



**Kimando & 6 others (Suing as officials of Croton Ridge Gardens Residents Association) v Mwaura; County Government of Kiambu & 3 others (Interested Parties) (Environment and Land Appeal E052 of 2024) [2024] KEELC 6690 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6690 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ENVIRONMENT AND LAND APPEAL E052 OF 2024**  
**JG KEMEL, J**  
**OCTOBER 9, 2024**

**BETWEEN**

**DR LAWRENCE KIMANDO ..... 1<sup>ST</sup> APPELLANT**  
**DR WILSON MUNA ..... 2<sup>ND</sup> APPELLANT**  
**PETER RINGERA ..... 3<sup>RD</sup> APPELLANT**  
**JOHN WAKERE ..... 4<sup>TH</sup> APPELLANT**  
**BERNARD WACHIURI ..... 5<sup>TH</sup> APPELLANT**  
**ENG PURITY MWIRIGI ..... 6<sup>TH</sup> APPELLANT**  
**ENG JOEL CHEGE ..... 7<sup>TH</sup> APPELLANT**  
**SUING AS OFFICIALS OF CROTON RIDGE GARDENS RESIDENTS ASSOCIATION**

**AND**

**RAHAB WANJIKU MWAURA ..... RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF KIAMBU ..... INTERESTED PARTY**  
**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY**  
**NATIONAL CONSTRUCTION AUTHORITY ..... INTERESTED PARTY**  
**MANGU INVESTMENTS LIMITED ..... INTERESTED PARTY**



## RULING

### Introduction

1. Vide their Application dated 5/6/2024 expressed under Sections 1A,1B, 3A of the *Civil Procedure Act*, Order 40 Rules 1&4, Order 42 and Order 51 Rule 1 of the Civil Procedure Rules, the Appellants/ Applicants seek Orders THAT;
  - a. Spent.
  - b. Spent.
  - c. A temporary injunction be issued restraining the Respondent, her servants, agents and any other person claiming through her from continued illegal and/or unlawful construction on all that parcel of land known as Juja-kiaura Block7/2645 located in Croton Ridge Gardens Estate, Kenyatta Road pending the hearing and determination of the appeal.
  - d. There be a stay of execution of the costs awarded to the Respondent pending the hearing and determination of the appeal.
  - e. The Officer Commanding Station Kibii Police Station do supervise the enforcement of the orders issued herein.
  - f. The appellant/Applicant be at liberty to apply for further orders and/or direction as the Honorable Court may deem just to grant.
  - g. The costs of and incidental to this Application be provided for.
2. The Application is premised on the grounds on the face of it that the Appellants had filed a suit against the Respondent which was dismissed on 30/5/2024 for want of jurisdiction. That aggrieved with the dismissal order, the Appellants have lodged the instant appeal. That the effect of the impugned Ruling is that the appellants face substantial loss due to ongoing construction being undertaken without requisite approvals thereby violating environmental, planning, zoning and land use regulations. Accordingly, the prayer for injunction is warranted to preserve the subject matter of the appeal which appeal is said to raise triable issues with high chances of success.
3. The Application is further supported by the Affidavit of even date of Peter Ringera, the 3<sup>rd</sup> Applicant and Secretary of Croton Ridge Gardens Residents Association (hereinafter the Association). He deposed that the Association boundaries includes all that parcel of land previously known as Juja Kiaura Block 7 & 8 and referred to as Mutundu Estate. Rehashing the grounds in the motion, the deponent averred that the Association By-laws provide that all developments in the Estate adhere to original subdivision plan as a controlled development area for single dwelling residential units. That the respondent who is a registered member of the Association started undertaking construction works on parcel Juja Kiaura Block 7/2645 (the suit land) sometime in January 2023 without requisite approvals. That having raised their concerns with the County Government of Kiambu, National Environment and Management Authority (NEMA) & National Construction Authority (NCA), the Applicants did not get any feedback prompting them to file their suit in the trial Court vide a plaint dated 19/3/2024. Resisting the suit, the Respondent and the Interested Parties filed notices of Preliminary Objection which were upheld in a Ruling dated 30/5/2024 hence the appeal. Copies of the trial Court pleadings, Ruling and Memorandum of Appeal are annexed as annexures PR.



4. Opposing the application, the 1<sup>st</sup> Interested Party filed its Grounds of Opposition dated 12/6/2024. It was stated that the crux of the matter raises the question of physical planning, land use and development of land matters which are regulated under the Physical Land Use and Planning Act (PLUPA), 2019. That such issues primarily lie with the County Physical Land Use and Planning Liaison Committee as established under Part VI of the PLUPA and as such this Court has been moved prematurely. The 1<sup>st</sup> Interested Party outlined the process for application of development permission as contained in sections 58, 60 & 72 of the PLUPA and urged the Court to dismiss the application with costs.
5. Contemporaneous to filing the Grounds of Opposition, the 1<sup>st</sup> Interested Party also filed a notice of Preliminary Objection dated 12/6/2024 on grounds That;
  - I. This Honorable Court lacks jurisdiction to entertain the present application and appeal owing to the doctrine of exhaustion of statutory remedies for the following reasons; -
    - a. The Application and appeal herein primarily raise the question of Physical planning, land use and development of land matters which are regulated under the PLUPA, 2019.
    - b. Under Section 61(3) & (4) of the PLUPA, an Applicant or interested party that is aggrieved by the decision of County Executive Committee member regarding an application or development permission may appeal against that decision to the County Physical and Land use Planning committee.
    - c. That this Court is not the right forum to hear and determine matters relating to Environmental Impact Assessment (EIA) licence issued or to be issued by the 2<sup>nd</sup> Interested Party.
    - d. That the correct and appropriate forum is the National Environmental Tribunal (NET) as provided under Section 129 (1) of the EMCA.
    - e. That the Applicant/appellant have failed, ignored and or neglected to exhaust the alternative means of dispute resolution as provided by the said legislation.
  - II. This application and entire appeal contravene the provisions of Articles 159 (2) (c) of *the Constitution* of Kenya, 2010.
  - III. The law provides for a forum where grievances raised by the Applicant/appellant herein ought to be addressed.
  - IV. The instant suit is therefore premature, abuse of Court process, vexatious and frivolous.
6. The 1<sup>st</sup> Interested Party beseeched the Court to dismiss the application and appeal with costs.
7. The Respondent and the 2<sup>nd</sup> – 4<sup>th</sup> Respondents elected not to oppose the application.

### **Written Submissions**

8. On 1/7/2024 directions were taken to canvass the Notice of Motion and Preliminary Objection simultaneously by way of written submissions.
9. The 1<sup>st</sup> IP through its legal counsel J.J Cheserek filed submissions dated 19/6/2024 while the Applicants' submissions filed by Moka Advocates are dated 24/7/2024.
10. On behalf of the 1<sup>st</sup> Interested Party, four issues were drawn for determination namely whether this Court has jurisdiction to hear this matter; whether the issues for determination herein fall under the jurisdiction of the County Physical Land Use and Planning Liaison Committee (hereinafter the



Liaison Committee); whether issues touching on Environmental Impact Assessment (EIA) can be adjudicated by this Court and lastly whether the Applicant is entitled to the prayers sought.

11. Citing *the Constitution* of Kenya, County Government Act, 2012 and the PLUPA 2019 alongside the classical case of Owners of Motor Vessel ‘Lilian S’ Vs. Caltex Oil Kenya Ltd [1989] eKLR, the first issue was answered in the negative. The 1<sup>st</sup> Interested Party submitted that this Court in the first instant lacks original and appellate jurisdiction to determine this matter in light of the existing legislation creating statutory bodies to determine the dispute.
12. On the second issue the 1<sup>st</sup> Interested Party maintained that the Liaison Committee is the proper forum to address any grievance touching on development permission as stipulated under Section 61(3) PLUPA.
13. Thirdly the 1<sup>st</sup> Interested Party submitted that issues relating to EIA licence are vested in the National Environment Tribunal (NET) as provided for under Section 129(1) of the Environment Management and Co-ordination Act (EMCA). Reliance was placed on the Court of Appeal case of Kibos Distillers Ltd & 4 Others v Benson Ambuti Atega & 3 Others [2020] eKLR which affirmed that issues relating to EIA license lie to the NET or the National Environmental Complaints Committee (NECC) as competent organs vested with original jurisdiction.
14. In addition the 1<sup>st</sup> Interested Party submitted that in light of the forgoing, the Applicant is not deserving of the orders sought and urged the Court to uphold the Preliminary Objection and dismiss the application and entire appeal with costs.
15. On the other hand, the Applicants drew two issues for determination; whether this Court has jurisdiction to entertain the claim and whether the application dated 5/6/2024 is merited.
16. On the first issue the Applicants cited the Supreme Court decision on the question of jurisdiction in the case of Re The Matter of the Interim Independent Electoral Commission [2011] eKLR and the provisions of Article 162(2)(b) Constitution of Kenya as read with Section 13 *Environment and Land Court Act* (ELCA) That where there are clear laid down mechanisms to resolve disputes, a party must adhere to procedures such as filing cases in the right forums including Tribunals. That the 1<sup>st</sup> Interested Party raised an objection that the Applicants ought to have filed their claim before the Liaison Committee which is established pursuant to Section 76 of the PLUPA and is vested with jurisdiction under Section 78 of the PLUPA to hear issues relating to planning, use, regulation and development of land in Kenya. That the 1<sup>st</sup> Interested Party quoted Section 61(3) PLUPA which states;  
  
“(3) An Applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”
17. That according to the wording of the above section, the provision refers to parties who are aggrieved by a decision of the County Executive Committee can invoke the Liaison Committee’s jurisdiction. That in this case, there is no decision falling for challenge by the County Executive Committee rather their case is against the Respondent’s move to undertake construction without approvals. Similarly, that the jurisdiction of NET under Section 120 of the EMCA is invoked only after NEMA has decided on an application. That where a developer initiates construction without NEMA approval, an aggrieved



person does not have recourse to NET but to a Court of law. Reliance was placed on the persuasive authority of *Okalo v Sifat* [2023] KEELC 20291 (KLR) which dealt with similar issues as raised in the instant Preliminary Objection and the Court held that such matters of the Liaison Committee and NEMA are invoked after a decision has been made by the respective authorities.

18. On the second issue, the Applicants answered in the affirmative and rehashed the principles for grant of a temporary injunction pending appeal as stated in the leading case of *Patricia Njeri & 3 Others Vs. National Museum of Kenya* [2004] eKLR. Further that their intended appeal is meritorious as demonstrated in the 10 grounds of appeal in the Memorandum of Appeal dated 5/6/2024 to warrant grant of temporary injunction as prayed.

### **Analysis & Determination**

19. Flowing from the above and the totality of the material placed before Court, the issues for determination, in my view are;
  - a. Whether the Preliminary Objection dated 12/6/2024 is merited?
  - b. Whether the Application dated 5/6/24 is merited?
  - c. Who bears costs?
20. 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 in the leading case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 the celebrated case on Preliminary Objection, it was held as follows:

“ ... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.”
21. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR the stated that 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.
22. Flowing from the above it emerges that 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. See the case of *David Karobia Kiiru v Charles Nderitu Gitoi & Another* [2008] eKLR.
23. The 1<sup>st</sup> Interested Party raised a Preliminary Objection impugning this Court’s jurisdiction to entertain the instant Application and appeal as filed. It is trite that jurisdiction goes to the root of a matter and



as such it is a pure point of law. In the case of celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR it was stated thus;

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. The second test for a meritorious Preliminary Objection is it is argued on the assumption that all the facts pleaded by the other side are correct. The Applicants herein dispute the subject of the Preliminary Objection to the effect that this Court lacks the requisite jurisdiction to hear and determine both the application and Preliminary Objection. They contend that this Court enjoys original and appellate jurisdiction as vested upon it by the Constitution of Kenya, ELCA and PLUPA. In so far as they object to the 1<sup>st</sup> Interested Party’s position in the Preliminary Objection, the second test is thus not met.
25. The third and last test is that an efficacious Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
26. Undoubtedly the jurisdiction of this Court has been invoked pursuant to a Memorandum of Appeal dated 5/6/2024 challenging the Ruling of the trial Court in Ruiru ELC No. E055 of 2024 which upheld the 4<sup>th</sup> Interested Party’s Preliminary Objection dated 22/4/2024 that challenged the trial Court’s jurisdiction to entertain the suit. The 4<sup>th</sup> Interested Party had challenged the Court’s jurisdiction on three fronts; pecuniary jurisdiction, prematurely invoking Court’s jurisdiction in light of existing alternative dispute resolution mechanisms and the suit being sub judice. Without delving into the merits of the appeal, the 1<sup>st</sup> Interested Party herein has also raised the issue of this Court’s jurisdiction in view of the existing statutory bodies namely the Liaison Committee and NET.
27. The 1<sup>st</sup> Interested Party contends that this Court has been improperly moved since the Applicants have bypassed the Liaison Committee. The Applicants do not dispute this and indeed do acknowledged the role of the Liaison Committee as provided under statute. The Applicants’ point of departure however, is that they can only approach the Liaison Committee after a decision has been made by the County Executive Committee. That in this case no such decision has been made to warrant them to seek redress before the Liaison Committee. See paras 17- 21 of their submissions.
28. For the Court to determine the veracity of the Preliminary Objection it has to look into the impugned Ruling vis-à-vis the provisions of the law touching on the subject matter in respect to alternative dispute resolution mechanisms. The Court has to interrogate the rival parties’ cases in the trial Court, the respective evidence adduced and the Court’s determination thereon. This exercise calls for analysis of facts and evidence and thus ousts the third stricture of a successful Preliminary Objection.
29. The totality of the above rendition in particular the second and third tests for a commendable Preliminary Objection, leads to but one conclusion that the Preliminary Objection fails. The Applicants argued that it is raising the same issues it raised in the trial Court which form the gist of the appeal. To uphold the Preliminary Objection would thus in my view amount to summary dismissal of the appeal without according the parties the right to be heard. Moreover it would be tantamount to ousting the Applicants from the seat of justice in contravention of their right to a fair hearing as enshrined under the Constitution of Kenya.
30. Ultimately the first issue is answered in the negative.
31. Is the Applicants’ Application dated 5/6/24 merited? The Applicants in the main urge the Court to grant temporary injunction restraining the Respondent from continued unlawful construction on



land parcel known as Juja-kiura Block7/2645 (hereinafter the suit land) and stay of execution of the costs awarded to the Respondent pending the hearing and determination of the appeal.

32. The relevant law on temporary injunction is stipulated in Order 40 rule 1 of the Civil Procedure Rules that; -

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”

33. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* [1973] E.A 358. This position has been reiterated in numerous decisions from Kenyan Courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No.77 of 2012 [2014] eKLR where the Court of Appeal held that;

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, allay any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially”

34. Consequently, an Applicant ought to, first, establish a prima facie case. In the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR in which the Court of Appeal gave a determination on a prima facie case. The Court stated that:

“... in civil cases, it is a case in which, on the material presented to the Court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

35. Later on the same Court in the case of *Moses C. Muhia Njoroge & 2 Others Vs. Jane W. Lesaloi and 5 Others* [2014]eKLR, defined prima facie in the following terms;

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”



36. The Applicants averred that unless the Respondent is stopped, they face immediate and substantial loss resulting from the ongoing construction which is being undertaken without approval and potentially violating environmental, planning, zoning and land use regulations. That it is necessary to preserve the subject matter of the appeal so as not to render the appeal nugatory. Lastly that the balance of convenience tilts in favor of granting the injunction as prayed.
37. As already stated only the 1<sup>st</sup> Interested Party opposed this motion by way of Preliminary Objection and Grounds of Opposition dated 12/6/24. The gist of the Grounds of Opposition is the same as the Preliminary Objection in that the dispute herein lies to the County Physical Land Use and Planning Liaison Committee as established under Part VI of the PLUPA and as such this Court has been moved prematurely. This averment is reflected in the Memorandum of Appeal as well which as I have found is best reserved for the Appellate Court to determine.
38. The Applicants' case against the Respondent remains uncontroverted. It was avowed that the Respondent is a registered member of the Applicants' Association which comprises a gated community with attendant rules and regulations. That she is undertaking construction without the requisite approvals and contrary to the Association's binding bylaws. In the absence of evidence to the contrary, the Court is satisfied with the material on record that the Applicants have established a prima facie case against the respondent who is alleged to carry out construction without approvals.
39. Regarding irreparable injury, the Applicants posited that they will suffer substantial loss arising from Respondent's continued construction that directly impacts the use and enjoyment of their proprietary interests which cannot be compensated adequately by damages. It is common parlance that gated communities exist with a primal rules and regulations with respect to planned environment and if one of the members contravenes the agreed regulations, the negative impact on their developments will not be compensated with costs. The Court agrees with the Applicants that they are likely to suffer irreparable harm that cannot be remedied with damages.
40. Lastly on a balance of convenience, there being no doubt in the mind of the Court, the Court is satisfied that the grant temporary injunction as prayed is merited.
41. On stay of execution of costs awarded to the Respondents, I note that the trial Court awarded costs in favor of the Respondent. Order 42 rule 6 provides as follows;
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and



(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

42. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an application for stay of execution and *inter alia* held that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the trial Court’s discretion.

43. Firstly, the Applicants’ case on substantial loss they stand to suffer is unopposed. The impugned costs arising from a decision which is the subject of the appeal can be paid upon the determination of the appeal – if the appellate Court so orders. Secondly, at this juncture the Court appreciates that the instant application was timeously filed on 5/6/2024 whereas the assailed trial Court Ruling was rendered on 30/5/2024, barely 6 days later. Finally whereas the Applicants did not proffer any security for the due performance of the decree, nothing stops the Court from so ordering if the same is warranted. The prayer for stay of execution of costs is thus allowed.

44. Final Orders for disposal:-

- a. The Preliminary Objection dated 12/6/2024 is unmerited. It is dismissed.
- b. The Notice of Motion dated 5/6/2024 is allowed in terms of c, d and e.
- c. Costs in the cause.

45. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Ms. Mwangi HB Mr. Anyona for Applicants/Appellants

Respondent – Absent

Ms. Cheserek for 1<sup>st</sup> Interested Party

Mr. Ngara for 2<sup>nd</sup> Interested Party

3<sup>rd</sup> Interested Party – Absent

Ms. Mugo HB Karanja Kangiri for 4<sup>th</sup> Interested Party

Court Assistants – Phyllis/Oliver

