



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 76 OF 2020

RUNDA GARDENS RESIDENTS ASSOCIATION.....PLAINTIFF

=VERSUS=

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA).....1ST DEFENDANT

REGISTERED TRUSTEES OF FOUNTAIN GATE CHURCH.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 19th May 2020 brought under order 40 rules (2) and (1) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.
2. It seeks orders:-
 1. *Spent.*
 2. *Spent.*
 3. *That the 2nd defendant/respondent be restrained by itself, its servants, agents, and/or employees from constructing, gathering building materials, digging foundation, developing or in any other way interfering with the land parcel L.R No 27397 formerly LR NO.12672/152 until this suit has been heard and determined.*
 4. *That an order do issue to the 2nd defendant to destroy and or demolish all developments making up the proposed church premises on land parcel LR No.27397 formerly LR No 12672/152 situated in Runda Gardens Estate.*
 5. *The costs of this application be borne by the defendants/respondents in any event.*
3. The grounds are on the face of the application and are set out in paragraphs (a) to (g)
4. The application is supported by the affidavit of Vincent Kioko, the Chairman of the plaintiff/applicant sworn on the 19th May 2020.
5. The application is opposed. There is a replying affidavit filed by the 1st defendant/respondent sworn on the 4th March 2021. The 2nd defendant filed a notice of Preliminary Objection dated 7th July 2020. There is also a replying affidavit dated 7th July 2020.
6. On the 14th July 2020 the court directed that the Preliminary Objection and the Notice of Motion be heard together. The court also directed that the parties do file written submissions in respect thereof.
7. The Preliminary Objection dated 7th July 2020 is based on the grounds:-
 - (a) *That this court lacks jurisdiction since the plaintiff has commenced this suit without exhausting the relevant statutory dispute resolution mechanisms.*
 - (b) *That this suit is premature and not ready for litigation in court.*

(c) That this suit offends and contravenes the provisions of Section 129 of the Environmental Management and Co-ordination Act No. 8 of 1999.

8. I have considered the Preliminary Objection, the written submissions filed on behalf of the respective parties and the authorities cited. The issue for determination is whether the Preliminary Objection is merited.

9. The plaintiff's/applicant's case is premised on the decision by the 1st defendant to grant a licence to the 2nd defendant to construct a church in a residential area. That the plaintiff did write to the 1st defendant/respondent about the concerns of the members but the letter did not elicit any response. Further, that the plaintiff also wrote to the 2nd defendant/respondent inquiring from them about its members' reservation about the construction. The 2nd defendant/respondent has refused to share the approval documents with the plaintiff.

10. Section 9(2) and (3) of the Fair Administrative Action Act, implores on courts to take up matters only if it is shown that the alternative mechanisms have been exhausted.

11. Section 129 of the Environmental Management and Co-ordination Act provides that:-

Appeals to the Tribunal

(1) Any person who is aggrieved by—

a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder

c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

a) confirm, set aside or vary the order or decision in question;

b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

12. In the case of Prof. Albert Mumma vs Director General NEMA & 2 Others Tribunal Appeal No. NET/005/2018 as cited in David Awori & 2 Others on behalf of Gigiri Village Association vs Director General (NEMA) & 2 Others [2018] eKLR, it was held that:-

“Any appeal that seeks to challenge or touch on matters surrounding inter alia, the grant or refusal to grant a licence falls within the ambit of Section 129 (1) section 129 (2) covers appeals against acts of omissions of the Director General or the committee of the authority or its agents or matters outside the issue of licence”.

13. Similarly, in the case of Patrick Musumba vs NLC & 4 Others [2016] eKLR the court relied on the Court of Appeal decision in Republic vs NEMA Experte Sound Equipment Ltd [2011] eKLR where the court made it clear that:-

“challenges to Environmental Impact Assessment study report and/or Environmental Impact Assessment Licences shall be made to the National Environment Tribunal established under section 125 of Environment Management and Coordination Act. The tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment study report as well as the licences”.

I am also guided by the case of Speaker of The National Assembly vs Honourable James Njenga Karume [2008] 1KLR 425 the Court of Appeal held that:-

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

I find that the plaintiff/applicant ought to have invoked the jurisdiction of National Environment Tribunal under section 125 and 129 (3) of the Environmental Management Co-ordination Act before moving to this court.

14. In the case of **Kibos Distillers Ltd & 4 Others vs Benson Ambuti Adega & 3 Others [2020] eKLR** the Court of Appeal observed in part:-

“.....As aptly stated by the Supreme Court in Samuel Kamau Macharia and Another-vs- Kenya Commercial Bank Ltd and 2 Others (Supra), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute.....”.

The court went further to state:

“.....Further, I observe that the jurisdiction of the ELC is appellate under Section 130 EMCA. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”

15. I find that the plaintiff/applicant has failed to demonstrate that there existed exceptional circumstances to warrant it to move this court before exhausting the mechanism set out in the Physical Planning Act.

16. In conclusion, I am persuaded by the defendants/respondent that the plaintiff/applicant ought to have exhausted the alternative mechanism of dispute resolution in the Physical Planning Act and Environmental Management Co-ordination Act before moving to this court.

17. The upshot of the matter is that I find merit in the Preliminary Objection and the same is upheld.

18. Consequently, I need not go into the merits of the Notice of Motion dated 19th May 2020. The said Notice of Motion and the entire suit are struck out with costs to the defendants/respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 17TH DAY OF JUNE 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Waiganjo for the Plaintiff

No appearance for the 1st Defendant

Mr. Kairu for the 2nd Defendant

Phyllis – Court Assistant