



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 171 OF 2011

MUTANGA TEA & COFFEE COMPANY
LIMITED.....PLAINTIFF

VERSUS

SHIKARA
LIMITED.....1ST
DEFENDANT

MUNICIPAL COUNCIL OF
MOMBASA.....2ND DEFENDANT

RULING

1. This suit arises from a dispute involving two property owners in the area commonly known as New Nyali in Mombasa. Mutanga Tea & Coffee Co. Limited who is the plaintiff, is the owner of plot No. 5146 (original number 1952/1) section 1 Mainland North, while Shikara Limited who is the 1st defendant is the owner of Plot No. 2931 (original number 2926/6) Section 1 Mainland North. The properties are apparently adjacent to each other.
2. By a plaint filed on 23rd June, 2011 and amended on 19th July 2011, the plaintiff is aggrieved that the Municipal Council of Mombasa, (hereinafter referred to as the 2nd defendant), has approved the construction of a high rise multi-storied building by the 1st defendant on 1st defendant’s property, contrary to 2nd defendant’s town development plan and in violation of the Physical Planning Act. The plaintiff contends that the 1st defendant fraudulently and maliciously obtained change of user, and all necessary consents for the development, by misrepresentation and concealment of a material fact, that the development was sixteen apartments on four floors, and not twelve apartments and two floors as the 1st defendant had led the plaintiff to believe.
3. The plaintiff contends that the construction by 1st defendant does not conform to the town development plan for New Nyali, as the population intended to occupy the 1st defendant’s development was not envisaged and would overstretch the amenities and services planned for the area, resulting in inconveniences to other residents. The plaintiff is concerned that the 1st defendant’s construction if allowed would interfere with plaintiff’s access to natural air, natural light and breeze. It will also deprive the plaintiff and other residents privacy of their premises, as the occupants of the intended multi-storied

building would be able to view through the plaintiff's compound.

4. The 1st and 2nd defendants have raised a preliminary objection to the plaintiff's notice of motion and the entire suit. The main ground upon which the objection is based is that this court does not have jurisdiction to hear the plaintiff's suit, as the High Court does not have original jurisdiction to hear disputes in regard to physical planning and environmental issues.

5. Learned counsel for the 1st defendant Mr. Ndegwa, argued that the plaintiff's complaint is that the 2nd defendant has approved the 1st defendant's development contrary to the provisions of the Physical Planning Act, and the Environment Management Coordination Act (EMCA) i.e. Act No. 8 of 1999. Therefore the dispute ought to be resolved in accordance with the provisions of these Acts. Mr. Ndegwa points out that under section 13 and 15 of the Physical Planning Act, any person aggrieved by the decision of the Director of Physical Planning has a right to appeal to the Local Liaison Committee within sixty days, and if dissatisfied with the decision of the liaison committee, a further right to appeal to the National Liaison Committee, and if still dissatisfied with the decision of the National Liaison Committee, a final right to appeal to the High Court. Mr. Ndegwa argued that there was a clear procedure provided under the Physical Planning Act for dealing with objections; that the jurisdiction of the High Court in this matter is only appellate jurisdiction after the provisions provided in the Physical Planning Act have been exhausted; that in regard to EMCA, jurisdiction lies with the environmental courts established under the Constitution of Kenya. Mr. Ndegwa therefore urged the court to strike out the plaintiff's suit.

6. Mr. Kadima Learned counsel for the 2nd respondent associated himself with Mr. Ndegwa's submissions, maintaining that the High Court was not the proper forum for determining the plaintiff's suit as pleaded; that the plaintiff's suit was an abuse of the court process; that in granting approval for the 1st defendant's development, the 2nd defendant was merely discharging its mandate under the Physical Planning Act, which mandate has been admitted by the plaintiff; that the plaintiff could have obtained leave to bring its claim within the procedure provided in the relevant statute.

7. Learned counsel for the plaintiff, Mr. Asige dismissed the preliminary objection as being totally misconceived. He argued that a preliminary objection cannot be raised where facts are disputed; that the amended plaint shows that the facts were clearly in dispute and therefore a preliminary objection could not be entertained; that the court has no jurisdiction to strike out the entire suit on the basis of a preliminary objection; that the procedure for striking out is provided under Order II Rule 15 of the Civil Procedure Rules; that in filing its defence and counterclaim, the 1st defendant submitted to the jurisdiction of the Court; that the defence and counterclaim filed by the 1st defendant reveal numerous disputed facts, while the reliefs sought by the plaintiff went beyond environmental issues and included issues of fraud.

8. Mr. Asige further contended that Article 165(3)(a) of the Constitution of Kenya, gives the High Court unlimited jurisdiction in criminal and civil matters; that the tribunal under the EMCA is subordinate to the High Court; that the issues raised in the plaintiff's suit cannot be determined by the liaison committees; that the tribunal envisaged in the Environmental Act is not a court as Article 162(2)(b) of the Constitution of Kenya, envisages the establishment of a court with the status of a High Court; and that since that court has not been constituted the preliminary objection cannot hold. Relying on Article 159(2)(d) of the Constitution of Kenya, Mr. Asige urged the Court to administer justice without procedural technicalities and overrule the preliminary objection.

9. I have carefully considered the objection which has been raised, the submissions filed by counsel, and the pleadings. The first issue that arises is whether the preliminary objection has been properly taken. In the case of **Mukhisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors Limited** [1969] EA 697, Law JA, properly (in my view) described a preliminary objection as consisting of:

“...a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the

contract giving rise to the suit to refer the dispute to arbitration.”

10. With the above definition in mind, I note that it is not disputed that the plaintiff and the 1st defendant are the owners of adjoining properties, and that the 1st defendant is in the process of developing his properties. The plaintiff has come to this court in an effort to stop the 1st defendant’s construction, as the plaintiff believes that the approval of the 1st defendant’s development which is a high rise building extending to four floors is in violation of the Physical Planning Act, EMCA and the plaintiff’s right to air, light and privacy. It is not disputed that approval of development plans is governed by the Physical Planning Act and the EMCA. The issue raised by the defendants is on jurisdiction, that is, in light of the Physical Planning Act and EMCA, whether this Court has jurisdiction to hear the plaintiff’s claim. As is evident from the afore-stated definition by Law, JA., jurisdiction has always been held to be a legal issue which ought to be addressed by the Court as a preliminary issue. It is not a simple procedural issue which can be overlooked as a technicality. Indeed, any proceedings undertaken by this court without jurisdiction would be an exercise in futility.

11. In determining jurisdiction it is the subject matter of the plaintiff’s suit as revealed from the pleadings that will guide the court in determining which law is applicable and where jurisdiction falls. I take note of the definition given by **Sir. Charles Newbold P.** in **Mukhisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors Limited (supra)**, that:

“A preliminary objection is in nature what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion.”

12. I find that there are certain disputed facts such as, whether the plaintiff consented to the 1st defendant’s development or whether the plaintiff’s consent and the consent of the 2nd defendant, was obtained by fraud or misrepresentation. Nonetheless, the subject of the plaintiff’s suit is clear from the undisputed facts, that the suit is anchored on a dispute concerning the infringement of the plaintiff’s alleged rights arising from the development of the 1st defendant’s property which adjoins that of the plaintiff. In my considered view, the fact that there are some facts which are in dispute does not preclude the court from dealing with the issue of jurisdiction as a preliminary issue.

13. Paragraphs 4, 5, 6, 7, 8, 14, 15 and 16 of the Amended Plaintiff filed by the plaintiff on 19th July, 2011 confirms that the plaintiff’s claim is anchored on the Physical Planning Act Cap 286, and The Environmental Management and Coordination Act 1999. Those paragraphs of the plaintiff further reveal that the plaintiff is aggrieved that the 2nd defendant has approved the 1st defendant’s multi-storied residential building contrary to the Physical Planning Act; that the 1st defendant has obtained consents from the 2nd defendant and the National Environment Management Authority for the development fraudulently; and that the development will result in violation of the plaintiff’s access to natural air, natural light and breeze; and also deprive the plaintiff of privacy. A perusal of the Physical Planning Act Cap 286, and the Environmental Management Coordination Act, discloses elaborate provisions provided in these legislations for dealing with objections relating to approval of development plans and environmental issues.

14. In the case of approval of development plans, the 2nd defendant has a statutory mandate under Section 29 of the Physical Planning Act which provides that: -

“...each local authority shall have the power-

(a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;

(b) to control or prohibit the subdivision of land or existing plots into smaller areas;

- (c) to consider and approve all development applications and grant all development permissions;**
- (d) to ensure the proper execution and implementation of approved physical development plans;**
- (e) to formulate by-laws to regulate zoning in respect of use and density of development; and**
- (f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan”.**

15. The prayers sought by the plaintiff in the amended plaint are as follows: -

- (a) A declaration that the area known as New Nyali has been planned and/or set aside solely for single storey single family residential housing buildings and that the 2nd defendant[s] acts of allowing, consenting to and approving the construction of multi storey residential buildings on Plot Number 2931 (Orig.No.2926/6) Section Mainland North is unlawful and void.**
- (b) An order to prohibit the 2nd defendant from allowing, consenting to and/or approving the construction of any multi storey building or any other building which is not a single storey family residence within the area demarcated as New Nyali and the 2nd defendant be compelled to ensure that no constructions other than those allowed in the area town/development plan of the said area are erected and/or constructed within this area.**
- (c) A permanent injunction restraining the 1st defendant by themselves, their agents, servants/employees and/or representative from constructing a multi storey residential building on Plot No.2931 (Orig.No.2926/6) Section 1 Mainland North Mombasa and/or allowing the same to be occupied by tenants and an order for the modification, redesigning of the said intended building into a single storey single family residential building or in the alternative for the demolition of the same at the defendant’s own costs.**
- (d) In the alternative a mandatory injunction compelling the 1st defendant to build 12 apartments in two storey building and to demolish the third storey at the 1st defendant’s own cost.**
- (e) Costs of and incidental to this suit.**
- (f) Any further or other relief the court may deem just and necessary to grant.**

16. The plaintiff’s claim as drafted in the afore-stated paragraphs, read together with the afore-stated prayers, shows that the plaintiff’s suit is an attempt to enforce the 2nd defendant’s statutory obligation as provided under Section 29 of the Physical Planning Act. In paragraph 22 of the 1st defendant’s amended defence and counterclaim, the jurisdiction of this court has been denied in light of Sections 10(a), 10(b), 13(1) and 15 of the Physical Planning Act, and Section 32 of the EMCA. The question then is whether this court has jurisdiction to deal with issues arising from the enforcement of the 2nd defendant’s mandate under the Physical Planning Act.

17. I note that the mandate of the 2nd defendant in determining the approval or rejection of a development plan within its area is regulated by the provisions of the Physical Planning Act. Under Section 33(3) of the Physical Planning Act, the first stop for anyone who is aggrieved by the decision of the 2nd defendant is the Liaison Committee to which an appeal is provided. The provisions dealing with appeals are Sections 10, 13, 15(1) and (4). These provisions provide for procedure for progressing with appeals from the Liaison committee to the National Liaison Committee before appealing to the High Court. Therefore it is clear that the jurisdiction of the High Court under the Physical Planning Act is not original jurisdiction but appellate jurisdiction.

18. As regards the Environment Management and Coordination Act the National Environmental

Management Authority (NEMA), has the authority to grant a licence for any development subject to an environmental Impact Study Report being published. Again there are provisions provided for dealing with grievances concerning the issuance of a licence or refusal to issue a licence. In this regard, the first stop is the National Environmental Tribunal established under Section 125 of the EMCA and under Section 130, any person aggrieved by the decision of the order of a tribunal may within 30 days of that decision or order appeal against that decision or order to the High Court. Thus, once again the mandate of the High Court is not original jurisdiction but is appellate jurisdiction.

19. In Speaker of the National Assembly versus Karume, [1992] KLR 22, the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. I find that given the subject matter of the plaintiff's suit and the prayers sought, the jurisdiction of this court can only be appellate jurisdiction.

20. I am alive to the fact that the mandate given to the 2nd defendant under Section 29 of the Physical Planning Act is the exercise of a public duty, and that this court has powers under Section 9 of the Law Reform Act as read with Order 53 of the Civil Procedure Rules to issue orders of judicial review in relation to the performance of duties of a public nature. Nevertheless, the plaintiff has not invoked the supervisory powers of this court under the Law Reform Act. Moreover, I am persuaded by the holding in R versus Birmingham City Council ex parte Ferrero Ltd [1993] All ER 530 referred to by Wendoh, J. in R versus National Environmental Management Authority ex parte Sound Equipment Ltd [2010] eKLR, that:

“Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only exceptionally that judicial review would be granted. In determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers was the real issue to be determined and whether statutory appeal procedure was suitable to determine it.”

Needless to state, that no exceptional circumstances have been demonstrated to justify departing from the statutory provisions.

21. Further the attempt by the plaintiff to invoke this court's unlimited original jurisdiction cannot succeed as under Article 165(3)(a) of the Constitution of Kenya, this court's unlimited original jurisdiction is subject to Article 162(2)(b) which provides for the creation of courts with the status of the High Court to deal with disputes relating to the environment, the use and occupation of, and title to land. Thus, it is clear that the legislature has limited the original jurisdiction of this Court in regard to environmental matters, use and occupation of land.

22. Finally, the agreement that this court cannot strike out this suit without an application under Order 2 Rule 15 of the Civil Procedure Rules cannot hold. The objection being raised being one on jurisdiction, the following passage from the judgment of Nyarangi, JA. in Owners of Motor Vessel “Lillian S” v Caltex Oil (K) Limited [1989] KLR 1, is instructive.

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.

23. The upshot of the above is that I uphold the preliminary objection and strike out the plaintiff's notice of motion and the plaintiff's suit for want of jurisdiction. I award the defendants cost of the suit. Those shall be the orders of the Court.

SIGNED THIS 6TH DAY OF JULY, 2012.

H.M. OKWENGU

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2012.

JUDGE

In the presence of:

.....*Counsel for the Plaintiff*

.....*Counsel for the Defendants*

.....*Court Cle*