



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 37 OF 2016**

**TAIB INVESTMENTS LIMITED.....PLAINTIFF**

**=VERSUS=**

**1. FAHIM SALIM SAID**

**2. TOOL HOUSE LIMITED**

**3. BUILD MY HOME LIMITED**

**4. MUWA HOLDINGS LIMITED**

**5. THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**

**6. THE COUNTY GOVERNMENT OF MOMBASA.....DEFENDANTS**

**R U L I N G**

1. What is before me is the Preliminary Objection dated 24<sup>th</sup> March, 2016 filed by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' advocate.
2. The Notice of Preliminary Objection is seeking to have the suit struck out with costs on the ground that this suit relates to a decision that was made by the National Environment Management Authority (NEMA) and as such, it should be heard and determined by the National Environment Tribunal at the first instance; that this court does not have jurisdiction to deal with the matter and that the Plaintiff failed to make a full and frank disclosure when it obtained ex-parte orders.
3. The Plaintiff's and the Defendants' advocates appeared before me on 29<sup>th</sup> March, 2016 and made oral submissions.
4. Mr. Gikandi, counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, submitted that the dispute currently before the court is based on environmental issues allegedly affecting the suit property viz-aviz the property occupied by the 1<sup>st</sup> Defendant.
5. Counsel submitted that the Plaintiff is asking the court to quash the licence issued by NEMA to the Defendants; that the record filed by the Plaintiff shows that the issue of the environmental impact licence is critical and that the matter should have been filed with the National Environmental Tribunal which has the right expertise, time and skills.
6. Counsel submitted that since the Plaintiff is complaining about the issuance of a licence to the Defendants, it is the Tribunal which has jurisdiction at the first instance to deal with that issue pursuant to the provisions of Section 129 of the Environmental Management and Co-ordination Act (the Act).

7. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counsel submitted that where the law prescribes a procedure to be followed while instituting a suit, that procedure must be followed.
8. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counsel submitted that when the Plaintiff's advocate moved the court at the ex-parte stage he misled the court and failed to make a full disclosure of material facts.
9. Counsel submitted that his clients have been undertaking the impugned activities on the suit property since August 2015 with the Plaintiff's knowledge.
10. Counsel relied on numerous decisions of the High Court and the Court of Appeal which I have considered.
11. Mr. Mwakisha, counsel for the 4<sup>th</sup> Defendant, supported the Applicants' counsel's submissions.
12. Counsel submitted that the reading of paragraphs 22 to 27 of the Plaint shows that the matter falls under the purview of the Environmental Management and Co-ordination Act and the Physical Planning Act; that this court does not have jurisdiction in this matter and that the Act provides the mechanism of dealing with such disputes, which mechanism the Plaintiff has failed to follow.
13. Mr. Taib, counsel for the Plaintiff submitted that the suit before this court is not dealing with issues under the EMCA only; that the suit is multi-faceted in nature and that this court has the requisite jurisdiction.
14. Counsel submitted that under the provisions of Section 129 of the EMCA, the only person who can move the Tribunal established under the Act is one who is appealing against the decision of NEMA.
15. The Plaintiff's counsel submitted that the Plaintiff is not one of the persons contemplated under Section 129 of the Act.
16. Counsel submitted that there is no record showing the grant or refusal to grant a licence or permit by NEMA to entitle the Plaintiff to move the Tribunal.
17. The Plaintiff's counsel informed the court that in the Plaint, the Plaintiff has stated that the Defendants do not have a licence or permit issued by NEMA allowing them to proceed with the impugned activities. Therefore, it was submitted, Section 129 of the EMCA does not apply.
18. The Plaintiff's counsel further submitted that the Plaintiff has also raised the issue of allegations of fraud viz-a-viz the alleged Environmental Impact assessment Report.
19. Counsel submitted that the particulars of forgeries have been enumerated in the Plaint and that it is only this court that can deal with such issues.
20. Counsel for the Plaintiff submitted that the Preliminary Objection is unmeritorious because the Defendants have not filed a Defence rebutting the allegations in the Plaint.
21. Consequently, it was submitted, the court is not seized of the full facts of the case and cannot strike out the suit on the basis of a Preliminary Objection.
22. The Plaintiff's counsel relied on numerous High Court and Court of Appeal authorities which I have read.
23. The only issue that is before me for determination is whether this suit should have been filed in the National Environment Tribunal or in this court.
24. I shall not deal with the issue of whether the Plaintiff is guilty of material non-disclosure because that issue, in the event the suit is not struck out, should be dealt with when the Application for injunction comes up for interpartes hearing.
25. It is trite law that a Preliminary Objection consist 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 (**See Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696.**
26. As was held by Ojwang J (as he was then) in the case of **Oraro Vs Mbaja (2005) 1KLR 141**, *a preliminary objection is a pure point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence.*
27. Indeed, the question as to whether this court has the requisite jurisdiction in the instant matter is a point of law which may dispose of the suit if it is found that the court does not have jurisdiction to deal with the matter.
28. In its Plaint dated 14<sup>th</sup> March, 2014 and running into seventy five (75) pages, the Plaintiff has alleged that the 1<sup>st</sup> to the 4<sup>th</sup> Defendants illegally commenced and have continued to construct a warehouse structure and or a commercial structure using the Plaintiff's perimeter wall.
29. According to the Plaintiff, the Defendants' acts of constructing on their property a structure intended for commercial purpose in an area that is strictly designated for residential use contrary

- to the provisions of the Physical Planning Act is illegal and unlawful.
30. The Plaintiff has also alleged in the Plaintiff that the Defendants are developing the suit premises without submitting the Environmental Impact Assessment Report to NEMA in violation of Section 58 of the EMCA.
31. In a nutshell, the Plaintiff is challenging the developments that the 1<sup>st</sup> to the 4<sup>th</sup> Defendants are undertaking on Land Reference Number 3242/1/MN for want of an Environmental Impact Assessment Report and Licence and without the 6<sup>th</sup> Defendant's approval of the Plans and "change of user".
32. In the event that the 1<sup>st</sup> to the 4<sup>th</sup> Defendants have the requisite licences and permits to develop the suit premises, the Plaintiff has pleaded in alternative that the said licences and permits were illegally procured and that the same were obtained fraudulently. The particulars of fraud have been enumerated in the Plaintiff.
33. The Defendants have not filed their Defences to respond to the allegations in the Plaintiff.
34. However, the 1<sup>st</sup> Defendant filed a Replying Affidavit in response to the Plaintiff's Application for injunction in which he stated that the Plaintiff was aware that the 5<sup>th</sup> Defendant had approved the application by the 1<sup>st</sup> and the 4<sup>th</sup> Defendants in respect to carrying out the assembling of PVC Windows and doors on the suit property.
35. In the said Replying Affidavit, the 1<sup>st</sup> Defendant referred the court to the Plaintiff's documents at pages 135-198 and to the letters at pages 217 -230.
36. I have perused the documents in the Plaintiff's bundle, and in particular pages 135-198 and 217-230.
37. In those documents, I have come across a letter dated 16<sup>th</sup> October 2015 from NEMA responding to the Plaintiff's letter dated 15<sup>th</sup> October 2015. In the said letter, NEMA informed the Plaintiff as follows:-

**“ Please attached are the copies of the EIA report as you had requested. Kindly note that the Authority is still processing the report for final conclusion of the EIA licence”.**

38. Other than the above quoted letter, I have not been shown any other document that was issued by NEMA viz-a-viz the development of the suit property.
39. Having analysed the only pleadings and documents that are before the court, can it be said that the suit should have been filed in the National Environment Tribunal pursuant to the provisions of Section 129 of the EMCA?
40. Section 125 of the Environmental Management and Co-ordination Act (EMCA) establishes the National Environment Tribunal.
41. The jurisdiction of the Tribunal is set out under Section 129. The Section is titled "Appeals to the Tribunal". The section provides as follows:-

**“129(1) Any person who is aggrieved by:-**

- (a) the grant of a licence or permit or a refusal to grant a licence or permit or the transfer of a licence or permit, under this Act or regulations made thereunder.**
- (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;**
- (c) the revocation, suspension or variation of his licence under this act or regulations made thereunder;**
- (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;**
- (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations**

**made May within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the tribunal in such manner as may be prescribed by the Tribunal.”**

42. The Jurisdiction of the Tribunal is specific and limited to appeals emanating from the decisions of NEMA as enumerated above.
43. Section 129(2) of the Act empowers the Tribunal to entertain Appeals against the decision of the Director General, NEMA and the Committees established under the Act.
44. Indeed, an appeal against the decision of NEMA to grant or refuse to grant a licence or permit, to impose any condition or limitation on a licence or to revoke or suspend a licence can be made by any aggrieved person.
45. In this matter, I have not been shown from the pleadings and documents that before this suit was filed, the Plaintiff was aware that NEMA had issued to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants a licence or a permit to develop the suit property to enable the Plaintiff, instead of filing this suit, appeal to the Tribunal.
46. Indeed, the crux of this suit, as I understand it, is that the Defendants commenced the development of the suit property before obtaining a licence and permit from NEMA and before having their plans approved by the County Government.
47. Indeed, it would have been different if the 1<sup>st</sup> to the 4<sup>th</sup> Defendants had responded to the Plaintiff's demand letters in which the Plaintiff requested to be shown the licence or permit that was issued by NEMA by presenting the licence.
48. Section 63 of the EMCA states that NEMA can only issue a licence on such terms and conditions after being satisfied as to the adequacy of an environmental impact study, evaluation or review report.
49. It is only after the issuance of such a licence or refusal to issue the licence that an aggravated party may appeal to the Tribunal. That licence has not been exhibited by the Defendants.
50. The Plaintiff has also pleaded that in the event the said licence was issued by NEMA, then the same was procured illegally and fraudulently.
51. In any event, the Plaintiff's suit has not only raised the issue of whether the 5<sup>th</sup> Defendant (NEMA) issued to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants a licence, but also whether the County Government issued to the 1<sup>st</sup> to the 4<sup>th</sup> Defendants with the approval to commence developments on the suit property pursuant to the provisions of the Physical Planning Act and the County Government Act.
52. 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' development Plans.
53. 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.
54. However, where a suit raises specific issues which are supposed to be dealt with by a specific Tribunal or body established by law, then the matter must be commenced in the Tribunal or body so established before an appeal can be lodged in this court or the High Court, as the case may be. That is not the case in this matter. The issues raised in the Plaintiff's suit fall outside the mandate of the National Environment Tribunal.
55. It is for the reasons I have given above that I find and hold that this court has the requisite jurisdiction to entertain this matter.
56. The issue as to whether the Plaintiff is guilty of material non disclosure can only be argued when the matter comes up for inter partes hearing of the Plaintiff's Application for injunction.
57. I say so because the court will have to deal with the disputed facts and documents before it to make a determination as to whether indeed there was material non-disclosure on the part of the Plaintiff. That cannot be dealt with by way of a Preliminary Objection.
58. For those reasons, I dismiss 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Preliminary Objection dated 24<sup>th</sup> March, 2016 with costs.

Dated and signed in Malindi this **6<sup>th</sup>** day of **April**, 2016.

**O. A. ANGOTE**

**JUDGE**

Delivered and signed in Mombasa this **8<sup>th</sup>** day of **April** 2016

**A. OMOLLO**

**JUDGE**