



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC 111 OF 2021**

**HON GATHONI WACHOMBA**

**KIAMBU COUNTY WOMEN REPRESENTATIVE.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**NATIONAL GOVERNMENT AFFIRMATIVE**

**ACTION FUND KIAMBU COUNTY.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE & TECHNOLOGY.....DEFENDANT/RESPONDENT**

**RULING**

1. The Defendant herein filed a Notice of Preliminary Objection dated 29/10/2021 on grounds THAT;

**a. The Applicant's application dated 14/10/2021 and the suit filed herein are fatally defective and an abuse of this Honorable Court's processes and procedures as it offends the Provisions of The Public Finance Management (National Government Affirmative Action Fund) Regulations, 2016 made pursuant to the Public Finance Management Act ( No. 18 of 2012 and the Environment and Land Court Act No 19 of 2011 in that;**

**b. Under Regulation 8 (1) and 9 (1, there is established a National Government Action Fund (NGAAF) Board mandated to oversee the efficient management of the fund and therefore has the *locus standi* to institute any Court proceedings relating to the fund and not the 1<sup>st</sup> and/or the 2<sup>nd</sup> applicant herein.**

**c. That the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein therefore lack *locus standi* to institute this suit on behalf of the National Government Affirmative Action Fund.**

**d. That under Section 13 of the Environment and Land Court Act No. 19 of 2011, this being an issue of the termination of a commercial agreement/Memorandum of Understanding, this Honorable (sic) has no jurisdiction to entertain the Applicants application and suit dated 14/10/2021.**

**e. Consequently, this Honorable Court lacks the requisite jurisdiction to entertain this suit since the 1<sup>st</sup> and 2<sup>nd</sup> Applicants have no *locus standi* to institute this suit and further for the lack of jurisdiction of this Honorable Court under Section 13 of the Environment and Land Court Act respectively.**

2. The Preliminary Objection is dated 29/10/2021 and filed on 1/11/2021. Directions to canvass it were taken on the same day, 1/11/2021 and as such there is no Plaintiffs' response on record or evidence of service upon them. This opinion therefore is limited to the merit of the Preliminary Objection as unopposed.

3. The singular issue for determination is whether the Preliminary Objection is justified. The Preliminary Objection is predicated on two fronts, capacity of the Plaintiff to sue and the jurisdiction of this Court to entertain the suit.

4. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is

argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit. **See the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696.**

5. The Defendant is emphatic that under Section 13 (1) of the Environment and Land Court Act this being a matter of termination of a commercial agreement, this Court is bereft of jurisdiction to entertain it.

6. This Court is established pursuant to Article 162(2)b of the Constitution of Kenya with detailed jurisdiction as stated in Section 13 ELCA that;

**“13. Jurisdiction of the Court**

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**(e) any other dispute relating to environment and land.”**

7. A glean of the Memorandum of Understanding dated 19/6/2019 between the parties and specifically Article 15 provides for the procedure to be followed in the event of termination. At paragraph 14 of the plaint dated 14/10/2021, the Plaintiff have faulted the Defendant for breaching the Memorandum of Understanding as agreed between the parties. That the Memorandum of understanding forms the basis for the use and occupation of the suit land by the Plaintiff. Accordingly, it is my view that the provisions of Section 13(2) (d) and (e) of Environment and Land Act above fully cloth this Court with the jurisdiction to determine such dispute. On that limb, the Preliminary Objection thus fails.

8. The other objection touches on the Plaintiff’s capacity to sue in the instant matter also known as locus standi. Locus standi is defined in Black’s Law Dictionary, 9th Edition (page 1026) as “the right to bring an action or to be heard in a given forum”. Locus standi of a party is what jurisdiction is to a Court of law.

9. Regulation 16 of NGAAF 2016 Regulations provides for a committee to be known as the National Government Affirmative Action Fund Committee for every county. Regulation 16(2) lists the function of the County committee namely; ensure that the projects funded under these Regulations comply with the objects and purposes set out in these Regulations; (b) ensure compliance with guidelines on the disbursement of funds for projects approved under these Regulations; (c) oversee the implementation of projects financed through the Fund; (d) oversee the monitoring and evaluation of projects and programmes being undertaken at the county and funded under these Regulations; (e) identify, through a participatory process, projects to be funded; (f) receive proposals generated through a participatory process, review them and recommend them for approval by Board for funding; (g) prepare quarterly and yearly reports on the operations of the Fund; (h) sensitize the community on the objects and purpose of the Fund; (i) ensure projects recommended for funding are guided by the national development priorities and are not duplicative; and (j) perform any other function required under these Regulations or any other written law.

10. Regulation 16(3) provides for membership of the county committee to include; the national government officer in charge of a county and responsible for gender affairs or his or her nominee appointed in writing by him or her and the county coordinator, who shall be an ex officio member, and who shall be the secretary to the Committee. The Memorandum of Understanding annexed to the plaint indicates that the 1<sup>st</sup> Plaintiff doubles up as the county coordinator of the 2<sup>nd</sup> Plaintiff.

11. There is no express provision in the Regulations mandating the NGAAF Board or County Committee to institute suits in its name. My view is that this being a fund under the Ministry of Public Service, Youth and Gender Affairs, the Attorney General is legally empowered to sue and be sued in its behalf.

12. In the end the objection succeeds and the suit herein is hereby struck out with costs.

13. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of;**

**MS NYAKIANA HOLDING BRIEF FOR OSORO FOR 1ST AND 2ND PLAINTIFF/APPLICANT**

**KAMIRU FOR DEFENDANT/RESPONDENT**

**MS. PHYLLIS – COURT ASSISTANT**