



**Kibira & 3 others v Njorogre & 3 others; Garden Ridgeways Residents Association & another (Interested Parties) (Environment & Land Case E137 of 2023) [2024] KEELC 381 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 381 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E137 OF 2023**

**J OMANGE, J  
JANUARY 25, 2024**

**BETWEEN**

**CHARLES MUTETHIA KIBIRA ..... 1<sup>ST</sup> PLAINTIFF  
ALLAN G. N. KAMAU ..... 2<sup>ND</sup> PLAINTIFF  
DANIEL WAIGANJO MOKORA ..... 3<sup>RD</sup> PLAINTIFF  
HUMPHREY KABURU MICHAEL ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**DAVID NDUNGU NJOROGRE ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH GITHARA NJOROGRE ..... 2<sup>ND</sup> DEFENDANT  
NAIROBI CITY COUNTY GOVERNMENT ..... 3<sup>RD</sup> DEFENDANT  
AUTHORITY ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**GARDEN RIDGEWAYS RESIDENTS ASSOCIATION ..... INTERESTED PARTY  
GARDEN RIDGEWAYS RESIDENTS ASSOCIATION ..... INTERESTED PARTY**

**RULING**

1. The Notice of Motion application dated 6<sup>th</sup> April 2023 seeks the following injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:-
  - a. That pending hearing and determination of this application inter-partes, this Honourable Court be pleased to issue a temporary injunction to restrain the 1 and 2nd Defendants/ Respondents by themselves, agents and servants, employees, tenants or any person acting on



their behalf from continuing with the illegal erection and construction of the said unapproved and semi-permanent structures on their said land parcel LR No. 15003/88 and LR. No, 15003/90 situate in Nairobi.

- b. That pending hearing and determination of this application inter-partes, this Honourable Court be pleased to issue a temporary injunction to restrain the 1 and 2nd Defendants by themselves, agents and servants, employees, tenants and/or otherwise to stop forthwith carrying on of any business, trade, occupation which is unlicensed and which poses adverse health concerns to the Plaintiffs herein.
  - c. That pending hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction to restrain the 1s and 2nd Defendants by themselves, agents and servants, employees, tenants and/or otherwise to stop forthwith carrying on of any business, trade, occupation which is unlicensed.
  - d. That this Honourable Court be pleased to issue order directed at the 4<sup>th</sup> Defendant requiring it to discharge its statutory obligations by stopping forthwith the activities of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, agents and servants, employees, tenants and/or otherwise which are the cause of noise pollution in order to ensure that the Plaintiffs enjoy a noise-free environment thereto pending hearing and determination of this suit.
2. The application is supported by the affidavit of Charles Muthethia Kibira. The gist of the application is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have converted the use of their land from residential to commercial and have constructed temporary structures on the above mentioned parcels of land without the approvals of the 3<sup>rd</sup> and 4<sup>th</sup> defendant which structures have interfered with Applicants right to a clean, quiet and peaceful environment as neighbours to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Applicants state that they lodged a complaint through the 1<sup>st</sup> interested party to the 3<sup>rd</sup> defendant who indicated that it would demolish the said structures but has failed to do so to the detriment of the Applicants, hence the suit.
  3. The Applicant in their submissions relied on provisions of order 40 rule 1 of the civil procedure rules and the case of *Giella v Cassman Brown* and stated that they had met all the three requirements for grant of temporary injunctions as stipulated. It was submitted that the Applicants have an arguable case based on the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had constructed the structures without the necessary approvals from relevant bodies and that the injunctive orders sought were warranted to have the suit determined on merit without interference of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. They also relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014]* eKLR to demonstrate that irreparable loss will be occasioned to them.
  4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in response filed a replying affidavit dated 16<sup>th</sup> August 2023 sworn by the 1<sup>st</sup> respondent in which he deponed that the application was defective as the allegations were misconceived. He stated that the suit property was rightfully registered to him and the 2<sup>nd</sup> respondent and as such they had proprietary rights over the same. He denied that the suit property had been commercialized and insisted that the they lived in the suit property with their families making it a residential area.
  5. He further deponed that the application was premature before this court as the physical planning Act no 13 of 2019 provided for an alternative dispute resolution channel that the Applicants had not exhausted.
  6. The 3<sup>rd</sup> Respondent filed a notice of preliminary objection seeking that the application and entire suit be struck out with costs. The grounds raised in the Preliminary objection are that;



- i. The court lacks the jurisdiction to preside over and determine the suit pursuant to the mandatory provisions of sections 31, 32, 33 and 129 of the Environment Management and Coordination Act cap 387 as well as Provisions of sections 73, 78,80,84 of the *physical and Land use planning Act* No 13 of 2019 as to the exhaustion of alternative dispute resolution mechanisms.
  - ii. That the suit herein should be heard and determined by the established statutory established tribunals and committees as a matter of 1<sup>st</sup> instance.
7. The Applicants responded to the preliminary objection and submitted on the validity of the grounds raised. The applicant stated that the orders being sought for were injunctive in nature and this court is rightfully vested with jurisdiction to entertain the application derived from section 13(1) of the *Environment and Land Court Act* and article 162 of *the constitution* and that the issue in question is not captured as one that a tribunal under the Environmental Management and Coordination Act (EMCA) can adjudicate on. They relied on the court of appeal decision in Joshua Sembei Mutua v Attorney General & 2 Others and the case of West Kenya Sugar Company limited v Busia Sugar Industries Ltd & 2 others [2017] Eklr  
  
Lastly, they submitted that this court has the power to by pass the doctrine of exhaustion where there is no sufficient dispute resolution mechanism towards a multiplicity of issues as raised by the Applicants.
8. The court gave directions that the Preliminary Objection and the application were to be canvassed jointly. The following are the issues for determination before this court.
  - i. Whether the court has jurisdiction to preside over the suit.
  - ii. Whether the application for injunction is merited.
9. Jurisdiction is a courts power to decide a case or issue a decree. The Environment and Land Court in Kenya is created by *the Constitution* of Kenya under Article 162 2(b). The Court which has the same status as the High Court is vested with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as “a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes”.
10. Section 13(2) of the Environment and *Land Act* outlines the jurisdiction of the court which includes hearing and determining 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;
  - e. any other dispute relating to environment and land
11. Subsection 3 of the *Environment and Land Court Act* states “Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*”.



12. The 3<sup>rd</sup> Respondent in the Notice of preliminary objection quotes the provisions of sections 31,32,33 and 129 of the Environment Management and Coordination Act as well as sections 73,78, 80 and 84 *Physical and Land Use Planning Act* as ousting the jurisdiction of this court. It is the contention of the 3<sup>rd</sup> Respondent that the Plaintiffs have not exhausted all remedies available to them hence the court should not hear the matter.
13. The Judiciary of Kenya has over the years suffered from backlog that has seriously affected dispensation of justice. It is for this reason that the people of Kenya in enacting the new Constitution sought to address this challenge by expanding the system of courts to include Tribunals which are now considered as Subordinate Courts under Article 169 of *the Constitution*. The letter and spirit of *the Constitution* of Kenya 2010 is to expand the doorways for litigants to access justice.
14. In line with this Constitutional imperative, the Courts including this court have clearly stated that matters which should be heard by other entities should be handled by the bodies that have been granted jurisdiction to do so. In the case of *Benard Ambuti Andega & 2 Others Vs Kibos Distillers Ltd and 5 others( 2020)* eKLR the Supreme Court restated the importance of a court exercising jurisdiction strictly in accordance to the law..... “This principle has been replicated in a plethora of determinations by this Court, of common cause being that, a Court, even this Court, cannot arrogate itself jurisdiction through crafts of interpretation (see Interim Independent Electoral Commission Constitutional (Advisory Opinion) Application No. 2 of 2011) and a Court ought to exercise its powers strictly within the jurisdictional limits (Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others (supra)).”
15. The question we must now answer is whether this suit is one which can and should be heard by another entity. From a look at the pleadings it emerges that the primary cause of action is the alleged illegal structures which have been used to carry out businesses which have caused noise pollution which has affected the Applicants. Although the issues appear to be multifaceted, the primary issue which is the cause of the other alleged grievances is the structures which are alleged to be illegal. The other issues are ancillary. For purposes of considering the issue of jurisdiction I will consider whether this court has jurisdiction in light of the provisions of the *Physical and Land Use Planning Act*.
16. Section 77 of the *Physical and Land Use Planning Act* establishes the County Physical and Land use planning Committee. The functions of the committees are defined in section 78 of the Act thus; The functions of the County Physical and Land Use Planning Liaison Committee shall be to—
  - (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
  - (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
  - (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
  - (d) hear appeals with respect to enforcement notices.
18. It is evident that the Liaison Committee has clearly defined functions relating to; applications submitted to the planning authority; appeals against decisions of the planning authority; an advisory role; and appeals against enforcement notices. If these were the issues at hand in this case this court would have had no hesitation in downing its tools so as to allow the issues to be ventilated in the correct forum. However, in this case there is a twist. Already, it is the uncontroverted evidence of the Plaintiff that the 3<sup>rd</sup> Respondent has already reached a determination that the structures should be demolished.



The Plaintiffs agree with this decision and would want it implemented sooner rather than later. For some reason, though the 3<sup>rd</sup> Respondent has gone as far as mark the premises, it has not demolished them. This has prompted the filing of this suit. In prayer 3 of the plaint this court is being asked to compel the 3<sup>rd</sup> Respondent to execute a decision it has already made and if it cannot this court is being asked to consider using the court mechanism to execute this decision. The court is the right forum to issue this kind of order which cannot be issued by the County Liaison Committee. I therefore find that the preliminary objection on jurisdiction has no merit.

19. On the question of whether the application for injunction is merited, the law on grant of injunctions is fairly well settled by the locus classicus of *Giella v Cassman Brown* [1973] EA in which the courts held that the applicant must establish that they have a prima facie case with a probability of success; demonstrate that the applicant will suffer irreparable loss which would not be adequately compensated by an award of damages and lastly, if the court is in doubt on the above two requirements, decide the application on a balance of convenience.
20. The applicant's case is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have set up temporary illegal structures that are operating as a garage, furniture shops and other businesses in a residential area with constant loud music emanating from the establishments every other night depriving them of peace. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have denied the fact that the area has been turned into a commercial plot and insist that the suit property is used as a residential place. Further, it is their contention that the Applicants do not have any interest in the suit property neither have they proved how irreparable loss will be occasioned to them.
21. The photo evidence as attached in the applicant's supporting affidavit, supports the applicant's averments that the 3<sup>rd</sup> respondent had sent representatives to mark the structures as "to be demolished". This implies that the 3<sup>rd</sup> Respondent at some point was of the view that there was need for action against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This lends credence to the averment by the Plaintiffs that there is need to at least give some temporary relief while awaiting the hearing of the case.
22. I am convinced that the Applicants have established a genuine and arguable case and that they stand to suffer irreparable loss of which an award of damages cannot be adequate compensation. In the case of *Justus Irungu Gitbae & 12 others v Attorney General & 4 others* [2016] eKLR, the court held that injury which was continuous in nature could not be quantified or assessed in terms of damages. The issue of demolition can be addressed after hearing the parties. However, any new constructions should not take place.
23. In the end the application is allowed in the following terms;
  - a. An injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants their agents, servants, employees, tenants or any person acting on their behalf from carrying out any new construction of unapproved and semi-permanent structures on their land parcel LR 15003/88 and LR 15003/90 pending the hearing and determination of the suit.
  - b. That the 4<sup>th</sup> Defendant do within 30 days prepare a report on the noise level posed by any activities carried out by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or their agents, employees, tenants or any person acting on their behalf and present the same to court within 30 days.
  - c. Costs of the application to abide the hearing of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**JUDY OMANGE**



**JUDGE**

**In the presence of:**

**Ms Julia Omwamba for the 3<sup>rd</sup> Respondent**

**Mr. Ombati for Mr. Ondabu for Plaintiffs/Applicants**

**Mr. Wangwi for 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Steve - Court Assistant**

