



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CIVIL SUIT NO. 473 OF 2017**

**RAJNI PATEL & 10 OTHERS.....PLAINTIFFS**

**=VERSUS=**

**IKONO INVESTMENTS LIMITED & 2 OTHERS.....DEFENDANTS**

**RULING**

1. The Plaintiffs filed this suit against the Defendants seeking the following reliefs:-

- 1. Pending the hearing and determination of this application inter partes, a temporary Order of injunction do issue against the 1<sup>st</sup> Defendant, its servants and/or agents from carrying out any further construction or developments of any nature or commercial activity on LR No. Block 91/47 Gigiri Estate, Nairobi.*
- 2. Pending the hearing and determination of this suit a temporary injunction do issue restraining the 1<sup>st</sup> Defendant, whether by itself, through its servants and/or agents or any person acting under its direction, permission and/or authority from carrying out any construction or developments of any nature or commercial activity on LR No. Block 91/47 Gigiri Estate, Nairobi.*
- 3. A mandatory injunction do issue to compel the 1<sup>st</sup> defendant, by its servants and /or agents to demolish all illegal construction and developments on LR No. Block 91/47 Gigiri Estate, Nairobi.*
- 4. A declaration by this Honourable Court under Article 70 of the Constitution cancelling the licenses, approvals and or permits issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the 1<sup>st</sup> Respondent in respect of the development of LR No. Block 91/47 Gigiri Estate, Nairobi and directing the 1<sup>st</sup> Respondent to discontinue the project altogether and take restorative steps in respect of the plot and the environment.*
- 5. Orders that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to supervise the execution and performance of the orders stipulated.*
- 6. Costs of this suit.*
- 7. Any other relief that this Honourable Court may deem fit to grant.*

2. The Plaintiffs contemporaneously filed a Notice of Motion in which they sought the following orders:-

- 1. Spent*
- 2. Spent*
- 3. Pending the hearing and determination of this suit a temporary injunction do issue restraining the 1<sup>st</sup> Defendant, whether by itself, through its servants and/or agents or any person acting under its direction, permission and/or authority from carrying out any construction or developments of any nature or commercial activity on LR No. Block 91/47 Gigiri Estate, Nairobi.*
- 4. A mandatory injunction do issue to compel the 1<sup>st</sup> defendant, by its servants and /or agents to demolish all illegal construction and developments on LR No. Block 91/47 Gigiri Estate, Nairobi.*
- 5. That an order by the Honourable Court under Article 70 of the Construction cancelling the licences, approvals and or permits*

issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to the 1<sup>st</sup> Respondent in respect of the development of LR No. Block 91/47 Gigiri Estate, Nairobi and directing the 1<sup>st</sup> Respondent to discontinue the project altogether and take restorative steps in respect of the plot and the environment.

6. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to supervise the execution and performance of the orders stipulated.

7. That the costs of this application be provided for.

3. Before the Notice of Motion filed by the Plaintiffs could be heard, the 2<sup>nd</sup> Defendant raised a preliminary objection on the following grounds.

1. *This suit is incompetent, bad in law, ill-conceived and an abuse of the court process.*

2. *This Court lacks jurisdiction since the Plaintiffs have commenced this suit without exhausting the relevant statutory dispute resolution mechanisms.*

3. *That this suit is premature and not ready for litigation in Court at this juncture.*

4. *That this suit offends and contravenes the mandatory provisions of Section 13 of the Physical Planning Act.*

5. *That this suit flies in the face of the Constitutional principle of alternative dispute resolution and unnecessarily burdens this court hence wasting precious judicious time.*

4. The parties were directed to file written submission in respect of the preliminary objection. The 2<sup>nd</sup> Defendant filed its submissions on 20<sup>th</sup> March 2019. Those who had not filed their submission were given seven days to do so from 2<sup>nd</sup> October 2019. As at the time of writing this ruling, no other party had filed their submissions and if any were filed, then they are not in the file.

5. I have considered the submissions filed by the 2<sup>nd</sup> Defendant in light of the Preliminary Objection. The Plaintiffs filed this suit and application because the 2<sup>nd</sup> Defendant had allowed change of user in respect of **LR No. 91/47 Gigiri** in Nairobi. **LR No.91/47** is owned by the 1<sup>st</sup> Defendant which applied for change of user from residential to commercial. The 1<sup>st</sup> Defendant wanted to put up a hotel. The application by the 1<sup>st</sup> Defendant was allowed under the then Physical Planning Act (Now repealed).

6. The 1<sup>st</sup> Defendant had also obtained an Environmental Impact Assessment (EIA) Licence from the 3<sup>rd</sup> Defendant for the project. The Plaintiffs filed this suit challenging the change of user and grant of the EIA Licence. The 2<sup>nd</sup> Defendant now contends that this court has no jurisdiction to hear this suit because the Plaintiffs ought to have channelled their grievances to the Liaison Committee under the Physical Planning Act (Now repealed). The 2<sup>nd</sup> Defendant argues that this court should only have been approached after the Plaintiffs had exhausted the procedure under the Physical Planning Act (Now repealed).

7. In the case of owners of Motor Vessels “Lilians s” Vs Caltex Oil (Kenya) Ltd (1989) 1 KLR, Nyarangi JA stated as follows:-

*“ 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.*

8. In the instant case, the Plaintiffs are contending that the change of user was made without them being consulted. If this be the case, then under section 13(1) of the Physical Planning Act (Now repealed) they should have within 60 days of the decision by the Director of Physical Planning filed an appeal to the Liaison Committee as provided and if they would not have been satisfied with the decision appealed to the National Liaison Committee as per section 14(1) of the Physical Planning Act (Now repealed).

9. The Plaintiffs did not exhaust the procedure under the Physical planning Act (Now repealed). In Speaker of the National Assembly Vs Hon James Njenga Karume (2008) 1 KLR425, the Court of Appeal stated as follows:-

*“ 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 strictly be followed”.*

10. The Plaintiffs did not follow the procedure prescribed by the Physical Planning Act (Now repealed). They instead came directly to this court. The Plaintiffs also had the option of appealing to the National Environmental Tribunal against NEMA’S grant of the EIA Licence. When the Plaintiffs filed this suit, they did not disclose the fact that Gigiri Residents Associations through other individuals had unsuccessfully tried to appeal against the decision of NEMA vide Environmental Tribunal case no. NET 212 of 2017 which involved the same subject matter.

11. It is therefore clear that this court lacks jurisdiction to entertain this suit. In fact these proceedings are an abuse of the process of the Court in that after failing to do what was expected of them, the Plaintiffs have come to this court seeking to achieve what they should have achieved through invoking the provisions of the Physical Planning Act (Now repealed) and the Environmental Management and Co-ordination Act No.8 of 1999. I therefore uphold the preliminary objection and proceed to strike out the Plaintiffs’ suit with costs to the Defendants.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 11<sup>th</sup> day of December, 2019**

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Kahora for Mr Kimathi for Plaintiffs

Mr Were for Mr Kithi for 2<sup>nd</sup> Defendant and

Mr Marete for 1<sup>st</sup> Defendant

Court Assistant : Hilda

**E.O. OBAGA**

**JUDGE**