



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 26 OF 2017

NOVAPEK (PK) CONSTRUCTION & ENGINEERING

COMPANY KENYA LIMITED.....1ST PLAINTIFF/APPLICANT

PETER KURIA NJOROGE.....2ND APPLICANT

JAMES GACHERU KARIUKI.....3RD APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

RULING

1. The 2nd Plaintiff is the proprietor of the leasehold interest of all that parcel of land known as Kiambu/Municipality Block II/109 (“Suit Premises”). The 2nd Plaintiff has, apparently, consented to the 1st Plaintiff to put semi-permanent business premises on the Suit Premises.
2. The Plaintiffs claim that they obtained the relevant approvals and licences in order to construct the semi-permanent structures. However, they claim that the Defendant forcefully and without any colour of right or legality gained entry to the Suit Premises and carted away the semi-permanent fabricated buildings that the Plaintiffs had brought to the Suit Premises.
3. The Plaintiffs claim that the actions by the Defendant are illegal and in violations of their various rights – and that they have suffered great loss as a result. The suit, in the main, seeks certain declaratory orders of the (il)legality of the actions of the Defendant as well as injunctive relief and damages for the economic injuries inflicted. Simultaneously with the Complaint, the Plaintiffs filed an Application for interlocutory injunctive relief.
4. The Defendant appeared and immediately filed a Notice of Preliminary Objection. It is a simple one: it reads that by virtue of Article 162(2)(b) of the Constitution, only the Environment and Land Court (ELC) has jurisdiction to entertain the present suit. By the same token, the Defendant argues, the High Court is deprived of jurisdiction to entertain the matter.
5. Parties orally argued the Preliminary Objection before me. Mr. Ranja, for the Defendant, argued that the suit squarely falls within the jurisdiction of the ELC based on the Pre-dominant Test enunciated by the Court in *Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR*. The substratum of the suit, argued Mr. Ranja, is that the Plaintiffs allege that they made payments under the Physical Planning Act and Finance Act asking for approvals for certain developments they were undertaking on the Suit Premises. They then began the development before getting the relevant approvals. The main issue in the suit is whether the Defendant was justified in confiscating the containers the Plaintiffs have brought onto the land without approvals.
6. The Plaintiffs argue that the Preliminary Objection is premature since there is no defence yet, and that it is not possible to tell the real nature of the dispute before all the pleadings have been filed. They insist that they complied with the Physical Planning Act and that they had developed the plot in accordance with the development planning. Their case, they insist, is about the merchandise that was carted away illegally.
7. I have looked at the Complaint and the other materials filed by the Plaintiffs in the matter. Although the Plaintiffs have been very deft and cautious in their drafting, there is no escaping that, at the core, the real controversy in this case is whether the Plaintiffs obtained the necessary licences and approvals under the Physical Planning Act, and if they did, whether they have adhered to them. If so, that controversy is, then, related to the use of land. In that case, the Constitution is crystal clear: the ELC has exclusive jurisdiction in matters relating to the use, occupation and title to land and the environment under Article 162(2) (b) of the Constitution. The very fact that the Plaintiffs admit that they required approvals and building permits in order to carry out the development they envisaged to undertake on the Suit Premises is

sufficient to beckon that the dispute is about the use of land – a staple of the ELC.

8. I need not belabour the point. The Court that has appropriate jurisdiction in this controversy is the Environment and Land Court and not the High Court.

9. Having concluded that the High Court is not the appropriate forum for this suit, I will also follow the reasoning in *Spinners & Spinners Case* and *Pamoja Women Development Programme & 3 Others v Jackson Kihumbu Wang’ombe & Another (Kiambu H.C. Civil Suit No. 16 of 2016)* and transfer the suit to the ELC rather than strike it out. In the latter case, I dealt at length with the question whether this Court can transfer to the appropriate Equal Status Court a suit that has been wrongly but in good faith filed before it. In reaching the conclusion that it is appropriate for the High Court to so transfer such a suit, I stated thus:

Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

Kenyans’ objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits.

This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit.

I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith.

10. In reaching the conclusion that the High Court can transfer such a suit, I distinguished between substantive and incidental jurisdiction and concluded that even in the absence of express statutory provisions the High Court and, indeed, any of the Equal Status Courts, has inherent incidental jurisdiction to transfer matters which are improperly but in good faith filed before them but they more appropriately belong to one of the other Equal Status Courts and referred to this as the exercise of incidental concurrent jurisdiction of the Superior Courts.

11. I have found no good reason to depart from that case. I have not seen any evidence that the Plaintiffs acted in bad faith in filing the suit before the High Court. Consequently, my decision on the matter is that while this Court does not have jurisdiction to hear the suit, the Court has incidental concurrent jurisdiction to transfer it to the appropriate Equal Status: The Environment and Land Court.

12. The orders, then, shall be as follows:

i. The suit herein to wit Civil Case No. 26 of 2017 shall be transferred to the Environment and Land Court in Thika for hearing and disposal.

ii. The Defendant is awarded the costs of the Preliminary Objection.

13. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE