IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 54 OF 2014

BETWEEN

MUTANGA TEA & COFFEE COMPANY LTD……..……...……APPELLANT

AND

SHIKARA LIMITED…….....……..……1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA…..……..…….……2ND RESPONDENT

(Appeal from the Ruling and Order of the Court of Kenya at Mombasa (Okwengu, J.) dated 12th July 2012

in

HCCC No. 171 of 2011)

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JUDGMENT OF THE COURT

The central issue for determination in this appeal is whether a party aggrieved by a decision of the ***Director of Physical Planning*** under the ***Physical Planning Act***, ***cap 286 (PPA)*** or of the ***National Environment Management Authority (NEMA)*** under the ***Environmental Management and Co-ordination Act***, ***cap 387 (EMCA),*** may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed under those Acts. By a ruling dated ***12th July 2012***, the subject of this appeal, ***Okwengu, J.*** (as she then was), sustained a preliminary objection raised by the 1st respondent, ***Shikara Ltd*** and supported by 2nd respondent, the former ***Municipal Council of Mombasa***, and held that under the two Acts, the jurisdiction of the High Court is appellate rather than original. Accordingly the learned judge struck out the suit by ***Mutanga Tea & Coffee Company Ltd. (the appellant)***, which had sought to challenge, by invoking the original jurisdiction of the High Court, the change of user and consent for development given to the 1st respondent by the relevant authorities under the PPA and the EMCA.

Aggrieved by that decision, the appellant lodged this appeal, in which it set forth 4 grounds of appeal contending that the learned judge erred by:

(i) abdicating jurisdiction in favour of the Environment and Land Court, which at the material time had not yet been established and operationalized;

(ii) failing to exercise inherent jurisdiction of the High Court to preserve the appellant's suit pending the establishment of the Environment and Land Court and transfer thereto, of the suit;

(iii) deferring to the dispute mechanisms established under the PPA and the EMCA which do not have jurisdiction to grant the injunctive reliefs sought by the appellant; and

(iv) abdicating the original jurisdiction of the High Court under Article 165(3) of the Constitution and ignoring or constricting the provisions of Article 159 of the Constitution.

Before we consider those grounds of appeal, it is apposite to set out the background to this appeal, for the necessary facts and context. First it is necessary to point out that the County Government of Mombasa is in law the successor of the 2nd respondent. The ***Transition to Devolved Government Act***, ***cap 265A*** establishes among others, mechanisms for transition of Local Authorities, like the 2nd respondent, to County Governments. The ***County Government Act, No 17 of 2012***, repealed the Local Government Act under which the 2nd respondent was established, upon the transfer of the duties, functions, assets and liabilities of Local Governments to County Governments. This judgment is therefore subject to those changes in law.

The appellant was at all material times the owner of the property known as ***L.R. No 5146 (original No. 1952/1) Section 1 Mainland North***, which abutts ***L.R. No 2931 (original No. 2926/6) Section 1 Mainland North,*** owned by the 1st respondent. Both properties are located in New Nyali, Mombasa and on the appellant's land is erected a residential home.

Desiring to change user of its property from the designated One Private Dwelling House to high-rise multi-storeyed apartments, the 1st respondent applied to the 2nd respondent for the requisite change of user and approval of the proposed development. On 27th April 2010 a Notice was published in the Standard Newspapers notifying members of the public of the 1st respondent's application and inviting objections within 14 days, if any, to the application as required under section 41(3) of the PPA. It appears that no objections were received and on 27th July 2010 the Director of Physical Planning approved the 1st respondent's building plans and issued it with the necessary development permission.

On 3rd August 2010, in a Stakeholders Consultative Questionnaire under the Environment (Impact Assessment and Audit) Regulations 2003, the appellant indicated, as the owner of adjoining land, that it had no objection to the 1st respondent's development. The appellant however contends that the 1st respondent's development that it did not object to was two storeys, 12-apartment project, and not the four storeys, 16-apartment project which was ultimately approved by the 2nd respondent.

On 23rd June 2011 about two months shy of one year from the date of its no-objection, the appellant filed a plaint in the High Court, which was amended on 19th July 2011. It prayed for, among other remedies, a declaration that the approval granted to the 1st respondent by the 2nd respondent to construct a multi-storey building in New Nyali, a low population density area, was unlawful and void; an order prohibiting the 2nd respondent from allowing the construction of the 1st respondent's intended multi-storey building; a permanent injunction prohibiting the 1st respondent from building the intended multi-storey building or in the alternative an order compelling the 1st respondent to build 12 apartments on two storeys and a mandatory injunction compelling it to demolish, at its own cost, any additional part of the building. The above remedies were sought on the basis of pleadings that in approving the construction of the 1st respondent's building, the respondents had not complied with the requirements of the PPA and the EMCA and that the 1st appellant had obtained the consent and approvals for its project through fraud, misrepresentation and concealment of material particulars.

Initially the appellant applied and obtained, on 24th June 2011, an *ex parte* interim injunction stopping construction of the 1st respondent's building. Those orders were subsequently vacated when the 1st respondent applied to set them aside. The respondents filed their respective defences dated 4th and 6th 2011 and, as far as is relevant to this appeal, challenged the jurisdiction of the High Court to entertain the appellant's suit and application for injunction whilst the appellant had not complied with or exhausted the dispute resolution mechanism provided for under the PPA and the EMCA. On 17th July 2011 the 1st respondent filed a Notice of Preliminary Objection to the jurisdiction of the High Court based on the above grounds.

After hearing submissions from the parties, Okwengu, J. held that the preliminary objection was properly taken as it related to the jurisdiction of the Court, and ultimately struck out the suit and application as earlier stated.

With the consent of all the parties, the appeal was heard through written submissions with limited summation. ***Mr. Moses Mwakisha***, learned counsel appeared for the appellant whilst ***Mr. Wamuti Ndegwa*** and ***Ms. Rajab,*** learned counsel, appeared respectively for the 1st and 2nd respondents.

Presenting the appellant's case, ***Mr. Mwakisha*** submitted that as of the date of the hearing of the preliminary objection on 30th August 2011, the Environment and Land Court contemplated by Article 162(2) of the Constitution had not been established and operationalized. It was learned counsel's further submission that the judges of the said court were not appointed until August 2012. In those circumstances, it was argued, the learned judge erred by holding that it was the Environment and Land Court, which had jurisdiction to hear the appellant's complaint in so far as it related to issues arising from the EMCA, yet that court was not yet in existence. In counsel's view, the best course of action open to the learned judge was to invoke the inherent jurisdiction of the High Court; entertain the suit pending the establishment of the Environment and Land Court; and eventually transfer the appellant's suit to the latter court.

Turning to the PPA, learned counsel submitted that the appellant's grievance could not be addressed or adequately addressed under the dispute resolution mechanism provided in the PPA, and in particular under ***section 33,*** because those provisions provide mechanisms for addressing grievances by a ***developer*** rather than by ***an affected party*** such as the appellant. In those circumstances, we were urged to find that the appellant had practically no remedy under the PPA dispute resolution mechanism and was therefore entitled to seek relief from the High Court.

Learned counsel further argued that there was no evidence that the 2nd respondent had served upon the appellant, as a person likely to be impacted by the 1st respondent's proposed development, copies of its application for development approval and change of user as required by ***section 41(3)*** of the PPA. It was therefore contended that an affected neighbour who was not so notified is not without a remedy, and that in such a case the affected party was entitled to seek relief in the High Court.

As regards the propriety of striking out the suit on a preliminary objection, it was urged that since copies of the 1st respondent's application for development approval and change of user were not served upon the appellant as required by section 41(3) of the PPA, or at any rate service thereof was not admitted, the High Court had erred by entertaining the preliminary objection on disputed facts.

On the dispute resolution mechanism prescribed by EMCA, it was submitted that the mechanism thereunder was not an alternative to compliance with the provisions of section 41(3) of the PPA. While it was admitted that physical development does impact the environment, it was nevertheless contended that matters of planning *per se* are not issues for determination by the National Environment Tribunal and therefore there was no basis for holding that the appellant had to submit to the dispute resolution mechanism provided under the EMCA rather than approaching the High Court directly.

For the 1st respondent, Mr. Ndegwa, learned counsel, attacked the appeal as incompetent for failure to

include in the record of appeal a copy of the notice of preliminary objection dated 19th July 2011. In counsel's view, the notice of preliminary objection was an essential pleading necessary for the proper determination of the appeal within the meaning of ***rule 87(1)*** of the ***Court of Appeal Rules.*** Since the appeal arose from a ruling on the notice of preliminary objection, it was argued, failure to include it in the record of appeal was fatal.

On the merits of the appeal, it was submitted that the learned judge had not decided that the Environment and Land Court, which had not been operationalized, was the right forum to hear the appellant's grievance. On the contrary, it was submitted, the decision of the High Court was that the appellant's recourse was in the first instance to NEMA and the National Environment Tribunal, and thereafter on appeal to the Environment and Land Court. To the extent that the appellant had not first invoked the dispute resolution mechanism provided under the EMCA, it was contended, the establishment or non-establishment of the Environment and Land Court at the material time was irrelevant. On that basis therefore, it was argued, there were no valid proceedings before the High Court that could have been sustained and transferred to the Environment and Land Court once it was operationalized.

Regarding the PPA, learned counsel submitted that the dispute resolution mechanism provided thereunder accommodates ***any person*** aggrieved by a decision on matters connected with physical planning and provides first, a right of appeal to the Liaison Committee, thereafter a right of appeal to the National Physical Planning Liaison Committee and ultimately to the High Court. Relying on the decisions of this Court in ***SPEAKER OF NATIONAL ASSEMBLY V. KARUME [1992] KLR 21*** and ***NAROK COUNTY COUNCIL V. TRANSMARA COUNTY COUNCIL & ANOTHER, CA NO 25 OF 2000***, it was submitted that where Parliament has provided a clear procedure for redress of a grievance, that procedure must be followed.

On the nature of remedies that were available under the dispute resolution mechanism provided under the PPA and the EMCA, it was submitted that the same were as efficacious as those available from the High Court while at the same time being cheaper and more expeditious. It was pointed out that under section 30(3) of the PPA, the Director of Planning has power to stop or discontinue development, and under section 38(2) he is empowered to issue enforcement notices which may result in demolition or discontinuation of construction. In the same vein, it was contended that under the EMCA, NEMA is empowered to, among other things, issue environmental restoration orders.

Turning to the alleged failure by the learned judge to invoke ***Article 159*** of ***the Constitution*** in favour of the appellant, it was submitted that the issues raised before the Court were jurisdictional and not mere technicality that could be cured or overlooked under Article 159.

Learned Counsel concluded by submitting that for all intents and purposes this appeal was academic to the extent that the construction, which the appellant sought to stop, was completed and the 16 apartments sold to third parties. While not disputing that current status quo, the appellant maintained that should its appeal succeed, it would effect the necessary amendments to its pleadings before the High Court.

Ms. Rajab, learned counsel for the 2nd respondent, associated herself with the submissions of the 1st respondent adding that the appellant had sought in the High Court final and conclusive orders rather than preservatory orders pending the hearing of its claim by the forums with jurisdiction; that Article 159 of the Constitution could not be invoked to confer jurisdiction where none was conferred by the Constitution or statute; and that the PPA provided remedies to all persons aggrieved by the decision of the director.

We have anxiously considered the ruling of the High Court, the submissions of learned counsel, the authorities that were cited and the law. We shall immediately dispose of the 1st respondent's contentions that the appeal is incompetent due to omission of a primary document, namely the notice of preliminary objection dated 19th July 2011 and that the learned judge erred by entertain a preliminary objection while facts were disputed.

The record shows that on 16th June 2015 the appellant applied informally for leave to file a

supplementary record of appeal to bring on record a copy of the said notice of preliminary objection. ***Mr. Sitonik,*** learned counsel, held brief for Mr. Ndegwa for the 1st respondent and also for Ms. Rajab for the 2nd respondent. No objection was raised to the application and we accordingly granted the appellant leave to file a supplementary record of appeal, which it did on the same day, that is, 16th June 2015. Plainly there is no merit in the objection and we dismiss it.

As regards the propriety of the preliminary objection that was taken before Okwengu, J. the cut and dry issue before the learned judge was whether the High Court had jurisdiction to entertain a dispute arising under the PPA and the EMCA when the appellant had not invoked the dispute resolution mechanisms prescribed thereunder. Whatever dispute there may have been on facts, there was no dispute that the issues in dispute arose from the PPA and the EMCA and that the appellant had not first invoked the prescribed dispute resolution mechanism before moving the High Court. In ***RAYTHEON AIRCRAFT CREDIT CORP. & ANOTHER V AIR ALFARAJ LTD. CA No. 326 of 1998,*** this Court stated as follows on preliminary objections:

> ***"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of a pleading or an application before the court and which, if argued as a preliminary point, may dispose of the suit. Examples clearly are (amongst others):***
>
> ***(1) whether or not a court has jurisdiction to try the suit;***
>
> ***(2) whether the claim is barred under and by virtue of the Limitation of Actions Act;***
>
> ***(3)whether or not a condition precedent to refer the dispute to arbitration bars a court from hearing the suit (if proper steps are taken by the applicant);and***
>
> ***(4) whether or not parties' choice of law and forum can bar another forum from applying any other law."***

We are satisfied that the preliminary point was properly taken on an issue of jurisdiction.

Turning to the other grounds of appeal and having carefully considered the pleadings and the ruling of the High Court, we reiterate that the learned judge held that a party aggrieved by a decision of NEMA had recourse in the first instance to the ***National Environmental Tribunal*** and if still aggrieved, had a right of appeal to the Environment and Land Court. The central question on which the learned judge based her decision was whether the High Court (or for that matter the Environment and Land Court) had original jurisdiction in the matter in light of the provisions of the two Acts, which provide elaborate dispute resolution mechanisms before resort to the High Court or to the Environment and Land Court, by way of appeal. Having found that the appellant had not invoked the prescribed dispute resolution mechanism, the question of a first instance hearing before the Environment and Land Court, which was yet to be established, did not arise. Accordingly the argument that the learned judge erred by holding that the Environment and Land Court had original jurisdiction to hear and determine the dispute when that court had not been established, has no foundation in the ruling of the High Court and is a mere red herring.

The PPA was enacted to provide for among other things, the preparation and implementation of development plans. As noted by the High Court, it has a fairly elaborate dispute resolution mechanism that affords affected parties, be they developers, adjacent property owners, or any other affected person, an opportunity to be heard in the first instance followed by a two tier appeal process, before a final appeal to the High Court.

Under ***section 29*** of the Act, local authorities are empowered to, among other things, prohibit or control the use and development of land and buildings in the interest of proper and orderly development; to control or prohibit subdivision of land; to approve all development applications; and to grant development permissions. Under ***section 30*** no person may carry out development within the area of the local authority without development permission by the local authority and it is a criminal offence to undertake such development without permission.

Any person aggrieved by a decision of a local authority to grant or deny an application for change of user or development may appeal to the relevant ***Physical Planning Liaison Committee*** established under ***section 8*** of the PPA. A decision of a Physical Planning Liaison Committee is appealable to the ***National Physical Planning Liaison Committee***, a body made up of 19 members drawn from a cross-section of sectors, professions and interest groups. Its mandate includes hearing and determination of appeals from a person or local authority aggrieved by a decision of any of the lower level liaison committees. The Committee has power to reverse, confirm or vary the decision appealed against. Under ***section 15(4)*** of the Act any person aggrieved by a decision of the National Physical Planning Liaison Committee has a further right of appeal to the High Court.

We have carefully considered the provisions of the PPA and we do not see the basis of the argument that it contemplates the possibilities of some aggrieved parties sidestepping the provided elaborate dispute resolution procedures and taking their grievances directly to the High Court. Throughout the PPA refers to ***"any person aggrieved by a decision".*** That aggrieved person, in our view, includes the owner of an adjacent property like the present appellant. In our reading of ***section 41(3)*** of the PPA against the other provisions of the Act, a person who is supposed to be served with a copy of the application for change of user or for development and is not so served is an aggrieved party within the meaning of the Act and is entitled to resort to the dispute resolution mechanism provided under the Act to agitate his grievance. He is not entitled to ignore the provisions of the Act and invoke the original jurisdiction of the High Court.

The EMCA takes a similar approach on matters of the Environment. ***Section 58*** as read with the ***Second Schedule*** overrides all provisions of other laws (including the PPA) and requires any person undertaking, among others, a project involving an activity out of character with its surrounding, or a structure of a scale not in keeping with the surroundings or entailing major changes in land use to first undertake an environment impact assessment. Under the ***Environmental (Impact Assessment and Audit) Regulations 2003***, in undertaking an environment impact assessment, all persons likely to be affected by the project must be consulted. In ***section 31*** the Act establishes the ***Public Complaints Committee*** whose functions, among other things, is to investigate any allegations or complaints against any person relating to the condition of environment.

Like under the PPA, any person aggrieved by a decision of the Director General, of NEMA or of any of its Committees has a right of appeal to the National Environment Tribunal under ***section 129(2)*** of EMCA, which may confirm, set aside, or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is, under ***section 130*** appealable to the High Court.

The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance.

This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. ***SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME*** ***(supra***), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

> ***"[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

(See also ***KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS (2008) 3 KLR (ER) 296).***

It is readily apparent that in those cases the Court was speaking to issues of the correct ***procedure*** rather than of the correct ***forum*** for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, ***including*** reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word ***"including"*** leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In ***RICH PRODUCTIONS LTD. V. KENYA PIPELINE COMPANY & ANOTHER, PETITION NO. 173 OF 2014,*** the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> ***"The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."***

On the same reasoning, this Court, in ***REPUBLIC V. THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, CA NO 84 OF 2010*** upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in ***VANIA INVESTMENT POOL LTD. V. CAPITAL MARKETS AUTHORITY & 8 OTHERS, CA NO 92 OF 2014*** this Court also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the ***Capital Markets Appeals Tribunal*** established by the ***Capital Markets Act***.

We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very *raison d'etre* of the mechanisms provided under the two Acts.

What we have stated above also sufficiently disposes of the appellant's contention that the High Court failed to invoke its inherent jurisdiction or abdicated its jurisdiction. It also answers the applicant's contention that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under ***Article 159 (2) (d)*** of the Constitution. Granted the express constitutional principle under which the dispute resolution mechanisms provided by the PPA and the EMCA are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality. In ***RAILA ODINGA & 5 OTHERS V. IEBC & 3 OTHERS, PETITION NO. 5 OF 2013,*** the Supreme Court stated that in interpreting the Constitution, it must be read as one whole and that Article 159(2)(d) cannot be read or applied in a manner that ousts the provisions of other clear Articles of the Constitution. And in ***LEMANKEN ARAMAT V. HARUN MAITAMEI LEMPAKA***, Petition No. 5 of 2014, the same Court, while considering the provisions of Article 159(2) (d) of the Constitution noted that where the issue at hand is one of mere procedural lapse which has no bearing on jurisdiction, the court can cure the same under Article 159(d). However, where the Constitution links certain vital conditions to the power of the

court to adjudicate a matter, Article 159(2)(d) has no application.

In view of the conclusion we have reached, we do not find it necessary to address the question of the prevailing status quo on the ground, which the respondents submit has rendered this appeal academic. Accordingly, this appeal is dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Malindi this 31st day of July 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.