REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSTITUTION PETITION NO.2 OF 2014

IN THE MATTER OF ACCESS TO INFORMATION UNDER ARTICLE 35 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF ECONOMIC AND SOCIAL RIGHTS OF HOUSING UNDER ARTICLE 43(1)(b)

AND

IN THE MATTER OF FUNDAMENTAL RIGHTS OF CLEAN AND HEALTH ENVIRONMENT UNDER ARTICLE 42 AND 69

AND

IN THE MATTER OF NAKURU MUNICIPALITY BLOCK 23 KNOWN AS NAKA ESTATE

AND

IN THE MATTER OF PROTECTION OF PARCEL OF LAND UNDER ARTICLE 64 OF THE CONSTITUTION

RAYMOND CHERUIYOT & OTHERS.....PETITIONERS

VERSUS

ERICK KIBAARA NDERITU & 3 OTHERS.....RESPONDENTS

JUDGMENT

The petitioners have petitioned this court under **Articles 35, 47, 43(1)(b), 42, 69** and **64** of the **Constitution** claiming that sometimes in July 2013 the 1st and the 2nd respondent using their planners, Nakuplan Consultants, applied to Nakuru County Government for change of user of their plot **NO. NAKURU MUNICIPALITY BLOCK 23/326** from a single dwelling unit to a multi dwelling units

(flats). The petitioners contend that pursuant to **Section 32(3)(b)** of the **Physical Planning Act, Cap 286 Laws of Kenya**, the 3rd and 4th respondents were, upon receipt of the development application supposed to, *inter alia*, have regard to health, amenities and convenience of the community generally and the proper planning and density of the development and land use in the area and in the case of a lease to have regard to any special conditions stipulated in the lease. In this regard, it is the petitioners' case that according to the Physical Development Plan (POP) of the suit area (Nakuru Municipality Block 23) the suit area (Naka Estate) consists of plots measuring 0.25 acre on which a single dwelling house is supposed to be constructed. Further that according to the POP of the area, the houses to be constructed thereon, whether bungalow or maisonette, are not supposed to occupy more that 40% of the plot.

The petitioners contend that based on the conditions in the POP for the area and in accordance with the guidelines and approval of the 3rd and 4th respondent, they settled on the suit area and built thereon single dwelling houses per plot.

The petitioners have deposed that when they learnt of the intended change of user referred to herein above; they promptly lodged an objection to the proposed development. On 22nd July 2013 the 3rd and 4th respondents acknowledged receipt of their objections and their constitutional right to a clean environment and the need for their participation in planning of the suit area and advised the 1st and the 2nd respondents to consult them but in sheer and open disregard to their objections, the 3rd and 4th respondents unprocedurally received and approved development plans for 4 storey multi dwelling units in the suit area.

Terming the said approval illegal and in breach of their right to clean and healthy environment; their right to a fair administrative action and their right to participate in making of decisions that affect them and/or which are likely to infringe their rights, the petitioners contend that their efforts to obtain the documents that the respondents relied on to make the impugned decision were in vain.

Some of the documents that the petitioners sought from the respondents to no avail are said to be: the application for change of user, NEMA report, result of consultation with the neighbours, minutes pursuant to which the approval was granted and the building plan relating to the suit area.

The respondents' alleged refusal to accede to the petitioners' demand for information is said to be in breach of the petitioners' right to information under **Article 35** of the **Constitution**. For the foregoing reasons, the petitioners' seek the following reliefs against the respondents:-

a) A declaration that the refusal by the 3rd and 4th respondents to consider their objections to the proposed change of user and approval of developments concerning the suit property is an infringement of their right to fair administrative action under **Article 47** as read with **Section 32** of the **Physical Planning Act;**

b) A declaration that the purported change of user to the suit land, from residential dwelling houses to multi dwelling house, and the subsequent approval of building plans by the 3rd respondent is an infringement of the petitioners right to a clean and healthy environment;

c) A declaration that the refusal by the 3rd and 4th respondents to supply the petitioners with the application for change of user, the **NEMA** report, the results of consultation with the neighbours and the building plans is an infringement of the petitioners' constitutional right to information under **Article 35** of the **Constitution;**

d) A declaration that the 3rd and 4th respondents have no power to approve change of user and building plans whose cumulative effect is to dwarf the petitioners houses without getting the views and or public participation of the petitioners;

e) An order of injunction to restrain the respondents jointly and severally from developing multi dwelling houses and/or approving change of user from dwelling houses to multi dwelling houses or approving such plan on the suit area or any plot in the suit area;

f) Such other relief as the court may deem fit and just to grant;

g) Costs of the petition.

The petition is supported by the affidavit of the 1st Petitioner, Raymond Cheruiyot, annexed to the petitioners' application for interim orders (the chamber summons filed simultaneously with the petition, dated 24/1/2014). In that affidavit, the petitioners, through the deponent thereof, have deposed that the suit land is planned as a low density area; that the fact that the suit area was designated as such was known to all residents when they bought their respective plots; that based on the aforementioned information/knowledge the petitioners settled in the suit area and built single dwelling houses believing they would have a quiet and serene neighbourhood. However, contrary to their said belief and/or expectation, in the recent past (last three years), there has been a proliferation of multi-dwelling houses and flats in the estate. It is contended that the said developments have been carried with the express authority of the 3rd and 4th respondents and/or their predecessors without consulting the residents.

Because the development of multi-dwelling houses is affecting their neighbourhood, it is deposed that the petitioners approached the County Planner who informed them that the impugned developments had been allowed because residents were not objecting.

Upon receiving that information, their association (Association of the Residents of the Suit area) wrote to the town planner (vide a letter dated 19/9/2012) complaining about lack of consultation regarding those developments. As a result of their complaint, the 3rd and the 4th respondents confirmed to them that all building application plans and/or change of user would be referred to their association (NAKA Resident Welfare Association) for comments. That promise notwithstanding, the 3rd and 4th respondents subsequently received and approved applications for change of user from the 1st, the 2nd respondents and some other undisclosed persons without consulting them. It is explained that after the petitioners learnt about the applications herein, they promptly lodged an objection to the proposed development.

The 3rd and the 4th respondents are said to have acknowledged their rights to clean environment and participation. However, in breach of the promise and their expectation that they would be consulted before any applications for change of user were considered and/or approved, the 3rd and 4th respondents approved the 1st and 2nd respondents' application for change of user without consulting them.

Terming the approval of the 1st and 2nd respondents' change of user illegal, the deponent has maintained that the decision was in violation of the petitioners right to a clean healthy environment, right to a fair administrative action and right to participate in making of decisions that affect them or which are likely to infringe on their rights under **Articles 42** and **47** of the **Constitution.**

It is further contended that the impugned developments will dwarf the petitioner's houses and make them loose their privacy. The petitioners also argue that the developments are likely to interfere with their access to natural sunlight and other facilities like water. For the foregoing reasons the petitioners contend that unless the orders sought are granted they may suffer immense loss.

1st and 2nd respondent's response:

In reply the 1st and the 2nd respondent filed the replying affidavit sworn by the 2nd respondent, Erick Kibaara Nderitu. In that affidavit Mr. Nderitu has *inter alia* deposed that the petitioners have concealed from the court material facts to wit, that due to increased demand for housing the suit area has in recent years experienced growth of multi-storey buildings and structures.

Contrary to the petitioners contention that their development plans were illegally obtained, Mr. Nderitu contends that they legally sought the approval of the building plans from the Nakuru County Government which they got on 27/9/2013. He explains that upon getting the approval, in compliance with the provisions of the Physical Planning Act, they advertised the change of user for their plots in the Standard Newspaper and placed a site notice on the land inviting objections and representations from the members of public. In Mr. Nderitu's view, the said notification was sufficient public consultation.

Mr. Nderitu also argues that given the fact that NEMA gave its Environmental Impact Assessment licence, the petitioners' claim that the development would affect the neighbourhood has no basis.

Arguing that it was the petitioners who want to subvert the course of justice and infringe on their rights to property, the 1st and 2nd respondent deny having, at any time, breached the petitioners' constitutional rights under **Articles 40** and **64** of the **Constitution** or at all. In this regard the 1st and 2nd respondents term the petitioners' allegation that the suit area is planned as a low density residential area as misleading. According to them, the area has been changed to a medium density residential area. They also deny the petitioners' allegation that their development is a four storey and instead aver that it is a two-storeyed development. The intended development is said to be incapable of or in any way, interfere with the petitioners' privacy, access to natural sunlight and other facilities like water.

With regard to the allegations that they told off their neighbours concerning their objection, the deponent has termed those allegations unfounded and meant to paint a bad picture to their developments. The said allegations are also said to demonstrate the ill will which informed the filing of this petition.

Maintaining that they complied with the law of the land concerning the impugned developments, the 1st and 2nd respondents have argued that the petitioners should not be heard to claim that the proposed development infringes on their rights. According to them (1st and 2nd respondents) granting of the orders sought in this petition will limit and infringe on their rights to property and occasion them immense financial losses.

3rd and 4th respondents' response:

The 3rd and 4th respondents' reply to the petition is contained in the replying affidavit of Anthony Owour, the legal officer Nakuru County. In that affidavit it is admitted that the suit area was originally designated as a low density area but contended that in 2001 the Ministry of Land prepared a policy document which recommended that developers could build up to 3 floors/multi dwelling units. It is explained that the Municipal Council of Nakuru subsequently adopted the policy effectively allowing multi-dwelling units. In this regard it is contended that the documents produced in support of the petitioner's case **(RC1 a-f)** attest to that fact (show that the area was not exclusively for single dwelling units).

The petitioners are said to be fully aware that the suit area changed from low density population area to medium density. It is alleged that the officials of the 4th respondent informed the residents of the suit area of that fact in a meeting held on 19/7/2013.

It was explained that pursuant to that change of status of the suit area some of the residents applied for change of user as early as 2009. Those applications are said to have been approved by the defunct Nakuru Municipal Council. In view of the foregoing, the petition is said to have been made out of malice and material non-disclosure.

It is further explained that the defunct Municipal Council of Nakuru allowed plans for change of user for developers as long as the developers followed the stipulated procedures for change of user and that it only issued conditional permits to the prospective developers who then had to seek the approval of their development projects by **NEMA.**

It is contended that the 1st and 2nd respondents met all the legal requirements for approval of the change of user to wit, conducting of an Environmental Impact assessment **(EIA)** to be approved by **NEMA** before commencement of the proposed development; advertisement of the proposed change of user in at least one daily with a circulation of 200,000 readers and putting of a notice on the land inviting objections and representations from the public on the proposed change of user. The 1st and 2nd respondents are also said to have complied with the legal requirement under **Environmental Management and Co-ordination Act (EMCA).**

Concerning the allegation for non-disclosure of information it is deposed that the law, specifically **EMCA**

deals with those issues by requiring **NEMA** to cause to be published, in the gazette and newspaper circulating in the area in which the proposed project is to be undertaken once at least in each of the above publications for two successive weeks and the same notice showing-a summary description of the project; the place where the project is to be carried out, the place where the environmental impact assessment study, evaluation or review report may be inspected; and a time limit of not exceeding ninety days for the submission of oral or written comments by any member of the public on the environmental impact assessment study, evaluation or review report.

PETITIONER'S SUBMISSIONS:

When the matter came up for hearing, counsel for the petitioners, Mr. Githui informed the court that the petition concerns unfair administrative action and breach of legitimate expectation by the 3rd and the 4th respondents in approving the 1st and the 2nd respondents' application for change of user. The court heard that according to the leases given to the residents of the suit area, the area is zoned for construction of two level buildings only. The buildings were to occupy 50% of the space and be limited to residential purposes only. This notwithstanding, counsel explained that there has been a sudden mushrooming of flats/apartments in the suit area.

Opposed to the said state of affairs the petitioners raised their concerns with the County Government of Nakuru vide a letter dated 19/09/2012 (annexture RC 8). The Council responded vide ...**(annexture RC 11).** In that letter the Council is said to have appreciated that the suit area is planned for ¼ acre and low density and to have undertaken to invite comments from the residents of the suit area when approving future applications for change of user. With that undertaking it is submitted that the petitioners had legitimate expectation that the County Government of Nakuru, as the successor of the defunct Municipal Council of Nakuru, would consult the petitioners before approving any applications for change of user, those of the 1st and 2nd respondents included.

Counsel submitted that despite the petitioners having addressed their concerns about the mushrooming flats/apartments in the suit area, the 4th respondent went ahead and allowed the 1st and the 2nd respondent to construct apartments on the suit area.

Maintaining that the petitioners were not consulted, Mr. Githui informed the court that the approval of the 1st and 2nd respondents' change of user is the subject matter of this petition. The applications for change of user are said to be an administrative act granted to the County Government of Nakuru as the successor of the defunct Municipal Council of Nakuru. Referring to **Article 47** of the **Constitution** counsel submitted that the petitioners were denied their right to expeditious lawful and fair administrative action. He further submitted that under **Article 47(2)** of the **Constitution** where an administrative action is likely to adversely affect an individual, the individual must be given written reasons and then granted an opportunity to be heard. The said provisions of the law are said to be the benchmark to measure the conduct of the 3rd and the 4th respondents.

Mr. Githui further submitted that under **Article 42** of the **Constitution** the petitioners are entitled to a clean and congestion free environment. In this regard he pointed out that when the petitioners committed their monies in buying their respective parcels of land, they did it with full knowledge that the area was zoned as a low density area (buildings were not to go beyond 2 levels). According to the petitioners' counsel, if the petitioners wanted a high density area they would have been given such option at a lesser purchase price. Mr. Githui reiterated that change in zoning of types of houses will affect the petitioners' right to clean environment.

It was submitted that it was not in dispute that the 3rd and 4th respondent neither heard nor gave them written reasons for failing to hear the Petitioners.

On unfair administrative action reference was made to the cases of Multiple Hauliers East Africa Limited V. Attorney General & 9 Others, Petition No.88 of 2010; **Joel Nyabuto** V. **Sarah Mweru**. Counsel submitted that the 1st and 2nd respondents are beneficiaries of an illegal process.

On breach of legitimate expectation, Counsel submitted that the law on legitimate expectation is supposed to achieve two ends: to hold public bodies to their bargain or to the provisions of the law and to prevent abuse of power. The respondents are said to have been caught up in breach of legitimate expectation of the petitioners in that they failed to consider the petitioners' objection to the 1st and 2nd respondents' proposed developments on the suit area. Referring to the EMCA, counsel submitted that before the 3rd and 4th respondents approved the impugned developments there ought to have been an Environmental Impact Assessment report, which is not the case in the instant case.

Counsel argued that the petitioners had legitimate expectation that there would be an Environmental Impact Assessment **(EIA)** report from National Environment Management Authority **(NEMA)** before approval of the proposed developments. According to the evidence adduced in this case in particular a letter annexed to the 1st respondent's affidavit as annexture **"EKN 2A"**, it is pointed out that the approval of the 1st and 2nd respondents' development plans was given on or about 27th September, 2013. Whereas the approval was supposed to be based on an **EIA** report from **NEMA**, the **EIA** licence in respect thereto was issued after the plan had been approved (that is after about six months after the approval of the building plans). The **EIA** licence is said to be non-compliant with the law and the petitioners' expectation. The Environmental Impact study annexed to the 1st respondent's affidavit as **"EKN5"** carried out in June 2014 is equally said to be in breach of the law. The defence of innocent participation is said to be unavailable to the 1st and 2nd respondents.

It was reiterated that the petitioners had legitimate expectation that there would be an **EIA** report before building plans were approved.

Referring to a letter from the Nakuru County Government addressed to Nakuplan Consultants annexed as **"RC 7",** counsel submitted that consultation of the petitioners was necessary before the 1st and 2nd respondents development plans were considered and approved. This, according to counsel for the petitioners, did not happen.

With regard to letters annexed to the 1st respondent's affidavit sworn on 18th February, 2014 as **"EKN 4 & 5"** it was submitted that the persons consulted were not objectors or owners of land in the suit area. Besides, the consultation was done on a single day, 3rd January, 2014. According to the petitioners' counsel consultation must involve people who have raised objections and not strangers. On the question of unfair administrative action, the public bodies concerned (the 3rd and 4th respondents) are said to have stated that they had no obligation to consult any one.

Counsel maintained that in approving the 1st and 2nd respondents' development plans the 3rd and 4th respondents breached both the law and the petitioners' legitimate expectation. In this regard, it is submitted that giving approvals before compliance with the law is an abuse of power.

3RD AND 4TH RESPONDENTS' SUBMISSIONS

On his part, counsel for the respondents' Mr. Kurgat challenged the petition on the ground that there is no appropriate authority granted to the 1st Petitioner to represent the others. The Petition raises one issue namely, whether the impugned multi-storeyed structures are in conformity with the approved user of the suit area. In determining whether the impugned developments are in conformity with the approved user for the suit area the court is urged to refer to the petitioners' own documents, particularly **"RC 11"** which is a letter from the Municipal Council of Nakuru addressed to the residents of the suit area. That letter addressed the residents thus:-

> **"…due to increased demand for housing in the Municipality and a policy was revised by director of physical planning to open up the area for medium density developments".**

In view of the foregoing the complaint by the petitioners that the suit area is zoned for low density structures does not hold.

It is contended that following that communication of change in policy the residents of the suit area held meetings with the officials of the Council (predecessor of the Nakuru County Government, the Respondent). The council is said to have advised the residents that the suit area was no longer a low population density area but a medium density population area. Policy review is said to have been carried out and communicated in or about the year 2001. That fact is said to be borne out by the affidavit of the 3rd and 4th respondents (paragraph 5 thereof).

Whereas approval of building plans by the 3rd respondent is to the effect that it is for a maximum of up to 4 storey-dwelling units, according to condition number 6 of the approval given it is for 2 floors only.

On whether the construction of the approved buildings will infringe on the petitioners' right to clean environment it is submitted that the petitioners have not demonstrated how such infringement can occur.

The fact that the 1st and 2nd respondent obtained an **EIA** licence after submitting an **EIA** report is said to be prove that the concerns raised by the petitioners' were considered. Concerns that the approval was given before **EIA** report and licence was issued are said to be fully covered and/or explained under paragraph 14 of the 3rd and 4th respondents' replying affidavit where it is stated that initial approval is subject to provision of report and licence from **NEMA.** The petitioners are said to have failed to cite a provision of law requiring the approval of development plans to be granted after an **EIA** report or licence is issued by the concerned authority **(NEMA).**

The procedure provided by law before issuance of licence to carry out the proposed development is said to have been complied with; advertisement of the proposed development was done as required by law. Referring to annexture **EKM 5** annexed to the 1st respondent's affidavit, counsel submitted that the residents of the suit area and its neighbourhoods were consulted before the impugned development plans were approved.

Concerning the alleged breach of the petitioners' right to a clean and health environment under **Article 42** of the **Constitution**, counsel reiterated that the petitioners have failed to demonstrate how the proposed developments are going to infringe on their rights. In any event, according to Mr. Kurgat only owners of plots neighbouring Plot No. 326 can raise objection that the proposed development will interfere with their rights.

As for the impugned approvals, counsel submitted that they were guided by the provisions of the **Physical Planning Act**, **Cap 286 Laws of Kenya**. The petitioners are said to have failed to prove breach of any provisions of that statute, and in particular Section 33 thereof.

Reference to **Article 47** of the **Constitution** in the circumstances of this case is said to be made out of context. Counsel maintains that the impugned approvals were to be carried in accordance with the **Physical Planning Act** whose provisions the 2nd and 3rd respondents complied with.

With regard to the prayers sought, prayer (A) is said to be unavailable because the petitioners have failed to prove that there was failure to consider objections. In this regard, it is explained that upon receipt of objections, the 3rd and 4th respondents approved building of 2 levels as opposed to 4 levels that the 1st and 2nd respondents had planned for.

Prayer (B) in the petition is similarly said to be unavailable to the petitioners because the 1st and 2nd respondents obtained the necessary approvals from the body given mandate to deal with environmental issues and concerns. It is pointed out that the petitioners have not challenged the issuance of licence and Report to the 1st and 2nd respondent by the said body.

Concerning prayer (D) it is submitted that an injunction cannot issue unless there is breach of the law. In this regard it is reiterated that the petitioners have not demonstrated any breach of the law in granting the impugned approvals. The prayer is also said to be amorphous as it extends to a large area and to persons

who are not parties to the suit.

On the alleged breach of the petitioners' legitimate expectation reference is made to the petitioners' pleadings (the petition) and it was submitted that the issue of legitimate expectation is not pleaded.

The petitioners are also said to have failed to give the other bodies with jurisdiction to hear and determine their grievance an opportunity to do so. In this regard it is submitted that the Physical Planning Act provides for a mechanism of handling the petitioners' grievances.

In view of the foregoing the court is urged to dismiss the petition with costs to the respondents.

1ST AND 2ND RESPONDENTS' SUBMISSIONS

Counsel submitted firstly that the Petitioners' legitimate expectations were not infringed by the 3rd and 4th Respondents. Their grievance was that the 3rd and 4th Respondents breached their promise to consult them before changing the user of Block 23 Naka to allow the 1st and 2nd Respondents to construct multi-storey buildings.

However, the Government passed a policy authorising change of user of the area from single density residential area to a medium density residential area by the Government sometimes in the year 2005. The Petitioners themselves have severally applied for change of user from a single-dwelling unit to multi-dwelling unit thereby allowing them to construct storey buildings of upto three floors. Therefore the claim that the 3rd and 4th Respondents had acted contrary to their legitimate expectations has no basis.

Referring to paragraphs 11-17 of the Replying Affidavit, Counsel maintained that the 3rd and 4th Respondents followed due process while determining the 1st and 2nd Respondents' application for change of user. The Petitioners were given ample time to raise their objects before the project was approved, their petition now can only be regarded as an abuse of the court process.

That in order to claim that their legitimate expectations were not met, the Petitioners had to prove ownership of the properties. About 90% of the Petitioners were not included in the Government Valuation Report in regard to Block 23, annexure "AO7", because they were not owners of the parcels of land. In addition, no legitimate expectation could crystalise because Block 23 was a low density area.

Counsel also reiterated Mr. Kurgat's contention that the Petitioners had not followed dispute resolution mechanisms that are provided for by the Physical Planning Act. The petition was premature because the appeal process laid down by statute had not been exhausted.

REJOINDER

In a rejoinder counsel for the petitioners, Mr. Githui, reiterated that the 3rd and 4th respondent in considering the objections were obligated to hear the petitioners and give written reasons for their decision, which legal obligations they failed to fulfill. Concerning the contention that the approvals granted were subject to issuance of a licence to carry out the project by **NEMA** under **EMCA**, Mr. Githui submitted that under the Physical Planning Act there is no provision for provisional approval.

With regard to the contention that the petitioners have not pleaded breach of legitimate expectation, counsel submitted that legitimate expectation is an adjunct of fair hearing hence a free standing ground.

With regard to alleged procedural flaws in the petition counsel referred to **Article 159** of the **Constitution** to argue that this court is obligated to address issues brought before it without undue regard to procedural technicalities.

ISSUES FOR DETERMINATION:

From the pleadings herein and the submissions by the respective parties the issues for determination are:-

1) Whether this court has jurisdiction to entertain the dispute herein as the court of first instance?

2) Whether in approving the 1st and 2nd respondents' development plans, and in particular the impugned change of user the 3rd and the 4th respondent complied with the applicable law?

3) Whether in approving the 1st and 2nd respondents' development plans, and in particular the impugned change of user the 3rd and the 4th respondents breached the petitioners' constitutional rights?

4) Whether the petitioners have made up a case for issuance of the orders sought?

5) Who should bear the costs?

ANALYSIS

Whether this court has jurisdiction to entertain the dispute herein as the court of first instant?

As pointed out above, the dispute herein relates to discharge of the 3rd and 4th respondents powers under the Physical Plan Act (hereinafter referred to as "**the Act**). That being the case any complaint concerning exercise of those powers should be handled in accordance with the provisions of that Act. In that regard. Refer to the case of **International Centre for Policy and Conflict & 5 others** V. **The Attorney General & 4 others,** *(supra)* where it was held:-

> **"An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant bodies or state organs to deal with the dispute under the relevant provision of the relevant statute...."**

In the circumstances of this case, the Physical Planning Act establishes a mechanism for resolving any disputes/complaints that may arise from exercise of powers donated by that Act to either the 3rd or the 4th respondent. To this end **Section 7** of the Act establishes the Physical Planning Liaison Committees whose functions include:-

> **"To hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under the Act." See Section 10(2) (e) of the Act."**

Under **Section 13(1)** any person aggrieved by a decision of the Director concerning any development plan or matters connected therewith may, within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.

Under **Section 15** thereunder, any person aggrieved by the decision of the liaison committee may, within sixty days of receipt by him of the notice of such decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.

Under **Sub-section 4 of Section 15,** any person aggrieved by a decision of the National Liaison Committee under that section may appeal to the High Court against such decision in accordance with the Rules of procedure for the time being applicable to the High Court.

Under the rules enacted to facilitate lodging and determination of complaints against actions or inactions of the public authorities clothed with public power under the Physical Planning Act namely, the Physical Planning (Appeals to the Physical Planning Liaison Committee) regulations, 1998 (hereinafter referred to as "the Rules). Reference is made to Rule 2 of the Rules. Therein a Petitioner is defined as::-

> **"Any person aggrieved by a decision of the Director of Physical Planning (in this instant**

> **case the 3rd respondent) or a local authority (in this instant case the 4th respondent) concerning any physical development plan or matters connected therewith, and any person aggrieved by a decision of a liaison committee". Rule 2** of the rules.

Rule 3, on the other hand, provides for the procedure of approaching the Liaison Committees. It provides:-

> **"All appeals shall be made on forms P.P.A 8 and P.P.A 9 set out in the schedule respectively and issued by the relevant liaison committee or local authority, and shall include such particulars as may be required by the directions printed on the forms."**

The secretary to the relevant liaison committee shall within ninety (90) days of receipt of the application in writing inform the petitioner the date on which the liaison committee shall consider the appeal.

Under the Rules, the secretary to the relevant liaison committee is obligated to inform the petitioner of the decision of the committee within sixty days. Where the petitioner is not satisfied with the decision of the committee the petitioner may appeal to the National Liaison Committee within thirty days of receipt of the decision of the committee communicated under the regulations. The rules also provide for a final appeal to the High Court through the Rules of the Court.

Turning to the issue at hand, it is not in dispute that the Petition herein arose from the respondents, in particular the 3rd and the 4th respondents exercise of power under the Physical Planning Act. That being the case the petitioners herein perfectly fit in the description of a petitioner under Rule 2 of the rules.

If aggrieved by the decision of either the 3rd or the 4th respondent or both of them in their discharge of the functions or exercise of powers conferred on them by legislature under the Physical Planning Act, they ought to have followed the dispute resolution mechanism provided therein. It is only through the dispute mechanism provided therein that the parties would be guaranteed substantive justice. I say this because the members of the Liaison Committees are experts in their own areas of specialization as such they are the most suited to accord professional and objective assessment of the issues raised in the petition.

Clearly, from the aforementioned provisions of the law, this court is not the proper forum as it does not have jurisdiction to entertain a dispute arising out of exercise of power under the Physical Planning Act as a court of first instance. Its jurisdiction is limited to hearing appeals from the National Liaison Committee.

The import of a court's jurisdiction was stated by Nyarangi J.A (as he then was) in ***Owners of the Motor Vessel "Lilian S"*** *V.* ***Caltex Oil (K) Limited,*** [1989] KLR 1 thus:-

> **"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

DETERMINATION:

Having found that this court lacks jurisdiction to hear and determine the issues raised in the petition as a court of first instance, I need not belabour myself in considering the other issues framed for the court's determination and must down my tools. Consequently, I dismiss the Petition and make an order that each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 12th day of March, 2015.

A. MSHILA

JUDGE