



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**PETITION NO. 01 OF 2020**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF PUBLIC PARTICIPATION & PROTECTION TO PROPERTY**

**UNDER ARTICLES 10 & 40 OF THE CONSTITUTION OF KENYA (2010)**

**BETWEEN**

**JOSEPH BUNDI MBERIA.....1<sup>ST</sup> PETITIONER**

**JULIUS MUTI M'THIRIBI.....2<sup>ND</sup> PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MERU.....RESPONDENT**

**RULING**

1. Through a preliminary objection dated **21.6.2021**, the respondent states the court has no jurisdiction to hear this matter since the motion dated **16.11.2020** fails to comply with **Section 10 (2) of Physical Planning Act Cap 286** Laws of Kenya.
2. With leave parties by consent filed written submissions on the preliminary objection dated **13.7.2021**. The respondent submits **Section 61 (3) of the Physical and Land Use Planning Act 2019** provides an aggrieved party to a decision must submit an appeal under **Section 10 (3)** to the County Liason Committee as read together with the **Physical Planning (Building and Development) (Control) Rules 1998** particularly **Rule 28**.
3. Further the respondent invokes **Article 159 92) (c)** of the Constitution over issue of alternative disputes resolutions such as the Liason Committee.
4. Additionally the respondent relies on ***Muranga Tea & Coffee Company Ltd –vs- Shikara Limited & Another [2015] eKLR and Johnson Ewoi Lotiir & Another –vs- Jeremiah Ekamais Lomorukai & 4 Others [2017] eKLR*** on the proposition that by blocking a party from coming direct to the High Court without exhausting internal mechanism, the court would be upholding **Article 159 (2) (c)** of the **Constitution**. Moreover since the dispute concerns the cancellation of an approval of **Kianjai Market Stall Plot No. A 17 and B 49**, the applicant should have taken the dispute before the statutory body as the first port of call.
5. On the other hand the applicants oppose the preliminary objection through submissions dated 4.8.2021 relying on ***Mukisa Biscuits –vs- West End Distributors Ltd [1969] E.A*** on the proposition that the preliminary objection does not raise a pure point of law and that this being a constitutional petition touching on infringement of land ownership rights the court should look at substantive justice as opposed to technicalities.
6. Further, the applicants urges this court to find no prejudice will be occasioned if this dispute was heard by this court.
7. On 21.1.2020, the applicants filed a petition claiming the respondent had violated his rights over **market stall Kianjai Market Plot No. A**

**17 and B 49** by unlawfully changing the map, issuing a notice of eviction and giving out their plots to new occupants.

8. Further the applicants alleged the decision to change ownership of the plots was arrived at without: a fair hearing, public participation and prayed for compensation or in the alternative that they be left to occupy and use their plots as duly issued and be registered under their names vide minute **No. TP & M A (a) 17 and minute No. 20/92 (C) (B) 49** respectively.

9. The applicants averred the actions of the respondent were contrary to the values and principles under **Articles 10** of the Constitution. The prayers sought were for a declaration of breach of their right under **Article 40** of the **Constitution** through the illegal seizure and re-allocation of their plots to third parties, general damages for the breach and costs of the petition.

10. The petition was verified by an affidavit of the petitioners sworn on 21.1.2020 in which they attached **JBM1** copies of business licences, minutes of allocation of plots as **annexture JBM2 (a) & (b)**, a copy of a map as **annexture JBM 3**. A list of documents was also filed dated 21.1.2021.

11. On 29.3.2021 the petitioners filed a notice of motion dated 16.11.2020 seeking for the maintenance of status quo in which they attached various annexures in support thereof.

12. By a replying affidavit sworn on 26.5.2021, Jefferson Musyoka from the respondent opposed the main petition averring the applicants had produced no ownership documents to the plots in issue such as a certificate of plot allocation, and maintained that the applicants were to be allocated market stalls subject to the availability of space in the markets.

13. Further the respondent stated the applicants had failed to show such space had become available and were subsequently allocated some stalls; maintained Kianjai Market is fully planned under the planning laws and any available plots were allocated to the rightful proprietors hence the applicants had no property as alleged worth protectable under the constitution. Again Jefferson Musyoka stated the applicants were operating kiosks or stalls based on temporary permits which could be revoked at the pleasure of the respondents for purposes of proper planning and development of the market. Similarly, he stated the applicants had not disclosed who was allocated the plots in place of them, their claim had not met the constitutional threshold and lastly they failed to invoke the internal alternative dispute mechanisms under **Act No. 13 of 2019**.

14. The **Physical & Land Use Planning Act No. 13 of 2019** hereafter **PLUP** commenced on 5.8.2019. It provides for the Physical and Land Use Planning Liason Committee and appeal process at **Sections 73-89** and for enforcement notices of **Section 72** thereof.

15. It is not in dispute the respondent has a constitutional and statutory duty to ensure that development activities and land use in the County are planned in a manner that integrates with economic, social and environmental needs for present and future generations. See **Section 3 of Act No. 13 of 2019**.

16. **Section 78** of **PLUP** mandates the County Physical and Land Use Planning Liason committee with the powers to hear and determine any complaints and claims made in respect to an application submitted to the planning authority to hear appeals against the decisions made by the planning authority with respect to Physical and Land Use Development plans in the County; advise the County executive committee members on broad physical and land use planning policies, strategies and standards and lastly hear appeals with respect to enforcement notices. Under **Section 80** thereof appeals from Physical & Land Use Planning Liason Committee to the the National Physical & Land Use Planning Liason Committee.

17. As can be seen from the foregoing the mandate of the Liason Committee is limited to physical and land planning, use, regulation and development of land. **Section 2** thereof states the other object of the **Act** is to establish a mechanism for dispute resolutions with respect to physical and land use planning.

18. In the instant case the claim is over ownership of plots **No's Kianjai Market Stall Plot No. A 17 & Plot No. B 49**, re-acquisition, renovation and reallocation to other third parties without notice or public participation of the petitioners.

19. In ***Lashad Mohammed Mubarak –vs- County Government of Mombasa [2020] eKLR*** the court held that where the parent statute has provided a mechanism for resolving disputes, the court ought to be slow to invoke its inherent jurisdiction unless there are exceptional circumstances, to defer jurisdiction to specify dispute mechanism body that has been provided for in the statute.

20. In ***Mutanga Tea & Coffee Company Ltd. –vs- Shikara Ltd & Another [2015] eKLR*** the court held where there is a clear procedure for redress of any particular grievance prescribed by the **Constitution** or an **Act of Parliament** that procedure should be strictly followed. Jurisdiction is a creature of a **Constitution** and or a statute. It cannot be assumed or inferred. The **Physical & Land Use Committee** has specified what grievance it can handle.

21. The issue of revocation, re-allocation and recall of any allocated plots by the respondent are not listed as some of the grievance which the Liason Committee is entitled to handle and resolve. If the legislature intended the Liason Committee to hear all grievances it would have specifically stated so.

22. My understanding of the law in issue is that it deals with physical, use and planning of land and does not cover land allocation and acquisition.

23. In ***Mutanga*** case, the dispute fell squarely under the mandate of the Liason Committee. The same case was in ***Lashad Mohammed Case (Supra)***. The respondent has not demonstrated the claim herein falls under development on land, land use and management as enshrined under the Physical & Land Use Liason Committee. If PPULC was covering any other powers of the respondent with regard to recall and

reallocation of plots, the Act would have specifically stated.

24. Given the foregoing, it is my finding that the County Liason Committee has no jurisdiction to entertain claims for the breach of any constitutional rights and freedoms. The preliminary objection is therefore dismissed.

25. Regarding the application dated 16.11.2020, having looked at the annexures to the supporting affidavit and there being no opposition by the respondent to the motion, I order status quo to be maintained for 120 days from the date hereof.

26. Parties to comply with **Order 11** within 21 days and list the petition for hearing within 45 days from the date hereof.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 1<sup>ST</sup> DAY OF DECEMBER, 2021**

**In presence of:**

No appearance for parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**