dispute resolution provided by the [Physical Planning and Land Use Act](#), No 13 of 2019.
 - c) That this suit is incurably defective and repugnant to the provisions of the law, in particular the [Physical Planning and Land Use Act](#), No 13 of 2019.
 - d) That the instant suit is therefore premature, frivolous and an abuse of the court process.
 - e) That the application as formulated and envisaged is frivolous and bad in law and hence should be dismissed with costs to the defendant/respondent.
2. Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

Defendants's Submissions

3. Counsel relied on the case of [Mukisa Biscuit Manufacturing Co Ltd v West-end Distributors Limited](#) (1969) EA 696, on preliminary objections and submitted that the instant preliminary objection seeks to determine the instant suit in limine whether there is a cause of action due to want of jurisdiction.



4. Counsel submitted that the plaintiff herein was served with a notice on the June 24, 2021 requiring him to stop construction on the suit parcel of land and that he was also required to submit evidence that the allegations leveled against him were false failure to which the Respondent would undertake legal and/or any other action to remedy the illegalities. The notice further stated that the plaintiff was at liberty to appeal to the County Physical and Land Use Planning Liaison Committee in the event he felt aggrieved by the said notice.
5. It was counsel's submission that the plaintiff did not follow the requisite procedure of appeal as laid down in the notice and section 72 (3) of the *Physical and Land Use Planning Act*, Act No 13 of 2019 which provides that; -

“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.”
6. Ms Omondi submitted that it is trite law that where there is a clear procedure for redress of a particular grievance prescribed by an Act of Parliament, that procedure should be followed, thus the court cannot oust the jurisdiction bestowed upon the Physical and Land Use Planning Liaison Committee by law.
7. Counsel relied on the cases of *Samson Chembe Vuko v Nelson Kilumo & 2 others* [2016] eKLR and *Samuel Macharia Kamau v KCB & others* [2012] eKLR and submitted that court's jurisdiction flow from the *Constitution* or legislation or both.
8. Ms Omondi submitted that this Court lacks jurisdiction to determine this matter as there is an already existing statute to wit the *Physical and Land Use Planning Act*, Act No 13 of 2019 that has conferred jurisdiction to the County Physical and Land Use Planning Liaison Committee to deal with the issues herein before the said issues can be brought before this honourable court.
9. That the *Physical and Land Use Planning Act*, Act No 13 of 2019, is the principal statute that makes provision for the planning, use, regulation and development of land. The objectives of the *Act* are set out in section 3 which provides as follows: -
 - 3 . Objects of the *Act*
 - The objects of this *Act* are to provide—
 - (e) a mechanism for dispute resolution with respect to physical and land use planning; ...
10. Counsel further cited section 72 (3) of the *Physical and Land Use Planning Act*, Act No 13 of 2019 which provides the appropriate channel to be followed when a party is aggrieved by enforcement notice and that the Plaintiff herein did not follow the laid-out procedure and rushed to court before exploring the laid-out procedures.
11. Counsel also cited the case of *Dickson Mukwe Lukeine v Attorney General & 4 others* [2012] eKLR where Justice Majanja held that parties should use the applicable procedures to resolve disputes as provided by the statute before going to court.
12. It was counsel's further submission that article 159(2)(c) of the *Constitution of Kenya 2010*, provides that courts should encourage alternative forms of dispute resolution and urged the honourable court to find that the plaintiff prematurely filed the instant suit before appearing before the County Physical



and Land Use Planning Liaison Committee as expressly stated at section 72 (3) of the *Physical and Land Use Planning Act*, Act No 13 of 2019.

Plaintiff's Submissions

14. Counsel submitted that the preliminary objection is primarily pegged on the provisions of section 61 of the *Physical and Land Use Planning Act*, No 13 of 2019 which provides as follows: -

61.

(1) Decision Making and Communication.

When considering an application for development permission, a county executive committee member—

- a) shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans;
- b) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought;
- c) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought;
- d) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and
- e) in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.

15. Counsel submitted that section 61 on which the preliminary objection is premised would have been relevant, in as far as the applicant is concerned if his application had been denied, and on appeal to the Environment and Land Court, his recourse would have been to appeal to the County Physical and Land Use Planning Liaison Committee. That since the plaintiff's application was approved there was no need of filing an appeal to the Liaison Committee and that such avenue would have been open to "an interested party hence the applicant herein cannot have been an applicant and interested party at the same time.

16. Counsel also stated that the respondent refers to a notice to stop construction which is not the case as there was no notice. That the court cannot without any evidence, convince itself that such a notice exists and was indeed served on the applicant.

17. That the applicant's application was approved and commenced construction, which approval has not been rescinded, and if it has been so rescinded, no communication was made to the applicant as provided for under section 61 whose heading is, "Decision making and Communication."

18. Ms Obara submitted that the said construction was then brought down by the respondent, which is the genesis of this case and that the only issues that can go before the County Physical and Land Use Planning Liaison Committee arise out of a denial or approval of the application for development. Counsel urged the court to dismiss the preliminary objection with costs as it does not meet the threshold for preliminary objections.



Analysis And Dtermination

19. The issue for determination is whether the preliminary objection is sustainable as presented by the defendant that the court lacks jurisdiction to hear and determine this matter due to lack of exhaustion of the dispute mechanisms under Physical Planning Act.
20. It is true that the *Physical and Land Use Planning Act* has elaborate procedures regarding dispute resolution and institutions to deal with such disputes when they arise. The processes have been captured by the defendant.
21. Further it should be noted that the defendant is refereeing to a notice which was served on the plaintiff but the plaintiff's suit is not about a notice but violations on the demolitions and special damages which cannot be heard by the Liaison Committee.
22. The plaintiff applied for and got approval for the construction that he was undertaking therefore he is not complaining of a denial of approval which would squarely be within the purview and the jurisdiction of the *Physical and Land Use Planning Act*.
23. In the case of *Angela Mbugua & 4 others v KO Holdings Ltd & 2 others* [2020] eKLR, the court held that according to section 61(3) of the *Physical and Land Use Planning Act* a challenge to the decision of the planning authority lies with the Liaison Committee after which a party may approach the Environment & Land Court. The plaintiff herein is not challenging the decision of the Planning authority but seeking redress for the wrongs done by demolishing his property after approvals had been secured.
24. Preliminary objections should be purely on points of law and not factual. It is therefore my finding that the preliminary objection herein doesn't meet the threshold set in the *Mukisa Biscuit's* case and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF JULY, 2022.

MA ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving order 21 (1) of the Civil Procedure Rules.

