



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 81 OF 2020

ANGELA MBUGUA.....1ST PLAINTIFF/APPLICANT
JAMES KIRAGU.....2ND PLAINTIFF/APPLICANT
NJOKI WAINAINA.....3RD PLAINTIFF/APPLICANT
JAMES KARIUKI.....4TH PLAINTIFF/APPLICANT
CHRIS KIGATHI.....5TH PLAINTIFF/APPLICANT

OFFICIALS OF REDHILL KENTMERE RESIDENTS ASSOCIATION

VERSUS

KO HOLDINGS LIMITED.....1ST DEFENDANT/RESPONDENT
COUNTY GOVERNMENT OF KIAMBU.....2ND DEFENDANT/RESPONDENT
N.E.M.A.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination herein is the **Notice of Motion** application dated **15th September 2020**, brought by the Plaintiffs herein **Redhill Kentmere Residents Association** through its officials.

There are also **three Notices of Preliminary Objection** brought by each of the Defendants/Respondents.

In the Notice of Motion application, the Plaintiffs/Applicants have sought for the following orders:-

(a) That the 1st Defendant/Respondent by themselves, their agents and/or servants be restrained from constructing on land parcel No. LR No.12020/88, and/or changing its agricultural single dwelling residential use pending the hearing and determination of this suit.

(b) That costs of the application be provided for.

The application is supported by the grounds stated on the face of the application and the affidavit of **Angela Mbugua**. These grounds are:-

(a) That the 1st Defendant with the approval of the other Defendants has commenced construction of a high residential development on LR. 12020/88, which is a low density occupation area.

(b) That the 1st Defendant/Respondent conduct is unlawful as the approval used were the subject of Nairobi HC Petition No. 117 of 2019, which Petition was dismissed and the said approvals had been cancelled by 2nd Defendant/ Respondent.

(c) That no fresh approval process has been invoked.

(d) That the said construction is detrimental to the well being of the Plaintiffs/applicants and other residents in the area which is zoned as low density agricultural use.

(e) That unless restrained by the Court, the 1st Defendant will irreparably damage the environment before the determination of this suit.

In the Supporting Affidavit, **Angela Mbugua** the Chairlady of **Redhill Kentmere Residents Association**, who has been authorized by her Co-Plaintiffs and the Association members averred that **Redhill/Tigoni** area is historically an Agricultural large estate tea growing area with a low density residential occupation and is mainly zoned as an agricultural area.

Further that most of the grants for the area set out the user and a condition that **“Not more than one dwelling house shall be erected on any sub-division.”** She annexed **AM/2** which is a copy of special condition for **LR.No. 73471**.

That in the **year 2019**, it came to the knowledge of the Plaintiffs herein that the 1st Defendant intended to put up a high density development in the area. That the Plaintiffs/Applicants made **Petition** to the **County Government of Kiambu**, in opposition to the project and consequently, the approvals given to the 1st Defendant were cancelled. That the 1st Defendant was aggrieved by the **County Government of Kiambu’s** decision of cancelling the development approvals and filed **Nairobi High Court Petition No. 117 of 2019**, challenging the said cancellation. That in the said Petition, the Association herein was enjoined as Interested Party and on **19th December 2019**, the 1st Defendant’s Petition was dismissed with costs. Therefore, the revocation of the approvals still stood.

However, lately the 1st Defendant has commenced construction on the suit land as was evident from **AM 5**. It was her contention that the Association opposition to the construction was predicated on the fact that the development was against the normal use of the land as set out in the comparative grant and was also environmentally detrimental and would adversely affect the residents of the area. Further that the Association is not aware of any new application by the 1st Defendant for grant of approval of the construction after the Court Judgment of **19th December 2019**.

Again there has been no invitation to public participation by any of the Defendants. That the Association also filed an Appeal at the **Liaison Committee** of County Government of Kiambu on the issue of Physical Planning approval of **23rd July 2010**, as is evident from **AM 7**. That the County Government of Kiambu (2nd Defendant herein) did not respond or acknowledge receipt of the said Appeal. Further that there is no evidence of approval by NEMA, (3rd Defendant herein) of the 1st Defendant project.

It was her contention that the report by **Prof. Steven G. Njuguna**, an eminent environmentalist commissioned by the Association paints a grim picture of the environmental impact of the project including degradation of the traditional water tower of the land, loss of existent bio diversity and wetlands leading to loss of **fauna and flora**, increased soil erosion due to high density population and land clearing, resultant pollution from sewage and waste water disposal systems and destruction of existing tea estate, a major income earner.

Therefore, unless the Defendants/Respondents are restrained, their conduct will irreparably and irreversibly damage the environment and render any subsequent remedy nugatory.

The Application is opposed by all the Defendants/Respondents through their respective Notices of Preliminary Objections and the Replying Affidavits.

The 1st Defendant/Respondent filed its Replying Affidavit through **Charles Karani Nyamu**, a Director of the 1st Defendant who averred that the 1st Defendant’s primary business is real estate development. That in line with the said business, the 1st Respondent/Defendant commenced the process of development on **LR. No. 12020/88 (original No. 12020/84)** in the **year 2013**. That the 1st Defendant/Respondent had applied for **amalgamation and change of user** from agricultural to comprehensive development from the 2nd Respondent on **13th June 2014**. That via **Notification of Approval (form PPA 2)**, issued in **June 2013**, as well as a letter dated **7th August 2015**, by the **Ministry of Lands, Housing and Urban Developments**, the 1st Defendant/Respondent was granted approval, subject to complying with the conditions thereon. The said **Notification and Approval** were attached as **KNM2**.

Further that upon fulfilment of the conditions, the 1st Defendant/Respondent surrendered their **freehold** title and was issued with a **new Certificate of Lease** from the Ministry of Lands as well as a Lease in respect to the suit property with **99 years** lease term beginning on **1st August 2015**. That the use was specified as **“Comprehensive Housing Development (Town House and shops)”**. The copy of the lease was marked **KNM3** and **KNM4**. That the said change of user has not been impugned in this application and the authorized use of the suit property is **not** Agricultural but **“Comprehensive Housing Development (Town houses and shops)”**.

Further that contrary to the Plaintiffs’/Applicants’ allegations, that the approval issued for the construction on the suit property were the subject of **Nairobi HCC Constitution Petition No. 117 of 2019**, the only issue in the said proceeding were whether the Respondent (in their proceedings 2nd Respondent herein) had the power to cancel a construction permit issued to the 1st Respondent for the **comprehensive development through** its letter dated **23rd October 2018**, and whether the 1st Respondent’s **Constitutional right to Fair Administrative Action**, and **property** had been violated by the purported cancellation. However, the Court declined to make a determination in the said Petition citing **lack of jurisdiction**, and ruled that parties needed to invoke the mandatory provisions of the **Physical Planning Act (Cap 286)**, Laws of Kenya.

That following the outcome of **Petition No. 117 of 2019**, the 1st Defendant/Respondent engaged the 2nd Respondent with a view to finding

a resolution of the matter under the Act. Further that following a lengthy deliberations and representation from the 1st and 2nd Defendant's/Respondent's **County Physical and Land Use Planning and Technical Committee**, the 2nd Defendant/Respondent decided to uphold the earlier development permission granted to the 1st Defendant/ Respondent. The said decision was contained in a letter dated **28th February, 2020**, marked **KNM7**. Accordingly, the 1st Defendant/ Respondent resumed the project and began constructing an **access road, perimeter wall, a gate and gate house**, for purposes of comprehensive development. Thereafter the Plaintiffs/Applicants filed the instant suit.

It was his contention that the proposed project by the 1st Defendant/Respondent is a low density development comprising of single dwelling home on **0.1 hectares** (3/4 acres plot) contrary to the assertion by the Plaintiffs/Applicants. That the characterization of the project by the Plaintiffs/Applicants as highly density, was calculated to mislead the Court on the nature of the project in order to obtain the interim orders herein.

He contended that it is hypocritical for the applicants to seek to stop the 1st Defendant/Respondent proposed project on account of density, when members of the Plaintiffs/Applicants' Association including the 1st and 2nd Plaintiffs/Applicants herein reside in developments with densities similar to or denser than the 1st Respondent's proposed development and within the same geographical area. Further that that the **1st Plaintiff** is a resident and home owner in **Redhill Estate**, a development of **Town houses** on **¼ of an acre**, and the **5th Plaintiff** is a resident and home owner in **Rivers Edge Homes**, a development of **Town houses** on an **1/8 of an acre**. Further that the 1st Defendant's/Respondent's proposed project is not the first comprehensive residential development in the area as several other developments in the area are of the same kind.

It was further contended that though the construction permit issued by 2nd Respondent had been cancelled and became the subject of **Petition No. 117 of 2019**, all the other approvals granted in respect of the project by 3rd Respondent and others had not been cancelled and remain valid.

It was further contended that upon upholding of the development permission by the 2nd Respondent vide its letter dated **28th February 2020**, the 1st Respondent was at liberty to proceed with the project without any need of applying for new approvals in the project. Further that prior to the issuance of the **NEMA Licence** referred to, the 1st Respondent lawfully and properly subjected the project to an **Independent Environmental Impact Assessment** study. That the said **Environmental Impact Assessment** study entailed extensive public participation and consultations with the residents in the area including the applicant's herein. That after the Environmental Impact Assessment study, the 3rd Respondent approved the 1st Respondent's application and granted the Licence No. **NEMA/EIA/EIA/PSL/6539**, on **7th August 2018**, in respect of the project having taken the Plaintiffs/Applicants opposition into account.

Therefore, the Plaintiffs'/Applicants' allegations that they were not consulted prior to the grant of approvals on the project are false and misleading. That the licence issued by the 3rd Respondent to the 1st Respondent has not been revoked nor challenged. Further that the comprehensive development intended which is low density development of a single house per **0.1 Hectare** (a quarter acre) is not high density as alleged or at all. That the Plaintiffs'/Applicants' move to stop the 1st Respondent development is in **bad faith** actuated by **malice** and **personal vendetta, reeks of classism** and is an **abuse** of the Court process.

That the title deed and its terms cannot be changed. Further that the step of changing the user of the suit property was accomplished a long time and there is therefore no attempt to change the user from agricultural as alleged by the Plaintiffs/Applicants. The 1st Respondent urged the court to dismiss the Plaintiffs/Applicants application and suit.

The 2nd Respondent filed its Replying Affidavit through **Charles Mwangi**, the **Acting Director Physical Planning**, at the County Government of Kiambu and averred that the Plaintiffs/Applicants have failed and/or neglected to pursue the **appropriate dispute resolution mechanism** established under the **Physical and Land Use Planning Act 2019**. That from the advice of his Advocate, **section 61(3)** of the **Physical and Land Use Planning Act 2019**, provide that a person aggrieved by the decision of a County Executive Committee Members regarding an application for development permission may appeal against that decision to the **County Physical and Land Use Planning Liaison committee**. That he has further been advised that failing to pursue an appeal before the **Liaison Committee** as established under the Physical Planning and Land Use Act 2019, the Plaintiffs/Applicants have invoked the jurisdiction of this Court prematurely.

He further averred that by a letter dated **7th February 2020**, the 1st Defendant/Respondent wrote to the 2nd Defendant/Respondent regarding cancellation of development approvals granted on **LR. No. 12020/88** to construct **71** single family residential units on **0.1 hectares** each and a commercial centre.

Further that the **County Physical and Land Use Planning Technical Committee** in a meeting held on **28th February 2020**, deliberated on the said application by the 1st Defendant/Respondent vide its minutes no. **(PTC/058/2020/204**, and found the development application acceptable for approval. That the said plan is compatible with the character of the neighbourhood since it is a comprehensive master plan development that integrates physical, social and environmental aspects of the neighbourhood within the development plan. That though the Plaintiffs/Applicants made an application before the County Liaison Committee on **23rd July, 2020**, the said Liaison Committee has not been sitting since the outbreak of the **Covid-19 Pandemic**.

It was his contention that the Plaintiffs/Applicants are misleading the Court as the 1st Defendant/Respondent did not initiate a fresh approval process after cancellation of his initial approval, which fresh application was reviewed during the County Planning Technical committee meeting held on **28th February 2020**. However, the **Technical Committee** upheld the development permission granted to the developer though Notification Approval and construction permit issued on **4th August 2018** and **9th October 2018**.

He contended that the Plaintiffs/Applicants failed to appreciate that the Planning Department under the **Constitution of Kenya, County Government Act 2012** and **Physical and Land Use Planning Act 2019**, are mandated to plan terms and issue change of user where appropriate, in order to enhance development to sustain the growing population. Further that his advocate has advised him that an order of **prohibition** cannot be granted to **prohibit a public body** from doing that which it is authorised by law to do. Further that the Plaintiffs/Applicants are **not** deserving of the orders sought as they have failed to follow the **alternative dispute resolution mechanism** as provided by the statute. That the Plaintiffs/Applicants have not fulfilled the requirements for grant of the orders sought, and the application should be dismissed with costs.

The 3rd Respondent filed the Replying Affidavit through **Geoffrey Murigi a Lead Expert** duly registered by **National Environmental Management Authority (NEMA)**. He averred that he conducted the **Environmental Impact Assessment** on land parcel No. **LR. 12020/88** (the suit property) on behalf of the 1st Defendant/Respondent, which was conducted and prepared in accordance with **National Environmental Management Authority** regulations. That he met the statutory provisions stipulated in **Environmental Management and Coordination Act (EMCA)** and the **Environment Impact Assessment and Audit/Amendment Regulation 2016**. That he first ascertained the compatibility of the land to the development proposed and also conducted public participation. That he visited the site, ascertained the proposed development compatibility, conducted public participation as part of the Environmental Impact Assessment process.

That after the site visit and public participation exercise was completed, he prepared a comprehensive report which pointed out the potential environmental impact of the project and the mitigation measures to be taken during and after the implementation of the project. That their report was submitted electronically to **National Environmental Management Authority (NEMA)**. That **National Environmental Management Authority**, considered the Report and issued the **proponent** with a licence to proceed with the development.

He contended that the Plaintiffs/Applicants did not challenge the decision of **NEMA**, to issue the licence and have never appealed the NEMA's decision to issue the said licence. Further that if there was any objection, it ought to have been filed at the National Environmental Tribunal (NET) within **sixty days** in accordance with **section 129** of **Environmental Management and Coordination Act (EMCA)**.

It was his contention that the expert Report by **Prof. Steven G. Njuguna** who was appointed by the Plaintiffs/Applicants regarding the impact of the project on environment is grossly inaccurate, marred with half truths and inconsistencies and is calculated at deliberately misleading the Court. That though the said expert Report by the Plaintiffs/Applicants alluded to the fact that there was no **Environment Impact Assessment** that had been carried out with respect to the project, that was incorrect as the same had been done. That the said report is replete with generalizations and does not relate to the suit property herein and is in respect to a broader geographical area. He alleged that the Report failed to make any specific reference to the **flora** and **fauna** found on the suit property, and did not even contain a map of the suit property. To him, the said report was misleading and did not even disclose who had commissioned it and for what purpose.

The Plaintiffs/Applicants also filed a further affidavit through **Angela Mbugua** who averred that the objection raised by the Plaintiffs/Applicants was pursuant to its constitutional mandate and relate not only to the present Defendants, but to any such proposed development in the area as per annexure **AM 1**. That the 1st Defendant/Respondent is undertaking a massive constructions on the suit land quite out of character with the area. Further that the mere fact that some other developers have with impunity and opposition from the Plaintiff managed to degrade the environment in the area is not an excuse for the 1st Defendant/Respondent do continue degrading the same. That the said impunity should be more reason why the area should be preserved to remain uncontaminated. She urged the Court to allow the application.

Each of the Respondents filed a Notice of **Preliminary Objection** to the Plaintiffs/Applicants suit and the application. In its Notice of Preliminary Objection dated 2nd October 2020, the 1st Defendant/Respondent averred:-

1. That this Honourable Court lacks original Jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies for the following reasons:-

(a) The Plaintiff's suit herein primarily raises the question of planning, use and development of land parcel Number LR.12020/88 (the suit property), which matters are regulated under the Physical Planning Act, 1996 (No. 6 of 1996)(repealed) and the Physical and Land Use Planning Act, 2019;

(b) Under Section 61(3) of the Physical and Land Use Planning Act 2019, an applicant or interested party that is aggrieved by the decision of a County Executive Committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee.

(c) The Applicants herein have failed, ignored and/or neglected to exhaust the alternative means of dispute resolution as provided by the said legislation;

2. That this suit and application contravene the provisions of Article 159(2)(c) of the Constitution of Kenya, 2010.

3. That the issue raised by the Plaintiffs regarding approvals for the proposed construction on the suit property is res judicata since the same was settled in a Judgment delivered on 19th December 2019 by Hon. Justice J. A Makau in Nairobi HCC Constitutional Petition No. 117 of 2019 (KO Holdings Limited vs County Government and Redhill Kentmere Residents Association).

4. That the instant suit is therefore premature, abuse of court process, vexatious and frivolous, accentuated by malice.

The 2nd Defendant/Respondent also raised its Preliminary Objection on the following grounds:-

1) That this court lacks Jurisdiction to entertain the present suit.

2) That under section 61(3) of the Physical and Land Use Planning Act 2019, a person aggrieved by the Decision of a County Executive Committee Members regarding an application for development permission may appeal against the decision to the County Physical and Land Use Planning Liaison Committee.

3) That under section 61(4) of the Physical and Land Use Planning Act 2019, any party aggrieved with the decision of the County Physical and Land Use Planning Liaison committee may appeal against that decision to the Environment and Land Court.

(4) That the Plaintiffs herein have failed and/or neglected to

exhaust the alternative means of dispute resolution as provided by the statute.

(5) That the instant suit is therefore premature, frivolous and an abuse of the Court process as this Court has no

jurisdiction and its jurisdiction has been limited by statute.

The 2nd Defendant urged the Court to dismiss the Plaintiffs' suit with costs.

The 3rd Defendant too filed its **Notice of Preliminary Objection** dated 2nd October 2020 and averred that:-

1. That this court is not the appropriate forum to hear this matter by dint of section 129 of Environmental Management and Coordination Act 1999. The 3rd Defendant pleaded that the Court has no jurisdiction and relied on the decision of the Court of Appeal in Kibos Distillers Ltd and 4 others Vs Benson Ambuti Adega and 3 others (2020) eKLR.

2. That the ratio decidendi in the decision of KO Holdings Ltd Vs County Government of Kiambu and Another (2019) eKLR as produced by the Plaintiffs equally supports the striking of this suit due to want of jurisdiction.

3. That this matter can only have been filed at the National Environment Tribunal.

On 12th October 2020, the Court directed the parties to canvass the **Notice of Motion Application** and the **Notices of Preliminary Objection** together by way of written submissions.

In compliance thereto, the Plaintiffs/Applicants via the **Law Firm of R. M. Mutiso & Co Advocates** filed their submissions dated 28th October 2020. Equally, the 1st Respondent/Defendant through the **Law Firm of Mboya Wangong'u & Waiyaki Advocates**, filed its submissions dated 4th November 2020.

The 2nd Respondent though **Diana Rose Wangui, the Legal counsel** filed its submissions dated 4th November 2020, and the 3rd Respondent though **Erastus K. Gitonga Advocate** also filed its written submissions dated 19th October 2020.

The court has carefully read and considered the pleadings herein and the **three Notices of Preliminary Objection**, the written submissions, the cited authorities and the relevant provisions of law and renders itself as follows:-

There are three Notices of Preliminary Objection which challenge **Jurisdiction** of this Court. The Court will first determine the Notices of Preliminary Objection before dealing with the Notice of Motion. Basically, the three Notices of Preliminary Objection are the same as they challenge Jurisdiction of this Court.

It is evident that if Preliminary Objections are upheld, they are capable of determining or disposing off this matter preliminarily. See the case of Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999, where the court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminary without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Preliminary Objection was described in the case of Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 697 as follows:-

“It raises a pure point of law which is argued on assumption that all the facts pleaded are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of Judicial discretion”

The Respondents have challenged the Jurisdiction of this Court. Jurisdiction is everything and without it, the Court cannot proceed further. See the case of Owners of Motor Vessel “Lillian” ...Vs...Caltex Oil Kenya Ltd 1989 KLR where the Court held that:-

“.....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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

It is clear from the description of what amounts to a Preliminary Objection that the issue of Jurisdiction is a pure point of law and thus the Notices of Preliminary Objection raised herein falls within the said description. In the case of Samuel Macharia Kamau vs KCB & Others (2012)eKLR, a matter decided by the **Supreme Court of Kenya**, the Court held as follows:-

“A Courts Jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise Jurisdiction as conferred by the Constitution or other written laws. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law. The Court must operate within the constitutional limits. It cannot expand Jurisdiction through Judicial craft or innovation.”

The Respondents have averred and submitted that this Court **lacks Jurisdiction** to determining this matter because there are already existing statutes which have conferred Jurisdiction to other bodies to deal with the issues raised herein, before the said issues can be brought to Environment & Land Court.

The 1st Respondent submitted that this Court is not the appropriate forum to hear and determine this matter because as far as the issue of development approval as issued by the 2nd Respondent is concerned, the correct and appropriate forum is the **County Physical and Land Use Planning Liaison committee** established under the **Physical and Land Use Planning Act 2019**, where it provides in **Section 61(3)** as follows:-

“An applicant or interested party that is aggrieved by the decision of a County Executive Committee Members regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision.”

It was the 1st Respondent’s further submissions that since the Plaintiffs are aggrieved by the decision of 2nd Defendant/Respondent herein, then they ought to have appealed before the **Liaison Committee** and therefore this Court is not the appropriate forum to hear and determine the matter at this stage.

This was the same position taken by the 2nd Defendant/Respondent who submitted that since **section 61** of the **Physical and Land Use Planning Act 2019**, provides that a challenge to the decision of the **Planning Authority** shall first lie with the relevant **Liaison Committee**, then the Jurisdiction of this Court has been invoked prematurely.

Further the 1st Defendant and 3rd Defendant submitted that this Court is not the right forum to hear and determine matters relating to **Environmental Impact Assessment (EIA)** licence as approved by the 3rd Defendant. That the correct and appropriate forum is the **National Environmental Tribunal (NET)** as provided by **section 129(1)** of the **Environmental Management and Coordination Act** which provides:-

(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

That since the Plaintiffs are persons aggrieved by the issue of approval licence or permit granted by 3rd Defendant to the 1st Defendant, then the

law provides a forum for such grievances.

The 3rd Respondent also took the above position and relied on the decision of the Court of Appeal in Kibos Distillers Ltd & 4 others Vs Benson Ambuti Atega & 3 others (2020) eKLR where the Court held:-

“.....In this matter the key dispute in the Petition before the trial Court was whether the three appellants were polluting the environment and whether the three appellants EIA licences were lawfully processed. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal or the NECC.”

This Court has looked at the prayers sought by the Plaintiffs herein. The Court has considered the prayers in the Plaint because a preliminary

Objection must stem or germinate from the pleadings filed by the parties and must be based on pure point of law with no facts to be ascertained. See the case of *Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004.*

The prayers sought in the Plaint are as follows:-

1) As against the 1st Defendant a permanent injunction to restrain it by itself or servants from constructing and proceeding with construction of the project commenced on Land Parcel LR. No. 12020/88 (owned by the 1st Defendant) or any manner changing the present agricultural low density occupation of the land.

2) As against the 2nd and 3rd Defendants, cancellation of all approval granted by the 2nd and 3rd Defendants to the 1st Defendant for the construction of the project.

Basically from the above prayers, the Plaintiffs are lamenting about

the change of user granted to the 1st Defendant and also the development permit or approvals granted by the 2nd Defendant and **Environmental Impact Assessment license** as issued by the 3rd Defendant to the 1st Defendant for the construction of the alleged housing units on the suit property.

The Defendants have alleged and submitted that this Court lacks Jurisdiction to deal with the matter, since there are existing statutes which clearly stipulate the procedure or mechanism for disputes resolution of the nature complained by the Plaintiffs, before the parties can move to Court.

The Court has seen the Certificate of lease for **LR. No. 12020/88**, owned by the 1st Defendant. The user specified thereon is **“Comprehensive Housing Development (Town Houses and shops).”** The said user was specified by the **Ministry of Lands and Housing**, which issued the said certificate of lease.

The Plaintiffs have alleged that the 2nd Defendant had cancelled the 1st Defendant’s development approvals or permit that had been issued in the year 2018. This is after the Plaintiffs had complained and lobbied against the said development. Then the 1st Defendant moved to the Constitution Division and filed **Petition No. 117 of 2019**, which challenged the cancellation of the said approval. However, the Court dismissed the said Petition on the basis that it had **no Jurisdiction** to deal with the said matter as the Petitioners had not exhausted the alternative remedy provided by the Physical Planning Act.

The Plaintiffs have further alleged and challenged the permission granted to the 1st Defendant by the 2nd Defendant vide a letter dated **28th February 2020**. The Plaintiffs averred that the said letter was not a proper approval and that the Plaintiffs who had earlier complained and caused the earlier cancellation of the approval were not involved in the second process where the approval vide the above letter was granted. The Plaintiffs are thus **aggrieved** by the **decision** of the **County Executive Committee Members** on planning.

As provided by **section 61** of the **Physical and Land Use Planning Act 2019**, there is a procedure for dispute resolution in instances where a party is aggrieved by the decision of the **County Executive Committee Members** concerning any development permission matters like in the instant case.

According to **section 61(3)** of the said Act, a challenge to the decision of the Planning Authority shall first lie with the relevant **Liaison Committee** and then the appeal shall lie with the Environment & Land Court.

The Plaintiffs herein failed to pursue an appeal before the **Liaison Committee** under the **Physical and Land Use Planning Act 2019**. The Plaintiffs then failed to exhaust the remedy provided by the statute. They invoked the Jurisdiction of this Court prematurely. Just like the 1st Defendant who had filed **Petition No. 117 of 2019**, before exhausting the alternative remedy provided by the statutes, the Court finds that the Plaintiffs herein have prematurely brought this suit to court. The Plaintiffs dispute should be resolved in accordance with the provisions of the Physical and Land Use Planning Act 2019. The Court will be persuaded by the decision made in *Petition No. 117 of 2019 KO Holding Ltd vs County Government of Kiambu & Another* where the Court held:-

“I find the Petitioners failure to have the matter referred to Liaison committee amount to casting aspersions to a public body which is yet to undertake its duty and as usual undermining its independence”

..... I therefore make a finding based on the provision of the Act herein above mention that the Court lacks Jurisdiction to proceed with the instant matter on account of ouster clause provided or in statute that prescribes alternative means of resolving the dispute.”

The Court will further rely on the case of *The Speaker of National Assembly vs Karume (1992) KLR 22*, where the Court of Appeal that:-

“Where there is a clear procedure for the redress of a particular grievances prescribed by the Constitution as an Act of Parliament, that procedure should be strictly followed. I find that given the subject matter of the Plaintiffs suit and the prayers sought, the Jurisdiction of this Court can only be appellate Jurisdiction.”

Further in the case of *Mutanga Tea & Coffee Company Ltd Vs Shikara Ltd & Another [2012]eKLR*, the Court held that:-

“..... Under Section 33(3) of the Physical Planning Act, the first stop for anyone who is aggrieved by the decision of the Defendant is the Liaison Committee to which an appeal is provided. The provisions dealing with appeal are Section 31, 25, 25(1) and (4). These provisions provide for procedure for progressing with appeals from the Liaison Committee to 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”

Therefore, this Court finds that the issues raised by the Plaintiffs herein ought to have been referred to the **County Liaison Committee** of Physical Planning.

Further the Plaintiffs have challenged the **Environmental Impact Assessment license** and/or **approval** granted to the 1st Defendant by the 3rd Defendant (NEMA).

The Court finds that **section 129(1) of Environmental Management and Coordination Act** provides that:-

(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder,

May within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

If the Plaintiffs were dissatisfied or aggrieved by the approval granted to the 1st Defendant by the 3rd Defendant, they ought to have appealed to the **National Environmental Tribunal (NET)** within **60 days**, in accordance with the above provisions of **section 129(1) of Environmental Management and Coordination Act**. Instead the Plaintiffs invoked the Jurisdiction of this Court prematurely without exhausting the alternative remedies of disputes resolutions provided for by the statute.

The relevant provisions of law herein have provided forums where such grievances as advanced by the Plaintiffs should first be channeled before coming to Court. The principles of exhaustion of Statutory provisions remedies ought to have been applied herein by the Plaintiffs.

This Court is bound by the decision of the Court of Appeal in **Kibos Distillers Ltd & 4 others Vs Benson Ambuti Adegwa & 3 others (2020) eKLR** (supra) where the Court held:-

“.....In this matter the key dispute in the petition before the trial Court was whether the three appellants were polluting the environment and whether the three appellants EIA licences were lawfully processed. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal on the NECC.”

Having carefully considered the available pleadings, the rival submissions herein, the cited authorities and the relevant provisions of the law, the Court finds that it lacks jurisdiction to deal with this matter as there are **relevant alternative disputes resolution mechanisms**, which were not employed by the Plaintiffs and therefore this suit was prematurely filed and the Court is divested of Jurisdiction. Without Jurisdiction, the Court's hands are tied and it has no option but to down its tools; as for any action taken without Jurisdiction shall be null and void.

Having now downed its tools, the Court finds that the entire suit herein ought not to stand. For the above reasons, the suit herein is **struck out entirely** with costs to the Respondents.

This suit having been struck out entirely, there would be no reason to deal with and determine the Application dated **15th September 2020**, as it is an interlocutory application and proceeding of the struck out suit.

For the avoidance of doubt, the **interim orders** in place are **hereby vacated**, since the suit has been struck out entirely.

It is so ordered.

Dated, signed and Delivered at Thika this 19th day of November, 2020.

L. GACHERU

JUDGE

19/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Wachira holding brief for Mr. Mutiso for the Plaintiffs/Applicants

Mr. Waiyaki together with Mr. Kimani Njane and Mr. Mulongo for the 1st Defendant/Respondent

M/s Wambui for the 2nd Defendant/Respondent

Mr. E. K. Gitonga for 3rd Defendant/Respondent

L. GACHERU

JUDGE

19/11/2020