



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO 4 OF 2021

IMMACULATE GICUKU MUGO.....PLAINTIFF

-VERSUS-

KIAMBU COUNTY GOVERNMENT.....DEFENDANT

RULING

1. The plaintiff initiated this suit through a plaint dated 11/1/2021. She sought the following orders against the defendant, Kiambu County Government:

- a. **Permanent injunction restraining the defendant whether by itself, its governor, county executive members, agents, servants, employees, associates from demolishing or in any way interfering with the commercial shops erected on plots known as plot Ruiru/Kiu Block 3/962 and 967 and situate in Kahawa Sukari.**
- b. **A declaration does issue that the Defendant's enforcement notice dated 5th January 2021 is illegal and ultravires hence a nullity ab initio and that it violates the plaintiff's rights under Articles 40 and 47 of the Constitution of Kenya 2010.**
- c. **Cost.**

2. Her case is that she is the legal and equitable proprietor of two (2) plots, namely **Ruiru/Kiu Block 3/962 and 967** situated in Kahawa Sukari, within Kiambu County on which she erected four (4) commercial shops with the authority of the predecessor local authority. On 5/1/2021, the defendant served on her an enforcement notice under **Section 72(1)(b) of the Physical and Land Use Planning Act 2019, (the Act)**, directing her to restore the ground to its original state, which in essence required her to demolish the shops. Aggrieved, she brought the suit, challenging the enforcement notice.

3. On 23/2/2021, the defendant filed a notice of preliminary objection dated 23/2/2021, urging the court to strike out the suit on the following grounds:

- a. **That this honourable court lacks jurisdiction to entertain the present suit as it is a challenge to an enforcement notice issued to the applicant/plaintiff in accordance with Section 72 of the Physical and Land Use Planning Act, 2019.**
- b. **That under Section 72(3) of the Physical and Land Use Planning Act, 2019, a person on whom an enforcement notice is served may appeal to the County Physical and Land Use Planning Liaison Committee.**
- c. **That under Section 72(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.**
- d. **That the plaintiff herein has failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute.**
- e. **That the above position was reiterated by your ladyship in the case of Charles Ngigi Ndung'u & 2 others versus County Government of Kiambu & 7 others [2009]eKLR here your ladyship stated "..... that the petitioners failed to follow the laid down procedures as stipulated by the Physical Planning Act and therefore the court has no jurisdiction to determine the petition and application before it.**
- f. **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.

g. That the plaintiff's/applicant's case as against the defendant/respondent is a non-starter and an abuse of the court process as this honourable court's jurisdiction has been limited by statute.

4. The said preliminary objection is the subject of this ruling. The preliminary objection was canvassed through written submissions dated 19/3/2021, filed by Ms Keziah Mbugua, legal counsel for the County Government of Kiambu. Counsel submitted that the single issue falling for determination in the preliminary objection is whether this court has jurisdiction to entertain the present suit. Counsel referred the court to the provisions of **Section 72 of the Physical and Land Use Planning Act, 2019 (the PLUPA)** and contended that this court lacked jurisdiction to entertain this suit. Reliance was placed on, among other decisions, the Court of Appeal decision in: (i) **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**; and (ii) **Speaker of the National Assembly v James Njenga Karume[1992] eKLR**.

5. The plaintiff opposed the preliminary objection through written submissions dated 19/4/2021 filed by *M/s Gikenye Mugo Rienye Advocates*. Counsel for the plaintiff cited the decision of Gacheru J in **Thika Environment and Land Court Case No. 9 of 2019; James Kamau & 7 others v County Government of Kiambu**. Counsel contended that because the plaintiff in this suit did not make any application to the "Director" and no adverse decision was made against her, there was no basis for invoking the procedure set out in the PLUPA. Counsel added that the Plaintiff's suit raises the issue of violation of her constitutional rights under Articles 40 and 47 of the Constitution, hence this court has jurisdiction to adjudicate the dispute.

6. I have considered the grounds set out in the notice of preliminary objection. I have also considered the parties' respective submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key issue in the preliminary objection. The single issue falling for determination in the preliminary objection is whether this court is the proper forum where the impugned enforcement notice should be challenged.

7. Parliament enacted the **Physical and Land Use Planning Act, 2019**. Part V of the Act contains an elaborate framework on enforcement. Section 72(1) empowers the county executive committee member to serve the owner, occupier, or developer of property or land with an enforcement notice relating to developments on the land. Section 72(1) provides thus:

"72. (1) A county executive committee member shall (1) serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—

(a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or

(b) any condition of a development permission granted under this Act has not been complied with.

8. Section 72(3) and (4) provides the following framework on how a party who is aggrieved by an enforcement notice is required to seek redress:

"72.(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

72.(4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days."

9. It is clear from the above framework in Section 72(3) and (4) that the organ mandated by Parliament to exercise original jurisdiction in disputes relating to enforcement notices issued under Section 72(1) of the PLUPA is the **County Physical and Land Use Planning Liaison Committee**. This **Environment and Land Court** is mandated under Section 72(4) of the Act to exercise appellate jurisdiction. The only instance when this court may exercise its primary jurisdiction in disputes relating to enforcement notices is when a county does not have an operational liaison committee. Even if one were to contend that the impugned development pre-dated the PLUPA, the forum where to raise that defence is the liaison committee.

10. Our courts have umpteen times stated categorically that where Parliament has, through legislation, established primary dispute adjudication mechanisms and organs, the mechanisms must be exhausted. This was the principle spelt out in the Court of Appeal decision in **Speaker of the National Assembly v James Njenga Karume[1992] eKLR**. Not too long ago, the Court of Appeal emphasized this in **Kibos Distillers Limited & 5 others v Benson Ambuti Adega & 2 others**, a position that was affirmed by the Supreme Court in a subsequent petition.

11. For the above reasons, the court upholds the preliminary objection dated 23/2/2021 and directs that the plaintiff presents her grievances to the Kiambu County Physical and Land Use Planning Liaison Committee for adjudication by the Committee. There will be no order as to costs.

12. In the end, the defendant's preliminary objection dated 23/2/2021 is upheld and is disposed in the following terms:

a. The suit herein is struck out on the ground that the primary organ mandated to adjudicate disputes relating to enforcement notices issued under Section 72 of the Physical and Land Use Planning Act is the County Physical and Land Use Planning Liaison Committee.

b. The Plaintiff shall be at liberty to challenge the impugned enforcement notice through the mechanism provided under Section 72 of the Act.

c. There shall be no order as to costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF DECEMBER, 2021

B M EBOSO

JUDGE

Court Assistant: Lucy Muthoni