



**Karomo & Seinfert (Suing as the Chairman and Secretary Respectively of the New Nyali Residents Association) & 3 others v Pamwhite Limited & another (Environment & Land Case 219 of 2020) [2022] KEELC 3050 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3050 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 219 OF 2020**

**LL NAIKUNI, J**

**MAY 5, 2022**

**BETWEEN**

**KAROMO & SEINFERT (SUING AS THE CHAIRMAN AND SECRETARY RESPECTIVELY OF THE NEW NYALI RESIDENTS ASSOCIATION) ..... 1<sup>ST</sup> PLAINTIFF**  
**IDEAL LOCATIONS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**  
**KIRKE LIMITED ..... 3<sup>RD</sup> PLAINTIFF**  
**CONRAD PROPERTIES ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**PAMWHITE LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**THE COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Background**

1. Through a Complaint dated 26<sup>th</sup> November 2020 filed contemporaneously with a notice of motion application under certificate of urgency, the Plaintiffs instituted the instant suit. The afore said application was brought under the dint of the provision of Sections 1A and 3A of the Civil Procedure Act, Cap 21 and Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 all of the Laws of Kenya.

**II. The Plaintiffs/Applicants' case.**

2. The said application by the Plaintiff/Applicants sought orders:
  - a. That the Application be certified urgent and heard *ex - parte* in the first instance.



- b. That pending and hearing and determination of the application, there be and is hereby issued an order of injunction to restrain the 1<sup>st</sup> Defendant either by itself, its contractors, agents, employees, directors, shareholders or any person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Centre on Property known as Plot no MN/1/3156.
  - c. That pending and hearing and determination of the suit, there be and is hereby issued an order of injunction to restrain the 1<sup>st</sup> Defendant either by itself, its contractors, agents, employees, directors, shareholders or any person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Centre on Property known as Plot no MN/1/3156.
  - d. That costs of the application be paid by the Defendants jointly and severally.
3. The said application was premised by the grounds, facts, testimonies and averments in the 36 Paragraphed Supported Affidavit sworn by one Benson Karomo the Chairperson of the New Nyali Resident Association, and fourteen (14) annexures annexed thereto. Upon perusal of the Application the Court (C. Yano J) through an order dated 1<sup>st</sup> December ordered:-
- a) That the application dated 26<sup>th</sup> November 2020 is certified as urgent.
  - b) That pending and hearing and determination of the application, there be and is hereby issued an order of injunction to restrain the 1<sup>st</sup> Defendant either by itself, its contractors, agents, employees, directors, shareholders or any person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Centre on Property known as Plot no MN/1/3156 for 14 days pending inter partes hearing.
  - c) That the interim injunction is granted on condition that the Applicants shall file an undertaking as to damages within the next 3 days from the date thereof.
  - d) That the application be served for inter - partes hearing on 16<sup>th</sup> December 2020
4. From the filed pleadings, the 1<sup>st</sup> Plaintiff describes itself as the New Nyali Resident Association (hereinafter referred to “NNRA”) which is an association of property owners and residents of new Nyali in Mombasa represented in this suit by its officials, the Chairperson and the Secretary. The 2<sup>nd</sup> Plaintiff is the owner of the properties known as Land reference Number 14407 and 16088, section 1, Mainland North Mombasa Municipality ( C.R 42055) and ( C.R 46440), the 3<sup>rd</sup> Plaintiff is the owner of the property known as LR no MN/1/3174 while the 4<sup>th</sup> Plaintiff is the owner of the property known as LR no MN/1/3154. The Plaintiffs property borders the 1<sup>st</sup> Defendant’s property who is undertaking a commercial development known as Festival City Shopping Centre.
5. The Plaintiffs contend that the 1<sup>st</sup> Defendant had never obtained permission for its development permission from the County Executive Committee Member of the 2<sup>nd</sup> Defendant as required by section 57 (1) of the *Physical and Land Use Planning Act*, 2019. The Plaintiffs averred that the development undertaken by the 1<sup>st</sup> Defendant was illegal as it was being undertaken in breach of the statutory provisions and regulations. According to the Plaintiffs, under the provisions of Sections 57( 1), 58 (1), 60 and 61 of the *Physical and Land Use Planning Act* 2019, it was only the County Executive Committee Member of a County Government who has the legal mandate and thus duly authorized to issue and give development permissions and/or approvals whatsoever.
6. It was the assertion of the Plaintiffs that the 1<sup>st</sup> Defendant purported to have obtained the approval and the 2<sup>nd</sup> Defendant purported to have issued the approval/ permission for the 1<sup>st</sup> Defendant’s



development in an irregular and illegal manner because the same was issued by the Chief Officer Lands, Planning and Housing and not the County Executive Committee Member of the County Government of Mombasa who is the only officer authorized to give the approval / permission for development as envisaged by law.

In other words, the Plaintiffs opined that the purported approval issued to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant was not only invalid for having been issued by unauthorized officer but was also issued without the notification or participation of the public contrary to the provisions of Section 58 (7) and (8) of the [Physical and Land use Planning Act](#). The Plaintiffs held that despite irregularities regarding the 1<sup>st</sup> Defendant's development, the 2<sup>nd</sup> Defendant had adamantly and deliberately failed, ignored and refused to stop the development from being undertaken. Further the Plaintiffs stated that the ostensible development by the 1<sup>st</sup> Defendant was being undertaken in a manner that was in breach of the National Building regulations.

7. Through a notice to withdraw suit dated 7<sup>th</sup> January 2021 filed by mr Benson Karomo, the 1<sup>st</sup> Plaintiff withdrew its entire claim against the Defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed notice of withdrawal dated 31<sup>st</sup> May 2021 withdrawing their suit against the Defendants wholly which was amended on 7<sup>th</sup> June 2021

### III. The Defendants case

8. The 1<sup>st</sup> Defendant is a limited liability company dully incorporated in Kenya and the registered owner of the parcel of land known as LR no MN/1/3156 situated in Nyali, Mombasa County while the 2<sup>nd</sup> Defendant is the County Government of Mombasa established under the provision of Article 176 of the [Constitution](#) of Kenya, 2010 and the [County Governments Act](#) 2012.

*Vide* a Memorandum of Appearance dated 8<sup>th</sup> December 2020, the 1<sup>st</sup> Defendant through the law firm of Messrs. Mathew Nyabena and Co Advocates entered appearance while the 2<sup>nd</sup> Defendant entered appearance vide a memorandum of appearance dated 14<sup>th</sup> December 2020 through the law firm of Messrs. Otieno B.N & Associates.

9. The 1<sup>st</sup> Defendant filed a Replying Affidavit dated 14<sup>th</sup> December 2020 sworn by its Director opposing the Application. The 1<sup>st</sup> Defendant asserted that the Plaintiffs were given an opportunity to present their views before the issuance of development approval. To the 1<sup>st</sup> Defendant opportunity was granted by the 2<sup>nd</sup> Defendant not only to the NNRA but also to the general public, institutions, organizations or individuals through an advertisement published in the local dailies of wide national circulation and reader base being "The Daily Nation" newspaper notification dated 26<sup>th</sup> February 2020 inviting anybody with an objection to the Change of User.
10. The 1<sup>st</sup> Defendant averred that the approval granted for development was lawful. According to the 1<sup>st</sup> Defendant, the provision of Section 20 (i) of the [Physical and Land Use Planning Act](#) 2019, the County Director of Physical and Land Use Planning issued the permission in exercising the express authority under the aforementioned section which gives the County Director of Physical and Land Use Planning a legal mandate to issue permissions for development.
11. The 1<sup>st</sup> Defendant denied the averments made out by the Plaintiffs to the effect that the approval issued effecting its development of the property L.R no MN/1/3156 was obtained in an irregular manner. In as far as the 1<sup>st</sup> Defendant were concerned, the development approval was issued in strict adherence to the law. The 1<sup>st</sup> Defendants stated that the approvals were obtained from all the government departments concerned in issuing approvals which were:



- a. The Chief Lands officer in the ministry of lands and physical planning consented to the proposal of change of use *vide* letter dated 15<sup>th</sup> March 2020.
  - b. The Coast Regional Surveyor consented to the project *vide* a letter dated 26<sup>th</sup> May 2020 where he raised no objection to the change of user and development.
  - c. The County Physical and Land Use Planning officer in the Ministry of Lands consented to the proposed the Change of User and development *vide* letter dated 10<sup>th</sup> June 2020.
  - d. The County Government of Mombasa through Director of Planning and Housing department issued a Change of User Certificate/Consent on 17<sup>th</sup> June 2020 where he raised no objection to the change of user.
  - e. The County of Mombasa issued consent / approval of the development permission dated 12<sup>th</sup> August 2020.
12. The 1<sup>st</sup> Defendant opined that the development was being undertaken in strict adherence to the laws and regulations and approved plans dated 12<sup>th</sup> August 2020 and the development is at the preliminary stages of excavation. Paradoxically, through a further affidavit dated 17<sup>th</sup> February 2021 sworn by its Director, the 1<sup>st</sup> Defendant agreed that it was true that pursuant to the provisions of Sections 57(1), 58(1), 60 and 61 of the [Physical and Land Use Planning Act](#) 2019, the County Executive Committee Member was the only legal person who had the legal mandate and was authorized to give development permission/approval and that pursuant to Section 20 (j) of the [Physical and Land Use Planning Act](#) 2019, with the permission / approval of the County Executive Committee Member , the County Director of Physical and Land Use Planning had express authority and mandate to issue development permissions and therefore the approval is valid. The 1<sup>st</sup> Defendant argued that the Plaintiffs had not produced evidence of any objections they made to the relevant authorities with regard to the Change of User of the 1<sup>st</sup> Defendants land.

#### IV. The 2nd Defendant's case.

13. While opposing the application, the 2<sup>nd</sup> Defendant while opposing the application filed by the Plaintiff, filed a Replying Affidavit dated 18<sup>th</sup> February 2021 sworn by its Director of legal services. The 2<sup>nd</sup> Defendant deposed that:-
- a. Under the provisions of Sections 2 and 45 (4) of the [County Governments Act](#) no 17 of 2012, a Chief Officer is an authorized officer and could therefore execute the mandate of the County Executive Committee member.
  - b. Any dispute in relation to any decision on issuance of development permission under the [Physical and Land Use Planning Act](#) no 13 of 2019 should be lodged with the County Physical and Land Use Planning Liaison Committee.
  - c. The 2<sup>nd</sup> Defendant deposed that it had raised a preliminary objection seeking the whole suit filed to be struck out as it was instituted in the wrong forum which was an abuse of court the due process and law. Hence, it should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



## V. The Notices of Preliminary Objection

### A. The 2nd Defendant's Notice of preliminary Objection.

14. On 19<sup>th</sup> February, 2021, the Learned Counsel for the 2<sup>nd</sup> Defendant, the Law firm of Messrs. Otieno B.N & Associates filed a notice of preliminary dated 18<sup>th</sup> February 2021 on the grounds that the suit herein is fatally defective. Nonetheless, subsequently through a notice of withdrawal dated 30<sup>th</sup> April 2021 the 2<sup>nd</sup> Defendant withdrew its entire Notice of Preliminary Objection dated 18<sup>th</sup> February 2021 and filed on 19<sup>th</sup> February 2021.

### B. The 1st Defendant's Notice of Preliminary Objection

15. However, on 2<sup>nd</sup> June, 2021 the Learned Counsel for the 1<sup>st</sup> Defendant the Law firm of Messrs. Matata Mwambonje Advocates filed a notice of Preliminary Objection dated 2<sup>nd</sup> June 2021. Critically speaking, this notice is the exact replica of the initial Notice of Preliminary Objection filed and later on withdrawn by the 2<sup>nd</sup> Defendant. For the purposes of record, this Honorable Court will endeavor to reproduce the contents of the 1<sup>st</sup> Defendant's Preliminary objection verbatim thus:-

That the suit by the Plaintiffs herein was fatally defective for the reasons that:-

- a. This Honourable Court lacks jurisdiction to determine or make any orders thereof in regard to the suit against the 2<sup>nd</sup> Defendant.
- b. The suit is incurably defective because the administrative decisions by public bodies can only be challenged by way of judicial review and not through a Plaint. Therefore this Honourable Court cannot entertain the suit herein . The jurisdiction as the ultimate guarantor of legality to scrutinize actions and decisions of administrative officers, institutions, bodies/ and or tribunals is vested before the high court sitting as a judicial review court.
- c. The suit is premature and any attempt to entertain the present proceedings before this Honourable Court is unconstitutional for the reasons that there exists sufficient adequate mechanisms to deal with the issues raised in the present suit and the jurisdiction of the court should not be involved until such mechanisms have been exhausted.
- d. The suit arises from the decision making and communication on issuance of development permission under "The *Physical and Land Use Planning Act* no 13 of 2019. Thereafter, any claim in relation to decision making and communication on issuance and/ or refusal and/ or revocation of a development permission to be lodged with the county physical and land use planning liaison committee.
- e. that this suit is incurably defective and repugnant to the provisions of the law, in particular the *physical and land use planning act* no 13 of 2019 and the *constitution* of Kenya 2010.

## VI.Submissions

16. On 14<sup>th</sup> December, 2021 while in the presence of all parties, Court directed that the Notice of Preliminary objection dated 2<sup>nd</sup> June, 2020 by the 1<sup>st</sup> Defendant be disposed off by way of written submission. Pursuant to that all parties obliged. On 8<sup>th</sup> February, 2022 all the Parties were accorded



some brief opportunity to highlight their written Submissions before Court reserved time for the delivery of the ruling.

From the very onset, I must confess that the Advocates conducted themselves with extreme resilience, decorum and decency while making such articulate, well researched and informed presentation. The Honorable Court wishes to express its gratitude to them as it goes all the way in enriching the jurisprudence in this Country.

#### **A. 1st Defendant's written submissions**

17. To begin with, I reiterate that the submissions by the 1<sup>st</sup> Defendant is the exact replica of its submission filed in support of the 2<sup>nd</sup> Defendant's Preliminary objection. In its submissions, mr Sumba Advocate for the 1<sup>st</sup> Defendant submitted that this court lacks jurisdiction to entertain this suit. To the 1<sup>st</sup> Defendant the suit is premature because the Plaintiff ought to have appealed to the County Physical and Land use Planning Liaison Committee.

The Learned Counsel emphasized that an administration decision of a public body could only challenged by way of instituting judicial review and not by filing of an ordinary suit through a Plaintiff. To buttress its case that the preliminary objection meets the necessary threshold, the 1<sup>st</sup> Defendant cited the case of "*Charles Ogoti v Safaricom Limited & another* 2020 eKLR" quoting the case of "*Mukisa Biscuit Manufacturing Co Limited v West End Distributors Ltd* 1969 EA 696".

18. The Learned Counsel further relied on the provisions of Section 78 of the *Physical and Land Use Planning Act*, the numerous cases of "*Chembe Vuko v Nelson Kilimo & 2 Others* 2016 eKLR and *Lashad Mubarak v County Government of Momasa* 2020 eKLR. Further reliance was placed in the case of "*The Owners of Motor Vessel 'Lillian S' v Caltex Oil Kenya Limited* 1989 to the effect that this Honourable Court has no jurisdiction to hear the matter and should down its tools and allow the 1<sup>st</sup> Defendants Notice of preliminary objection.

#### **B. The 2nd Defendant's Written submissions**

18. Before withdrawing it, the Learned Counsels for the 2<sup>nd</sup> Defendant, the Law firm of Messrs. Otieno B.N Advocates filed their written submissions dated 7<sup>th</sup> February 2022. Mr Onduso Advocate argued that the epicenter of the instant suit revolves around seeking and obtaining development permission under the provisions of *Physical and Land Use Planning Act* 2019, and the approval was sought and obtained irregularly having been purportedly issued by the Chief Officer Lands, Planning and Housing as opposed to the County Executive Committee Member of the County Government of Mombasa.

The Learned Counsel submitted that the Act in question was entrenched with elaborate and exclusive dispute resolution mechanism which ought to be exhausted first before invoking the jurisdiction of the court. According to him, the Act governed decisions revolving around issuance and or refusal, and or revocation of development permission. To buttress its case, the Counsel for the 2<sup>nd</sup> Defendant cited the provisions of Sections 61 (3) and 78 of the *Physical and Land Use Planning Act*.

19. To the Counsel, the Plaintiffs had prematurely approached this Court before exhausting the laid down dispute resolution mechanisms under the *Physical and Land Use Planning Act* 2019. The Advocate argued that the development permission was granted by the County Chief Officer who is an authorized officer and could execute the mandate of the County Executive Committee Member. He cited the provisions of Sections 2, 45 (4) of the *County Government Act* and the case of "Judicial Review no 14 of 2019, *Lashad Mohammed Mubarak v the County Government of Mombasa*."



### C. The Plaintiffs' written submissions

20. The Plaintiffs strenuously opposed the notice of preliminary objection. On 2<sup>nd</sup> November, 2021 and 8<sup>th</sup> February, 2022 the Learned Counsel for the Plaintiffs, the Law firm of Oluga & Associates Advocates filed both their main and Supplementary written submission. Mr Oluga Advocate submitted that this Honourable Court has jurisdiction to hear and determine the suit. He said so on three (3) broad grounds. Firstly, there was no decision made by the County Executive Member to warrant invoking the jurisdiction of the County Physical and Land Use Planning Liaison Committee under Section 61(3) of the [Physical and Planning Land Use Act](#) 2019. The Plaintiff argued that clearly what was appealable to the County and Land Use Planning Liaison Committee was a decision of the County executive committee member and nothing else.

21. The Learned Counsel for the Plaintiffs stressed that what that means is that the jurisdiction of the County Physical and Land use Planning Liaison committee can only be invoked in instances where there was a decision of the County Executive Committee Member. To the Learned Counsel, put differently the County Physical and Land Use Planning Liaison Committee could only sit and preside over an appeal against the decision of the County executive committee member and not a decision by any other person or officer within the county. The Plaintiffs placed reliance on the provisions of Sections 57, 58 and 61 of the Act.

Further, the Plaintiff submitted that there is no decision of the County Executive Member to appeal against to the County Physical and Land Use Planning Liaison Committee, to the Plaintiff, in essence there is no decision of the County Executive Member to trigger the jurisdiction of the Liaison Committee.

The Plaintiff alludes that the permission was issued by the Chief Officer lands, Planning and Housing and not the County Executive Committee Member, clearly an indication that there was no decision which is appealable. To the Plaintiff there was no development permission granted to the 1<sup>st</sup> Defendant by the County Executive Committee Member. The decision being challenged in this suit was made by the Chief Officer, Lands, Planning and Housing and not the County Executive Committee Member. The Plaintiff submitted that the main complaint in the suit is that the 1<sup>st</sup> Defendant development is being undertaken without development permission granted by the officer mandated to grant it in law (the County Executive Committee Member).

22. Basically the Plaintiff is submitting that the approval no P/2020/201 issued by the 2<sup>nd</sup> Defendant's Chief officer, Lands, Planning & Housing for the 1<sup>st</sup> Defendant's commercial development of plot no MN/1/3156 was issued by unauthorized officer and is therefore illegal, null and void.

The Counsel submitted that upon coming to court they are being now told to go back to the Liaison Committee where they will be told that there was no decision of the county executive committee member which would entitle them to appeal liaison committee effectively shutting down the door for the Plaintiff.

Secondly, the Learned Counsel further averred that even if the court were to find that there was a decision of the Chief executive member and the Plaintiffs ought to have appealed to the County Physical and Land Use Planning Liaison Committee, there is still there is legal justification why this suit cannot and should not be struck out. This was because the Mombasa County Physical and Land Use Planning Liaison Committee is non – existent and non – functional. Indeed, the Learned Counsel contention was that this legal structure had never been constituted at all. He urged the court to consider the contents of the Paragraphs Replying Affidavit sworn by Willis O Oluga. From that affidavit,



he deposed that he came to learn that Mombasa County Physical and Land Use Planning Liaison Committee did not exist and had never been constituted.

23. He deposed that on or about 4<sup>th</sup> October 2021 he went to the department of Lands, Housing and Physical Planning of Mombasa County government situated at Bima towers with a view to lodging an appeal to the Mombasa County Physical and Land Use Planning Liaison Committee on behalf of the client who had been served with an enforcement notice under the provisions of Section (71) (a) as read with Section 75 of the [Physical Use and Planning Act](#). While there, according to him, he was informed by the receptionist that Mombasa County Liaison Committee never existed and had no registry. Pursuant to that, he proceeded to the offices of the County Attorney where it was confirmed to him that Mombasa County Physical and Land Use Planning Liaison committee never existed. Therefore, he deposed that the document he intended to file was received by the County government of Mombasa department of Lands, Housing and Physical Planning. He annexed a copy of the first page which bears the official stamp of the Clerk of the County Assembly of Mombasa and not the Mombasa County Physical and Land Use Planning Liaison Committee which is presently non - existent.

Thirdly, the Learned Counsel relied on the provisions of Section 93 of the [Land Physical Planning and Liaison Act](#) to the effect that in the case of the non existence of the said Committee then the right legal forum available was the Environment and Land Court.

To buttress its point, the Learned Counsel for the Plaintiff placed reliance on of the case of “Judicial Review no 14 of 2019 [Lashad Mohammed, Depar Limited v County Executive Committee Member for Lands](#) 2021 eKLR, [Angela Musimba & 7 Others v Fred Rabongo & 8 Others](#) and Section 93 of the [Physical and Land use Planning Act](#).

## VII. Analysis and Determination.

24. I have keenly considered all the pleadings filed by the parties in this matter as pertaining the two Notices of Preliminary objection instituted by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein dated 2<sup>nd</sup> June, 2021 and 18<sup>th</sup> February, 2021 respectively, written submission, cited authorities, other precedents and the relevant provisions of the law and the [Constitution](#) of Kenya, 2010.

In order to arrive at an informed, just and fair decision on this matter at hand, I have framed the following salient four (4) issues for determination. These are:-

- a) Whether the grounds set out in the notice of Preliminary Objection meets the threshold of a Preliminary Objection based on law and precedents.
- b) Whether the Environment and Land Court has the jurisdiction in this matter?
- c) Whether the Environment and Land Court has power to grant judicial review orders?
- d) Whether the instant pleadings is incurably defective?
- e) Who will bear the Costs for the Preliminary Objection.

### **ISSUE no 1. Whether the grounds set out in the notice of Preliminary Objection meets the threshold of a Preliminary Objection based on law and precedents.**

25. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”



The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited*. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:-

“The first matter relates 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 demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in 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 the issue. The improper practice should stop”

I wish to cite the case of *Attorney General & another v Andrew Mwaura Gitbinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*:-

- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

26. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 1<sup>st</sup> Respondent are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. Indeed, under this sub-heading on the one hand, while the court fully concurs with the position taken by 1<sup>st</sup> Defendant on to raise and defend the objection on law.

Further Ojwang J (as he then was) in the case of “*Oraro v Mbaja* [2005] eKLR held that:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point .....Anything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence .....

27. All the submissions were canvassed through both written and oral submissions. As indicated herein, the 2<sup>nd</sup> Defendant withdrew its preliminary objection *vide* a notice of withdrawal dated 30<sup>th</sup> April,



2021. Therefore, the Notice Preliminary Objection by the 1<sup>st</sup> Defendant Dated 2<sup>nd</sup> June, 2021 is the subject of this ruling. Fundamentally, it is anchored on two broad Legal objections. The first limb of the preliminary objection is that this court lacks jurisdiction to hear and determine or make any orders thereof in regard to the instant suit. They argued that the suit instituted by the Plaintiffs herein was premature as there exists sufficient alternative statutory mechanisms to deal with the issues raised in the present suit. Thus, the jurisdiction of the court should not be involved until such mechanisms have been exhausted as provided for under the Doctrine of Exhaustion and the *Physical and Land use Planning Act* no 13 of 2019 .

28. The second limb of the 1<sup>st</sup> Defendant’s preliminary objection is that this court has no powers to grant judicial review orders in particular the Plaintiffs having instituted the present suit through a plaint and the power to scrutinize actions and decisions of administrative officers, institutions, bodies/ and or tribunals is vested before the High Court sitting as a judicial review court.

Further, the basis of the preliminary objection is that the suit herein is incurably defective because the administrative decisions by public bodies can only be challenged by way of judicial review and not through a plaint and therefore this honourable court cannot entertain the suit herein as the power to scrutinize actions and decisions of administrative officers, institutions, bodies/ and or tribunals is vested before the High Court sitting as a Judicial Review Court.

Based on the foregoing legal reasoning and preposition, I am satisfied that the notice of preliminary objection raised by the 1<sup>st</sup> Defendant meets the legal threshold as established in the *Mukisa Biscuit* case (*Supra*) as it raises pure points of law. For these reasons, therefore, I find that the objection raised by the 1<sup>st</sup> Defendant was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to “*Mukisa Biscuits Manufacturing Co. Limited (Supra)*”. Applying the above test, the matters raised by the 1<sup>st</sup> Defendant in their preliminary question are clearly pure points of law that I shall proceed to elaborately consider and determine each of these two issues separately accordingly.

## **ISSUE no 2. Whether the Environment and Land Court has the jurisdiction in this matter?**

29. Under this sub – heading, I wish to rely on the legal ratio as founded in the now famous decision of which held:- “*the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* [1989] KLR 1. Nyarangi J.A. held that:-

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

Where does the jurisdiction of the Environment and Land Court emanate from? It is trite law that the jurisdiction of the court flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of “*Samuel Kamau Macharia v KCB & 2 Others*, Civil Application no 2 of 2011 noted:-

“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”

The Preliminary objection raised by the 2<sup>nd</sup> Defendant seeks the Court to address the necessity by parties to exploit alternative statutory dispute resolution mechanisms prior to approaching the court as provided under the *Physical and Land use Planning Act* no 13 of 2019 which demands any claim in relation to decision making and communication on issuance and/or refusal and/ or revocation of a development permission be lodged with the County Physical and Land Use Planning Liaison Committee.

It is well established jurisprudence that jurisdiction is the foundation upon which a court or Tribunal hears and determines a case. It is the heart that gives a Court the lifeline to hear a matter. Before a court makes one more step, it must be fully satisfied that it possesses the requisite jurisdiction. Without jurisdiction any one more step is a nullity and any orders made by a court without jurisdiction is a nullity without any legal force. It is desirable that questions relating to jurisdiction be raised at the earliest opportunity possible before the court makes further step.

30. The Jurisdiction of the County Physical and Land use Planning Liaison Committee

Parliament enacted the statute known as “The *Physical and Land Use Planning Act*, 2019. Part VI of the Act and particularly Section 76 establishes a County Physical and Land Use Planning Liaison Committee for each county in all the 47 Counties.

Section 78 of the Act provides that:-

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to—

- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
- (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
- (d) hear appeals with respect to enforcement notices.

Section 61 (3) provides that:-

“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”.

As per Section 61(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”.



Based on the above, and in order not to be negatively perceived to be making any conflicting decision with what the same court of equal status has decided over almost the same subject matter I wish to make a direct distinction to the said cases. In the case of Mombasa Judicial Review no 14 of 2019, [\*Lashad Mohamed Mubarak v County Government of Mombasa\*](#) [2020] eKLR Justice Sila Munyao noted:-

- “ 10. It will be seen from the above, that apart from providing the framework for development control, the statute also provides a mechanism for dispute resolution with respect to physical and land use planning”
- “ 13. It will be seen from the above, that a person who is aggrieved by a decision of the County Executive Member over a planning application, has liberty to appeal to the County Physical and Land Use Planning Liaison Committee. I believe that this right of appeal is not only on the grant or refusal to grant development permission in the first instance, but also a decision to revoke or modify a planning permission. There is therefore a right of appeal that has been granted by statute. This right of appeal would encompass all matters that a person feels aggrieved against, whether it is procedural or on merits. (Emphasis is mine)”

31. Our courts have on an umpteen times stated categorically that where Parliament has, through legislation, established primary dispute adjudication mechanisms and organs, the mechanisms must be exhausted. Indeed, in the case of the Court of Appeal decision in “[\*Speaker of the National Assembly v James Njenga Karume\*](#) [1992] eKLR.”, the Court stated:-

“.....Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.....”

On the same breath, I fully concur with the robust legal reasoning and ratio in the case of “[\*Geoffrey Mutbinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others\*](#) where the Court of Appeal (P. N. Waki, R.N Nambuye & P.O Kiage J JA ) explained the constitutional rationale and basis for the doctrine and held as follows:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the [\*Constitution\*](#) which commands Courts to encourage alternative means of dispute resolution.”

32. Crafty Pleadings.

In a bid to oust the jurisdiction of the Liaison Committee and demonstrate that this Honourable Court has jurisdiction to hear and determine the suit, the Plaintiffs submitted that they say so because to them there is no decision made by the County Executive Member to warrant invoking the jurisdiction of the County Physical and Land use Planning liaison Committee under Section 61(3) of the [\*Physical and Planning Land Use Act\*](#) 2019 . The Plaintiff argues that clearly what is appealable to the County and Land Use Planning Liaison Committee is the decision of the County executive committee member and nothing else.



The Plaintiffs submitted that what that means is that the jurisdiction of the County Physical and Land use Planning Liaison committee can only be invoked in instances where there is a decision of the County Executive Committee Member. To the Plaintiff, put differently the County Physical and land use planning liaison Committee can only sit and preside over an appeal against the decision of the county executive committee member and not a decision by any other person or officer within the county.

The Court of Appeal in "*Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020]eKLR stated that *inter alia*:-

“Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute...”

“Jurisdiction of the court or a tribunal flows from the constitution or statute and it cannot be conferred by the art and craft of counsel or litigant drawing pleading to confer or oust the jurisdiction given to another institution or tribunal by statute.”

33. Respectfully, however crafty the Plaintiff has drawn the Plaintiff to oust the jurisdiction of the Mombasa County Physical and Land use Planning Liaison Committee, the gist of the Plaintiffs case is that they are aggrieved by the decision of 2<sup>nd</sup> Defendant herein to grant development permission to the 1<sup>st</sup> Defendant for commercial development known as Festival City Shopping Centre on Property known as Plot no MN/1/3156 *vide* the approval no P/2020/201 issued by the 2<sup>nd</sup> Defendant’s Chief Officer and, planning and housing.

It is clear that the original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies lies with the County Physical and Land use Planning Liaison Committee and this Court only has appellate jurisdiction.

Jurisdiction of the Environment and land court – The jurisdiction of the Environment and land Court in as far as these matters are concern has been created by law. The provision of Section 93 of the Physical Land use Planning Act provides:-

“All disputes relating to physical and land use planning, before establishment of the National and County Physical and Land Use Planning Liaison Committees shall be heard and determined by the Environment and Land Court”.( emphasis mine)

As a matter of facts, it has been graphically demonstrated by the Plaintiffs here through several averments deponed to under an affidavit by one mr Willis O. Oluga an advocate of the High Court of Kenya that as deponent he came to learn that Mombasa County Physical and Land use Planning Liaison Committee does not exists and has never been constituted.

34. He deponed that on or about 4<sup>th</sup> October 2021 he went to the department of Lands, Housing and Physical Planning of Mombasa County Government situated at Bima towers with a view to lodging an appeal to the Mombasa County Physical and Land use Planning Liaison Committee on behalf of the client who had been served with an enforcement notice under Section (71) (a) as read with Section 75 of the Physical and Land use and Planning Act and was informed by the receptionist that Mombasa County Liaison Committee did not exist and had no registry. On being stranded, he proceeded to the offices of the County Attorney where it was once again authoritatively confirmed to him that Mombasa County Physical and Land use Planning Liaison Committee never existed. Eventually, the document he intended to file was received by the County Government of Mombasa department of lands housing and physical planning and he annexed a copy of the first page which bears the stamp of the clerk of



the County Assembly of Mombasa and not the Mombasa County Physical and Land use Planning Liaison Committee which is presently non-existent.

Both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not rebutted nor controverted the assertion that Mombasa County Physical and Land use Planning Liaison Committee was non-existent. I have perused the annexed first page of the alleged intended appeal to Mombasa county liaison committee and it bears stamps to the effect that it was received by the County Government of Mombasa department of lands housing and physical planning.

35. I take cue from the famous decision to invoke the original and inherent jurisdiction of this Court relating to environmental planning and protection by the decision of in Mombasa Judicial Review no 14 of 2019, *Lashad Mohamed Mubarak v County Government of Mombasa* [2020] eKLR (*supra*) by Judge S. Munyao establishing the circumstances of invoking the inherent jurisdiction of the Environment and Land Court under section 93 of the Act when he noted:-

“ 14. .... Where the parent statute has provided a mechanism for resolving disputes, the court ought to be slow to invoke its inherent jurisdiction, and unless there are special circumstances, for example, that the body that is meant to hear the dispute has not been constituted, then the court ought ordinarily to defer jurisdiction to the specific dispute mechanism body that has been provided for in the statute”.

I dare say that the Courts of law are a creature of the Constitution with a sole purpose of provision of the rule of law and protection of the fundamental rights among other rights. In the spirit of the access to Justice as enshrined under Article 48 of the *Constitution* of Kenya, it feels extremely awkward whenever litigants lack or fail to avail to this basic right from the established legally established institutions. In the instant case, I perceive that frustrating atmosphere and feeling depicted from the Plaintiffs when they find out for themselves and are actually authoritatively informed by the representatives of the 2<sup>nd</sup> Defendant that the Physical Planning Liaison Committee is not only non-existent but also not functional. That grim scenario reminds the Honourable Court to the story of a famous and key character known as Okwonkwo the village wrestler in the Masterpiece book by the Nigerian reknown author Chinua Achebe, “Things Fall Apart” . Mr Okwonkwo, by then a very respectable character within the village of Umwofia Kwenu, got entrusted the parental responsibility of taking care of a young man called Ikemefuna, captured while young from a neighbouring village of arch enemies. He brought him up so well upto his teenage stage to a point of regarding him as his parent. One day, the elders being suspicious that the boy once grown would be a menace decided that he be killed on pretense of being returned to his ancestor village. but when a decision was arrived at by the Umuofia Kwenu that the boy had to be killed they picked on Okwonkwo to do the heinous act. He inevitable and reluctantly found himself doing it as boy run towards him for safety from group of enraged and impatient elders so that Okwonkwo was almost betraying them. The act haunted him for ever. He lived on this curse upto his death. Likewise, this Court, on being faced by such similar circumstances, it quickly seeks a soft landing solace from the Scripture in songs by David in the book of Psalms 121 verses 1 which holds:-

“ I lift my eyes to the mountains. From where does my help come? My help come from the Lord, who made heaven and earth. He will not let your foot be moved, he who keeps you will not slumber. He who keeps Israel will neither slumber nor sleep. The Lord is your Keeper; the Lord is your shade on your right hand. The sun shall not smite you by day nor the moon by night.....”



Thus, based on this glaring legal lacuna and vacuum, created by the County Government of Mombasa, the only place left for the Plaintiff herein, is to institute this case before this Honorable Court. Until and unless this legal structure is actually created, and it becomes vibrantly operational, the Court of law should never smash them with machete as Okwonkwo in the story from mr Chinua Achebe's Master Piece, did by sending them away. Thus, on that front the preliminary objection fails.

### **ISSUE no 3. Whether the Environment and Land Court has power to grant judicial review orders?**

36. Under this sub - heading being the third issue of determination, the 2<sup>nd</sup> Defendants contends that the suit herein is incurably defective because the administrative decisions by public bodies can only be challenged by way of judicial review and not through a Plaint and therefore this honourable court cannot entertain the suit herein. The 2<sup>nd</sup> Defendant alludes that the jurisdiction is the ultimate guarantor of legality to scrutinize actions and decisions of administrative officers, institutions, bodies/ and or tribunals is vested before the high court sitting as a judicial review court. I have taken judicial notice that the Plaintiffs did not submit on this issue.

Under sub - Article 22 (1) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Under Sub-Article 23(3) in any proceedings under Article 22, a court may grant appropriate relief including:

- i. a declaration of rights;
- ii. an injunction;
- iii. a conservatory order;
- iv. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- v. an order for compensation; and
- vi. an order of judicial review. ( emphasis mine)

Article 162 of the Constitution provides:-

- “(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause
- (2). (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - (a) .....
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)”

Under the provision of Section 13 of the Environment and Land Court Act, no 19 of 2011 on the jurisdiction of the Court provides:-

- “(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 Sub Sections (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.
- (6) Deleted.
- (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; ( underlining mine)
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (g) restitution;
  - (h) declaration; or
  - (i) costs”.

37. This Court is startled by the averments that the jurisdiction to scrutinize actions and decisions of administrative officers, institutions, bodies/ and or tribunals is vested before the high court sitting as a judicial review court and not the Environment and Land Court. While citing the case of Supreme Court “*Petition no 5 of 2014, Karisa Chengo*” where the Supreme Court held.....Clearly the 2<sup>nd</sup> Defendant is misguided, the Environment and Land Court is a specialized court of equal status with the High Court and certainly has the power to grant the orders of judicial review.



#### **ISSUE no 4 Whether the instant pleadings are defective?**

38. To address the issue raised by the 1<sup>st</sup> Defendant that the suit herein is incurably defective because the administrative decisions by public bodies can only be challenged by way of judicial review and not through a Plaint and therefore this Honourable Court cannot entertain the suit herein. In response to that unfortunate assertion, I am guided by the decision in “*Peter Muchai Muhura v Teachers Service Commission* [2015] eKLR Cause 53 of 2014 (Formerly Hccc 84 of 2012 at Nyeri) Justice Byram Ongaya noted:-

“Thus, under the cited provisions, it is possible for a litigant to apply for and pray for both compensatory relief and orders of judicial review in the same pleading. Thus in judicial review proceedings under the current constitutional dispensation, other substantive remedies as provided for in the *Constitution* are available under the same proceedings and the court in such proceedings, which appears to have been the case in the said judicial review application no 53 of 2010, is entitled to delve into both procedural and substantive or merit issues. It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the *Constitution* of Kenya, 2010. The *Constitution* has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the *Constitution* shall be protected and promoted”.

39. The Honorable Court further upholds the reasoning of Majanja J. in the case of “*Geoffrey Otieno Ogola v Homa Bay Boys’ High School and 2 Others* [2014]eKLR where the High Court declined to strike out a Plaint seeking to enforce fundamental rights and freedoms upon the submission that the plaintiff ought to have filed a petition as provided under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. The court held that it was enough that the Plaint disclosed the claim with sufficient clarity and allowing the Plaint was in accordance with Article 159(2) (d) of the *Constitution* of Kenya which enjoined the court to administer justice without undue regard to procedural technicalities. I strongly believe the legal ratio and logic by this Court has adequately and robustly answered the concerns posed by the 2<sup>nd</sup> Defendant herein.

#### **ISSUE no 5 Who will bear the Costs of the Notice of the Preliminary Objection by the 1<sup>st</sup> Defendant.**

40. It is trite law that matters of Costs to be awarded to the litigants after the conclusion of any stage of the litigation are purely discretionary. The provision of Section 27 of the *Civil procedure Act*, Cap. 27, holds that Costs follow the event. By the event here it means the results after the process has been concluded. It is the outcome of the litigation.

In this case, the notice of the Preliminary objection by the 1<sup>st</sup> Defendant herein has failed and therefore the Plaintiffs are entitled to be awarded costs. Thus, the court proceeds to do exactly that which is demanded of it to do and as required by law.



## **IX. Conclusion and disposition**

41. Ultimately, in view of the indepth and elaborate analysis and findings by this Honourable Court as enumerated above, the Court makes the following determination:-
- a. That this Honourable Court has jurisdiction over the instant matter and the pleadings are properly before this Court.
  - b. That the Notice of Preliminary Objection dated 2nd June 2021 by the 2nd Defendant is unmeritorious and hence be and is hereby dismissed in entirety.
  - c. That for expediency sake and rapid disposal of the instant case, the suit should be fixed and finally determined within the next One hundred and eighty (180) days from the date of this ruling hereof. There should be a mention on 8th June, 2022 for purposes of Pre – Trial Conference and Case management under Order 11 of the *Civil Procedure Rules*, 2010.
  - d. That Costs shall be in the cause.

It so ordered accordingly.

**DATED, DELIVERED, SIGNED AND READ IN OPEN COURT AT MOMBASA THIS 5TH DAY OF MAY 2022.**

**HON. JUSTICE L.L. NAIKUNI (JUDGE)**

**ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**In presence of:-**

**M/s. Yumna, Court Assistant.**

**Mr Oluga Advocate for the Plaintiff.**

**Non Appearance for the 1<sup>st</sup> Defendant/Respondent.**

**Mr. Onduso Advocate for the 2<sup>nd</sup> Defendant/Respondent.**

