REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC No. 10 OF 2016

ZAKARIA MACHARIA KAGUNYA ..... 1ST PLAINTIFF

ANTONY GATHECHA NDUNG'U ..... 2ND PLAINTIFF

JOYCE WANGU WACHIRA ..... 3RD PLAINTIFF

-VERSUS-

THE COUNTY GOVT OF LAIKIPIA ..... 1ST DEFENDANT

ADAN HUSSEIN JILLO (TRUSTEE OFFICIAL) ..... 2ND DEFENDANT

ALI MOHAMED KISUMULA ..... 3RD DEFENDANT

RULING

1. The notice of motion dated **5th February, 2016** seeks to restrain the defendants herein by themselves, their agents, officials, employees, proxies and/or any other person claiming under them from continuing with the construction and/or putting up a roof on the purported mosque structure located on unsurveyed Residential Plot No. A5 No.60-Nanyuki Mucipality pending the hearing of the application and the suit. The motion also seeks a mandatory injunction to compel the defendants by themselves, their agents, officials, employees, proxies and/or any other person claiming under them to remove and or demolish the purported mosque structure located on unsurveyed Residential plot A5 No.60-Nanyuki Municipality.

2. The application is premised on the grounds on the face of the application and the affidavit of the 1st plaintiff, **Zacharia Macharia Kagunya**, sworn on **5th January, 2015**.

3. From the said grounds and the affidavit, apparently the plaintiff's claim against the respondents is that the construction of the mosque was done without obtaining the requisite development approvals, like obtaining a change of user of the land on which the property stands; carrying out environmental impact assessment and that the project was implemented in disregard to the views and wishes of the plaintiffs.

4. The application is opposed through the grounds of opposition dated **23rd February, 2016** where it is contended that the plaintiffs have no *locus standi* to bring the application and the suit; that the orders sought cannot issue through the current suit; that the applicants will suffer no prejudice if the orders sought are denied and that the applicants have not made up a case for being granted the orders sought.

5. The application is also opposed through the replying affidavit of the 2nd defendant, **Adan Hussein Jillo**, sworn on **23rd February, 2016** where it is deposed that there is no justification for opposing the

construction as there are churches in the same area; that the mosque has been in operation since 2006; that the construction is complete and that the application for change of user has been applied for (is pending).

6. It is further deposed that the project has cost the respondents alot of money; the applicant's have not offered security for costs, that the threshold for grant of orders sought has not been met and that the applicants are actuated by malice, hatred and intention to arouse religious animosity.

7. It is reiterated that the applicants have not demonstrated what prejudice they would suffer if the orders sought are denied. Further that the orders sought cannot be granted at the interlocutory stage.

8. For the foregoing reasons, the application is said to be incompetent and an abuse of the court process.

9. When the matter came up for hearing, counsel for the applicant reiterated the grounds on the face of the application and submitted that the applicants have made up a case for being granted the orders sought. In this regard he stated that it is not indispute that the law was not complied with in effecting the impugned development.

10. On whether a mandatory injunction can issue at the interlocutory stage, he submitted that on account of the undisputed fact that the law was not complied with in effecting the development, the orders are necessary in order to aid the law.

11. Based on the decisions in the cases of **Lolldaiga Hills Limited & 2 others v. Robert James Wells & 3 others-Nairobi HCCC No.345 of 2011**; **Mohamed Ahmed Noor & 3 Others v. Bora Developers Limited & 2 others (2012) eKLR** and **Machamuka Farmers Co. Limited v. Soima Lekenge Ntaiya & Others-Nyeri HCCC No.152 of 2011** it is submitted that the court cannot condone hooliganism.

12. Counsel for the 1st respondent, **Mr. Deya**, admitted that the 2nd and 3rd respondents did not adhere to certain procedures in undertaking the impugned development but pointed out that the 1st respondent has given them time to comply. He also pointed out that the 2nd and 3rd respondents have taken steps calculated at complying with the law. In view of the foregoing, he urged the court to exercise caution, especially concerning the prayer for mandatory injunction, which he termed draconian.

13. Counsel for the 2nd and 3rd respondents, **Mr. Chweya**, informed the court that prayer 3 has been overtaken by events because by the time the application was filed a roof had already been put up.

14. He reiterated the contention that the applicants have no capacity to bring the application in question and that the applicants have not made up a case for being granted the orders sought.

15. Concerning the cases cited by the plaintiffs, he contended that the first one supports the respondent's case while the second and third are distinguashable.

16. In a rejoinder, counsel for the applicants, **Mr. Abwour**, stated that the deponent of the affidavit sworn on behalf of the 1st respondent has denied the averments of the 2nd and 3rd respondents. He submitted that the doctrine of separation of powers is inapplicable to the circumstances of this case.

17. Wondering why counsel for the 2nd respondents is not remorseful for his clients' infractions, he stated that according to annexture **AJH-3** the mosque is incomplete.

18. On whether the applicants have capacity to sue or bring the current aplication, he stated that they are residents of the area in question. He further explained that **Section 22** of the Urban and Cities Act gives residents capacity.

19. On relevance of authority NO. 3, he explained that it deals with illegality and pointed out that in the instant case there is illegality.

Analysis and determination

20. From the pleadings filed in this suit and the instant application, the dispute herein relates to construction of a mosque on unsurveyed plot number unsurveyed Residential Plot No. A5 No.60-Nanyuki Mucipality. It is not indispute that the plot belongs to the 2nd and 3rd respondents. The only borne of contention is that certain legal processes were not complied with in effecting the development. For instance, whereas the area in which the project has been implemented is planned as a residential area, no change of user was obtained before the project was impemented. It is not in dispute that the necessary approvals under the Physical Planning Act, the Environmental Management and Co-ordination Act and Cities Act, County Government Act were not complied with before the project was effected. For those reasons, the aplicants who are opposed to the development moved to court to stop the developments pending the hearing and determination of the suit and application herein and perpetually. The applicants want the respondents to be compelled to remove the development on grounds that it was effected illegally.

21. Whilst admitting that the 2nd and the 3rd respondents have not complied with the applicable procedures, the respondents contend that the applicants have no capacity to bring the suit and the application and that they have not made up a case for being granted the orders sought. The following reasons are given for the said contention:-

1. Applicants have not shown what prejudice, if any, they would suffer if the orders sought are denied;

2. The Mosque has been in existence since 2006;

3. There are churches in the area;

4. The applicants are actuated by malice and religious hatred;

5. Applicants have not provided security for costs, in case they lose the main suit.

6. Some of the orders sought have been overtaken by events (mosque is already completed); and

7. That the 2nd and 3rd respondents have taken steps aimed at complying with the law.

22.**The issues for the court's determination are:-**

(a) Whether this court has jurisdiction to hear and determine the issues raised in this application as a court of first instant?

(b) Whether the applicant's have capacity to bring the current suit and/or application?

(c) Whether the applicant's have made up a case for being granted the orders sought?

(d) What Orders should the court make?

23.On whether this court has jurisdiction to hear and determine the issues raised in this application and the suit, since the issues raised in the suit touch on approval of developments under the Physical Planning Act and EMCA, among other statutes touching on approvals of development plans and given the contention by the respondent's that this court is not the right forum for determination of the issues raised in the suit andapplication; (see ground (b) of the grounds of opposition herein); it is imperative to determine whether this court has jurisdiction to hear and determine disputes arising from exercise of the mandates granted under those statutes as a court of first instance. This is criticalbecause before this court can exercise its jurisdiction under **Article 165** of the Constitution it must give anopportunity to the relevant bodies or state organs to deal with the dispute under the relevant provisions of the statute. In this regard see the case of **InternationalCentre for Policy and Conflict & 5 others** V. **The Attorney**

General & 4 others where it was held:-

> **"An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant bodies or state organs to deal with the dispute under the relevant provision of the relevant statute...."**

24.With regard to this question, having read and considered the provisions of both the Physical Planning Act and EMCA I am of the considered view that this court lacks jurisdiction to hear and determine disputes arising from those statutes as a court of first instance. This is sobecause the statutes establish various bodies which are given powers to deal with disputes arising from the discharge of mandate donated to the various agencies or bodies created under those statutes. Under those statutes, the High Court only gets seized of the disputes as an appellate court and not as a court of the 1st instant. In this regard see the decision in the case of **Mutanga Tea & Coffee Company Limited v. Shikara Limited & Another (2012)e KLR** where it was observed:-

> "**The plaintiff's claim as drafted in the afore-stated paragraphs, read together with the afore-stated prayers, shows that the plaintiff's suit is an attempt to enforce the 2nd defendant's statutory obligation as provided under Section 29 of the Physical Planning Act. In paragraph 22 of the 1st defendant's amended defence and counterclaim, the jurisdiction of this court has been denied in light of Sections 10(a), 10(b), 13(1) and 15 of the Physical Planning Act, and Section 32 of the EMCA. The question then is whether this court has jurisdiction to deal with issues arising from the enforcement of the 2nd defendant's mandate under the Physical Planning Act.**
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> **17.I note that the mandate of the 2nd defendant in determining the approval or rejection of a development plan within its area is regulated by the provisions of the Physical Planning Act. Under Section 33(3) of the Physical Planning Act, the first stop for anyone who is aggrieved by the decision of the 2nd defendant is the Liaison Committee to which an appeal is provided. The provisions dealing with appeals are Sections 10, 13, 15(1) and (4). These provisions provide for procedure for progressing with appeals from the Liaison committee to the National Liaison Committee before appealing to the High Court. Therefore it is clear that the jurisdiction of the High Court under the Physical Planning Act is not original jurisdiction but appellate jurisdiction.**
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> **18.As regards the Environment Management and Coordination Act the National Environmental Management Authority (NEMA), has the authority to grant a licence for any development subject to an environmental Impact Study Report being published. Again there are provisions provided for dealing withgrievances concerning the issuance of a licence or refusal to issue a licence. In this regard, the first stop is the National Environmental Tribunal established under Section 125 of the EMCA and under Section 130, any person aggrieved by the decision of ororder of a tribunal may within 30 days of that decision or order appeal against that decision ororder to the High Court. Thus, once again the mandate of the High Court is not original jurisdiction but is appellate jurisdiction.**
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> **19. In Speaker of the National Assembly versus Karume, [1992] KLR 22, the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. I find that given the subject matter of the plaintiff's suit and the prayers sought, the jurisdiction of this court can only be appellatejurisdiction.**
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> **20.I am alive to the fact that the mandate given to the 2nd defendant under Section 29 of the Physical Planning Act is the exercise of a public duty, and that this court has powers under Section 9 of the Law Reform Act as read with Order 53 of the Civil Procedure Rules to issue orders of judicial review in relation to the performance of duties of a publicnature.**

Nevertheless, the plaintiff has not invoked the supervisory powers of this court under the Law Reform Act. Moreover, I am persuaded by the holding in R versus Birmingham City Council *exparte* Ferrero Ltd [1993] All ER 530 referred to by Wendoh, J. in R versus National Environmental ManagementAuthority *exparte* Sound Equipment Ltd [2010] eKLR, that:

"Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only exceptionally that judicial review would be granted. In determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers was the real issue to be determined and whether statutory appeal procedure was suitable to determine it."

Needless to state, that no exceptional circumstances have been demonstrated to justify departing from the statutory provisions.

21.Further the attempt by the plaintiff to invoke this court's unlimited original jurisdiction cannot succeed as under Article 165(3)(a) of the Constitution of Kenya, this court's unlimited original jurisdiction is subject to Article 162(2)(b) which provides for the creation of courts with the status of the High Court to deal with disputes relating to the environment, the use and occupation of, and title to land. Thus, it is clear that the legislature has limited the original jurisdiction of this Court in regard to environmental matters, use and occupation of land."

25. In the case of **Peter Njeru Mugo v. Nairobi City Council (2015) e KLR** it was held:-

"Both Sections 13 and 38(5) (of the Physical Planning Act, Cap 386 Laws of Kenya) entitle the Petitioner to an appeal to the National Liason Committee but it is obvious that he did not invoke that procedure. Both Sections also create a role for the High Court only if a party is dissatisfied with the decisions of that committee and not before.

It is my view that whereas a party can approach the High Court directly under both its constitutional interpretation mandate and its civil law mandate, to avoid a clear procedure set by law is an abuse of Court process. If all Statutes were to be ignored and the Constitution invoked in every instance, then those Statutes would lose meaning and all statutory processes would be halted to eternal chaos insociety.

I reiterate that where the law has set up procedures to be followed in addressing any complaint, those procedures must be followed.

Having so held, it follows that the Petition is premature and ought to be struck out and necessary orders shall be made at the end of this judgment.

But suppose the Petition was properly before me, is there any substance to it?

As can be seen above, the Petition basically challenges the notices issued to the Petitioner for the developments made on his land. Those are matters to be addressed by the National Liaison Committee and any other organ created by Statute to deal with it. The High Court's role is also clear and to say anything about the merits of the case would pre-judge matters not yet properly before it."

26. In **Republic v. County Goverment of Kiambu ex parte Fechim Investments Limited (2016) eKLR** it was held**:-**

"As the applicant has clearly not exhausted the remedies available to it under section 38 of the Physical Planning Act, this application is also misconceived."

27.Also see the case of **Raymond Cheruiyot & others v. Erick Kibaara Nderitu & 3 others (2015) eKLR** where it was observed**:-**

> **"The Physical Planning Act establishes a mechanism for resolving any disputes/complaints that may arise from exercise of powers donated by that Act to either the 3rd or the 4th respondent….If aggrieved by the decision of either the 3rd or the 4th respondent or both of them in their discharge of the functions or exercise of powers conferred on them by legislature under the Physical Planning Act, they ought to have followed the dispute resolution mechanism provided therein. It is only through the dispute mechanism provided therein that the parties would be guaranteed substantive justice. I say this because the members of the Liaison Committees are experts in their own areas of specialization as such they are the most suited to accord professional and objective assessment of the issues raised in the petition.**
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> **Clearly, from the aforementioned provisions of the law, this court is not the proper forum as it does not have jurisdiction to entertain a dispute arising out of exercise of power under the Physical Planning Act as a court of first instance. Its jurisdiction is limited to hearing appeals from the National Liaison Committee."**

28.The import of a court's jurisdiction was stated by Nyarangi J.A (as he then was) in ***Owners of the Motor Vessel "Lilian S" V. Caltex Oil (K) Limited,*** **[1989] KLR 1** thus:-

> **"...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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

29.I associate myself with the holding in the aforesaid cases and finding that I have already determined that this court lacks jurisdiction to hear and determine the issues raised in the suit and the application, as a court of first instance, I need not belabour myself in considering the other issues framed for the court's determination. Consequently, I dismiss the application and the suit with costs to the respondents."

Orders accordingly.

Dated, signed and delivered at Nyeri this 6th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiffs

N/A for the defendants

Court assistant - Lydia