



Moshi & 2 others (Suing as Officials of the Forest Court Residents Welfare Association) v Gathogo & another; Membley Park Residents Association (MEPRA) (Interested Party) (Environment & Land Case E139 of 2021) [2022] KEELC 2754 (KLR) (18 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E139 OF 2021**

**BM EBOSO, J
JULY 18, 2022**

BETWEEN

**DAVID INGANGA MOSHI, JULIUS CHEGE MUCHOKI & STELLA KARUGA
(SUING AS OFFICIALS OF THE FOREST COURT RESIDENTS WELFARE
ASSOCIATION 1ST PLAINTIFF
JULIUS CHEGE MUCHOKI 2ND PLAINTIFF
STELLA KARUGA 3RD PLAINTIFF
SUING AS OFFICIALS OF THE FOREST COURT RESIDENTS WELFARE
ASSOCIATION**

AND

**SAMUEL MUTAHI GATHOGO 1ST DEFENDANT
DIRECTOR, PHYSICAL & LAND USE PLANNING, KIAMBU COUNTY
GOVERNMENT 2ND DEFENDANT**

AND

**MEMBLEY PARK RESIDENTS ASSOCIATION (MEPRA) INTERESTED
PARTY**

RULING

1. The plaintiffs initiated this suit in their capacity as officials of Forest Court Estate Residents Welfare Association. Through their plaint dated 25/11/2021, they contend that the 1st defendant is the registered owner of Land Reference Number 20722/160 and the beneficial owner of Land Reference Number 20727/161, both located in Forest Court Estate, Ruiru, Kiambu County. They allege that Forest Court Estate is situated within Membley Park Estate which is zoned as a medium density



residential area by virtue of the special conditions attached to the land titles in the estate as well as under the Ruiru Integrated Strategic Development Plan 2020 – 2030. They contend that the special conditions and plan only permit construction of single dwelling, town houses, maisonettes and bungalows.

2. The plaintiffs contend that in the second half of 2021, the 1st defendant unlawfully commenced construction of unknown developments within the two suit properties. Upon request, the 1st defendant declined to avail to them the approved development plans and the approval issued by the 2nd defendant. They add that they established that the 1st defendant applied for and was irregularly issued with an approval dated 29/10/2019 to build a perimeter wall on Land Reference Number 20727/161 by the Thika Sub County Planning Director who did not have jurisdiction to issue the approval. They contend that the 1st defendant was undertaking the said development without the requisite approval and in contravention of the zoning regulations.
3. Consequently, they seek among other reliefs, orders restraining the 1st defendant against undertaking further construction works on the two properties. They further seek an order invalidating the approval issued by the Thika Sub County Physical Planning Office. They also seek a mandatory injunction compelling the 1st defendant to restore the suit property to its original state.
4. Together with the plaint, the plaintiffs brought a notice of motion dated November 25, 2021, through which they seek interlocutory orders: (i) restraining the 1st defendant against undertaking further developments/constructions that are not in conformity with the single dwelling residential user status of the properties; (ii) restraining the 2nd defendant against considering and/or approving any application for change of user or construction permit intended to change the character of use of the properties; (iii) finding that the Thika Sub County Physical Planning Office lacks jurisdiction to issue a development approval relating to the suit properties; (iv) compelling the 1st defendant to restore the suit properties to their original condition prior to the commencement of the impugned construction; and (v) finding that Forest Court Estate is zoned as a medium density residential area under the Ruiru Integrated Strategic Development Plan 2020 – 2030 as read together with the special conditions in the titles relating to the properties in the area and that any construction not in conformity with the zoning regulations and residential user is prohibited.
5. The application was supported by an affidavit sworn on 25/11/2021 by David Inganga Moshi and a further affidavit sworn by the same deponent on 17/12/2021. The said application is one of the three items that fall for determination in this ruling.
6. In answer to the suit and to the application, the 1st defendant filed a statement of defence and counterclaim dated 5/1/2022 and a replying affidavit sworn by him on 7/12/2021. His case is that the impugned developments and constructions were lawfully approved by the relevant authority and he erected the requisite signage only for the plaintiffs to remove some information from the signage before taking photographs of the distorted signage. He denies the allegations made by the plaintiffs. He disowns the approval exhibited by the plaintiffs and contends that his approvals were duly issued by the relevant physical planning office and not the Thika Sub County Physical Planning Office. He adds that he only required an approval for the boundary wall relating to land reference number 20727/161 because land reference number 20727/160 already had an existing boundary wall constructed by his neighbor who owns land reference number 20727/159. He has exhibited approval Reference No. SN:SD – CPD001 – AAA1825 dated 5/3/2021 issued by Dennis Abuya, relating to Plan Registration No. RRU-SD-CPD001 – AAA6793. The said approval is unsigned but bears an electronic quick response (QR) Code. The approval authorized construction of a boundary wall on land reference number 20727/161. He has also exhibited approval number SN: SD-TEC-CPD001 – AAA0473 dated 26/11/2021 in respect of the plan registered as number RRU – TEC – SD - CPD001 – AA 3636,



- relating to amendments to the boundary wall to be effected on land reference number 20727/161. The said approval was signed and is expressed as having been issued by Charles Mugambi, a Sub County Physical Planning Officer. It also bears an electronic quick response (QR) Code.
7. The 1st defendant contends that upon receiving the requisite approval, he executed the works to conclusion. He has exhibited photographs of the developments which he contends contain servant quarter/gate house which was introduced through the approved amendments to the original approved plans relating to the boundary wall.
 8. By way of counterclaim, the 1st defendant contends that the 1st plaintiff repeatedly trespassed onto the suit properties. He adds that on 13/11/2021, the 1st plaintiff trespassed onto the suit properties and carried away one water pump, one wheel barrow, six spades, one generator and six hammers, all valued at Kshs.41,000. Consequently, he seeks an order restraining the plaintiffs against trespassing on the suit properties. He also seeks an order directing the plaintiffs to return the above properties. Further, he seeks general damages and costs of the primary suit and the counterclaim.
 9. Besides the above responses to the suit and to the application, the 1st defendant brought a preliminary objection dated 3/12/2021 inviting this court to strike out the plaintiff's suit in limine on the grounds that: (i) the plaintiffs have no locus standi to institute the suit; (ii) this court lacks the necessary jurisdiction to hear and determine this suit; (iii) the prayers sought are based on speculation and conjecture and have no foundation in fact; and (iv) the prayers sought have been overtaken by events. The said preliminary objection is the second item falling for determination in this ruling.
 10. The third item falling for determination in this ruling is the 2nd defendant's notice of preliminary objection dated 25/2/2022 through which the 2nd defendant invites the court to strike out the plaintiffs' suit in limine on the ground that the suit contravenes the dispute resolution requirements set out in sections 61(3) and 61(4) of the *Physical and Land Use Planning Act* 2019. The 2nd defendant's preliminary objection was canvassed through written submissions dated 25/2/2022.
 11. I have considered the plaintiffs' application together with the two notices of preliminary objection. The two notices of preliminary objection challenge the jurisdiction of this court to adjudicate this dispute at this stage. The principle to guide a court whenever it is confronted with a an objection relating to jurisdiction was outlined by Nyarangi JA in *Owners of Motor vessel "Lillian S" v Caltex Oil Kenya Limited* (1989) KLR 1 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 its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”
 12. The Supreme Court of Kenya reiterated the above principle in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* (2012) eKLR as follows;

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.



13. It follows from the above principle that because the two notices of preliminary objection raise the question of jurisdiction of this court to adjudicate the dispute in this suit, the court is obligated to dispose that question first, to ascertain whether it has jurisdiction to adjudicate the dispute further.
14. The gist of the 2nd defendant's preliminary objection is that the primary jurisdiction to adjudicate the dispute in this suit is vested in the county physical and land use planning liaison committee. The second limb of the 1st defendant's preliminary objection raises the same ground of objection. I have considered the ground of objection.
15. The plaintiffs brought this suit contending that the 1st defendant was undertaking developments on the suit properties in contravention of the user of properties in that particular zone. At the stage of giving *ex parte* directions on the application for interim interlocutory reliefs, this court directed the plaintiffs to serve the suit papers on the defendants. Further, the court directed the 1st defendant to file a replying affidavit and exhibit copies of all requisite approvals procured by him in relation to the impugned development. In compliance, the 1st defendant filed a replying affidavit on 7/12/2021 and exhibited the two approvals alluded to in one of the preceding paragraphs in this ruling.
16. What emerges from the 1st defendant's defence and replying affidavit is that the impugned developments were approved by the Kiambu County Directorate responsible for physical planning. The first approval relates to the original development plans in respect of a boundary wall relating to land reference number 20727/161. The second approval relates to changes to the original developments. The plaintiffs fault the first approval on the ground that it was neither signed nor stamped. It is, however, noted that the exhibited copy has a quick response code (QR Code). Quick response codes [QR codes] have lately become accepted electronic matrix for verifying or authenticating documents. Put differently, quick response codes have lately become accepted electronic signatures. The 2nd defendant has not challenged nor disowned the two approvals attributed to it.
17. Having read the plaintiffs' pleadings, it is clear that the dominant dispute in this suit relates to the 1st defendant's developments. At this stage, the 1st defendant has demonstrated that the impugned developments were approved by the 2nd defendant. Secondly the reliefs sought by the plaintiffs revolve around the question of user of the suit property. This suit essentially constitutes a challenge against the approvals which the 1st defendant has exhibited. Is this court the proper primary forum where the above challenge should be mounted?
18. In my view, the answer to the above question is in the negative. In its wisdom, Parliament, through the *Physical and Land Use Planning Act* of 2019, established the county physical and land use county liaison committees and vested in them the primary jurisdiction to adjudicate physical and land use planning disputes (see section 61 (3) of the Act). Further, Parliament vested in the Environment and Land Court appellate jurisdiction in relation to the above disputes (see Section 61 (4) of the Act).
19. This court would ordinarily have jurisdiction to adjudicate the plaintiffs' grievances if the impugned developments had not been approved. Through his replying affidavit, the 1st defendant has demonstrated that the impugned developments were approved. In the circumstances, the proper primary forum where the plaintiffs' grievances should be ventilated is the Kiambu county physical and land use liaison committee. This court will have appellate jurisdiction once the liaison committee pronounces itself on the dispute.
20. Should this suit be struck out in limine in the circumstances? The Supreme Court of *Kenya in Benson Ambuti Atega v Kibos Distillers Ltd & 5 others* [2020]eKLR outlined an appropriate advisory on the



approach which other courts should take in scenarios such as what this court is confronted with. The Supreme of Kenya rendered itself thus:

“The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate court should have at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination.”

21. In the present suit, evidence of approval of the impugned developments was presented to the plaintiffs through the 1st defendant’s replying affidavit. There is no evidence to suggest that the plaintiffs had prior knowledge of the approvals exhibited in this suit by the 1st defendant. In the circumstances, this court will not strike out the suit. It will instead remit the dispute to the Kiambu county physical and land use liaison committee for adjudication.
22. The result is that the 2nd defendant’s preliminary objection and the limb of the 1st defendant’s preliminary objection raising the question of jurisdiction of this court undersections 61 (3) and 61 (4) of the *Physical and Land Use Planning Act* of 2019 is upheld. The court will, in the circumstances, down its tools without pronouncing itself on the other issues in the 1st defendant’s preliminary objection and in the plaintiffs’ application. Consequently, this dispute is hereby remitted to the Kiambu county physical and land use liaison committee for adjudication and/or disposal within the framework of the *Physical and Land Use Planning Act* 2019. There will be no order as to costs of the proceedings in this court because at the time of filing this suit, the plaintiffs did not have access to the approvals subsequently exhibited by the 1st defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF JULY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kabaiku for the Plaintiff

Mr Muriithi for the 1st Defendant

Ms Gikonyo for the Interested Party

Court Assistant: Ms Lucy Muthoni

