



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. APPEAL CASE NO. 265 OF 2016

APEX APARTMENTS LIMITED.....APPELLANT

VERSUS

ELIZABETH MARUMA MREMA.....1ST RESPONDENT

BEATRICE SABANA.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)....3RD RESPONDENT

NAIROBI CITY COUNTY.....4TH RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 31st March 2016 in which the 1st and 2nd Respondents/Applicants seek for an order of temporary injunction restraining the Appellant/Respondent from continuing with construction or conducting construction activities whatsoever or in any manner developing the parcel of land known as Land Reference Number 1/796, Kilimani, Nairobi (hereinafter referred to as the “suit property”) pending the hearing and determination of this Appeal.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Respondent, Elizabeth Maruma Mrema, sworn on 31st March 2016 in which she averred that she is the owner of the parcel of land known as Land Reference Number 1/1282 which neighbours the suit property. She further averred that the 2nd Respondent, Beatrice Sabana is the owner of the parcel of land known as Land Reference Number 1/1283 which also neighbours the suit property. She further averred that the Appellant is undertaking a development on the suit property which both she and the 2nd Respondent are opposed to as procedures for public participation as well as due regard to the Nairobi City County Zoning and Planning Regulations have not been complied with. She disclosed that this non-compliance is the subject of their Appeal dated 4th March 2016 being Tribunal Appeal No. Net/161 of 2015 filed before the National Environment Tribunal. She further averred that despite filing that Appeal, the Appellant has continued construction aggressively with the purpose of defeating their objection to the development. She added that the construction is proceeding without due regard to the safety and health of the neighbours, it has caused the sinking of the security wall and grounds immediately adjacent to the construction site and they are apprehensive that with the continued construction, their houses will be

affected as well. She further stated that they fear the damage shall continue and could be irreparable unless this court intervenes and stops the developments.

The Application is contested. The Appellant filed the Replying Affidavit of Zamzam Abdi Abib, an Advocate of the High Court of Kenya who has the conduct of this suit on behalf of the Appellant. He averred that the Applicants have filed a reference application before the National Environmental Tribunal being NET 161 of 2015 to which they filed a response. He averred that this court has no jurisdiction to hear this Application as this court is an appellate court in respect of matters emanating from the National Environmental Tribunal (hereinafter referred to as the “Tribunal”). He pointed out that the order of temporary injunction being sought by the Applicants herein is being sought for the first time in these appellate proceedings before this court.

In addition, the Appellant filed its Preliminary Objection dated 4th May 2016 stating that this Application offends the express provisions of section 3(3), 126 and 130 of the Environmental Management and Co-ordination Act No. 8 of 1999 and therefore lacks jurisdiction to hear and entertain this Application. A preliminary objection is purely on a point of law as was stated in the case of **Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors (1969) EA 696**. The court held that

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

There has been a challenge to the jurisdiction of this court to entertain this Application on the grounds that this Application offends the express provisions of section 3(3), 126 and 130 of the Environmental Management and Co-ordination Act No. 8 of 1999 (the “EMCA”). The question of a court's jurisdiction or otherwise is the beginning and the end of any matter as stated by Nyarangi JA (as he then was) in **The Owners of Motor Vessel “Lillian S” versus Caltex Oil Kenya Limited (1989) KLR** where he stated that,

“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 the moment it holds the opinion that it is without jurisdiction”.

In their submissions, the Appellant referred to Section 126(2) of the EMCA which states in part that the Tribunal shall “inquire into the matter and make an award, give directions, make orders or make decisions” upon an appeal made to it to make the point that this provision clearly spells out the original jurisdiction of the Tribunal. They went on to submit that the injunctive reliefs sought by the 1st and 2nd Respondents/Applicants in this Application ought to have been sought before the Tribunal in NET 161 of 2015 and not canvassed before this court which is clearly designated in the EMCA as an appellate court. They highlighted section 130 of the EMCA which clearly prescribes that any person aggrieved by a decision of the Tribunal may appeal against such decision or order to this court. They pointed out that the Applicants never filed an application seeking injunctive orders against them before the Tribunal and therefore have no decision to appeal against. They further submitted that as a result of this anomaly, if this court was to grant the orders sought by the Applicants, the Appellant would not be able to appeal against this decision as this court is the final appellate court prescribed by law.

The Applicants appear not to have submitted on this particular Preliminary Object in the submissions they filed.

The court agrees with the Appellant that this court is an appellate court whose jurisdiction as spelled out

in section 130 of the EMCA is strictly appellate jurisdiction and not original jurisdiction. This court may only hear appeals on decisions or orders of the Tribunal which a party may be aggrieved by. In this particular suit, the 1st and 2nd Respondents/Applicants did not apply for injunctive orders before the Tribunal but side stepped it and came before this court for the injunctive orders. That is not in order. Indeed, it offends the provisions of section 130 of the EMCA. This court proceeds to uphold the Preliminary Objection raised by the Appellants. This Application is accordingly hereby dismissed with costs to the Appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE