



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC. CASE NO. 09 OF 2015**

CHARLES ONGADI NYAMBUGA.....1<sup>ST</sup> PLAINTIFF  
ERIK DILLERUD.....2<sup>ND</sup> PLAINTIFF  
ALICE OYUGI MAGANYA.....3<sup>RD</sup> PLAINTIFF  
OLIVER SOREN OTIENO.....4<sup>TH</sup> PLAINTIFF  
PHILIP ODERO ONYANGO.....5<sup>TH</sup> PLAINTIFF  
THOMAS GODFERY MACHENERI.....6<sup>TH</sup> PLAINTIFF  
EMMA ADHIAMBO OTIENO.....7<sup>TH</sup> PLAINTIFF  
LOICE ASEWE OCHANDA.....8<sup>TH</sup> PLAINTIFF  
PHELIX AGUREY OSONGO.....9<sup>TH</sup> PLAINTIFF

**VERSUS**

CALEB ODHIAMBO OGUYA.....1<sup>ST</sup> DEFENDANT  
THE DIRECTOR CITY PLANNING,  
COUNTY GOVERNMENT OF KISUMU.....2<sup>ND</sup> DEFENDANT  
CITY MANAGER,  
COUNTY GOVERNMENT OF KISUMU.....3<sup>RD</sup> DEFENDANT

**RULING**

1. Caleb Odhiambo Oguya, the 1<sup>st</sup> Defendant, filed the notice of Preliminary Objection dated 25<sup>th</sup> July 2017 seeking for striking out of suit commenced through the plaint dated 19<sup>th</sup> January 2015 with costs on the following two grounds;

1. “This court lacks the statutory jurisdiction to hear and determine this case. The dispute herein is a preserve of the National Environment Tribunal established under Section 125 of the Environment Management and Co-ordination Act (Cap 387) laws of Kenya.

2. This case violates Section 6 of the Civil Procedure Act as it is a duplicate of and subjudice the National Environment Tribunal Appeal Case No. 151 of 2015 which involves the same parties where the matter in issue is also directly and substantially in issue herein.”

2. The Preliminary Objection came up for hearing on the 22<sup>nd</sup> January 2018 when directions on filing and exchanging written submissions were given. The learned counsel for the 1<sup>st</sup> Defendant and the Plaintiffs filed their written submissions dated 16<sup>th</sup> February 2018 and 14<sup>th</sup> March 2018 respectively.

3. The following are the issues for determination by the court;

- a) **Whether the court has jurisdiction to determine this dispute in view of the existence of the National Environment Tribunal.**
- b) **Whether there exist another suit between the same parties and over the same subject matter in the National Environment Tribunal, and if so, which of the suits was filed before the other.**
- c) **Who pays the costs in the preliminary objection.**

4. The Court has carefully considered the grounds on the notice of preliminary objection, written submissions by both counsel, the pleadings filed and come to the following determinations;

a) That from the pleadings in the plaint dated 19<sup>th</sup> January 2015, the Plaintiff's takes issue with the development being carried out by the 1<sup>st</sup> Defendant on Land Parcels 13432/10 and 11, Kisumu Municipality for the following reasons;

- **That they were not consulted before the approval yet they own properties in the neighborhood.**
- **That the development's approval was illegally and un-procedurally done as the project does not conform to the land use zoning of the area.**
- **That no change of user was obtained to allow such a development on the plots.**
- **That no Environmental Impact Assessment was carried out for the project.**

b) That the Defendants have opposed the Plaintiffs' suit through their filed statements of defence, averring that the development complained off is duly approved and is carried out in a zone for such developments.

c) That this court has exclusive original and appellate jurisdiction to hear and determine all disputes on the environment and the use and occupation of, and title to land in accordance with **Article 162 (2) (b) of the Constitution** and **Section 13 of the Environment and Land Court Act No. 19 of 2011**. The court has carefully considered the various superior courts decisions cited by both counsel in their written submissions and is in agreement that if this suit is only about a challenge of licence issued under **Section 67 of the Environmental Management & Coordination Act**, then such a dispute would in the first instance be with the National Environmental Tribunal under Section 129 of the said Act. That however, by the time this suit was filed on 20<sup>th</sup> January 2015, the Plaintiffs' position was as per paragraph 9 of their plaint that "...there was no Environmental Impact Assessment done..... and if .....National Environmental Management Authority (NEMA) license was issued, the same was irregularly obtained...." That the court has taken note of the copy of the Environment Impact Assessment License attached to the 1<sup>st</sup> Defendant replying affidavit sworn on the 21<sup>st</sup> April 2015. The license is dated 13<sup>th</sup> April 2015 and hence not in existence by the time this suit was filed on 20<sup>th</sup> January 2015.

d) That the suit raises other issues for determination beyond the Environment Impact Assessment licence. Those issues includes whether or not the area where the project is situated is zoned for such a development; whether the development plans were procedurally processed and whether the 1<sup>st</sup> Defendant obtained a change of user to allow such a project on the plots. That those issues are beyond the mandate of the National Environment Tribunal. That in such a scenario, the court agrees with the finding in **Taib Investment Limited vs Falum Salim Said & 5 Others Mombasa ELC No. 37 of 2016** where the court held that;

***"The tribunal established under Section 129 of the EMCA cannot entertain a dispute as to whether the County Government or the Director of Physical Planning approved the 1<sup>st</sup> to the 4<sup>th</sup> Defendants plan. Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of Article 162 (2) (b) of the Constitution, that can deal with all those issues. That it follows that this court has the jurisdiction to hear and determine the issues in this suit."***

e) That the National Environment Tribunal Appeal Case No. 151 of 2015, as submitted by the Counsel for the plaintiffs, was filed after the license of 13<sup>th</sup> April 2015 was issued. The appeal before the Tribunal seeks for the cancellation of the license which is not a prayer in this suit. That National Environmental Management Authority (NEMA) are not party in the tribunal Appeal. That the Plaintiffs Counsel's submissions on the date of filing of the Tribunal appeal, prayer thereon, and the NEMA being a party has not been disputed by the 1<sup>st</sup> Defendant. That accordingly the provision of **Section 6 of the Civil Procedure Act Chapter 21 of Laws of Kenya** does not make this suit subjudice as it was filed months before the license of 13<sup>th</sup> April 2015, which is the subject matter of the Tribunal appeal filed thereafter, was issued.

f) That the parties in this suit could do justice for themselves and the court by ensuring compliance with **Order 11 of Civil Procedure Rules** as proposed in the Court's ruling of 18<sup>th</sup> May 2016. That way, the matter will proceed to hearing without undue delay and determined on merit.

5. That following from the foregoing, the court finds no merit in the 1<sup>st</sup> Defendant's Preliminary Objection to the Plaintiffs' suit. The Preliminary Objection is dismissed with costs to the Plaintiffs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>th</sup> DAY OF September 2018**

**In the presence of:**

Plaintiffs Absent

Defendants Absent

Counsel Mr. Odeny for 1<sup>st</sup> Defendant. Mr. Anyl for Rodi for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**