REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 117 OF 2019

DOMINIC G. NG'ANG'A .....1ST PLAINTIFF/ APPLICANT

LUCY WANJIKU KANJA..... 2ND PLAINTIFF/ APPLICANT

(Suing in their own capacity and on behalf of the **KIDFARMACO RESIDENTS ASSOCIATION)**

Versus

DIRECTOR GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST DEFENDANT/RESPONDENT

ATLAS TOWER KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

ALICE MUKAMI NJUGUNA..... 3RD DEFENDANT/RESPONDENT

DANIEL KITHINJI.....4TH DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF KIAMBU .....5TH DEFENDANT/RESPONDENT

RULING

The Plaintiffs herein brought this suit on their own capacity and on behalf of **KIDFARMACO RESIDENTS ASSOCIATION,** and sought for various reliefs against the Defendants. Among the prayers sought are an Order of **Permanent Injunction** to restrain the 2nd Defendant from further construction of the **Base Transceiver Station** on the property known as **Kikuyu/Kikuyu block 1/269:** A permanent order of injunction restraining the 2nd Defendant from erecting any **Base Transceiver Station** or any **Telkom Mast** on any property located within **Kidfarmaco Estate,** and an order for payment of **general damages** to the Plaintiffs by the Defendants for violating their rights to safe, clean and healthy environment.

In their claim the Plaintiffs alleged that the Defendants actions have violated their right to clean and safe environment and they now live in fear of the exponential risk brought by the **Telkom Mast,** which is being erected on the named property, without consideration of the Plaintiffs' health and without their consent. They further alleged that they have come to Court to seek equal protection by the law against the serious health risks exposed to them by the **2nd**, **3rd** and **4th** Defendants herein.

Simultaneously, the Plaintiffs filed a **Notice of Motion** application dated **4th July 2019,** and sought for a temporary order of

injunction to restrain the **2nd Defendant/Respondent,** from further construction of the **Base Transceiver Station,** on the property known as **Kikuyu/Kikuyu/Block1/269,** located in **Kidfarmaco Estate,** pending the hearing and determination of the suit.

The matter came to Court under **Certificate of Urgency,** on **8th July 2019,** and the Court granted **prayer No. 2** of the said **Interlocutory application** by granting a temporary order of injunction. The said order has been extended severally by this Court.

The suit and the Interlocutory application are contested by the **2nd, 3rd, 4th** and **5th Defendants** herein.

The 2nd 3rd and 4th defendants filed a **Notice of Preliminary**

Objection dated **17th July 2019** and sought for striking out of the entire suit and the Notice of Motion application dated **4th July 2019,** on the following grounds:-

1. ***That the suit and plaintiffs' application contravene the mandatory provisions of sections 129 and 130(1) of the Environmental Management and Coordination Act (EMCA) Cap 8 of 199 as read together with Regulation 46 of Environment (impact assessment and Audit Regulations), 2003.***

2. ***That this Honourable Court lacks original jurisdiction to hear and determine this matter in the first instance;***

3. ***That the jurisdiction of this Honourable Court has been invoked prematurely;***

4. ***That this suit and Plaintiffs' Application contravene the provisions of Article 159(2)(c) of the Constitution;***

5. ***That the Plaintiffs' Application is incompetent and fatally defective.***

The 5th Respondent also filed a **Notice of Preliminary Objection**

dated **28th August 2019,** against the entire suit on the following grounds:-

1. ***That this Honourable Court lacks jurisdiction to entertain the present suit;***

2. ***That under Section 61(3) of the Physical and Land Use Planning Act 2019, an applicant or interested party that is aggrieved by the decision of a County Executive Committee, members regarding an application for development permission may appeal against that decision to County Physical and Land Use Planning Liaison Committee within fourteen days of the decision.***

3. ***That Section 61(4) of the Physical and Land Use Planning Act 2019 provides that an applicant or an interested party who files an appeal and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.***

4. ***That further, section 75(2)(d) of the Physical and Land Use Planning Act 2019, provides for the National Physical and Land use Planning Liaison committee to hear appeals against decisions made by the national planning authority including decisions on the environmental impacts and the implementation or national or inter-county physical land use development plans.***

5. ***That the applicant herein has failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute***

6.***That the instant suit is therefore premature, frivolous and an abuse of the Court process as this Honourable Court's Jurisdiction has been limited by statute.***

The Court directed the parties to canvass the **Preliminary objections** first which they did through written submissions.

The **2nd, 3rd and 4th Defendants,** through the Law Firm of **Iseme**, **Kamau & Maema Advocates,** filed their written submissions on **7th August 2019,** and submitted that the suit and the Plaintiffs' application contravenes the mandatory provisions of **Sections 129** and **130(1)** of **Environment Management and Coordination Act (EMCA),** as the plaintiffs failed to raise their grievances with the **National Environmental Tribunal (NET),** which is created under **Section 125** of **EMCA**. It was submitted that the Court **lacks jurisdiction** to entertain this matter and that this Court is only vested with **Appellate Jurisdiction** to hear and determines **Appeals** emanating from **NET**. They relied on the case of ***Okiya Omtatah Okoiti vs Kenya Power & Lighting Company Ltd & 10 others [2018]eKLR*** where the court held:-

"Otherwise the Court of Appeal held in Republic …vs….. NEMA Exparte Sound Equipment Ltd CACA No. 84 of 2010 [2011] Eklr, challenges to Environmental Impact assessment Licences should be made to National Environmental Tribunal established for that purpose under Section 125 of the ENVIRONMENT MANAGEMENT AND COORDINATION ACT (EMCA). Rather than come to this Court, the Tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licenses."

They further relied on the care of ***Michael Moragia Nyachae Vs Buddies Kisii Ltd & 2 Others [2015)eKLR,*** where the Court held:-

"In the instant matter, it is my view that the Environment Management and Co-ordination Act (EMCA), has prescribed a procedure for handing of grievances and /or disputes which arise from its application and/or the application of the regulations made under it. In the words of the Court of Appeal in the case of Speaker of the National Assembly Vs the Hon. James Njenga Karume (supra), the procedure set out thereunder should be followed strictly.

'Thus in my view, the Petitioners ought to have lodged an appeal before the NEMA Tribunal against the decision of the 2nd Respondent permitting the 1st Respondent to set up its business on Parcel Block 111/198 Kisii Municipality. I uphold the Preliminary Objection by the 1st Respondent and the result is that the Petitioners' Application and the petition are struck out with costs to the 1st Respondent."

On whether this Court **lacks Jurisdiction** to hear and determine this matter, the Defendants relied on **Article 162(2)b,** of the **Constitution** and **Section 13(1)** of **Environment and Land Court Act, Cap 19** of **2011**. They further quoted **Section 148 of EMCA** which provides:-

"***Any written law by the national and county governments relating to the management of the environment in force immediately before the commencement of this Act shall have effect, subject to such modifications as may be necessary to give effect to this Act, and where the provisions of such law are in conflict with any provisions of this Act, the provisions of this Act shall prevail."***

Further they relied on the case of ***Samson Chembe Vuko vs Nelson***

Kilumo & 2 Others [2016] eKLR, where the court held that:-

"It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed."

'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 statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.'

'What the appellant was asking the court to do is to assume jurisdiction which it did not have. The consequence is that the decision therefrom would have amounted to nothing. On the whole, we are satisfied that the trial court did not err by upholding the Preliminary Objection to the extent that the appellant's suit sought to invoke the original jurisdiction in a matter that was left to be dealt with by alternative dispute resolution mechanism by an Act of Parliament. The appellant for reasons best known

to himself refused to invoke it."

It was also submitted that the Plaintiffs' Application contravenes the provisions of **Article 159(2)(c)** of the **Constitution 2010,** which enjoins this Court to promote **alternative forms of disputes resolution** and for this point they relied on ***Chembe Vuko's* case** (**supra**) where the Court further held:-

"The basis for that view is 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 work "including" leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent the Constitution requires that these forms of dispute resolution mechanisms be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitution 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."

The 2nd, 3rd and 4th Defendants urged the Court to uphold their **Notice of Preliminary Objection** dated **17th July 2019,** and strike out the Plaintiffs' **entire suit** and the accompanying **Notice of Motion application,** with costs.

The **5th Defendant** also filed its written submissions **on 2nd October 2019**, and submitted that this Court lacks jurisdiction to entertain this matter. They relied on **Section 61(3)** of the **Physical & Land Use Planning Act, 2019,** which provides procedure for disputes resolution at the instant where a party is aggrieved by the decision of a County Executive Committee, regarding application of development permission. The said section provide as follows:-

"(3) An Applicant or interested party that is aggrieved by the decision of a County Executive Committee Member regarding an application for development permission may appeal against that decision on the county Physical and Land Use Planning Liaison Committee within fourteen days of the appeal being filed."

Further the 5th Defendant relied on the case of **Speaker of the National Assembly Vs Karume [1992]eKLR 22**, where 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 appellate jurisdiction."

They further relied on **Section 80,** of the same Act ,which provides:-

"(1) A person who appeal to the County Physical and Land Use Planning Liaison committee shall do so in writing in the prescribed form.

(2) A County Physical and Land Use Planning Liaison committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination.

(3) The Chairperson of a County Physical and Land Use Planning Liaison committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court and published in the Gazette or in at least one newspaper of national circulation."

For this section of Law, the 5th Respondent relied on the case of **Mutanga Tea & Coffee Company Ltd Vs Shikara Ltd & Another [2012]eKLR,** where the Court held that:-

"…… Under Section 33(3) of the Physical Planning Act, the first stop for anyone who is aggrieved by the decision of the Defendant is the Liaison Committee to which an appeal is provided. The provisions dealing with appeal are Section 31, 25, 25(1) and (4). These provisions provide for procedure for progressing with appeals from the Liaison Committee to 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 ……"

Therefore, the **5th Defendant** submitted that the **Plaintiffs** failed to follow the **appellate procedure** laid down in the relevant Statute, and the Court was urged to uphold the **Preliminary Objection** and finds that it has **no jurisdiction** to entertain the present suit.

The two **Preliminary Objections** are contested and the Plaintiffs filed their written submissions on **6th November 2019,** and urged the Court to dismiss the said Preliminary Objections.

On whether the Court **lacks jurisdiction** to entertain the present suit, the Plaintiffs submitted that the suit herein was file don **5th July 2019,** and the **Physical and Land Use Planning Act 2019,** was enacted on **22nd July 2019,** and therefore the **Notice** of **Preliminary Objection** raised by 5th Defendant cannot stand.

They further submitted that the Defendants failed to give life to the Constitutional right of Fair administrative process as provided by **Article 47** of the **Constitution 2010**. They relied on the case of ***R vs Town Planning Committee of City Council of Nairobi and 2 others Misc Civil Case No. 753 of 2007.***

It was their further submissions that the **Court has jurisdiction** and the issues raised in their suit are Constitutional issues on the right to clean environment and go beyond Physical Planning Liaison Committee. For this the Plaintiffs relied on the case of ***John Kabukuru Kibicho & Another Vs County Government of Nakuru & 2 others [2016] eKLR,*** where the Court held:-

"The substantive issue in this suit concerns a planning permission that allowed a change of user of the suit property. I agree with the respondents on the argument that a person faced with a planning decision, has a right to appeal that decision to the Liaison Committees. However, I do not agree with the contention that the petitioners herein ought to have channeled their grievance to the Liaison Committees. They had absolutely no opportunity to do so. In as much as the 1st Respondent deposed that the petitioners were informed of the decision allowing the change of user, I have no proof of such. I have not seen any letter or any form of communication from the 1st respondent to the petitioners, informing them that their objection against the change of user was rejected. If there was such communication, then the issue of the petitioners not channeling through the liaison committees would probably have had some weight."

The plaintiffs also relied on a further court's decision in the above stated case where it was held;

"The dispute herein is related to land use planning, or land administration and management, or is otherwise a dispute relating to environment and land. It follows that this court has jurisdiction to try the subject matter of this suit. I am therefore of the view that this court has jurisdiction to try this suit and dismiss the arguments that this court has no jurisdiction over this matter."

It was further submitted that the Plaintiffs came to Court on the strength of **Article 162(2)(b)** of the **Constitution 2010,** which gives the **Environment & Land Court,** mandate to hear disputes concerning land and the environment. Further that the jurisdiction is elaborated in the **Environment & Land Court Act, 2011** at **Section 13** which states:-

"13(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

13(4) In addition to the matter referred to in subsections(1) and (2) the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court."

The above point was emphasized by relying on the case of ***John Kaburuku Kibicho (supra)*** which states:-

"…… I am still of the above opinion. In circumstance of this case, the petitioner have demonstrated breaches of procedures both in Environment Management and Coordination Act (EMCA) and in the Physical Planning Act. Given these breaches, I do not see how it can be submitted that the 1st and 3rd Respondents have properly convinced themselves that the project is one that is in conformity with the law or is one that is not harmful to the petitioner's right to a clean and healthy environment.

For the above reasons, I am of the opinion that the petitioners have demonstrated that the project is one, that at the very least, has potential to cause harm to their right to a clean and healthy environment."

The Plaintiffs also relied on **Section 129(1)** of **EMCA** on **Appeals** to the **Tribunal** (NET) and submitted that the stated provisions of law grants the **tribunal jurisdiction** only on matter where parties have applied for **Environment Impact Assessment (EIA)** licenses and not on who is objecting to grant of the same. For this point, the Plaintiffs relied on the case of **Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others Nakuru ,ELC Constitution Petition No. 50 of 2013,** where the Court held:-

"Where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment".

It was the Plaintiffs' submissions that due process was not followed and where due process is not followed, the jurisdiction falls squarely on this Court. For this issues, the Plaintiffs relied on the case of **TAIB Investment Ltd vs Fahim Salim said & 5 others [2016] eKLR,** where the court held:-

" ……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 ….."

Therefore the Plaintiffs urged the Court to dismiss both **Notices of Preliminary Objection,** and allow the matter to proceed for hearing and be determined on merit.

The 2nd, 3rd and 4th Defendants, filed **supplementary** written submissions on **16th December 2019,** which this Court has also considered.

The Court has carefully considered the two **Notices of Preliminary Objection** and the **rival written submissions.** The two Preliminary Objections are basically dealing with the issue of this court lacking jurisdiction to entertain the suit herein. It is trite that jurisdiction is everything and when a court is devoid of jurisdiction it has no option but to down its tools. See the case of **Motor Vessel Lillian 'S' vs Caltex Oil (K) Ltd 1989 KLR 1** where the court held that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

As the two Preliminary Objections challenge Jurisdiction of this court, then it is prudent to first determine whether what has been raised by the objectors (Defendants) falls within the rubrics of what amount to a Preliminary Objection as described in the case **Mukisa Biscuit & Co. Ltd Vs. West End Distributors Ltd (1969) EA 696:-** where the Court held that;

"So far as I am aware, 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."

What has been questioned herein is the issue of jurisdiction of this Court. It is evident that if a proper Preliminary Objection is

upheld, it can bring a matter to an end preliminarily. See the case of **Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999,** where the court held that:-

"When preliminary points are raised, they should be capable of disposing the matter preliminary without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings."

It is evident herein that if the court is to uphold that it has no jurisdiction, then automatically it will down its tools thus bringing this matter to a halt at the preliminarily stage. Further, a question of Jurisdiction should be raised at the earliest opportunity. See the case of**: Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR,** where the Court held that:

"We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises."

Therefore this Court finds that the objections as filed by the Defendants amounts to Preliminary Objections as described in the **Mukisa Biscuits case** (supra).

The next issue is whether the preliminary objections herein are merited.

The defendants have alleged that the Plaintiffs suit and application were brought to court prematurely as the Plaintiffs did not follow the procedural channels of disputes resolutions before coming to Court. Therefore, the above omissions by the Plaintiffs amounts to premature filing of this suit and consequently, the Court lacks jurisdiction.

This court has considered the prayers sought in the Plaint and the statement of claim. Apart from seeking for the cancellation of the **E.I.A license** and **Approval** of **change of user** and construction of the **Base Transceiver,** on the property **L.R. Kikuyu/Kikuyu/1/269,** the Plaintiffs have also sought out payment of **general damages** by the Defendants for violating their **right** to **safe, clean** and **healthy environment**.

In their statement of **Claim,** the Plaintiffs alleged that their right to clean and safe environment was being violated by the defendants through construction of the **Base Transceiver Station,** on the **3rd and 4th Defendants'** property by the **2nd Defendant.**

The Plaintiffs claim is therefore a claim that falls under protection of clean environment. Further the Plaintiffs have alleged that the **1st** and **5th Defendants** allowed the **2nd Defendant** to erect the said **Base Transceiver Station,** without having been given an opportunity to be heard. The jurisdiction of this Court stems from **Article 162(2)(b)** of the **Constitution 2010,** which mandates the Court to hear and determines **disputes** concerning **land** and **environment**. Further the Court's jurisdiction is also set out in **section 13(2)** of the **Environment& Land Court Act, 2011** which states:-

(2) In exercise of its jurisdiction under Article 162 (2) (b)

of the Constitution, the Court shall have power to hear

and determine disputes relating to environment and

land, including disputes"

a. relating to environmental planning and protection,

trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

(d) relating to public, private and community land and

contracts, choses in action or other instruments

granting any enforceable interests in land; and

e. ***any other dispute relating to environment and land.***

It is evident that the dispute herein relates to **land use, planning** and also **environment and land.** These are disputes that this Court has jurisdiction to handle as stipulated in **Article 162(2)(b)** of the Constitution and **Section 13(2)** of the **ELC Act** (supra).

Having carefully considered the above provisions of law, this Court finds that it has jurisdiction to try the subject matter of this suit. I am further persuaded by the finding of **Hon. Justice Sila Munyao,** in the case of **John Kaburuku Kibicho & Another (Supra)** and also the holding and finding of **Hon. Justice O. A. Angote**,in the case of **Taib Investment Ltd vs Fahim Salim Said & 5 Others [2016] eKLR** where the Court held:-

"…… 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 ….."

The court finds that the claim herein is a claim relating to **violation** of **right** to **clean environment** and even though numerous **tribunals** dealt with the issuance of licenses and approvals, those issues cannot be dealt separately and thus this Court is clothed with jurisdiction to deal with the claim herein as provided in **Article 162(2)(b)** of the **Constitution.**

Further the **5th Defendant's** Notice of **Preliminary objection** is premised under the provisions of **Physical and Land Use Planning Act, 2019,** which **Act** was enacted on **22nd July 2019,** whereas the suit herein was file don **5th July 2019**.By the time of filing of this suit, the above Act had not yet come into force.

Having now carefully considered all the rival submissions herein and the provisions of **Article 162(2)(b)** of the **Constitution 2010,** and **Section 13(2) of the ELC Act,** and the cited provisions of **EMCA,** the Court finds that it has **jurisdiction** to deal with the instant claim. Consequently, the court dismisses the two **Notices of Preliminary Objection** as filed by the Defendants and **directs** that this matter be heard and determined on merit.

Costs shall be in the cause.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this ***12th*** *day* of ***March 2020***.

L. GACHERU

JUDGE

12/3/2020

In the presence of

M/s Kimani holding brief for Mr. Okeyo for Plaintiffs

No appearance for 1st Defendant

M/s Igecha holding brief for Mr. Nyaburi 2nd, 3rd &4th Defendants (objectors)

M/s Nguru Holding brief for M/s Mbugua for 5th Defendant (objector)

Lucy - Court Assistant.

L. GACHERU

JUDGE

12/3/2020