



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 1187 OF 2016**

**MACHARIA MWANGI**

**MARGARET NYAMBURA NJAAGA**

**ROSE WANGARI KIMANI (Suing as the registered officials of**

**KAMITI CORNER WELFARE GROUP**

**KIAMBAA STTLED AREA.....PLAINTIFFS**

**=VERSUS=**

**JOSEPH GACHOKI GITARI & 4 OTHERS....DEFENDANTS**

**RULING**

1. This is a ruling in respect of a notice of motion dated 21<sup>st</sup> April 2017. The application which is brought by the 5<sup>th</sup> Defendant /applicant seeks to have the plaintiff's suit as against it struck out or the entire suit be struck out. The applicant contends that the suit is an attempt by the plaintiffs to have this court usurp the powers of Kiambu County Government which is vested upon the county by virtue of the provisions of the Physical Planning Act and other Acts of parliament.

2. The applicant also wants the suit against it struck out as it discloses no cause of action against it. The applicant further states that the plaintiffs did not obtain a resolution from their welfare to file this suit and as such they do not have locus standi to bring the same. The other ground for seeking the striking out of the suit is that the plaintiffs/respondents are not the registered owners of the suit property and further that the respondent have not exhausted the statutory mechanisms available for resolution of the dispute and as such the suit filed herein is premature.

3. The respondents have opposed the applicant's application based on replying affidavit sworn by Macharia Mwangi on 10<sup>th</sup> October 2018. The respondents contend that they had authority to bring this suit which authority was filed together with the suit. The respondents further contend that the applicant is mandated to ensure that constructions are put up in accordance with the law and as such the applicant cannot argue that there is no cause of action against it. The respondent contends that the applicant abdicated its duty of ensuring that buildings which come up have all the approvals.

4. I have considered the applicant's application as well as the opposition thereto by the respondents. I have also considered the submission by the parties. The applicant is contending that the respondents did not exhaust their options under the Physical Planning Act before coming to court. In response to this, the respondents contend that the first and second defendants did not obtain any approvals from the Kiambu County Government and as such, there is no way they would have resorted to appealing against what was not granted. The respondents point out to paragraphs of the defence of the third defendant where it has categorically stated that the first and second defendants did not seek approval to put up the building. There is even a letter which is from the third defendant which confirms that the first and second defendant did not obtain any approvals and the building appears to have been put up on public land.

5. The applicant cannot therefore expect the respondent to invoke the provisions of the physical planning Act for appeal against a non-existent decision or move to court for judicial review to quash a decision which was never made. On the issue of the land being registered under Murarandia Development Company Limited, this issue is neither here nor there. The company is the one which sold the land to the respondents. The company may be having a suit filed against it by the respondents but the issue here is not on ownership but rather construction of a building without approval and contrary to the regulations governing the area under which the building falls.

6. The respondents have a right to come to court when authorities which are supposed to do their part have abdicated their duty and watched

as illegal structures come up. The applicant is mandated to control such structures which have not been approved. The applicant watched as the building came up. They had the power to ask the developer to stop it but they did not. They cannot now turn around and say that there is no cause of action against it. I find no merit in the applicant's application which is hereby dismissed with costs to the Plaintiffs/Respondents.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 4<sup>th</sup> day of October 2018.**

**E.OBAGA**

**JUDGE**

In the presence of :

M/s Muchuhi for 1<sup>st</sup> Defendant/Respondent

M/s Wanjiku for Plaintiff/Respondents

Mr Mbaluto for Mr Lubullellah for 5<sup>th</sup> Defendant/Applicant

Hilda : Court Assistant

**E.OBAGA**

**JUDGE**