



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 19 OF 2019**

**WILSON OTIENO OMWOM.....PLAINTIFF**

**-VERSUS-**

**COUNTY GOVERNMENT OF KISUMU.....RESPONDENT**

**RULING**

Wilson Otiemo Omwom filed this suit against the County Government of Kisumu claiming that at all material times herein, plot No. 9341/123 MASENO TOWNSHIP was allotted to PHOEBE NYANDO ADHANJA (deceased is the administrator of the said estate. Sometimes on 29<sup>th</sup> August 2019, the Plaintiff applied for development permission from the Defendant to develop the said suit plot No. 9341/123 which permission was granted on 30/8/2018.

Upon granting of the said permission, the Plaintiff commenced development works on the suit parcel and to-date he has completed the first floor of the said storied structure at a cost of over Kshs. 4,000,000/=.

Sometimes on 4/6/2019 the Defendant served the Plaintiff with an enforcement notice seeking demolition of the structure on grounds that no permission had been granted.

The plaintiff claims that the Defendants acts were in bad faith, unlawful and malicious.

The Defendant has threatened to enforce the Enforcement Notice and demolish the Plaintiff's structure an act which will occasion the Plaintiff irreparable loss.

The Plaintiff prays for permanent injunction restraining the defendant either by itself, agents, servants from interfering, entering or in any other howsoever destroying the plaintiff's user of plot No 9341/123 or enforcing the enforcement notice against the plaintiff.

In its defence, the defendant states that plot number 9341/123 Maseno Township was allotted to Phoebe Nyando Adhanja and avers that the alleged transfer of the suit plot from Richard Oronge (deceased) was done fraudulently after Richard Oronge (deceased) had long passed on and his estate had not been succeeded and as such anything done without the letters of administration amounts to intermeddling with the estate of the deceased and only strict proof shall suffice.

The defendant avers that the approval was granted in the mistaken belief that the Plaintiff had genuine documents to the suit property, however it has since emerged that the documents held by the Plaintiff are fraudulent.

The defendant admits that the plaintiff has commenced development works on the suit parcel however denies that the plaintiff has completed the first floor of the said storied structure at cost of over Kshs. 4,000,000.

The defendant denies that the intended demolition premised on illegal construction of the suit land will occasion the plaintiff irreparable loss..

The Defendant raised a Preliminary Objection on grounds that the court lacks jurisdiction to entertain the suit since the suit contravenes Section 38 (4) (5) and (6) of the Physical Planning Act which requires that a person aggrieved by an enforcement Notice may first Appeal to the relevant liable committee and if dissatisfied by the committees decision he may appeal to the relevant liaison committee and if dissatisfied with the decision of the committee he may appeal to the National liaison committee. An appeal to the High Court would be from the National Liaison Committee.

The Defendant submits that the suit is premature and the court lacks jurisdiction. The defendant submits that the plaintiff has breached the doctrine of exhaustion. The plaintiff to the contrary submits that this court is clothed with jurisdiction under section 13 of the Environment and Land Court Act 2013.

I have considered the submissions on record and do find that Section 38 (1) of the Physical Planning Act provides:

**“(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.”**

Section 38 (2)

**“(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require 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”.**

Section 38 (3)

**“(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice. “**

Section 38 (4)

**“(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.”**

Section 38 (5)

**“(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.”**

Section 38 (6)

**“(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.”**

It is a clear legal policy that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the Jurisdiction of the court is invoked. There should be no shortcut to the High Court.

The Supreme Court in Samuel Kamau Macharia and another – v- Kenya Commercial Bank and 2 Others, Application No. 2 of 2011, pronounced itself on jurisdiction thus:

*“[68] 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. .... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”*

**Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others [2020] eKLR the court held that: -**

**“Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance.”**

I do find that the suit herein is pre-mature as the Jurisdiction of the Liaisons Committees has not been invoked. The suit is hereby struck out with costs.

**DATED AT KISUMU THIS 28<sup>th</sup> DAY OF JANUARY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19**

**pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**