



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 51 OF 2019

HIGHBURY PROPERTIES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST DEFENDANT

DIRECTOR, URBAN PLANNING

NAIROBI CITY COUNTY GOVERNMENT.....2ND DEFENDANT

RULING

1. Through a plaint dated 15/2/2019, the plaintiff initiated this suit on 18/2/2019. They contended that the defendants had illegally demolished their developments on **Land Reference Numbers 209/138/60** and **209/138/59**. They sought damages and costs of the suit. They subsequently amended the plaint on 8/5/2019 and filed the amended plaint on 10/5/2019. These particular amendments were made before close of pleadings. Subsequent to that, on 14/6/2019, the two defendants filed a memorandum of appearance, a statement of defence, and a notice of preliminary objection, all dated 12/6/2019. On 23/7/2019, the plaintiff filed a further amended plaint dated 4/6/2019 in which they pleaded and particularized special damages.

2. The defendants' notice of preliminary objection dated 12/6/2019 is one of the two items falling for determination in this ruling. The second item falling for determination is the plaintiff's application dated 12/11/2020 through which the plaintiff seeks leave to further amend their pleadings and file a second further amended plaint. The two items were canvassed through written submissions.

3. I have considered both the defendants' preliminary objection dated 12/6/2019 and the plaintiff's application for leave to further amend the further amended plaint. Because the preliminary objection challenges the jurisdiction of this court to entertain this suit, I will dispose it first before dealing with the application for leave to further amend the further amended plaint.

4. The notice of preliminary objection raised the following four verbatim grounds of objection:

i. The suit herein ought to be dismissed with costs to the 1st and 2nd defendants as this honourable court has no jurisdiction under the Physical Planning Act to entertain a claim on an already enforced enforcement notice under these proceedings at all.

ii. The Plaintiff in filing this suit herein failed to abide by the doctrine of exhaustion as laid out in the Physical Planning Act in respect of the defendants' enforcement notice dated 8th February 2016, by reason of which the court cannot entertain the proceedings based on such notice.

iii. The Plaintiff by its suit herein has acted in breach of Section 9(4) of the Fair Administrative Action Act, in invoking relief under Article 47 of the Constitution, necessitating this honourable court to strike out the process.

iv. Neither the plaint originally filed nor the amended plaint complies with Order 3 Rule 2(d) of the Civil Procedure Rules, 2010, as NO demand letter was ever served on the defendants before action as by law mandated.

5. The preliminary objection was canvassed through written submissions dated 28/1/2021. Counsel for the defendants submitted that the suit herein was time-barred because the cause of action arose on 8/2/2016 and the suit was filed on 18/2/2019, outside the three-year limitation period for claims founded on tort. Secondly, counsel argued that this court did not have jurisdiction to entertain this suit because the suit challenged the enforcement notice dated 8/2/2016. Counsel contended that **Sections 15** and **38 (1)** of the now repealed **Physical Planning Act** provided a dispute resolution mechanism which the plaintiff had not exhausted. Counsel cited the following decision, to support the defendants' objection: (i) **Whitehorse Investments Ltd v Nairobi City County Government (2019)eKLR**; (ii) **Owners of the Motor Vehicle M. V. Lillian "S" v Caltex Oil (K) Limited (1989) IKLR**; and (iii) **Diana Kethi Kilonzo & Ano v Ahmed Isack & Ano [2014] eKLR**.

6. In response to the objection, counsel for the plaintiff argued that the plaintiff's suit raised issues of constitutionality of the actions taken by the defendants, including breach of the plaintiff's right to property under **Article 40** of the Constitution; the right to fair administrative action under **Article 47**, and the right to a fair hearing. Counsel added that the doctrine of exhaustion of remedies would be applicable only when the alternative dispute resolution forum was accessible, affordable, timely and effective. On limitation, counsel argued that the suit was filed within 3 years. He added that the issues raised in the suit were constitutional and the **Limitation of Actions Act** did not apply.

7. I have considered the grounds set out in the defendants' notice of preliminary objection, the submissions tendered in support of the objection, and the plaintiff's response. I will briefly analyse the grounds in the sequence in which they were itemized. Before I do that, I will comment of the issue of limitation which counsel for the defendants raised in their written submissions.

8. The notice of preliminary objection which is the subject of this ruling did not focus on the issue of limitation. The notice itemized four grounds of objection. The issue of limitation under the **Limitation of Actions Act** was not one of the grounds. It was therefore wrong for the defendants to raise the issue of limitation in their written submissions in support of the preliminary objection without raising it in the notice itself. I will, in the circumstances, decline to determine that issue as one of the grounds in the preliminary objection because it is not. The defendants are, however, at liberty to raise and canvass it on an appropriate platform.

9. The first and second grounds of objection focus on the jurisdiction of this court within the context of the now repealed **Physical Planning Act of 1996**. The defendants contend that the court has no jurisdiction under the Act to entertain a claim on an already enforced notice under the Act. My reading of the plaintiff's pleadings is that the plaintiff contends that the demolition of their developments was irregular and unconstitutional. They seek damages on account of the alleged irregularity and unconstitutionality. Redress under **Section 38 (4)** of the repealed **Physical Planning Act** would have been available to the plaintiff only if the enforcement notice had not been enforced at the time of filing this suit. The situation in the present suit is that the plaintiff came to court to seek redress after the defendants had enforced the notice and demolished the plaintiff's developments. The plaintiff is seeking redress [in form of damages] for what they consider to be irregular and unconstitutional demolition of their developments. They cannot be faulted for not seeking redress under the repealed Act because that redress forum had been overtaken by the event of demolition. I accordingly reject the two grounds of objection.

10. The third ground of objection was that, by filing this suit, the plaintiff acted in breach of **Section 9 (4)** of the **Fair Administrative Action Act**. As stated in the preceding paragraph, the plaintiff's suit is essentially a plea for damages. The plaintiff cannot be told to confine themselves to judicial review remedies under the **Fair Administrative Action Act** in the present circumstances where it is apparent that judicial review remedies would not be efficacious in redressing the plaintiff's grievances. What the plaintiff is seeking are essentially damages.

11. The fourth ground of objection was that neither the original plaint nor the amended plaint complied with the framework in **Order 3 rule 2 (d)** of the **Civil Procedure Rules** in that no demand letter was filed alongside the Plaint. **Order 3 rule 2** of the **Civil Procedure Rules** provides as follows:

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

(a) the affidavit referred to under Order 4 rule1(2);

12.

(b) a list of witnesses to be called at the trial;

13.

(c) written statements signed by the witnesses excluding expert witnesses; and

14.

(d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11

15. My interpretation of the above legal framework is that, in a scenario where a copy of the demand notice is available at the time of filing the plaint, it should form part of the bundle of documents to be filed with the plaint together with all the other documents to be relied upon at trial. However, failure to include a copy of the demand notice in the bundle, for whatever reason, is not a fatal omission or a proper ground for striking out a suit.

16. I will not say more. Suffice it to say that, the preliminary objection dated 12/6/2019 does not disclose any proper ground for striking out this suit. I reject all the four grounds of objection in the said notice.

17. I now turn to the plaintiff's application for leave to further amend the further amended plaint. Jurisdiction to grant leave to amend pleadings is exercised under the legal framework in **Order 8 rule 3(1)** of the **Civil Procedure Rules** which provides as follows:

1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any

party to amend his pleadings.

18. The general principle upon which the above jurisdiction is exercised is that amendment of pleadings should be allowed if it does not occasion injustice to the other part. [see

19. I have looked at the draft second further amended plaint. The proposed amendments, though many, do not introduce any new cause of action. The cause of action remains the demolition of the plaintiff's developments. There is no evidence of any injustice which will be suffered by the defendants if leave is granted to the plaintiff to further amend their pleadings. In the circumstances, I will grant the plaintiff leave to amend their pleadings.

Disposal Orders

20. In the end, I make the following disposal orders in relation to the defendants' notice of preliminary objection dated 12/6/2019, and the plaintiff's application dated 12/11/2020:

a) The defendants' preliminary objection dated 12/6/2019 is rejected for lack of merit

b) The plaintiff is granted leave to further amend and serve their pleadings within 14 days from today.

c) Costs of the preliminary objection and the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ann Njoroge for the Plaintiff

Court Assistant: Hilda