



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC. CASE NO. E019 OF 2021**

LAWRENCE M. NJAGI.....1<sup>ST</sup> PLAINTIFF  
 KARIUKI APOLLO.....2<sup>ND</sup> PLAINTIFF  
 KENNEDY NJENGA.....3<sup>RD</sup> PLAINTIFF  
 HENRY SAGWA.....4<sup>TH</sup> PLAINTIFF  
 RAPHAEL MBALO.....5<sup>TH</sup> PLAINTIFF  
 BEATRICE LEAH ATIENO.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

CYRUS NJOROGE.....DEFENDANT

**AND**

MAYOR ROAD RESIDENTS’ ASSOCIATION.....1<sup>ST</sup> INTERESTED PARTY  
 NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY  
 COUNTY GOVERNMENT OF KAJIADO.....3<sup>RD</sup> INTERESTED PARTY

**RULING**

What is before Court for determination is the Defendant’s Notice of Preliminary Objection dated the 22<sup>nd</sup> April, 2021 where he seeks the Plaintiffs’ Notice of Motion dated 6<sup>th</sup> April, 2021 and suit to be struck out on grounds that it does not comply with the requirements of the Legal Notice No. 117 of 2013 and the Constitution (Protection of rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 (Mutunga Rules). The Notice of Preliminary Objection is based on the grounds that the Plaintiffs’ application and suit, seek protection of rights and fundamental freedoms as well as invoke public interest under the Constitution. Further, the Court lacks jurisdiction to entertain the matter herein as it has not been moved properly as a Constitutional Court.

The Plaintiffs opposed the Notice of Preliminary Objection by filing a replying affidavit sworn by KENNEDY NJENGA, who has authority from all of them to do so. He deposes that the Defendant continues to infringe on the rights of the Plaintiffs under Articles 42, 69(d) and 69(g) of the Constitution, exposing them to great danger and hence craving the protection of their constitutional rights. He contends that they are entitled to seek redress in this court for breach of clean including unhealthy environment on behalf of the association and that of public interest. He insists this court has jurisdiction to hear and determine constitutional disputes that the subject matter involves land and environment. Further, the Court can also determine matters on fundamental rights ancillary and incidental to those matters. He reiterates that the Preliminary Objection is incompetent and misconceived in law; a waste of the court’s time including process and an abuse of the court process.

The instant Notice of Preliminary Objection was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the instant Notice of Preliminary Objection including the replying affidavit and rivaling submissions, the only issue for determination is whether the Plaintiffs' application dated 6<sup>th</sup> April, 2021 including the suit should be struck out with costs.

The Defendant in his submissions has reiterated his averments in the Notice of Preliminary Objection and insists the Plaintiffs commenced this suit using a wrong procedure. To support his arguments he has relied on the following decisions: **Beach Bay Holdings Ltd V Ratim Realtors Ltd & 2 others (2013) eKLR and Hermana Phillipus Stegn Vs Giovanni Gnechi Russone Supreme Court Application No. 2 of 2012.**

The Plaintiffs in their submissions insist this court is seized with jurisdiction to hear and determine the dispute herein which relates to land. To buttress their averments, they have relied on the following decisions: **Patrick Musimba Vs National Land Commission & 4 Others (2015) eKLR and Daniel N. Mugendi Vs Kenyatta University & 3 Others (2013) eKLR.**

From perusal of the Plaint, I note the Plaintiffs seek various orders including declaration that the Defendant has infringed on their rights, a permanent injunction; a mandatory injunction and compensation for breach of their rights.

Except for filing a replying affidavit to the Plaintiffs' Notice of Motion application dated the 6<sup>th</sup> April, 2021, the Defendant did not file a Defence to deny the Plaintiffs' averments but proceeded to file the instant Notice of Preliminary Objection.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **'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 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 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 the issues. This improper practice should stop.'**

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: **'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'**

While in the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that: **-"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."**

Insofar as the Defendant has relied on decisions indicating the procedure to be adhered to where a party seeks for prayers touching on provisions of the Constitution, it is trite that he should have filed a Defence to deny the Plaintiffs' averments first and to also anchor his Preliminary Objection.

Based on the facts as presented while associating myself with the decisions cited above, I find that there are no pleadings filed to provide a basis for the Preliminary Objection which also requires the court to ascertain facts before the same can be determined. Further, at this juncture I find the Notice of Preliminary Objection premature. On the issue whether this Court has jurisdiction to deal with the instant case. I wish to refer to Section 13 of the Environment and Land Court Act which confers jurisdiction to this Court and noting that the fulcrum of the dispute herein revolves around land, I beg to disagree with the Defendant that this Court is devoid of jurisdiction to determine this case. I opine that the Defendant is simply seeking to rely on technicalities to defeat the Plaintiffs' claim before the matter is heard and determined. Further, Pursuant to Article 159 (2) (d) of the Constitution, I find that the Defendants' action of filing a Preliminary Objection before even filing a Defence is indeed a defeated avenue.

In the circumstance, I find the Notice of Preliminary objection dated the 22<sup>nd</sup> April, 2021 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**