



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

ELC CASE NO. 51 OF 2020

KIBOS DISTILLERS LTD.....PLAINTIFF

VERSUS

WANAHEWA HOUSING COOPERATIVE LTD.....1ST DEFENDANT

COUNTY GOVT OF KISUMU.....2ND DEFENDANT

MINISTRY OF LANDS AND

PHYSICAL PLANNING.....3RD DEFENDANT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....INTERESTED PARTY

RULING ON OPINION ON THE PRELIMINARY OBJECTION DATED 29/9/2020

The 1ST Defendant raised the abovementioned preliminary objection in the following terms: -

1. That the application and suit is in clear contravention of Article 159(2)(c) of the Constitution which provides for alternative dispute resolution mechanisms.
2. That the application and suit as framed failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute and the constitution.
3. That Section 61(3),61(4) and Section 76 and 78 (b) of the physical and land Use Planning Act No.605 of 2019 provides that a party aggrieved by the decision of the County Executive Committee Member to appeal before the County Physical and Land Use Planning Committee within 14 days.
4. In the Supreme Court decision in the case of Samuel Kamau Macharia vs Kenya Commercial Bank & 2 others CA. No. 2 of 2011 the court held *inter alia* that; “a court’s jurisdiction flows from either the constitution or legislature or both...”
5. The Court of Appeal in **Kibos Distillers Ltd & 4 others vs Benson Ambuti Atega & 3 others [2020]eKLR** stated that; “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...”
6. That the instant suit is premature, frivolous and an abuse of the court process as this honourable court’s jurisdiction has been limited by statutes and binding judicial pronouncements.
7. That the instant suit is premature and an abuse of the court process since there is no decision the interested party has made to be challenged.
8. The suit as filed is incompetent, bad in law and lacks merit.
9. Any other ground as shall be argued at the hearing.

Vide directions issued on 24/3/2021 the Preliminary objection was to be canvassed by way of written submissions.

BACKGROUND

The Plaintiff herein filed a plaint dated 19th August 2020 whereby in a nutshell they sought to prevent the 1st Defendant from subdividing land parcel L.R NO. 654/21 which is adjacent to their factory.

The plaintiff averred that the 1st Defendant's land is in an area designated as an industrial zone hence not suitable for residential purposes, hence a permanent injunction against subdivision, sale and leasing of the same for construction of residential houses should issue.

The 1st Defendant however contends that the Plaintiff has not exhausted the statutorily laid down procedure for resolving of such issues before filing this suit.

1ST DEFENDANT'S SUBMISSIONS

In support of the Preliminary Objection the 1st Defendant filed submissions dated 6th April 2021. The Defendant averred that the plaintiff had not abided by the provisions of the Physical and Land Use Planning Act on resolving of such disputes. The defendant alluded to Section 61(4) of the Act which provides that the jurisdiction of this court only lies on appeal from the decision of the County Physical and Land Use Planning Liason Committee, which committee the Plaintiff had bypassed.

They relied on the case of **Angela Mbugua & 4 others vs KO Holdings ltd & 2 others [2020] eKLR**, where it was held that according to Section 61(3) of the Physical and Land Use Planning Act a challenge to the decision of the Planning Authority lies with the Liaison Committee after which a party may approach the Environment & Land Court. And that failure of the Plaintiffs to pursue an appeal before the liaison Committee meant that they had invoked the court's jurisdiction prematurely.

In view of the foregoing the 1st Defendant further submitted that this court lacked jurisdiction and that it should therefore down its tools. To support this contention counsel relied on the celebrated case of **Owners of The Motor Vessel Lillian vs Caltex Oil (Kenya) Limited**.

He further averred that jurisdiction of the court flows from the constitution or statute and that 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. They relied on the case of **Kibos Distillers Limited & 4 others vs Benson Ambuti Adegga & 3 others [2020]eKLR**.

In conclusion they called this court's attention to the case of **Francis Mutuku vs Wiper Democratic Movement Kenya & 2 Others (2015) eKLR**

Where in paragraphs 23 and 24 it was stated in summary that where there are specialized procedures provided by law or the constitution for the resolution of disputes they should be followed.

They called for dismissal of this suit with costs.

PLAINTIFF'S SUBMISSIONS

Despite directions being issued on 24/3/2021 on filing of submissions, none was filed on behalf of the Plaintiff, neither did the other Defendants nor the Interested Party.

ISSUES FOR DETERMINATION

1. Whether the Plaintiff exhausted the statutorily laid down procedure for appeal before filing this suit.

ANALYSIS

Whether the plaintiff has exhausted the statutorily laid down procedure before filing this suit.

It was the first Defendant's submission that the dispute herein falls within the ambit of the Physical and Land Use Planning Act. The plaintiff herein essentially sought orders of permanent injunction stopping the 1st Defendant from converting the suit property into a residential area, secondly that the area surrounding the Plaintiff's factory be declared an industrial zone. And finally, that an order to issue declaring the change of use issued to the 1st Defendant by the 2nd Defendant for change of use of L.R.No. 654/21 null and void.

The 1st Defendant submitted that the suit herein revolves around change of user of the suit property. And that Section 76 of the Physical and Land Use Planning Act establishes the County Physical and Land Use Planning Liaison committee, which under Section 78 is mandated to hear and determine appeals from the planning authority.

It is trite law that preliminary objections should be raised on a pure point of law. This point was stressed by **SIR CHARLES NEWBOLD P** in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO. LTD -V -WESTEND DISTRIBUTORS LIMITED (1969) EA. 696** when he stated 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 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 issues. This improper practice should stop.”

Further Ojwang J as he then was in the case of **ORARO VS. MBAJA(2005) I KLR** 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 pointAnything 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”

In the present circumstances the 1st Defendant alludes to their being a change of user which is the main point of contention in this suit. However, the same has not been produced in this suit for perusal by the court. Even though there is an inkling that the Plaintiff and the 1st Defendant agree to there being a change of user, the 2nd Defendant who ordinarily issues consent of change of user has not voiced their opinion on the same.

Such a scenario could lead to matters of fact being contested in the future and it would not be prudent for the court to pronounce itself summarily at this moment. As has been rightly stated in the **Oraro vs Mbaja Case (supra)**, a preliminary objection must not be blurred with factual details liable to be contested. The defendants have equally not filed their defences signaling the fact that they either agree or disagree with the plaintiff's suit. It is therefore not tenable for the court to proceed on the assumption that all the facts pleaded by the plaintiff are correct.

It is therefore my finding that the preliminary objection herein doesn't meet the threshold set in the Mukisa Biscuit's case and should be and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE