



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 170 OF 2015**

**JAMES IRUNGU MWANGI**

**NAOMI NJOKI NJOROGE**

**MONICA MURINGI GACHAU** (Suing as the Chairman, Secretary and

Treasurer of White Sisters Neighborhood Welfare Group....**PLAINTIFFS**

**VERSUS**

**LABAN MACHARIA MUIRURI**.....**1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU**.....**2<sup>ND</sup> DEFENDANT**

**RULING**

This is in respect to the Preliminary Objection dated 3rd February 2016 and filed by the 1st defendant raising the issue that this Court lacks jurisdiction to handle this dispute because the matter is sub-judice as there exists **NAIROBI HIGH COURT JUDICIAL REVIEW CASE No. 186 of 2015** involving the 1st defendant and the 2nd defendant pending at the Court of Appeal.

The plaintiffs filed this suit on 30th December 2015 as owners of land parcel No. **NGOINGWA BLOCK 22** also known as **THIKA MUNICIPALITY BLOCK 22**. Their grievance is that the 1st defendant who is the registered owner of land parcel **NGOINGWA BLOCK 22/13** also known as **THIKA MUNICIPALITY BLOCK 22/13** has commenced the construction of multi dwelling residential units on his land in complete disregard of the *Environment Management Coordination Act* and other relevant laws which is detrimental to the plaintiffs. The plaintiffs therefore seek various remedies including a permanent injunction to restrain the 2nd defendant from issuing approval plans for the construction and that the construction by the 1st defendant extending over and above the level of a single dwelling user be demolished at the expense of the defendants jointly.

The Preliminary Objection has been canvassed by way of written submissions which have been filed both by the firm of **ORUENJE, KIBET & KHALID** Advocates for the 1st defendant and **WAIGANJO WACHIRA & CO.** Advocates for the plaintiffs.

I have considered the Preliminary Objection and the submissions by counsel.

The Preliminary Objection is premised on the plea that this suit is sub-judice as provided under **Section 6 of the Civil Procedure Act** which provides as follows:

***“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant such relief”.*** Emphasis added

It is the 1st defendant’s case that there exists **NAIROBI HIGH COURT JUDICIAL REVIEW CASE No. 186 of 2015** (the Nairobi Case) between the 1st defendant and the 2nd defendant in which judgment was delivered on 1st December 2015 in favour of the 1st defendant. A copy of the said judgment has been availed in which the 1st defendant, as ex-parte applicant, had sought orders of certiorari to quash the Planning and Enforcement notice issued by the 2nd defendant as Respondent. The Judge also prohibited the 2nd respondent from stopping the ex-parte applicant’s development of a multi-dwelling residential unit on land parcel No. **NGOINGWA/BLOCK 22/13** also known as **THIKA MUNICIPALITY BLOCK 22/113**. Since the 1st defendant is pleading sub-judice, the onus is on it to place before this Court evidence to prove the same. That evidence has been availed in the form of the judgment in the Nairobi Case. However, that case was heard and finally determined by **ODUNGA J.** a judgment dated 1st December 2015 and although the 1st defendant claims that the 2nd defendant appealed to the Court of Appeal, nothing has been placed before this Court to demonstrate that any appeal is pending in the Court of Appeal arising out of the judgment in the Nairobi Case. Sub-judice cannot therefore arise because there is no ***“suit or proceeding..... pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”*** as is required in **Section 6 of the Civil Procedure Act.**

Although the 1st defendant’s Preliminary Objection dated 3rd February 2016 only confined itself to the issue of sub-judice, its counsel went further in submissions to also claim that this suit is res-judicata. Having not pleaded the issue of res-judicata in the Preliminary Objection, the 1st defendant cannot now introduce it through submissions. It is established law that parties must confine themselves to their pleadings. A Court would be engaging in a frolic of its own if it deviated from interrogating issues placed before it and determined peripheral matters. However, since counsel for both parties fell into the same error and submitted on the issue of res-judicata and guided by the decision in **ODD JOBS VS MUBIA 1970 E.A 476**, I will address the issue of res-judicata since both parties have invited me to do so and none will suffer any prejudice in the circumstances.

Res-judicata is provided for under **Section 7 of the Civil Procedure Act** as follows:

***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.***

As I have already indicated above, the Nairobi Case was a Judicial Review Application in which the 1st defendant was the Ex-parte applicant and the 2nd defendant was the respondent. The issues in dispute involved the quashing of the 2nd defendant’s Planning and Enforcement notice issued on 24th April 2015 and an order of prohibition prohibiting the 2nd defendant from stopping the 1st defendant’s development of a multi-dwelling residential unit on land parcel No. **NGOINGWA BLOCK 22/13** also known as **THIKA MUNICIPALITY BLOCK 22/113**. The plaintiff was not a party in that case and neither is it litigating under any of those parties or under the same title. The plaintiffs are litigating as owners of land parcel No. **NGOINGWA BLOCK 22** also known as **THIKA MUNICIPALITY BLOCK 22** whose property will be affected by the 1st defendant’s development of their property.

Secondly, and most significantly, the Nairobi Case being a Judicial Review Application could only be concerned with whether or not the 2nd defendant acted fairly by giving the 1st defendant a hearing before issuing the Planning and Enforcement notice dated 24th April 2015. Judicial Review is concerned with the decision making process and not with the merits or otherwise of the decision itself – **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL No. 185 of 2001.** Judicial Review is not concerned with private rights and therefore where the resolution of

the dispute before the Court involves the determination of such rights, that cannot be within the jurisdiction of a Court determining a Judicial Review Application as was the case in the Nairobi Case. The proper forum for such a dispute is in a Civil Court such as this one. I am also guided by the Court of Appeal's decision in the case of **COMMISSIONER OF LANDS VS HOTEL KUNSTE LTD C.A CIVIL APPEAL No. 234 of 1995** where it was held that Judicial Review jurisdiction is a special one governed by the **Law Reform Act** and is neither civil nor criminal. See also **REPUBLIC VS NATIONAL TRANSPORT & SAFETY AUTHORITY & 10 OTHERS EX-PARTE JAMES MAINA MUGO (2015) e K.L.R** where the Court, after stating the role of a Judicial Review Application, goes on to add that:

***“It follows that where the resolution of the dispute before the Court requires it to make a determination on disputed issues of fact, that is not a suitable case for Judicial Review”.***

I have said enough to demonstrate that this suit is neither sub-judice nor res-judicata. The Preliminary Objection must therefore be dismissed as it is devoid of merit. I therefore issue the following orders with respect to the 1st defendant's Preliminary Objection dated 3rd February 2016:

***1. The Preliminary Objection dated 3rd February 2016 is dismissed.***

***2. The 1st defendant will meet the plaintiff's costs of this application.***

***3. The subject matter in this suit are parcels of land designated as THIKA MUNICIPALITY 22 and THIKA MUNICIPALITY 22/13 and since there is now an Environment and Land Court at Thika, this suit is hereby transferred to that Court. The suit be mentioned before Hon. Gacheru J. on 4th May 2017 for further directions.***

It is so ordered.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**

Ruling delivered, dated and signed in open Court this 21<sup>st</sup> day of April 2017

Mr. Momanyi for Mr. Oruejo for 1<sup>st</sup> Defendant present

No appearance by the other parties.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**