



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC PETITION NO E003 OF 2021

FRANCIS MUGARAMI KAMAU.....1ST PETITIONER
 CHRISTINE WAMBUI MWANGI.....2ND PETITIONER
 KIM MUTURI MATU.....3RD PETITIONER
 ANNET WANJIKU MBURU.....4TH PETITIONER
 ISABEL ACHIENG OLWENYO.....5TH PETITIONER
 ROBERT ODUOR OTIENO.....6TH PETITIONER
 MATHEW KIMOLO NZUKI.....7TH PETITIONER

[Suing on their behalf and on behalf of the Residents and
 Home owners of Migaa Integrated Golf Estate]

=VERSUS=

SYCAMORE PINE LIMITED.....1ST RESPONDENT
 HOME AFRICA COMMUNITIES LIMITED.....2ND RESPONDENT
 KIAMBU COUNTY GOVERNMENT.....3RD RESPONDENT
 NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY...1ST INTERESTED PARTY
 MIGAA GOLF ESTATE RESIDENTS ASSOCIATION.....2ND INTERESTED PARTY

RULING

1. The petitioners brought this petition on 27/5/2021. Their case was that they were residents and property owners within **Migaa Integrated Golf Estate**, a gated community-based development that was conceptualized on the tenets of environmental sustainability, with 50% open green space, translating into an acre of green for every acre of built area. They had learnt that the 1st respondent had been handed a total of 17.2 acres out of the 19.86 acres that had been planned and designated as **Migaa Commercial & Office Park** [the Commercial Node], and that the 1st respondent had commenced the construction of low-cost residential apartments in the name of **Samara Estate** on the said land, consisting of 28 high-rise apartment blocks with a total of 1,959 residential units. They contended that the construction of the 28 high-rise apartment blocks was out of character with the permitted land use in the area, and was being carried out in direct breach of the Estate’s approved and registered master plan; and was being carried out in contravention of the framework in the **Physical and Land Use Planning Act 2019**, (“the **PLUPA**”) and the **Environmental Managements and Co-ordination Act (the EMCA)**.

2. The petitioners specifically contended that the said development was being carried out without the requisite environmental impact assessment licence and the physical and land use planning permission. Further, the petitioners contended that the 3rd respondent had failed to provide them with information relating to the Estate’s master plan, and the circumstances under which the impugned development was being undertaken.

3. Consequently, the petitioners sought the following verbatim reliefs against the respondents:

- a) *A declaration that the 3rd respondent contravened Article 35 of the Constitution by refusing to respond to the petitioners' letters dated 17/2/2021 and 6/4/2021 and declining to supply them with the information as requested.*
- b) *A declaration that the respondents have breached Articles 40 and 42 of the Constitution by allowing and/or carrying out unlawful construction in the property known as Unit No. CC01 situated on LR No. 29059 within the Migaa Integrated Golf Estate in Kiambu County.*
- c) *A declaration that the 2nd and 3rd respondents breached Article 47 of the Constitution by failing to inform the petitioners and the area residents on their decision (if any) to issue change of use of the commercial zone to make way for the impugned development.*
- d) *A declaration that the 3rd respondent breached Article 42 of the Constitution by failing to ensure that the subject development complies with the zoning policy and the master plan of the Migaa Integrated Golf Estate in Kiambu County.*
- e) *An order of permanent injunction restraining the respondents from advertising for sale, constructing, carrying on with the impugned construction of low-cost apartments numbering 1,959 comprised in 28 high-rise blocks of apartments in the property known as Unit No CC01 situated on LR No 29059 within the Migaa Intergrated Golf Estate in Kiambu County.*
- f) *An order compelling the 1st respondent to demolish all offensive unlawful developments in the property known as Unit No CC01 situated on LR No. 29059 within the Migaa Integrated Golf Estate in Kiambu County and restore the site to its previous state.*
- g) *An order of permanent injunction restraining the respondents from irregularly and without compliance with the due process and consultation, interfering with and/or altering the master plan of the Migaa Integrated Golf Estate in Kiambu County as registered on 23/3/2012.*
- h) *A declaration that the respondents are liable to pay damages to the residents of Migaa Estate for the breaches of their constitutional rights.*
- i) *Costs of this petition.*
- j) *Any other reliefs the honourable court may deem fit and just to grant.*

4. Together with the petition, the petitioners brought a notice of motion dated 20/5/2021, seeking conservatory orders, pending the hearing and determination of the petition. On 14/6/2021, Gacheru J granted a *status quo* order stopping further construction, pending the hearing and determination of the preliminary objection which had been brought against the petition.

5. When this matter came before me on 20/9/2021, advocates of the parties to the petition indicated that there were two preliminary objections pending disposal: (i) the 1st respondent's preliminary objection dated 2/6/2021; and (ii) the 2nd respondent's preliminary objection dated 4/6/2021. The two preliminary objections are the subject of this ruling. The two preliminary objections were orally canvassed in the virtual court on 27/10/2021.

6. The gist of the 1st respondent's preliminary objection was that, this court lacks jurisdiction to hear this petition because Sections 56, 57 and 72 of **the PLUPA** gives the County Executive Committee Member responsible for physical and land use planning powers to deal with the dispute, hence this petition offends the doctrine of exhaustion of administrative remedies. The gist of the 2nd respondent's preliminary objection is that this court is bereft of jurisdiction to entertain this petition because the petitioners have not exhausted the remedies provided by statutes under Sections 78, 79, 80 and 81 of **the PLUPA** and Sections 125, 129 and 130 of **the EMCA**.

7. Urging the court to uphold the 1st respondent's preliminary objection, Mr Kenneth Wilson, counsel for the 1st respondent, submitted that the petitioners had not exhausted the redress mechanism provided under the **PLUPA 2019**, specifically Section 57(3), (4) and (5). Counsel contended that the County Executive Committee was empowered to deal with issues relating to planning and development and that in the event of a dispute, the aggrieved party was required to lodge a complaint with the executive committee member and thereafter the Physical and Land Use Planning Liaison Committee would be seized of the dispute. Counsel added that no exceptional circumstances had been demonstrated to warrant invocation of this court's jurisdiction.

8. On his part, Mr Marete, counsel for the 2nd respondent, submitted that the dispute in this petition was about: (i) planning and land use; and (ii) environmental impact assessment. Counsel submitted that the first port of call in the event of a dispute relating to physical and land use planning is the County Liaison Committee and that is where the petitioners should have sought redress, in tandem with the provisions of Sections 76, 78, 79, and 81 of **the PLUPA**. Mr Marete added that the first port of call whenever a dispute relating to environmental impact assessment arises is the **National Environment Tribunal (the NET)**, in tandem with the provisions of Sections 125, 129 and 130 of **the EMCA**. Counsel added that no prior application was brought to invoke the original jurisdiction of this court. Counsel argued that clothing a dispute with constitutional elements does not oust the jurisdiction of established statutory dispute resolution organs.

9. Mr Agwara, counsel for the petitioners, submitted that the two preliminary objections were unmerited because a preliminary objection is argued on the premise that the facts before the court are uncontested. Counsel added that, as at the time of canvassing the two preliminary objections, there was no contest about the facts that: the 1st respondent was undertaking a massive development; the development was not approved by the relevant regulatory authorities; and that the foregoing was the basis upon which this petition was brought. Counsel for the

petitioners submitted that lodging a complaint with the County Executive Committee is a factual issue which required evidence. Counsel added that the petitioners were seeking relief against the County Government because the County Executive Committee Member had failed to respond to their concerns.

10. Mr Agwara added that it had been admitted that the Kiambu County Government had not established a County Physical and Land Use Planning Liaison Committee. Counsel argued that Section 93 of the **PLUPA** vested jurisdiction in the Environment and Land Court in the absence of the County Physical and Land Use Planning Liaison Committee. Counsel added that the disputes which go for adjudication before the County Liaison Committee relate to decisions made by the County Government in relation to physical and land use planning in the County. It was the position of counsel that no decision had been availed to the petitioners to enable them seek adjudication by the County Physical and Land Use Planning Liaison Committee.

11. Counsel for the petitioners added that in the absence of a decision by the National Environment Management Authority (**the NEMA**), there would be no basis for invoking the jurisdiction of the NET. Lastly, counsel submitted that, were this court to find that the dispute in this petition should have been lodged elsewhere for adjudication, the court should direct transfer of the petition to the relevant adjudicatory body as opposed to striking it out, in tandem with the **Supreme Court** decision in **Benson Ambuti Adegga & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR**.

12. Mr Nyanyuki, counsel for the 2nd interested party, submitted that Section 13 of the Environment and Land Court Act gives this court both original and appellate jurisdiction over disputes relating to environmental protection, planning and land use. Counsel added that, in the absence of approvals, there was nothing to challenge in the NET and in the County Physical and Land Use Planning Liaison Committee. Counsel referred the court to the preceding submissions by the County Government to the effect that the requisite approvals had not been issued and that the Kiambu County Physical and Land Use Planning Liaison Committee had not been established. Counsel added that the present petition raised land planning, environmental, and constitutional issues and was properly before this court.

13. I have considered the gist of the 1st respondent's preliminary objection. The preliminary objection is specifically premised on the provisions of Sections 56, 57 and 72 of **the PLUPA**. The 1st respondent objects to this petition on the ground that it offends the doctrine of exhaustion of administrative remedies. I have examined the provisions cited by the 1st respondent.

14. Section 56 of **the PLUPA** contains the legal framework on the powers of the County Government to undertake development control. It outlines the specific powers of the County Government in relation to control of developments. Section 57 on the other hand outlaws the carrying out of a development without a development permission by the respective County Executive Committee Member and confers upon the County Executive Committee Member powers to require a person who has commenced development without permission to restore the land on which the development is taking place to its original condition. Further, the Section empowers the County Executive Member to revoke a development permission. It is therefore clear that Sections 56 and 57 of the PLUPA do not contain any framework on alternative dispute resolution mechanisms. The two Sections cannot, in my view, be a proper basis for finding that the petition herein is bad in law, *moreso*, when the petition seeks a declaration that the 3rd defendant has abdicated its duty and has consequently breached Article 42 of the Constitution.

15. It is also clear from Section 72 of the PLUPA that the dispute resolution framework in Section 72 applies to a party aggrieved by an enforcement notice issued and served to the party by the County Executive Committee Member. The petitioners in this petition are not the proponents of the impugned development and no enforcement notice has been issued to them. They are therefore not the party contemplated under Section 72 of the PLUPA. The party contemplated under Section 72 of the PLUPA is the development proponent who is served with an enforcement notice.

16. Consequently, I find no merit in the 1st respondent's preliminary objection dated 2/6/2021 because the provisions on which the preliminary objection is anchored do not provide a proper basis for the objection. I now turn to the 2nd respondent's preliminary objection.

17. I have considered the tenor and import of the 2nd respondent's preliminary objection; the parties' respective submissions; and the relevant legal frameworks and jurisprudence. The following are the three issues that fall for determination in relation to the 2nd respondent's preliminary objections: (i) Whether the issues raised in the preliminary objection can properly be disposed on the platform of a preliminary objection in the context of the relevant law and the materials before court at this point; (ii) Whether, in the circumstances of this petition, the jurisdiction of this court has been invoked prematurely by dint of the provisions of the PLUPA; and (iii) Whether in the circumstances of this petition, the jurisdiction of this court has been invoked prematurely by dint of the provisions of the EMCA. I will make brief sequential analysis and pronouncements on the three issues in the above order.

18. The first issue emerging in relation to the 2nd respondent's preliminary objection is whether the issues raised in the preliminary objection can be properly disposed on the platform of a preliminary objection in the context of the relevant law and the materials before court at this point. The definition and essential features of a preliminary objection were outlined by Law JA **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 at page 700** in the following words:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

19. The preliminary objection by the 2nd respondent is two-pronged. First, the 2nd respondent contends that disputes relating to physical and land use planning ought to be first presented to the County Physical and Land Use Planning Liaison Committee before being presented to this court on appeal. The 2nd respondent invokes Sections 76, 78, 79, 80 and 81 of the PLUPA to support that contention. Secondly, the 2nd respondent contends that the first port of call in relation to disputes relating to environmental impact assessment is the NET. I will therefore examine the relevant legal frameworks to establish whether a preliminary objection is the appropriate platform for canvassing the grounds set out in the preliminary objection.

20. Section 76 of the PLUPA establishes the County Physical and Land Use Planning Liaison Committees. Section 78 outlines the functions of the Liaison Committees. **Section 78 of the PLUPA** provides thus:

“78. The functions of the County Physical and Land Use Planning Liaison Committee shall be to —

(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;

(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

*(c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards;
and*

(d) hear appeals with respect to enforcement notices.

21. Section 79 contains the framework relating to procedure of the Liaison Committees when discharging their mandate. Section 80 provides the procedural framework on appeals to the Liaison Committees. Section 81

vests in the Liaison Committees powers to summon witnesses.

22. It is clear from Section 76 of the PLUPA that the complaints contemplated under the Act are those relating to applications submitted to the planning authority in the County. There is nothing in the petition to suggest that parties to this petition submitted development permission applications to the planning authority. Secondly, there is nothing before court to demonstrate that the planning authority granted development permission or made a decision appealable to the Liaison Committee. If any application or permission exists, the same has not been brought to the attention of the court. It is therefore, in my view that, if the 2nd respondent wants this court to down its tools, it should bring a formal motion and exhibit all the applications and approvals granted. I say so because the dispute resolution mechanism contemplated under the framework invoked by the 2nd respondent is available only when there exists an application for permission or a decision relating to development permission.

23. The second limb of the 2nd respondent’s preliminary objection relates to the jurisdiction of the NET as the primary dispute resolution organ in disputes relating to environmental impact assessment. **Section 125** of the EMCA establishes the NET. I have examined the framework in Sections 125, 129 and 130 of the EMCA. My understanding of the framework is that the jurisdiction of the NET is available only when the NEMA has made a decision. It is the decision of the NEMA that is challengeable at the NET.

24. The 2nd respondent has objected to this court’s jurisdiction on the basis of the framework in Section 125, 129 and 130 of the EMCA without exhibiting any decision made by NEMA. Without evidence of a decision made by NEMA in relation to the impugned development, I cannot pronounce myself on the alleged inappropriateness of this petition.

25. The totality of the foregoing is that, although the 2nd respondent has raised pertinent issues relating to jurisdiction, they require evidence and that evidence has not been presented to the court. The proper platform on which to canvass those issues in the circumstances of this petition is a motion supported by an affidavit exhibiting development applications, development permissions, EIA licences etc. It is therefore my finding that in the circumstances of this petition, a preliminary objection is not the proper platform on which to canvass the issues raised by the 2nd respondent.

26. For the same reasons, it is my finding on the second and third issues that in the absence of necessary evidence, the court has no basis for finding that the jurisdiction of this court has been invoked prematurely. The 2nd respondent will be at liberty to bring a substantive motion to canvass any jurisdictional issue they may wish to raise. Lastly, the objectors shall bear costs of the respective objections.

27. In light of the foregoing, the 1st respondent’s preliminary objection dated 2/6/2021 and the 2nd respondent’s preliminary objection dated 4/6/2021 are disposed as follows:

a) The 1st respondent’s preliminary objection dated 2/6/2021 is dismissed for lack of merit for having been anchored on a legal framework that does not provide a proper basis for the objection.

b) The 2nd respondent’s preliminary objection dated 4/6/2021 is rejected without venturing into the merits of the jurisdictional issues raised therein because, in the circumstances of this petition, the issues raised in the preliminary objection require evidence.

c) The respective objectors shall bear costs of the preliminary objections.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF DECEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Agwara for the Petitioners

Mr Muriithi for the 2nd Respondent

Mr Nyanyuki for the 2nd Interested Party

Court Assistant: Lucy Muthoni