



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.9 OF 2019

JAMES KAMAU.....1ST PLAINTIFF/APPLICANT

LUCY MUGO.....2ND PLAINTIFF/APPLICANT

JOSPHAT IRUNGU.....3RD PLAINTIFF/APPLICANT

WILLIAM MAINA.....4TH PLAINTIFF/APPLICANT

KINYUA KIHOTO.....5TH PLAINTIFF/APPLICANT

JANE MWANGI.....6TH PLAINTIFF/APPLICANT

JOHN GACHERU.....7TH PLAINTIFF/APPLICANT

ALBERT THAKA.....8TH PLAINTIFF/APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF KIAMBU.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs herein filed a claim against the Defendant, *County Government of Kiambu* and sought for various orders among them an order to compel the Defendant to issue the Plaintiffs with relevant permits and approvals to operate business shops on *Kahawa Sukari, Plots No,3113, 297, 3114, 1194, 3096, 295, 3132 and LR.No.3/536*.

Simultaneously, the Plaintiffs filed a *Notice of Motion* application dated *15th January 2019*, wherein they sought for injunctive orders against the Defendant seeking orders that the said Defendant/Respondent be restrained from encroaching the Plaintiffs' structures which are on the specified plots at *Kahawa Sukari* being *Plots No,3113, 297, 3114, 1194, 3096, 295, 3132 and LR.No.3/536*.

The Respondent herein in response to the said *Notice of Motion*

application filed a *Notice of Preliminary Objection* and averred that;-

- 1) *The court has jurisdiction to hear and determine this mater.*
- 2) *The Physical Planning Act No.5 of 1996 clearly outlines the procedure to be followed when dealing with the issues before the court.*
- 3) *That the Physical Planning Act under Section 7 establishes the Physical Planning Liaison Committee.*
- 4) *That the Physical Planning Liaison Committee is empowered under Section 10 of the Physical Planning Act to hear appeals lodged by persons aggrieved by decisions made by the Director or County Government.*
- 5) *That any person who is aggrieved by a decision made by the Director shall appeal the decision to the Liaison Committee as provided under Section 13 of the Physical Planning Act.*

6) That under Section 13 of the Physical Planning Act Cap 286, a challenge to the decision of the Director of Physical Planning concerning any Physical Planning Development Plan or matters connected to such approvals shall first lie with the relevant Liaison Committee.

7) That under Section 15 of the Physical Planning Act, Cap 287, an appeal from the Liaison Committee, shall lie with the National Liaison Committee with a right to appeal lying with the High Court.

8) That the Applicant herein had failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute.

9) That the instant suit is therefore premature, frivolous and an abuse of the court process as this Honourable Court's jurisdiction has been limited by statute.

Since the Respondent challenged jurisdiction of this court, the court directed that the *Preliminary Objection* to be dealt with at first. The same was canvassed by way of written submissions which the parties did file as directed.

The Court has considered the pleadings herein and the instant *Notice of Preliminary Objection*. What the court has to consider first is whether what has been raised meets the description of a *Preliminary Objection* as stated in the *Mukisa Biscuits Manufacturing Co. Ltd..Vs...West End Distributors Limited (1969) EA. 696*, where the Court held:-

“So far as I am aware, a preliminary objection consists 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.”

The Defendant/Objector has challenged the jurisdiction of this Court. Jurisdiction is a point of law and if the court is to find and hold that it has no jurisdiction, then it will have to down its tools and thus bring the matter to an end at the preliminary stage. 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 preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Therefore the Court finds that the *Notice of Preliminary Objection* herein as raised by the Defendant/Objector meets the description of what a *Preliminary Objection* is as per the *Mukisa Biscuits Case (supra)*.

The next question is whether the *Preliminary Objection* is merited.

The Defendant/Objection averred that the court has no jurisdiction to hear the matter since the said matter ought to have been exhaustively dealt with by the bodies established by the *Physical Planning Act No.6 of 1996*. It was specifically averred that *Section 7* of the said *Physical Planning Act* establishes a *Physical Planning Liaison Committee* empowered under *Section 10* of the said Act to hear Appeals lodged by any person aggrieved by decisions made by the Director of the County Government. That the said Appeal shall be filed before the Liaison Committees provided by *Section 13* of *Physical Planning Act* and Appeal from the *Liaison Committee* shall lie with the *National Liaison Committee* with a right to appeal to the *High Court* or *Environment & Land Court*.

It was the Defendant/Objector assertion that the Plaintiffs failed to follow the above channel before coming to court. However, the Plaintiffs are not challenging the decision of the Director but the import of the *Planning Enforcement Notices* which were issued to them on *18th December 2018*, to remove structures on their suit plots and return the ground to original state. The Plaintiffs have not made any application to the Director of Physical Planning and adverse decision made against them to warrant them appeal to the *Physical Liaison Committee*. The Plaintiffs are challenging the decision of the *County Government of Kiambu* to direct them to remove the structures on the suit plots.

The court finds that as provided by *Section 13* of the *Environment & Land Court Act*, the court has original jurisdiction on cases dealing with legality and administrative decision made by the *County Government of Kiambu*. The court therefore finds that it has jurisdiction to hear this matter and the *Notice of Preliminary Objection* is found *not* to have any merit and is dismissed entirely with costs to the Plaintiffs.

Further as provided by *Section 3A* of the *Civil Procedure Act* and *Rule 32* of the *Environment & Land Court Practice Directions*, the Court finds that it has inherent powers to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process. Again the court has a duty to expedite disposal of cases before it.

Further under *Sections 1A & 1B* of the said *Civil Procedure Act*, the court has a duty to facilitate adherence of overriding objective of the said Act which is to facilitate the *just, expeditious and proportionate* determination of matters before the court. This Court finds that it has a duty to facilitate expeditious disposal of matters before it. Such expeditious disposal can be done by disposing off the interlocutory applications and allowing parties to deal with the main suit.

For the above reasons, the Court will invoke the provisions of *Rule 32* of the *Environment & Land Court Practice Directions* and direct that *status quo* herein be maintained and the *status quo* is that the Defendant is restrained from encroaching, interfering with or demolishing structures built on *Kahawa Sukari, Plots No,3113, 297, 3114, 1194, 3096, 295, 3132 and LR.No.3/536* pending the hearing and determination of this suit.

The above *status quo* order compromises the above *Notice of Motion* application dated *15th January 2019*.

Further, the Plaintiffs to take out summons within a period of *14 days* from the date hereof and serve upon the Defendant. The Defendant has 14 days after service to file its Defence and Plaintiffs have 7 days to Reply to the said Defence.

Thereafter the close of pleadings, the parties have 30 days to comply with Order 11 of the CPR and a date to be taken for Pre-trial Directions before the Deputy Registrar.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of June 2019.

L. GACHERU

JUDGE

8/6/2019

In the presence of

M/S Chege for the Plaintiffs/Applicants

No appearance for Defendant

Lucy - Court Assistance

L. GACHERU

JUDGE

18/6/2019