



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CONSTITUTIONAL PETITION NO. 846 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ARTICLE 20,21,22,23(1&3)(ENFORCEMENT OF THE BILL OF RIGHTS)&40(PROTECTION OF RIGHT TO PROPERTY OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: VIOLATION OF RIGHTS AND FREEDOMS OF INDIVIDUALS AND MISUSE OF PUBLIC LAND AS ENSHRINED UNDER ARTICLE 40 &62 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE LAND ACT ,2012 AND THE LAND REGISTRATION ACT 2012

IN THE MATTER OF: COUNTY GOVERNMENT OF KIAMBU AND THE RIGHTS OF LAND OWNERS AND AFFECTED PERSONS ADJACENT TO PUBLIC PROPERTY & PUBLIC ROAD IN RUIRU, KIAMBU COUNTY.

BETWEEN

CHARLES NGIGI NDUNGU.....1ST PETITIONER

MUTHONI GITAU.....2ND PETITIONER

HODGE & EDGEWOOD LIMITED.....3RD PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

CHIEF OFFICER LAND, HOUSING &

PHYSICAL PLANNING KIAMBU COUNTY.....2ND RESPONDENT

HANNAH NJOKI.....3RD RESPONDENT

JAMES MUNYOROKU WAMATHAL.....4TH RESPONDENT

SAMUEL NJOROGE.....5TH RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING

COMPANY LIMITED.....6TH RESPONDENT

KENYA POWER AND LIGHTINING

COMPANY LIMITED.....7TH RESPONDENT

FOCUS.....8TH RESPONDENT

RULING

The matter for determination is the **Preliminary Objection** dated **30th January 2018**, by the 1st and 2nd Respondents on the grounds that the Court is devoid of Jurisdiction to hear and determine the Petitioner's application dated **7th November 2017**, as the complaints by the Petitioner and the complaints should be determined by the Liason Committee as provided for by **Section 10(2) (a) of the Physical Planning Act Cap 286, Laws of Kenya**.

On the **26th of April 2018**, the court directed that the Preliminary Objection be canvassed by way of written submissions.

In compliance with the above directions, the 1st and 2nd Respondents filed their written submissions on **25th May 2018** and urged the Court to uphold their **Preliminary Objection**.

The Objectors relied on various provisions of **Physical Planning Act, Cap 286 Laws of Kenya**, specifically **Sections 10(2)(a)(e)** and **15(1)(2)4** of the said Act.

It was submitted that complaints made against the Local Authority in exercise of its function or duty shall first be made to the relevant Liason Committee established under **Section 8** of the **Physical Planning Act**. A decision by the Liason Committee is appealable to the National Liason Committee, a body made up of 19 members drawn from different professionals. Such decision has a further right of appeal to the High Court.

The Objectors too relied on various decided cases among them the case of **Speaker of National Assembly...Vs...Njenga Karume (1992)KLR 22**.

It was the objectors' view that since the Statute has provided for alternative dispute resolution mechanism, the avenue should be exhausted before a party approaches the court seeking reliefs that are already available to them had they followed the laid down procedure.

The 7th Respondent too filed its submissions on **14th June 2018**, and urged the Court to uphold the **Preliminary Objection**. The 7th Respondent relied on the case of **Wainaina Kinyanjui & 2 Others...Vs...Andrew Nganga (2013) eKLR**, where the Court held that:-

“Section 30(1) of the Physical Planning Act provides that no person shall carry out development within the area of local authority without a development permission granted by the local authority. Development is defined under Section 3 of the Act to include the making of material change in the use or density of any building or land”.

The Petitioners on their part filed their submissions on **19th June 2018**, and urged the Court to dismiss the entire **Preliminary Objection**.

The Petitioners submitted that the Physical Planning Act does not apply as what is complained about is an invasion of public land under the care of 1st Respondent being **Ruiru/Kiu Block 2/862**, but that has nothing to do with Physical Planning Act.

It was therefore their submissions that this matter falls under the jurisdiction of **Environment & Land Court** and this Court should hold and find that it has jurisdiction to adjudicate the issues raised in the Petition.

The Court has carefully considered the entire **Preliminary Objection** as raised by 1st and 2nd Respondents and the respective rival submissions and the issue for determination is whether the court has jurisdiction to entertain the matter herein.

The Petitioners have submitted that their complaints have nothing to do with the Physical Planning Act, but invasion of public land. However, the 1st, 2nd & 7th Respondents have submitted that the issues raised by the Petitioners ought to have been referred to the relevant Liason Committees as provided by the **Physical Planning Act, Cap 286 Laws of Kenya**.

Under **Section 5** of the **Physical Planning Act**, one of the functions of the Director is to advise the Commissioner of Lands on all matters concerning alienation of land under the Government Land Act and the trust lands and advise on the most appropriate use of land.

Section 10(2)(a) of the **Physical Planning Act, Cap 286** provides for the functions of other liaison Committees and states that it shall be:-

“To inquire into and determine complaints made against the Director in the exercise of its functions under this Act or local authorities in exercise of their functions under this Act”.

The Petitioners having been aggrieved with the manner in which the Director had chosen to advise on the use of the land, the appropriate procedure would have been to first seek redress from the Liason Committee before appealing to the National Liason Committee and eventually having the matter appealed before the High Court if one is still aggrieved.

In the case of *Speaker of National Assembly...Vs...Hon. James Njenga Karume (2008) 1 KLR 425*, 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”.

Jurisdiction is everything and without it, the Court has no option but to down its tools. See the case of *Owners of Motor Vessel ‘Lilian S’... Vs...Caltex Oil (Kenya) LTD (1989) 1 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 at the moment it holds the opinion that it is without Jurisdiction”.

This Court holds the respective opinion that the Petitioners failed to follow the laid down procedure as stipulated in the Physical Planning Act and therefore the Court has no Jurisdiction to determine the Petition and the application before it.

The upshot of the foregoing is that the ***Preliminary Objection*** herein ***has merit and is upheld***. In the circumstances, I hold that ***this Court has no Jurisdiction to entertain this matter and consequently proceeds to strike out the whole Petition and other consequential proceedings with costs to the 1st, 2nd and 7th Respondents.***

It is so ordered.

Dated, Signed and Delivered at Thika this 7th day of March 2019.

L. GACHERU

JUDGE

7/3/2019

In the presence of

Mr. Kinyanjui holding holding for Mr. Ranja for 1st and 2nd Respondents

No appearance for other parties

No appearance for Petitioners

Lucy - Court Assistant

L. GACHERU

JUDGE

7/3/2019