



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 675 OF 2017

WALMART LIMITED PLAINTIFF

VERSUS

IBRAHIM MOHAMUD ALI T/A

SYRACUSE WILDLIFE HOUSE

AND RESEARCH CENTRE 1ST DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY 2ND DEFENDANT

RULING

What is before Court is the 1st Defendant's Preliminary Objection dated 29th June, 2017 against the Plaintiff's Notice of Motion dated 27th April, 2017 and the entire suit on the following grounds which in summary is that:

- The Plaintiff's claim against the 1st Defendant lacks merit, is bad in law, is fatally defective and is a clear abuse of the judicial process as the 1st Defendant is not the legal or beneficial owner of the property Kajiado/Olekasasi/982.
- The 1st Defendant has no legal or beneficial interest/ownership in the property and its neither undertaking construction or applied for approval for construction on the property Kajiado/Olekasasi/982 nor has it taken out any approvals or building plans.
- The application and the entire suit does not raise any cause of action within law as against the 1st Defendant and therefore the suit lacks substratum and should be dismissed as against the 1st Defendant
- The Honourable Court should strike out the name of the 1st Defendant from the Application and the entire suit.

On 26th September, 2017, Mr. Otieno who was Counsel for the 1st Defendant submitted that they raised two points of law in the Preliminary Objection. This relates to the competence of the 1st Defendant as a party to this suit. He stated that the Court is bereft of jurisdiction of the 1st instance to hear and determine the suit herein. The suit is premature before court and therefore misconceived. Further that what is relevant is the contention of the issue of approvals for development of the suit properties. The impugned development is purportedly said to be for want of the requisite approvals.

He submitted that the approvals are the mandate and prerogative of the 2nd Defendant and Physical Planning Department of the County Government of Kajiado. Unless the Court is satisfied that recourse has been made to those bodies and same conclusively exhausted, the suit should not be before this court. He referred the Court to the **Vessels** Case and the case **Speaker of the National Assembly vs. Njenga Karume**. He averred that the 2nd Defendant's replying affidavit to the application stated that they are in constant communication with both the Plaintiff and the 1st Defendant to resolve the issue before court. Further, that 2nd Defendant is properly and regularly beseeched of the matter. He referred to paragraph 9 of the replying affidavit where the 2nd Defendant intimated that there are concerted efforts at mediation and arbitration in accordance with Article 159 of the Constitution.

He reiterated that the Plaintiff has made a complaint at the National Complaints Committee of National Environmental Management Authority [NEMA] which decision is yet to be provided. He said the decision should precede suit before court. He referred to paragraph 11 of the Plaintiff's supporting affidavit where the Plaintiff stated that they requested for a report, which was not made available. He wondered why the Plaintiff could not wait for the report. He intimated that the last time a follow up was made on the report on 7th September, 2015, and stated that the suit and application before court is premature as the dispute can be handled by the relevant governmental bodies and application should be struck out.

Mr. Kinyanjui who was Counsel for the Plaintiff submitted that the suit is not premature as Plaintiff has adhered to the due process established by law. It is the adumance of the 2nd Defendant that has put the Plaintiff in the current position. Further that the 2nd Defendant's replying affidavit dated 28th June, 2017 concurs with the Plaintiff that indeed a structure being put up by the 1st Defendant should not be constructed. At paragraph 11 of the 2nd Defendant's replying affidavit, he states that 1st Defendant should suspend his project. Counsel submitted that this is what the Plaintiff seeks in this current suit, which is seeking an injunctive order to stop the construction and development of the suit property. From the documents attached by the 1st Defendant, it is evident that due process has been adhered to, complaints made and nothing has been forthcoming. From the documents attached to the Plaintiff, it shows follow up commenced in 2014 and it would defeat justice if the Plaintiff's suit is struck out as the report is awaited. He insists the Court is properly seized of the matter, has jurisdiction to entertain it and issue binding orders. He said the Preliminary Objection (P.O) should be dismissed with costs.

Mr. Otieno for the 1st Defendant reiterated that if the Plaintiff wanted to disregard NEMA, it ought to have done so in the first instance and lodge the application. He insisted the Plaintiff was engaging in forum shopping and the 2nd Defendant has asked the Court to halt the current proceedings pending the outcome of the proceedings before NEMA's National Complaints Committee.

Analysis and Determination

Upon perusal of the PO, the pleadings and submissions from the Counsels, the two issues for determination are:

- Does the application and the entire suit raise any cause of action within law as against the 1st Defendant
- Whether the application and suit should be struck out as Plaintiff has not exhausted the mechanism under the NEMA National Complaints Committee.

On the issue of the competency of the 1st Defendant in the suit, I note the Plaintiff amended the Plaintiff on 4th September, 2017 which was filed on 5th September, 2017 to include the proprietor of the suit land.

Section 19(1) of the **Environment and Land Court Act** further stipulates that ***'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence.'***

Further article 159 (2) (d) of the Constitution states that '*in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.*'

In relying on the facts above and the legal provisions, I find that the 1st Defendant's competency has been overtaken by events, since the Plaintiff was amended on 4th September, 2017 and filed on 5th September, 2017 and he is properly enjoined in the suit. This limb of the PO thus fails.

On the question of jurisdiction of the court, Section 13 of the **Environment and Land Court Act** provides as follows:

' (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

These provisions are couched in mandatory terms and give exclusive jurisdiction to the Environment and Land Court to handle all disputes relating to land and environment. The Plaintiff has raised pertinent issues in the Plaintiff and I note the NEMA National Complaint Mechanism has not released their report from 2014 to date. In the interest of justice, I would hesitate to strike out the Plaintiff, which seeks injunctive orders, on the basis of a pending report as this would defeat the ends of justice.

In the circumstances, I dismiss the Preliminary Objection in its entirety.

Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 25th day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present :

Cc – Mpoye

Kinyanjui holding brief for Kingori for the plaintiff

N/A for Defendants