



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND CASE NO 112 OF 2016

HELLEN KARWIRWA IMATHIU (Legal Representative

of the Estate of the late

GREGORY KIAMBI ITIRITHIA).....PLAINTIFF

VERSUS

PANCRAS BIRIRI MABURUKI.....1ST DEFENDANT

MERU COUNTY GOVERNMENT.....2ND DEFENDANT

RULING ON PRELIMINARY OBJECTION

1. The Preliminary Objection dated 13th September, 2016 has been brought on the following grounds:-

(1) **THAT** Honourable Court lacks Jurisdiction to entertain the claim in the first instance in the light of the provision of Section 19 as read together with Sections 24 and 26 of the physical planning Act, CAP 286 Laws of Kenya.

(2) **THAT** Honourable Court lacks jurisdiction to entertain the claim in view of non-exhaustion of the grievances handling procedure set out under Section 19 as read together with sections 24 and 26 of the physical planning Act.

2. **Submissions.**

Parties agreed to argue the P.O by way of written submissions.

3. 1st Defendant's submissions are :-

that the P.O dated 13/09/2016 challenges the jurisdiction of the Court to entertain this claim citing the case of **OWNERS OF MOTOR VESSEL "LILIANS' VS CALTEX OIL (KENYA)LTD (1989)KLR 1** where the court held that ***"jurisdiction is everything and without it a court of law cannot take any steps in a suit"***.

4. Further ,the first defendant states that the Plaintiff seeks to challenge the decision by the District Physical Planning Officer to re-plan plot. 43 Ruiru market also known as title No. Kiirua/ Ruiru/1210/43. The re- planning was apparently necessitated by the tarmacking of the Meru- Ruiru Kianjai road which was realigned through the 1st Defendant;s plot No. 43. The 1st Defendant was compensated for the

portion that was taken away by the road. It was therefore necessary to re-plan plot No. 43 Ruiru so as to reflect the new position of the road as well as incorporate the portion given as compensation to the 1st Defendant.

5. In support of the Preliminary Objection 1st defendant has invoked the following provisions of the physical planning act;

- **Section 24** which gives the District Physical Planning Officer powers to prepare a local physical development plan.
- **Section 26** which provides that any person aggrieved by a local physical development plan should file an objection with the office of the Director of Physical planning.
- **Section 19** sets out an elaborate procedure for lodging and determination of objections filed with the office of the Director of Physical Planning.
- **Section 19 (3)** gives the Director Powers to determine objections and notify the aggrieved party within 30 days of his decision.
- **Section 19 (4)** allows a party dissatisfied with the decision of the Director to lodge an appeal with the relevant liaison committee and further up to the National Liaison Committee.
- **Section 19 (15)** provides for a further right of appeal against the decision of the National Liaison Committee to the High Court.

Defendant states that applicant jumped the gun by moving to this Court without following the procedure for lodging an objection and appeals as elaborately provided for under the aforementioned act.

6. Further defendant states that it is now settled law that where a statute sets out a dispute resolution mechanism/procedures, that mechanism/ procedures must be exhausted before approaching the courts and that this was the holding by the courts in the following cases.

(a) GEORGE MORARA MANYARA VS HON. MAINA KAMANDA & 3 OTHERS (2014) EKLR (COPY attached)

(b) NJOROGE BAIYA & 4 OTHERS VS NATIONAL ALLIANCE & ANOTHER (2013)EKLR.

7. Defendant concludes his submissions by stating that this should not be the first point of call for the applicant and that the said applicant can only approach the court in an appellate forum.

8. The Plaintiff's submissions on the other hand are follows:-

9. That Plaintiff /applicant is not seeking to challenge the District Planning officer to re plan plot No. 43 RUIRI MARKET also known as KIIRUA /RUIRI/1210/43.

10. That the plaintiff has moved this Court vide a plaint dated 22nd July, 2016 substantially seeking an order of declaration to the effect that the purported /alleged and or illegal allotment of plot NO.KIIRUA/RIURI 1210/43 to the extent that it affects the public road leading and meeting Meru to Isiolo at Ruiru is null and void.

11. Plaintiff further prays for a permanent injunction to restrain the defendant from entering , developing or whatsoever interfering with the road fronting the plaintiffs parcel of land.

12. That the Plaintiffs claim is a hinged on a permanent injunction to restrain the defendant from encroaching on his parcel of land thus blocking the access road to KIIRUA/RUIRI/3167.

13. Plaintiff has cited the case of Mukisa biscuits co-vs-west end distributors (1969) EALR PG 697 the East African Court where it was stated that;

“ So far as I am aware a preliminary objection consists of a pure point of law which has been

pleaded, or which arises by clear implication out of the pleading and which it argued as a preliminary point may dispose off the suit.”.

14. Plaintiff further states that it is an issue as to whether there was any decision of re-planning by the District Physical Planning Officer in respect of the suit land.

15. In summary plaintiff is saying that there is a need to adduce evidence on whether there was re planning of plot no.43 and whether defendant has blocked an access road. This would be in line with **Audi alteram partem** rule of natural justice which requires a court to adjudicate a matter by according parties a full hearing before deciding the matter in dispute or issue on merit .

16. **The issues for determination ;**

i. Whether the suit and the Notice of Motion offends the provisions of the physical planning act (CAP 286), particularly, section 19.

ii. Whether the P.O has merits.

iii. Who is to pay the costs of the P.O.

17. The physical Planning act has elaborate procedures regarding dispute resolution mechanisms and the submissions of the first defendant aptly captures these processes. The pleadings of the plaintiff do not however make reference to the procedures under the physical planning act. What the plaintiff is complaining about is the blockage of a public road where by the defendant is proceeding to put up a structure. This is retaliated in the grounds in support of the notice of motion of 27/7/2016.

18. On the other hand,1st defendant is the one who has made reference to the to the existence of the local physical development plan which shows that the alleged public road does not exist. Certainly the averments by 1st defendant are issues of fact which are subject to proof by way of evidence. A perusal of the documents filed with the plaint shows that the issue of the access road appears to have been a thorny one for a very long time. It is an issue that can only be brought to rest via litigation. The plaintiff has chosen the correct path.

19. I note that the 1st defendant has not even filed his pleadings yet he is the one who is making reference to factual matters. He is actually the one who is jumping the gun.

20. I do find that as at now the issues appertaining to the physical planning,the legality of plot no. KIIRUA/RIURI 1210/43 as well as encroachment on road reserve are in the realm of facts . Therefore, the suit and the N.O.M do not offend the provisions of the physical planning act.

21. Does the P.O have merits?.

As submitted by the plaintiff, the law on P.O.s was cemented in the **Mukisa biscuit case. (Supra)****The P.O. must raise a pure point of law which has been pleaded.** It appears that the 1st defendant has not filed his pleadings. He ought to file his pleadings in order to lay a foundation for his claims. That is however not a licence to bring forth another P.O .I therefore conclude that the arguments by the 1st defendant are not properly anchored before this Court .The up shot of this is that the P.O. is not meritorious and the same is dismissed.

22. Costs.

The 1st defendant is condemned to pay the costs of the P.O.

It is so ordered

DELIVERED IN OPEN COURT AT MERU THIS 1ST DAY OF MARCH, 2017 IN THE PRESENCE OF

CA: Dalphine

Kariuki for the 1st Defendant

Kimathi for the 2nd defendant

L.N. MBUGUA

JUDGE