



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 227 OF 2020**

**BENSON KAROMO AND HURBERT SEIFERT**

*(Suing as the Chairman and Secretary respectively of the*

*New Nyali Residents Association).....PLAINTIFFS*

**VERSUS**

**PAUL ONYANGO KIAGI**

**COUNTY GOVERNMENT OF MOMBASA.....DEFENDANTS**

**RULING**

The 2<sup>nd</sup> Defendant raised a Notice of Preliminary Objection dated 11<sup>th</sup> May 2021 and filed on 19<sup>th</sup> May 2021. Stating that they objects to this Honourable Court’s jurisdiction on the ground that the suit ought to be heard by the County Physical and Land Use Planning Liaison Committee as stipulated in section 61 (3) of the Physical and Planning Land Use Act, 2019.

In its written submissions dated 14<sup>th</sup> June 2021 and filed on 15<sup>th</sup> June 2021, the 2<sup>nd</sup> Defendant expanded the grounds of its challenge to the Court’s jurisdiction to include the allegation that the Plaintiff did not exhaust all avenues provided for in the law before approaching this court.

The 2<sup>nd</sup> Defendant’s challenge to the Court’s jurisdiction was supported by the 1<sup>st</sup> Defendant who filed his written submissions dated 24<sup>th</sup> June 2021 on 25<sup>th</sup> June 2021.

The Plaintiff submits that this Honourable Court has jurisdiction to hear and determine this suit. That the 2<sup>nd</sup> Defendant has never filed a Statement of Defence and therefore has no right to raise the Preliminary Objection. There is no decision made by the County Executive Committee member to warrant invoking the jurisdiction of County Physical and Land Use Planning Liaison Committee. The questions of exhaustion of all legal avenues cannot be used to challenge this suit because the Mombasa County Physical and Land Use Planning Liaison Committee is non-existent and has never been formed. That the Defendant has no right to raise the Preliminary Objection as the Defendant in this case has not filed a Statement of Defence at all and cannot therefore raise the Preliminary Objection. They rely on the Court of Appeal case of Stephen Onyango Achola & Another v Edward Hongo Sule & Another (2004) eKLR.

In the case of *Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999*, the court held that;

***“When preliminary points are raised, they should be capable of disposing the matter preliminary without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings.”***

Preliminary Objection was described in the case of **Mukisa Biscuits Manufacturing Co. Ltd...vs...West End Distributors Ltd (1969) EA 697** as follows;

***“It raises a pure point of law which is argued on assumption that all the facts pleaded are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of Judicial discretion”***

In the case of **Owners of Motor Vessel “Lillian” ...vs...Caltex Oil Kenya Ltd 1989 KLR** where the Court held that;

*“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

It is clear from the description of what amounts to a Preliminary Objection that the issue of Jurisdiction is a pure point of law and thus the Notice of Preliminary Objection raised herein falls within the said description. In the case of *Samuel Macharia Kamau vs KCB & Others (2012)eKLR*, a matter decided by the **Supreme Court of Kenya**, the Court held as follows:-

*“A Courts Jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise Jurisdiction as conferred by the Constitution or other written laws. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law. The Court must operate within the constitutional limits. It cannot expand Jurisdiction through Judicial craft or innovation.”*

The Defendants have averred and submitted that this Court **lacks Jurisdiction** to determining this matter because there are already existing statutes which have conferred Jurisdiction to other bodies to deal with the issues raised herein, before the said issues can be brought to Environment & Land Court. From the pleadings filed and without the defense this court is able to ascertain the facts on the issue of jurisdiction and will proceed and consider the preliminary objection.

The **Physical Planning Act No. 6 of 1996** has since been replaced by the **Physical and Land Use Planning Act No. 13 of 2019**, which repealed it under **Section 91**. The new Act has a commencement date of 5<sup>th</sup> August, 2019. The **Physical and Land Use Planning Act** has provided for the Physical and Land Use Planning Liaison Committees and the appeal processes at **Part VI, Sections 73 to 89** and for enforcement notices at **Section 72**. As pointed out above, the dispute herein relates to discharge of powers conferred to the public authorities established under the Physical and Land Use Planning Act. The plaintiff stated that there is no decision made by the County Executive Committee member to warrant invoking the jurisdiction of County Physical and Land Use Planning Liaison Committee. The questions of exhaustion of all legal avenues cannot be used to challenge this suit because the Mombasa County Physical and Land Use Planning Liaison Committee is non-existent and has never been formed. However, they stated that the Ministry of Lands Physical Planning – County Planning Office approved a change of user but stated that it must adhere to the zoning regulation and standards of City Mall – Nyali Center zone.

The Defendant submitted that this Court is not the appropriate forum to hear and determine this matter because as far as the issue of development approvals issued by the defendant is concerned, the correct and appropriate forum is the **County Physical and Land Use Planning Liaison committee** established under the **Physical and Land Use Planning Act 2019**,

**I have considered the averments and submissions from both parties. Section 61(3) provides as follows:**

*“An applicant or interested party that is aggrieved by the decision of a County Executive Committee Members regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision.”*

I find that since the Plaintiffs are aggrieved by the decision of 2<sup>nd</sup> Defendant herein on granting permission for the development in question, then they ought to have appealed before the **Liaison Committee** and therefore this Court is not the appropriate forum to hear and determine the matter at this stage. Since **section 61 of the Physical and Land Use Planning Act 2019**, provides that a challenge to the decision of the **Planning Authority** shall first lie with the relevant **Liaison Committee**, then the Jurisdiction of this Court has been invoked prematurely. As provided by **section 61 of the Physical and Land Use Planning Act 2019**, there is a procedure for dispute resolution in instances where a party is aggrieved by the decision of the **County Executive Committee Members** concerning any development permission matters like in the instant case.

According to **section 61(3)** of the said Act, a challenge to the decision of the Planning Authority shall first lie with the relevant **Liaison Committee** and then the appeal shall lie with the Environment & Land Court. Indeed in their replying affidavit dated 25<sup>th</sup> October 2020, Willis O. Oluga advocate for the plaintiffs in paragraph 5 states that he went to the Department of Land Housing and Physical Planning of the County Government situate at Bima Towers with a view to lodging an appeal in a different matter to the Mombasa County Physical and Land Use Planning Liaison Committee and was told it does not exist and was received but another office. I find that all the same this matter should have been lodged before the said committee and if ignored as alleged then the court may have arrived at a different decision.

From the circumstances of this case I find that *this Honourable Court lacks original Jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies for the reasons that, the Plaintiff's suit herein primarily raises the question of planning, use and development of Plot Number MN/1/3205, which matters are regulated under the Physical Planning Act, 1996 (No. 6 of 1996) (repealed) and the Physical and Land Use Planning Act, 2019. Under Section 61(3) of the Physical and Land Use Planning Act 2019, an applicant or interested party that is aggrieved by the decision on an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee. The plaintiffs herein have failed, ignored and/or neglected to exhaust the alternative means of dispute resolution as provided by the said legislation. 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. I find that the Plaintiffs herein have failed and/or neglected to exhaust the alternative means of dispute resolution as provided by the statute. I find this suit is premature and is dismissed with costs.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8<sup>TH</sup> DECEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**