



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**PETITION NO. 8 OF 2020**

**LUCY KINUTHIA & 47 OTHERS**

**(MAGOKO LADIES GROUP).....PETITIONERS/RESPONDENTS**

**VERSUS**

**GEORGE MWANGI MUNYUA.....1<sup>ST</sup> RESPONDENT/OBJECTOR**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Petitioners/ Respondents filed the instant Petition dated **26<sup>th</sup> August 2020**, seeking for various reliefs as against the Respondents. However, the 1<sup>st</sup> Respondent/Objector filed a Notice of Preliminary Objection dated **21<sup>st</sup> September 2020** on the grounds that:-

- 1. That the Application as filed and canvassed in the Petitioner's Application and Petition dated 26<sup>th</sup> August 2020, are fatally and incurable defective and as such cannot stand or be ventilated before this Honourable Court.***
- 2. That the Petitioners' Application and Petition is fatally defective incompetent and bad in law in view of provisions of Order 1 Rule 13 (1) & (2) of the Civil Procedure Rules 2010.***
- 3. That the Application and suit contravenes the mandatory provisions of law.***
- 4. That in light of grounds 1, 2 and 3 above, the Application and Petition is ipso fact an abuse of the Court process and ought to be struck out and dismissed with costs.***
- 5. That the 1<sup>st</sup> Respondent shall refer to the said provisions and set precedence for its full tenor and effect at the hearing hereof.***

The 3<sup>rd</sup> Respondent also filed a Notice of Preliminary Objection on the entire suit dated **8<sup>th</sup> October 2020**, on the grounds that;

- 1. That this Honourable Court lacks jurisdiction to entertain the present suit.***
- 2. That Under Section 61(3) of the Physical and Land Planning Act 2019, a person aggrieved by the decision of a County Executive Committee member regarding an Application for development permission may appeal against the decision to the County Physical and Land use Planning Liaison Committee.***
- 3. That Under Section 61 (4) of the Physical and Land Use Planning Act 2019, any party aggrieved with the decision of the County Physical and Land Use Planning Liaison Committee may appeal against that decision to the Environment and Land Court.***
- 4. That the Plaintiff herein has failed and/or neglected to exhaust the alternative means of dispute resolution as provided by statute .***

**5. 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**

The Preliminary Objections were canvassed by way of written submissions and the 1<sup>st</sup> Respondent through the **Law Firm of Meritad law Africa LLP**, submitted that in support of the Petitioner's Chamber Summons Application dated **26<sup>th</sup> August 2020**, as well as the Notice of Motion and the Petition, the 15<sup>th</sup> Petitioner erroneously referred to herself as the 1<sup>st</sup> Petitioner, despite the fact that the assertion was false. That no resolution authorizing the filing of the Petition was annexed to the Affidavit and it was therefore submitted that the 1<sup>st</sup> Respondent has failed to adduce any evidence in support of her purported Authority to act on behalf of the 47 Petitioners.

That none of the 47 Petitioners have filed any Notice to appear or any related documents as per the provisions of **Order 1 Rule 13** of the **Civil Procedure Rules 2010**. The 1<sup>st</sup> Respondent/Objector relied on the case of **Abdulla Abshir & 38 others ...Vs... Yasmin Farah Mohamed (2015) eKLR**.

It was further submitted that the 15<sup>th</sup> Respondent's lack of authority to plead on behalf of the rest of the Petitioners is apparent and the Petition ought to be struck out.

The 3<sup>rd</sup> Respondent filed its written submissions on **5<sup>th</sup> March 2020** through **Keziah Mbugua**, its Director of litigation and prosecution and submitted that the Court lacks jurisdiction to entertain the present suit as **Section 61** of the **Physical and Land Use Planning Act 2019**, provides for the procedure for dispute resolution at the instance where a party's aggrieved by the decision of the County Executive Committee member concerning any development permission and matters concerned therewith. That **Section 57(5) of the Physical Planning Act** gives a County Executive Committee member powers to revoke development permission if the Applicant has contravened any provision of the Act or conditions imposed on the development permission.

That the Court ought not to hear and determine matters development permissions. That the Constitution encourages resolution of disputes through alternative disputes methods and therefore alternative mechanisms by Statutes should be encouraged and protected. It was thus submitted that the Petitioners have failed to follow the Appellate procedure laid down by Statute and the Court ought to uphold the 3<sup>rd</sup> Respondent's Preliminary Objection.

The Petitioners/ Respondents filed their written submissions dated **28<sup>th</sup> February 2021**, through the Law Firm of **Okumu Kubai & Company Advocates** and submitted that the 1<sup>st</sup> Respondent's / Objector's Objection is without merit as there is no requirement under the **Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Rules, 2013** that the Authority has to be filed at the time of filing the Petition. That the overriding Objective of the Mutunga Rules is to facilitate access to justice from all persons as required under **Article 48 of the Constitution**.

It was further submitted that there is on record a resolution authorizing the filing of the Petition. Further that under the Mutunga Rules, a Petition shall not be defeated by reason of misjoinder or non-joinder of parties and the Court may in every proceeding deal with the matter in dispute.

It was further submitted that the 3<sup>rd</sup> Respondent's objection has no merit as the Petition relates to the **use and occupation of land**, the impugned change of user was issued under **Physical Planning Act 1996**, and the **2019** one was not in existence at the time and therefore inapplicable. That even if the Objection would have been premised on the **Physical Planning Act**, it would still have failed since the Petitioners were never notified of the decision by the 3<sup>rd</sup> Respondent on the issuance of the Change of User to the 1<sup>st</sup> Respondent. Further that the Petition consists of multifarious prayers not limited to development permission, which are outside the jurisdiction of the County Liaison Committee and the reliefs sought can only be issued by this Court. The Court was therefore urged to dismiss the Preliminary Objections.

The Court as carefully read and considered and finds that the issue for determination is whether the **Notices of Preliminary Objections are merited**.

There are two Preliminary Objections for determination. One by the

1<sup>st</sup> Respondent and the second one is by the 3<sup>rd</sup> Respondent. The Court must first determine whether what has been raised by the Respondents/ Objectors amount to what a Preliminary Objection is as per the definition of a Preliminary Objection in the case of **Mukisa Biscuit Manufacturer Ltd ...Vs... Westend Distributors Ltd (1969) E A 696** where the Court held that;

**"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.**

**Sir Charles Newbold P** in that case stated:-

**"...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."**

A preliminary Objection must be raised on a pure point of law and the same must not be raised if the facts have to be ascertained by the Court as to call for rebuttal. The 1<sup>st</sup> Respondent has based his Preliminary Objection on various grounds amongst them is that the

Application and Petition is fatally defective incompetent and bad in law in view of provisions of **Order 1 Rule 13 (1) & (2) of the Civil Procedure Rules 2010**, as they contravenes the mandatory provisions of law. It is thus not in doubt that in ascertaining whether or not the provisions of law have been followed, the Court will not be called upon to ascertain facts and or probe evidence and therefore the same is a Preliminary Objection properly raised.

Another ground on the Preliminary Objection is that in light of grounds 1, 2 and 3 above, the Application and Petition is ipso fact an abuse of the Court process and ought to be struck out and dismissed with costs. The Court finds that in determining whether or not a suit is an abuse of the Court process, it will have to ascertain facts and probe evidence and therefore the same is not a Preliminary Objection properly raised.

The 3<sup>rd</sup> Respondent in its Preliminary Objection has called into question the jurisdiction of this Court. Jurisdiction is everything and without it, a Court has no option but to down its tools. The Court finds and holds that the issues as to whether or not a Court is clothed with the requisite jurisdiction is a pure point of law and therefore the Preliminary Objection is properly raised.

The Court must then determine whether the Preliminary Objections raised are merited. The 1<sup>st</sup> Respondent submitted that no resolution authorizing the filing of the Petition was annexed to the Affidavit by the 1<sup>st</sup> Petitioner and that the 1<sup>st</sup> Respondent has failed to adduce any evidence in support of her purported Authority to act on behalf of the 47 Petitioners. It has been submitted by the Petitioners that there are other Petitioners who have opted out of the Petition and they will be removed in due Course.

It is not in doubt that the instant suit is a Petition. The Constitution allows anyone to file a Petition on behalf of any person whose rights have been violated and therefore there is no doubt that the 1<sup>st</sup> Petitioner can file a Petition on behalf of a group of persons or any other person who it is alleged that their rights have been violated. In the case of **Sollo Nzuki ....Vs... Salaries and Remuneration Commission & 2 others [2019] eKLR** the Court held that:-

*It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person hold bona fide grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional Petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.*

*36. In this case the Petitioner not only contends that there is not only a threat to the violation of the Constitution but that the Constitution has in fact been violated by the Respondents. In light of such allegations I cannot fault the Petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the Petitioner's case."*

The Court finds that the 1<sup>st</sup> Petitioner has the requisite locus standi to file the Petition, and the Petition cannot be struck out on the basis that an authority was not filed since even without the said Authority to file the Petition, the 1<sup>st</sup> Petitioner can file suit on behalf of the other Petitioners. That is however not to say that a party can file the Petition in the name of another without their express permission.

If the Court was to find that the Petition was filed in the name of a person who had not authorized the same, and not on behalf of that person, then the Court would find the same meritorious. However, lack of the authority at this stage would not in any way invalidate the Petition. See the case of **Insignia Limited versus Zaddock & 3 others (2012)** where the Court held that:-

*"the mere failure to file the (authority) with the Plaintiff does not invalidate the suit. I associate myself with the decision of Kimaru J. in Republic versus Registrar General and 13 others Misc. Application No. 67 of 2005 (2005) eKLR and hold the position in law is that a resolution by the Board of Directors of a Company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit."*

This Court finds and holds that the Preliminary Objection by the 1<sup>st</sup>

Respondent is not merited and the same is dismissed.

On the 2<sup>nd</sup> Preliminary Objection by the 3<sup>rd</sup> Respondent it is its contention that the Petitioners have not exhausted the Appeal mechanisms as **Section 61 of the Physical and Land Use Planning Act 2019** provides for the procedure for disputes resolution at the instance where a party's aggrieved by the decision of the County Executive Committee member concerning any development permission and matters concerned therewith.

The Court has carefully gone through the Petition and the Affidavit in support thereof. It is not in doubt that the Petitioners are alleging that their rights to a **clean and healthy environment** has been violated by the Respondents. That the scale of project undertaken by the 1<sup>st</sup> Respondent vis viz the Project License granted by the 2<sup>nd</sup> Respondent do not tally, that there is an inadequate provisions in respect of water and sanitation, there was no public participation and the Respondents did not notify the public of the change of user. Essentially, in the Court's considered view, the Petitioners are challenging the grant of the EIA license and further contending that in granting the said license, their constitutional rights have been violated. Therefore, the Court finds and holds that the Petition is multifaceted.

That while, the National Environment Tribunal (NET) as established by **Section 125(1), of the Environmental Management and Coordination Act, (EMCA)** is mandated to hear and determine appeals by any person who is aggrieved by the grant of a license or permit

or a refusal to grant a license or permit, or the transfer of a license or permit, or the imposition of any condition, limitation or restriction on a license, or the revocation, suspension or variation of a license within sixty days after the occurrence of the event against which that person is dissatisfied, this Court has jurisdiction under **Article 162 (2) (b)** of the **constitution and Sections 4 and 13** of the **Environment and Land Court Act**, to hear any matter related to the environment and land, including Constitutional Petitions such as the instant one. Further Appeals on the decisions of the Tribunal lie to this Court under **Section 130 of EMCA**.

In the case of ***Benson Ambuti Atega & 2 Others ....Vs... Kibos Distillers Limited & 5 Others (2020)eKLR***, the Supreme Court of Kenya stated as follows:-

*“49. It would therefore seem that the superior Court, determined, quite incorrectly, that it had power or jurisdiction to hear and determine the Petition, which although raised issues that were within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee.*

*50. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two superior Courts was were the trial Court then went further to determine that these multifaceted issues could be determined by the Court “in the interests of justice.” It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition.....”*

*“53....the more favourable relief that the superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regard to the issuance of EIA licenses by the 4<sup>th</sup> Respondent to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Court should have reserved the issues pending the outcome of the decisions of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the constitution was protected.”*

*The above being a Supreme Court decision, it therefore follows that this Court is bound by its decision, this Court is called upon to reserve the Constitutional issues raised in the Petition and allow for the tribunal to resolve the issue of the license to be determined by the tribunal to afford any aggrieved party a chance to be heard.”*

Consequently the Court finds and holds that the preliminary Objection by the 1<sup>st</sup> Respondent is not merited and the best option is not to dismiss the Petition, but to allow the Petitioners a chance to ventilate on the said issues. See the case of ***Lydia Kaguna Japheth & 2 others v Mbesa Investments Limited & 2 others [2020] eKLR***, where the Court held that;

*“In light of the above, and being guided by the above decision of the Supreme Court which no doubt is binding on me, it is my finding that the outcome of the preliminary objection would not be to strike out this Petition. It is my finding that this Court has jurisdiction to determine the constitutional issues raised in the Petition that is, the rights to a clean and healthy environment, the right to fair administrative action, the right to equal protection and benefit of the law and the right to public participation. It is also my finding that the issue touching on the EIA license ought to be determined by the NET. Accordingly, I hereby refer the dispute touching on the legality of the EIA license to the NET but retain the rest of the issues for determination by this Court alongside any matter that may be appealed, if at all. In the result, the preliminary objection raised by the 1<sup>st</sup> Respondent seeking to strike out the suit is hereby dismissed with no order as to costs.”*

Having carefully considered the two **Notices of Preliminary Objections**, the Court finds them **not merited** and both of them are consequently **dismissed entirely**. However, on the dispute touching on legality of **Environmental Impact Assessment (EIA) license**, the same is referred to **National Environmental Tribunal (NET)**, but the Court retains the rest of the issues for determination by this Court.

It is so ordered.

*Dated, signed and Delivered at **Thika** this 17<sup>th</sup> day of June 2021.*

**L. GACHERU**

**JUDGE**

17/6/2021

Court Assistant - Lucy

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kubai for the Petitioners/Respondents**

**Mr. Wanda for the 1<sup>st</sup> Respondent**

**No appearance for the 2<sup>nd</sup> Respondent**

**M/s Mbugua for the 3<sup>rd</sup> Respondent**

**L. GACHERU**

**JUDGE**

**17/6/2021**