



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. E001 OF 2022

SUSAN WANJIKU MAINA.....PETITIONER

=VERSUS=

DIRECTOR, PHYSICAL AND LAND USE PLANNING

KIAMBU COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER, LAND, HOUSING PHYSICAL PLANNING,

MUNICIPAL ADMINISTRATION & URBAN DEVELOPMENT, KIAMBU COUNTY GOVERNMENT... 2ND RESPONDENT

RULING

1. The petitioner, **Susan Wanjiku Maina**, initiated this suit through a petition dated 27/1/2022. In summary, her case was that she was the lawful proprietor of a parcel of land she described as “**LR NO. RUIRU KIU BLOCK 3/2060 PLOT NO. 955 KAHAWA SUKARI**” which she was developing at the time of initiating the suit.. On 11/1/2022, she received **Enforcement Notice No 00776**, dated 11/1/2022, from the County Government of Kiambu, directing her to immediately stop further construction on the land and seek development permission. The said enforcement notice indicated that in the event she failed to seek development permission, she was to reinstate the ground to its original state. The enforcement notice was captioned as “**2nd Enforcement Notice**”, notwithstanding the fact that no prior enforcement notice had been issued to her by the County Government.

2. She contended that she had at all times complied with all the legal requirements and she had obtained all relevant approvals and paid all requisite fees. She added that despite evidence of compliance, the respondents purported to revoke the said approvals; ordered stoppage of construction; and directed her to apply for new approvals. It was her case that despite finding the above decision to be unreasonable, she complied and halted further construction activities. She thereafter submitted architectural drawings to the respondents for re-approvals as demanded in the enforcement notice. She contended that the above decision by the respondents was a violation of her constitutional right to fair administrative action; violated the framework in the Fair Administrative Action Act; and smacked of unreasonableness. She contended that the decision was made at the behest of a few individuals belonging to **Kahawa Sukari Welfare Association** and **Kahawa Sukari Limited** who had usurped the statutory functions of the respondents as the approving authorities.

3. Consequently, she sought the following verbatim reliefs against the respondents:

i. A declaration that the purported revocation of the petitioner’s development permission is unconstitutional and a violation of the petitioner’s right to a fair administrative action.

ii. A declaration that Enforcement Notice No. 00776 dated 11th January 2022 directing the petitioner to stop further construction and seek reapproval of development permissions is unconstitutional and a violation of the petitioner’s right to fair administration action.

iii. A declaration that the failure by the respondents to make available the statutory forum for adjudicating appeals against their impugned actions constitutes a violation of the petitioner’s right to fair administrative action that is expeditious, efficient, lawful and procedurally fair to her right to access justice.

iv. A judicial review order of certiorari calling into this court and quashing the entire decision issued by the respondents vide Enforcement Notice No. 00776 dated 11th January 2022 directing the petitioner to stop further construction and seek reapproval of development permissions.

v. A judicial review order of certiorari calling into this court and quashing the entire decision issued by the respondents to cancel

existing development approvals and permits issued to the petitioner.

vi. A judicial review order of prohibition restraining the respondents by themselves or their agents from stopping or in any manner whatsoever interfering with ongoing construction works on LR. No. RUIRU KIU BLOCK 3/2060 PLOT NO. 955 KAHAWA SUKARI.

vii. Damages for violation of the petitioner's constitutional rights.

viii. Any other relief that the court may deem fit to grant.

4. Upon being served with the petition, the respondents brought a notice of preliminary objection dated 14/2/2022, contesting the jurisdiction of this court and urging this court to dismiss the petition *in limine* on the following grounds:

a) That this honourable court lacks jurisdiction to entertain the present suit as it is a challenge to an enforcement notice issued to the petitioner in accordance with Section 72 of the Physical and Land Use Planning Act, 2019 (hereinafter referred to as the Act.)

b) That under Section 72(3) of the Act, a person on whom an enforcement notice is served may appeal to the County Physical and Land Use Planning Liaison Committee.

c) That under Section 72(4) of the Act, any party aggrieved with the decision of the County Physical and Land Use Planning Liaison Committee may appeal against the said decision to the Environment and Land Court.

d) That the petitioner herein has failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute.

e) That the instant suit is therefore premature, frivolous and an abuse of the court process as this honourable court's jurisdiction has been limited by statute.

5. The preliminary objection was canvassed through written submissions dated 14/2/2022. Oral highlighting of the submissions was made in the virtual court on 21/2/2022. The gist of the preliminary objection is that the dispute in this petition relates to an enforcement notice issued by the 1st respondent. It is the case of the respondents that Section 72 of the PLUPA provides a statutory procedure for challenging an enforcement notice. In her oral submissions, counsel for the objector invited the court to take judicial notice of **Gazette Notice No 7622** dated 30/7/2021 through which Members of the Kiambu County Physical and Land Use Planning Liaison Committee were appointed. Counsel added that an appeal mechanism is provided under the law.

6. On his part, counsel for the petitioner argued that the statutory resolution that should ordinarily avail to the petitioner is the Kiambu County Physical and Land Use Planning Liaison Committee but the said Committee did not exist and/or was not sitting at the time of initiating this suit. Relying on the further affidavit filed in support of the petition, counsel submitted that the petitioner had made inquiry on 25/1/2022 and the respondents had advised her that the Committee had not been inaugurated and was therefore not sitting. Counsel urged the court to dismiss the preliminary objection.

7. I have considered the grounds set out in the preliminary objection under consideration together with the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the issue falling for determination in the preliminary objection. Further I have considered the gist of the dispute in this petition. The single issue falling for determination in the preliminary objection is whether this court is the primary adjudicatory body vested with jurisdiction to adjudicate the dispute in this petition.

8. The centrality of the concept of jurisdiction in our civil disputes adjudication was captured by Nyarangi JA in the case of **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR** in the following words:

“ 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.”

9. The Supreme Court of Kenya outlined the importance of the concept of jurisdiction in the case of **Samuel Kamau Macharia & ano v Kenya Commercial Bank Limited & 2 others [2012] eKLR** in the following words:

“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. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in In the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011. 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. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the

jurisdiction of such a court or tribunal by statute law.”

10. The broad jurisdiction of this court is donated by **Article 162(2)** of the **Constitution** which provides as follows:

(2) “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

11. In compliance with the dictates of the Constitution under Article 162(2)(b), Parliament established this court through the enactment of the Environment and Land Court Act. The Act elaborates the jurisdiction of the court in **Section 13** as

follows:-

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs”

12. There is a general interpretation of the law to the effect that where Parliament has, through statute, established other primary adjudicatory bodies, this court should let those primary adjudicatory bodies exercise their primary jurisdiction, and this court should only exercise appellate jurisdiction. Indeed, this was the principle emphasized by the Court of Appeal in **Kibos Distillers Limited & 4 others v Benson Ambuti & 3 others [2020] eKLR**. The Supreme Court, while declining to grant leave for an appeal to the apex court, agreed with the Court of Appeal on this interpretation of the law in **Benson Ambuti Atega v Kibos Distillers Ltd & 5 others [2020] eKLR**. There is similarly an accepted general interpretation of the above framework to the effect that because the Environment and Land Court Act grants this court both original and appellate jurisdiction in disputes relating to environment and the use, occupation of and title to land, whenever the other institutions vested with primary jurisdiction to adjudicate similar disputes are, for one reason or the other, unable to sit, this court should be able to exercise its original jurisdiction in those circumstances. The circumstances include a situation where a liaison committee or a tribunal is, for one reason or the other, unable to sit and discharge its adjudicatory functions.

13. This petition challenges the enforcement notice dated 11/1/2022, issued by the respondents. Further, the petition challenges the respondents’ decision revoking the petitioner’s development permission and requiring her to apply for a fresh development permission. It seeks to invalidate the enforcement notice and the impugned decision.

14. Section 72(3) and (4) of the PLUPA contains the following framework on adjudication of disputes relating to enforcement notices:

“(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.”

15. Similarly Section 61(3) and (4) of the PLUPA contains the following framework on adjudication of disputes relating to decisions made in relation to development permissions:

“(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.

(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”

16. Having reflected on the gist of the dispute in this petition *vis-à-vis* the above legal framework on primary adjudication of disputes relating to enforcement notices and development permissions, I entirely agree with the respondents that this dispute has been placed before this court prematurely. It is my view that the petitioner ought to exhaust the primary dispute adjudication mechanism provided under the PLUPA before invoking the jurisdiction of this court.

17. It is, however, noted from the materials presented to the court that prior to invoking the original jurisdiction of this court, the petitioner reached out to the County Government and made inquiries about the sittings of the Liaison Committee. Officers of the County Government advised her that although the Liaison Committee had been appointed, it had not been inaugurated. It is against that background that the petitioner brought this petition, inviting the court to exercise its original jurisdiction. At the time of canvassing the preliminary objection, Ms Mbugua, counsel for the respondents, submitted that the Liaison Committee was appointed and is functioning.

18. Given the above circumstances, I will defer to the guidance given by the Supreme Court of Kenya in **Benson Ambuti Atega v Kibos Distillers Ltd & 5 others [2020]eKLR** to the effect that, in appropriate circumstances, instead of striking out suits, superior courts should remit disputes to the appropriate primary dispute adjudication bodies for proper resolution of the disputes. The Supreme Court rendered itself on this principle as follows:

“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.”

19. In the end, the respondents’ preliminary objection relating to the primary jurisdiction of this court is upheld to the above extent and the following disposal orders are made:

a) The petition herein is hereby remitted to the Kiambu County Physical and Land Use Planning Liaison Committee [the Liaison Committee] for adjudication as a claim/ dispute/ complaint/ grievance within the framework of the Physical and Land Use Planning Act 2019 and any rules or regulations made thereunder.

b) For the purpose of limitation, the dispute shall be deemed to have been filed on 25/1/2022, the day the petitioner was advised

that the Liaison Committee had not been inaugurated.

c) The Liaison Committee shall be at liberty to require the petitioner to file such other documents as shall be necessary to align the documentations with the rules, regulations and procedures of the Liaison Committee.

d) Parties shall bear their respective costs of the proceedings in this court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF MARCH 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Orange for the Petitioner

Ms Mbugua for the 1st and 2nd Respondents

Court Assistant: Lucy Muthoni

COURT: Court Registry to type the proceeding and remit the file once the proceedings are typed.