IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 083 of 2019

In the matter between

1. **KITGUM MUNICIPAL COUNCIL}**
2. **BANYA EMMANUEL**
3. **OKWERA PETER OMOYA**
4. **KILAMA BOSCO**
5. **LING GEOFFREY** **APPELLANTS**

And

1. **SUZAN ADOKORACH**
2. **SILVIA AKELLO**
3. **AKENA PAUL**
4. **ACAN JENNIPHER**
5. **AWOR BEATRICE**
6. **AKOKO ROSE**
7. **HAIDA AGNEE**
8. **ODOCH POLYCARP**
9. **OKOT BENSON**
10. **IRWONDO PETER FRED**
11. **KILAMA SAFI**
12. **ARYEMO BEATRICE**
13. **SYLVIS OTTOO**
14. **JACKIE ODONGKENE**
15. **AKENA PAUL** **RESPONDENTS**

Heard: 25 September, 2019.
Delivered: 26 September, 2019.

Civil Procedure *— Statute ousting court's jurisdiction — A statute ousting the jurisdiction of a civil court must be strictly construed. The exclusion of jurisdiction of a civil court to entertain civil causes should not be readily inferred unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of the nature. Such exclusion must either be explicitly expressed or clearly implied — A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction— Except where their jurisdiction is expressly or impliedly barred, magistrates' courts have the jurisdiction to entertain and try "all suits of a civil nature — A statute may expressly or by necessary implication bar the jurisdiction of Magistrates Courts in respect of a particular civil matter — The Physical Planning Act, No. 8 of 2010 creates an internal mechanism of review by one higher level planning board after another, and when the internal system is exhausted, by way of appeal to the High Court — Such a system of internal review is intended to enable the planning authorities to swiftly identify and correct mistakes at a minimal fiscal and administrative cost and without the need to involve the judicial branch — Courts require administrative issue exhaustion as a general rule because it is usually appropriate for contestants in an adversary proceeding before it to develop fully all issues there — Where a dispute involves the recognition, observance or enforcement of rights and obligations created by enactment, which enactment provides a forum for resolution of such disputes, the only remedy is to approach the forums created by the Act and must thus firs exhaust the available administrative remedies before judicial relief will be granted — The doctrine of exhaustion, where applicable, is designed to allow the administrative agency to perform the task delegated to it by the legislature, the application of its specialised understanding to problems within a specified area, free from the disruption of judicial intervention in its established procedure.*

Town Planning *— Urban planning is a multi-disciplinary process that not only seeks to tap into that range of skills and competencies, but also guarantee a truly wide consultation — Once the plan is approved and gazetted, its implementation is then entrusted to the responsible urban authorities — Interference by elected officials and the public in plan implementation can derail good planning outcomes — It becomes essential for courts to protect the independence of decision making in the implementation of urban plans, while the public and elected officials need to respect the professional role of planners in word and deed — It creates an internal mechanism of review by one higher level planning board after another, and when the internal system is exhausted, by way of appeal to the High Court — Determining the suitability of the location of a market is an urban planning question that brings into play discrete and*

technical issues falling within the specific expertise of the planning appeal tribunals established by the Act — In disputes of this nature, a planning tribunal is more suited than a Court to undertake the task after considering all relevant issues of law, fact, policy and discretion.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] This is an appeal arising from a ruling of the Chief Magistrate of Kitgum, dismissing a preliminary objection that was raised by counsel for the appellants, contending, as a preliminary point of law, that the court had no jurisdiction over the subject matter of the dispute.

[2] The background to the appeal is that respondents are market vendors that operate at a market within the Central Division of Kitgum Municipality. During or around February, 2019 they were issued with an enforcement notice under section 46 of *The Physical Planning Act, No. 8 of 2010*, by the appellant's local physical planning committee as occupiers or developers of land, in respect of which the committee was satisfied that the development thereon was being carried out, without the required development permission. The respondents not having complied within the time stipulated in law, the appellant set about to cause a forceful closure of the market and to force to the respondents to re-locate to another market established by the appellant. The respondent filed Civil Suit No. 9 of 2019 before the Chief Magistrate's Court by which they sought to challenge the decision to close the market and relocate them as well as a claim for general and special damages for their property either damaged, destroyed or lost during the forceful eviction. Pending the hearing of that suit, they filed an application for an interim injunction, which was granted, and one for a temporary injunction.

The appellant's preliminary objection in the court below:

[3] It is at the hearing of that application that counsel for the appellant raised a point of law, as a preliminary objection, contending that section 48 of *The Physical Planning Act, No. 8 of 2010,* ousted the jurisdiction of the Magistrates Courts. He argued that the respondents ought to have appealed to the next level of Physical Planning Committees set up under the Act when dissatisfied by the notice, and not by way of a suit before a court of law. They could only appeal to the High Court in the event that the final Physical Planning Committee, the National Planning Committee, did not decide in their favour. He prayed that the interim injunction be set aside, the application for a temporary injunction be dismissed and the suit be struck out.

The respondent's response to the objection in the court below:

[4] In response, counsel for the respondents submitted that the suit was properly filed before that court and that it had jurisdiction over the subject matter. All that the court should focus on at that stage was preservation of the status quo. He prayed that the preliminary objection be overruled.

Ruling of the court below:

[5] In his ruling, the Chief Magistrate overruled the objection stating that the enforcement notice, whose validity the respondents sought to challenge by the proceedings pending before that court, was not consistent with the format stipulated by the Act, was not issued by a local physical planning committee but rather the 2nd respondent, yet planning laws apply to both permanent and temporary structures. An enforcement notice that is not compliant with the requirements of *The Physical Planning Act, No. 8 of 2010,* can be challenged by suit in a court of law. He accordingly overruled the objection and decided that the application be heard on its merits.

The grounds of appeal:

[6] Being dissatisfied with that decision, the appellants appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law when he tried the matter while lacking jurisdiction, which occasioned a miscarriage of justice.
2. The learned trial Magistrate erred in law when he ordered that the Chief Magistrates Court shall proceed to hear and determine Miscellaneous Application No. 15 of 2019 on its merits.
3. The learned trial Magistrate erred in law and fact when he failed to evaluate all the evidence on court record, and held that the enforcement notice served on the respondents did not conform to the statutorily provided format, thereby arriving at a wrong decision that occasioned a miscarriage of justice.

Arguments of Counsel for the appellant:

[7] In his submissions, counsel for the appellants, argued that the suit was filed by the respondents to prevent the 1st appellant from evicting then from a satellite market. Under *The Markets Act*, s.1 (b) no person can establish a market without authority of the Municipal Council. It is the duty of the 1st appellant to establish Markets. Urban Councils in a District too can create markets. *The Physical Planning Act* under s. 46 (1), 32 and 33 confers jurisdiction on the 1st appellant to plan markets. Section 46 (1) applies to enforcement notices. Upon service of the notice, an appeal is to be made to the higher physical planning committee. An appeal under section 48 (2) thereof should be made within 30 days. Notice was served on 30th January, 2019. It is only under s. 48 (3) that an appeal may be made to the high Court *(see Baku Raphael v. Attorney General. S.C appeal No. 1 of 2005* to the effect that a court that hears a matter without jurisdiction does so in error). The respondents refused to relocate after notice was served upon them hence, the need for enforcement. He prayed that the appeal be allowed.

Arguments of Counsel for the respondents:

[8] In response, counsel for the respondents, argued that the suit is for recovery of property destroyed and the decision to relocate market vendors. A one M.P. Okin made a development that was approved by the Municipality much earlier and a big part of that development is the satellite market therefore no further approvals were necessary for the structures. It was an existing market alongside the other market. Notice to demolish was unnecessary. It did not follow the law and was unnecessary because the market already existed. It was next to the main market. The exceptions that permits courts to hear matters within the jurisdiction of administrative tribunals apply to this claim. The Magistrate had jurisdiction because the respondents never appealed. The market they occupy is the only market where people go and where they are being told to relocate to is inconvenient. He prayed that the appeal be dismissed.

Jurisdiction of Magistrate courts in matters of enforcement of planning laws

[9] The three grounds of appeal will be considered concurrently. The major contention in this appeal revolves around the jurisdiction of the Magistrate's Court in matters to do with the enforcement of planning laws. A court of competent jurisdiction is one that has jurisdiction over the parties, the subject matter of the litigation and the remedy being sought. Jurisdiction is everything; without it a court has no power to make even one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction *(see Owners of Motor Vessel Lillian "s" v. Caltex Oil Kenya Limited [1989] KLR 1).*

[10] Various provisions of *The Constitution of the Republic of Uganda, 1995* relating to the administration of justice guarantee every person having a grievance of a civil nature, the right to institute a suit in a court of the lowest grade competent to

try and determine it, unless its cognisance is either expressly or impliedly barred. It is well established that the jurisdiction of courts so created to try suits of a civil nature is assumed unless it is taken away statutorily, either expressly (by enactment) or by necessary implication (based on general principles of law and equity or on ground of public policy). The mere conferment of special jurisdiction on a tribunal in respect of the said matter though does not in itself exclude the jurisdiction of civil courts.

[11] By virtue of section 208 of *The Magistrates Courts Act*, every magistrate's court has jurisdiction, subject to the provisions of the Act, to try all suits of a civil nature excepting suits of which its cognisance is either expressly or impliedly barred. Therefore, except where their jurisdiction is expressly or impliedly barred, magistrates' courts have the jurisdiction to entertain and try "all suits of a civil nature." By virtue of that provision, subject to other limiting provisions within the Act, Magistrates courts have inherent jurisdiction to hear any civil matter unless it is expressly or impliedly excluded from their jurisdiction.

[12] A statute may expressly or by necessary implication bar the jurisdiction of Magistrates Courts in respect of a particular civil matter. Magistrates Courts have no authority to preside over cases where their jurisdiction is explicitly or implicitly barred by statute. When dealing with the question whether a civil court's jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind that every presumption should be made in favour of the jurisdiction of a civil court. It is well settled that a statute ousting the jurisdiction of a civil court must be strictly construed *(see Secretary of State v. Mask and Co., AIR 1940 P.C. 105).* The exclusion of jurisdiction of a civil court to entertain civil causes should not be readily inferred unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of the nature. Such exclusion must either be explicitly expressed or clearly implied.

[13] Exclusion of jurisdiction means prevention or prohibition of the court from entertaining or trying a matter, in essence limiting its ability to discharge its constitutional mandate. Therefore when interpreting statutes that have a bearing on the jurisdiction of courts, it is the principle of law that statutory provisions tending to oust the jurisdiction of the court should be construed strictly and narrowly. The rationale can be found in *De Smith's Judicial Review*, 6th ed (2007) by H. Woolf, J. Jowell and A. le Sueur, where they state at para 4-015 as follows;

> The role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice.

[14] For that reason, it is now a well recognised rule in the interpretation of statutes that a curtailment of the powers of a court of law, in the absence of an express provision or clear implication to the contrary, is not to be presumed. In the case of *Smith v. East Elloe Rural District Council [1965] AC 736* Lord Viscount Simonds stated as follows;-

> Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.

[15] It was also held similarly, in *Davies and Another v. Mistry [1973] EA* 463 where Spry VP, quoting the case of *Pyx Granite and Company v. Ministry of Housing and Local Government [1960] AC 260* stated that: "'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights in not to be excluded except by clear words. That is a 'fundamental rule' from which I would not for my part sanction any departure." Therefore, the right of access to any court can only be taken away by clear and unambiguous words of Parliament. The principle of law that statutory

provisions tending to oust the jurisdiction of the court should be construed strictly and narrowly was further propounded in the landmark decision in *Anisminic v. Foreign Compensation Commission [1969] I All ER 208* where Lord Reid stated:

> It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

[16] Similarly, Australian Courts have held that although Parliament bears the popular mandate, and that it can, indeed, provide for an ouster clause in a statute, it has to have spoken unequivocally. This is particularly clear from Craig v. South Australia [1995] 184 CLR, in which the High Court observed:

> Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.

[17] Mulenga, JSC (as he then was) in *Habre International Company Limited v. Kassam and others [1999] 1 EA 125* as well stated that:

> The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this.

[18] Since the exclusion of the jurisdiction of a civil court is not to be readily inferred but rather such exclusion must be clear, the question as to whether or not a civil court's jurisdiction to entertain a suit is barred by a statue expressly or by implication has to be determined in the light of the words used in the statute, the scheme of the relevant provisions and the object and purpose of the enactment.

In the case of a doubt as to jurisdiction, the court should lean towards the assumption of jurisdiction. It is also well established that even if jurisdiction is so excluded the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

[19] The circumstances giving rise to the dispute at hand, as can be gathered from the pleadings filed in the Chief Magistrates Court, arise from the attempted enforcement of planning laws. While the 1st appellant seeks to have the respondents re-locate to multiple satellite markets as part of its plan for building a new market within the Central Division of Kitgum Municipality, the respondents contend that the 1st appellant's plans for relocating them are not comprehensive enough to cover all the traders, the designated areas are too small, they are not centralised enough and therefore are inaccessible to the majority of their customers. It is on that account that a one M.P. Okin volunteered to provide space for a temporary market, which the respondents consider to be more spacious and convenient. It is from that place that the 1st appellant now seeks to evict them by demolishing numerous temporary structures they have put up in that area. They claim the 1st appellant embarked on that exercise by demolition of part of the temporary market they had set up on land offered by M.P. Okin, resulting in loss of their property worth millions of shillings, hence the suit and the injunctions sought from the Chief Magistrate's Court.

[20] The exercise that gives rise to this dispute has been undertaken as part of urban planning. The concept of urban planning is essentially based on the assumption that there is an interaction between the social needs of users of land (space required for different users, as well as their physical comfort and psychological well-being) and the physical and natural environment characteristics of urban centres. The development and implementation of an urban plan therefore requires a range of skills and competencies, and is a truly multi-disciplinary process. Determination of such aspects as size and location of plots, land use

zoning, site selection, engineering design of structures, and so on, depend on considerations such as topographical characteristics, environmental factors, potential hazards (earthquakes, floods), actual risks (pollution by industrial and human wastes), demographic growth, population density, occupancy rates, the desire to stem speculative land holdings, and so on; the list is endless.

[21] It is for that reason that *The Physical Planning Act, No. 8 of 2010* puts in place structures that ensure a multi-disciplinary process that not only seeks to tap into that range of skills and competencies, but also guarantee a truly wide consultation leading to the generation and approval of an urban plan. In that process, the public, politicians and bureaucrats are viewed as critically important agents in generating the urban plan. Both politicians and bureaucrats are viewed as critically important agents in the delivery of public projects. Politicians are elected by citizens to decide public policy, including the delivery of public projects, whereas bureaucrats are employed by the local governments to implement these policies. It is perfectly legitimate at that stage for politicians to get the bureaucrats to deliver plans that might win them votes. But once the plan is approved and gazetted, its implementation is then entrusted to the responsible urban authorities. Further intervention of politicians and the public at policy level in the process of implementation is then limited to seeking amendments to the plans as provided for under section 23 of *The Physical Planning Act, No. 8* of 2010 where there are either practical difficulties in the execution or enforcement of the approved plan, or there has been a change in the circumstances since the plan was approved.

[22] At the stage of urban plan implementation, it is the duty of the bureaucrats to deliver what was intended, in terms of the technical specifications, following and in accordance with the planning laws. One of the major contributors to the failure implementation of an urban plan is influence which occurs when particular interest groups or stakeholders have more resources or better access to planners, politicians and bureaucrats than other groups, giving them additional

leverage in the decision-making processes. Interference by elected officials and the public in plan implementation can derail good planning outcomes. Interference occurs when political pressure is brought to bear on planning implementation decision making. Decision-makers may attempt to alter approved plans using illegitimate means, particularly if stakeholders are strongly opposed. Not only can these imbalances impact urban planning decision-making and public service delivery, but it also erodes public trust in the planning process. Courts ought to be conscious of these imbalances and reflect on their implications. It becomes essential for courts to protect the independence of decision making in the implementation of urban plans, while the public and elected officials need to respect the professional role of planners in word and deed.

[23] By reason of the inherent complexity of the planning system and the multi-disciplinary nature of decision-making involved in urban planning decisions, *The Physical Planning Act, No. 8 of 2010* further seeks to make appropriate use of the knowledge and experience of persons skilled in such matters to resolve disputes over zoning, planning, and development decisions, which most often play out at the local level. The Act puts in place a multi-tiered system of tribunals comprising; at the lowest level, the sub county council as the local physical planning committee (section 13); an Urban Physical Planning Committee (section 12); the District Physical Planning Committee (section 10); and the National Physical Planning Board (section4). The majority of these committees have as their membership (for example the District Physical Planning Committee); a public physical planner, a surveyor, a roads engineer; an education officer; an agricultural officer; a water engineer; a community development officer; a medical officer; a career administrative officer; an environmental officer; a natural resources officer; and a physical planner in private practice.

[24] The composition of these tribunals not only brings together a team of people with competence and experience for making informed judgment in the event of

planning disputes, but also one that can act as speedily and with as little formality and technicality as is practicable, so as to minimise the costs to the parties. Those bodies are designed, based on the aggregate specialised knowledge of their membership, to achieve the resolution of questions, complaints or disputes, and to make or review decisions, fairly and according to the substantial merits of each case. Through a hierarchy of appeals from one level to another, the Act creates a merits review system in the implementation of planning laws and regulations.

Appeals arising out of planning disputes.

[25] It is section 48 of the Act that lays out the comprehensive hierarchy of appeals. It creates an internal mechanism of review by one higher level planning board after another, and when the internal system is exhausted, by way of appeal to the High Court (see section 48 (3) of the Act). Under that hierarchy, a person aggrieved by a decision of the urban physical planner or subordinate local authorities may appeal to the Urban Physical Planning Committee (section 12 (e) of the Act); a person aggrieved by a decision the Urban Physical Planning Committee may appeal to the District Physical Planning Committee (section 10 (e) of the Act); a person aggrieved by a decision the District Physical Planning Committee may appeal to the National Physical Planning Board (section 6 (1) (b) of the Act); and finally a person aggrieved by a decision the National Physical Planning Board may appeal to the High Court (section 48 (3) of the Act).

[26] They handle all manner of grievances from those relating to the public display of physical development plans (see sections 20, 27 (4) and 40 (3) of the Act), to approval or refusal of development permission (see section 38 (3) of the Act). Each relevant physical planning board appealed to may reverse, confirm or vary the decision appealed against and may make such order as it thinks necessary or expedient to give effect to its decision (see section 48 (4) of the Act). Such a system of internal review is intended to enable the planning authorities to swiftly

identify and correct mistakes at a minimal fiscal and administrative cost and without the need to involve the judicial branch. It is in the public interest that this procedure emphasises speed, certainty, and the prevention of vexatious litigation. Ordinarily, where there is an alternative remedy and procedure available for the resolution of a dispute, that remedy ought to be pursued and the procedure adhered to, since the alternative dispute resolution processes are complementary to the judicial process.

[27] The planning appeals system set up by *The Physical Planning Act, No. 8 of 2010* plays a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from its composition, its extensive knowledge of the functioning of urban planning and the broad investigative powers granted to it. By conducting hearings and investigative measures, the tribunals gather the evidence and testimonies that are necessary in order to establish the facts, as well as the data needed for an informed assessment thereof.

[28] As a general rule, a party must exhaust available administrative remedies before judicial relief will be granted. Universally applied, the doctrine of exhaustion of administrative remedies precludes an applicant from challenging the validity of administrative actions prior to seeking relief via prescribed administrative procedures *(see Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).* By reason of the inherent complexity of the planning system and the multi-disciplinary nature of decision-making involved in urban planning decisions, it is essential to exhaust the available administrative remedies in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues in the less formal proceedings, which those boards alone are competent to decide. Where the parties are expected to develop the issues in an adversarial administrative proceeding, the rationale for requiring issue exhaustion is at its greatest. Courts require administrative issue exhaustion as a general rule because it is usually appropriate for contestants in an adversary proceeding before it to develop fully all issues there. Courts reviewing agency action thus

regularly ensure against the bypassing of that requirement by refusing to consider un-exhausted issues.

[29] Often quoted as expressive of reasons for exhaustion is the statement in United *States v. Sing Tuck, 194 U.S. 161 (1964)* that;

> Orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts .... Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

[30] Accordingly, courts are reluctant to interfere with prescribed administrative procedure in the absence of unusual circumstances, particularly where the disputed question is one which is within the agency's special expertise. The doctrine of exhaustion, where applicable, is designed to allow the administrative agency to perform the task delegated to it by the legislature, the application of its specialised understanding to problems within a specified area, free from the disruption of judicial intervention in its established procedure. The exhaustion requirement is often put forward as a broad pre-requisite to judicial intervention, applicable whenever disputed issues could have been or could still be presented to the agency and decided by it through established processes, but have not been. There is therefore a procedural obligation for litigants to follow the administrative appeals process which may not be bypassed, except in very exceptional circumstances.

[31] Therefore, analysed from the perspective of the object and purpose of the Act and the scheme of its relevant provisions, there is a strong inference that *The Physical Planning Act, No. 8 of 2010* ousts the jurisdiction of Magistrate's court's, or courts generally at trial level, save by way of appeal to the High Court, in addition to the general power of judicial review of administrative action vested in

the High court, which is unaffected by the ouster. While the doctrine of exhaustion of remedies has been said to be one of discretion *(see McKart v. United States, 395 U.S. 185, 193 (1969),* arguably its application is mandatory where a statute prescribes a specific administrative procedure, limits the judicial intervention from such procedure to a specific court, and denominates such review as "exclusive" *(see See McAllister, Statutory Roads to Review of Federal Administrative Orders, 28 Calif. L. Rev. 129, 151-64 (1940).*

[32] For that reason *The Physical Planning Act, No. 8 of 2010* must also be analysed in the light of the words used in the statute. In determining whether to entertain an ordinary suit rather than requiring a plaintiff to proceed through a statutory appeal procedure, courts should consider:- the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). The category of factors should not be closed, as it is for courts in particular circumstances to isolate and balance the factors that are relevant *see (Canadian Pacific Ltd. v. Matsqui Indian Band [1995] 1 SCR 3).*

[33] In the instant case, section 47 (3) of the Act expressly provides that an owner, occupier or developer who has not lodged an appeal under section 48 of the Act, "shall not be entitled to question the validity of any action taken by the local physical planning committee under subsection (1) on any grounds that may have been raised in the appeal." This is not only a generic issue exhaustion provision, but also an expressed intention that technical expertise not possessed by the courts enters into planning determinations; for obviously this expertise should be drawn upon prior to judicial intervention. By this provision, it was the express intention of Parliament to give to the multi-level planning tribunals, rather than to the courts, the primary responsibility for enforcing and elaborating the regulatory scheme of planning laws.

[34] Provisions of this nature are intended to protect public authorities against litigation which prevents them from carrying out their statutory tasks, hence courts' deference to the administrative remedies created by such provisions. Their primary object is to make its safe for public money to be spent on the implementation of the decision without the danger that the decision might later be upset or invalidated. They are also intended to offer speedier, cheaper and more accessible justice, essential for planning decisions. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision *(see O'Reilly v. Mackman[1983] 2 AC 237).* Courts have therefore held that such clauses do not preclude them from scrutinising the decision only in circumstances involving an error of law that goes to the jurisdiction of the tribunal.

[35] A clause of similar effect was considered in *Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147* where section 4(4) of *The Foreign Compensation Act, 1950* stated: "The determination by the commission of any application made to them under this Act shall not be called into question in any court of law." The court held that in spite of this clause, it had jurisdiction to question the order of the foreign commission when there is error of jurisdiction and where the authority has wrongly assumed itself a jurisdiction which it did not have. Such clauses therefore are treated as not excluding the supervisory jurisdiction of the High Court as a superior court. The same cannot be said of Magistrates Courts as subordinate courts.

[36] An Act of Parliament may validly, expressly or impliedly, limit resort to judicial remedies with regard to a particular agency's actions, to time only after the agency processes have been completed, or within a specified time after the decision. To the extent that they do and are valid, such provisions bind the

subordinate courts and will defeat attempts to secure review at an earlier stage by the High Court, before the prescribed processes have run their course or later in circumstances when the issues being raised could have been raised within the scheme of reliefs established by the Act. Practical reasons for applying this aspect of the exhaustion requirement are strengthened when technical expertise not possessed by the courts enters into agency determinations; for obviously this expertise should be drawn upon prior to judicial intervention. The jurisdiction of civil courts to entertain and adjudicate questions "that may have been raised" in an appeal to any of the established planning boards or committees is clearly barred by section 47 (3) of *The Physical Planning Act, No. 8 of 2010* if no appeal was in fact made within the period provided by the Act. The law is settled that ouster clauses of this nature are only subject to the doctrine that they do not prevent the High Court from intervening in the case of excess of jurisdiction.

[37] *The Physical Planning Act, No. 8 of 2010* has provisions intended to ensure that appeals are made expeditiously. Section 48 (1) of the Act provides that a person aggrieved by a decision of a Sub County Physical Planning Committee may appeal within sixty days after the decision. The rest of the appeals in the hierarchy may be preferred within thirty days after the decision. When the stipulated time elapses without legal proceeding being started, section 47 (3) of *The Physical Planning Act, No. 8 of 2010* guarantees that the public authority can go ahead with its plans in the knowledge they cannot be upset subsequently.

[38] A time limit clause of this nature was considered in the famous case *Smith v. East Elloe R.D.C. [1956] A.C. 736.* In that case, *The Acquisition of Land Act 1956* required that judicial review claims against decisions to acquire land are made within six weeks of the decision to acquire. The compulsory purchase order was challenged on ground of "ultra vires" after the six 'weeks period on the ground of bad faith. But the court held that the literal meaning should be given and that the judicial review would be precluded. Viscount Simond speaking in his judgment for the House of Lords held that the house was bound by the "plain meaning" of the

words of the statute thus giving effect to the privative clause reasoning that a time limit clause cannot be altered by the judiciary. Similar decisions can be found in the Indian cases of *Dhruv Green Field Ltd v. Hukam Singh AIR 2002 SC 2841 and Dhulabhai and others v. State of Madhya Pradesh and another AIR 1969 SC 78.* In both cases it was held that where a statute gives a finality to the orders of the special tribunals, the civil courts jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit.

[39] According to paragraph 5 of the respondent's plaint filed in the Chief Magistrates Court on 5th March, 2019 the planning decision to modernise the main market in Kitgum was taken three years before, during the year 2016. In paragraph 8 of the same plaint it is pleaded that it is on 3rd January, 2019 and 6th march, 2019 respectively, that the respondent's Town Clerk wrote the respondents letters threatening demolition of the market. According to section 11 (a) of *The Physical Planning Act, No. 8 of 2010* the Town Clerk is the Chairperson of the Urban Physical Planning Committee whose decision may be appealed to the District Physical Planning Committee (section 10 (e) of the Act) within thirty days (section 48 (2) of the Act).

[40] There was no averment in the plaint that such an appeal was made, hence by virtue of section 47 (3) of the Act by failing to lodge an appeal under section 48 of the same Act, the respondents were "not entitled to question the validity of [that] action ....on any grounds that may have been raised in the appeal." Provisions of this kind are intended to ensure that objections to the proceedings of an administrative agency are made while it has opportunity for correction in order to raise issues reviewable by the courts *(see United States v. L.A. Tucker Truck Lines, Inc. 344 U.S. 33, 37 (1952).* Failure to comply with the exhaustion requirement causing a loss of the opportunity to invoke higher administrative authority within a limited time which has expired, results in the person concerned going remediless who may then be subject to enforcement proceedings *(see*

FPC v. Colorado Interstate Gas Co., 348 U.S. 492, 501 (1955); NLRB v. Cheney California Lumber Co., 327 U.S. 385 (1946); Spanish Int'l Broadcasting Co. v. FCC, 385F.2d 615 (D.C. Cir. 1967); United States v. Jeffcoat, 272 F.2d 266 (4th Cir. 1959).

[41] That result is inescapable in the instant case considering that the grounds raised by the respondents, as evident in paragraphs 5 - 10 of the plaint, are matters which could have been raised in the internal administrative review process. The grounds are that; (i) the process of transferring traders in not comprehensive; (ii) the designated area is not central enough to cover very many customers for simple food items; (iii) M.P Okin volunteered and provided a very spacious and suitable location for a market; (iv) the Town Clerk attempted to micro-manage matters in the domain of the Central Division; (v) and that it takes shs. 2,000/= by boda-boda to reach the proposed new market and a similar amount for the return journey. It is this court's considered view that all these are grounds that may have been raised in the internal administrative review process set up under *The Physical Planning Act, No. 8 of 2010.*

[42] Determining the suitability of the location of a market is an urban planning question that brings into play discrete and technical issues falling within the specific expertise of the planning appeal tribunals established by the Act. Not only do the tribunals have the necessary planning expertise but also Parliament intended to grant them that exclusive primary jurisdiction. The advantages of the Tribunals set up by the Act include cheapness (cost effectiveness), accessibility, freedom from procedural technicality, expedition and expert knowledge of their particular subject. In disputes of this nature, a planning tribunal is more suited than a Court to undertake the task after considering all relevant issues of law, fact, policy and discretion. One of the main justifications for the mandatory nature of such a procedure is to enable the High Court, in the event that an appeal is ultimately lodged to it, to have before it the findings of fact, items of information or assessment resulting from the deliberations of the planning appeal bodies,

especially since their membership is constituted by a wide spectrum of experts. In the circumstances, resort to court should only be permitted where the Act and its statutory scheme offer no relief.

[43] If that not be the case and the respondents were to be allowed to depart from the finely-tuned dispute resolution mechanisms created by *The Physical Planning Act, No. 8 of 2010*, a dual system of relief would be perpetuated, one applicable in the civil courts and the other in the forums established by the Act. One of the problems that would be associated with the enforcement of planning laws and schemes then would be the facts of overlapping and competing jurisdictions and the use of different forums to adjudicate planning issues. This invariably would lead to forum-shopping. Avoidance of that outcome is advanced by the High Court ensuring that the contentions and exceptions raised on appeal before it have been in fact effectively and meaningfully raised before the regulatory planning tribunals set up under *The Physical Planning Act, No. 8 of 2010.*

[44] Furthermore, the primary reason for the creation of the planning tribunals under that Act, just like any other administrative tribunals, is to overcome the crisis of delays and backlog in the administration of justice, in the light of the legal maxim *Lex dilationes semper exhorret* (the law always abhors delays). The process of Courts of law is elaborate, slow and costly. The scale of the delays before a non-expedited substantive hearing of suits has reached scandalous proportions due to heavy caseloads. Tribunals function as an effective mechanism to ameliorate the burden of the judiciary. The resources of courts should not be devoted to disputes in respect of which Parliament has provided an alternative right of recourse to those who are dissatisfied by a planning authority's decision.

[45] However if the dispute is not a planning dispute, and does not relate to enforcement of any authority under the Act, the remedy lies only in a civil court. A suit for the vindication of private law rights where these exist or litigation in which the infringement of rights in tort or contract is asserted, lies outside the ambit of

The Physical Planning Act, No. 8 of 2010. Furthermore, where a litigant asserts a private law right, which only incidentally involves the examination of a public law issue, he or she is not debarred from seeking to establish that right by ordinary action *(see Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee (FPC) [1992] 1 AC 624; [1992] 2 WLR 239; [1992] 1 All ER 705).*

[46] Furthermore, since the rule of exclusion of a suit by availability of an alternative statutory remedy is a rule of discretion and not one of compulsion (see *King v. Postmaster-General; Ex parte Carmichael, [1928]1 KB 29*), in an appropriate case in spite of availability of the alternative remedy, the Court having jurisdiction may still exercise its jurisdiction in at least three exceptions: (i) where the suit seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice *(see Rex v. Wands-worth Justices; Ex parte Read, [1942]1 KB 281)* or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of the Act and is challenged as such. None of these exceptions applied in the instant case.

[47] A party may also seek judicial intervention, not to challenge the validity of the agency's action, but rather merely to maintain the status quo during the administrative process. Interim relief ordinarily is granted in order to prevent irreparable harm to the party pending the agency's final decision *(see Scripps-Howard Radio,Inc. v. FCC, 316 U.S. 4, 9-11 (1942).* The courts will not require exhaustion either where the available administrative remedy would be inadequate to prevent irreparable injury or where to exhaust the prescribed administrative procedure would be an exercise in futility *(see Trojan v. Taylor Township 352 Mich. 636, 91 N.W.2d 9 (1958).*

[48] In the instant case, the planning issues are not merely incidentally involved in the dispute between the parties. They are the crux of the dispute and the private rights to property allegedly destroyed, stolen or lost appear as the incidental outcome. What the respondents pleaded in paragraphs 4, 11, and 12 of the plaint

regarding their property is clearly unrelated to the contentions that; (i) the process of transferring traders in not comprehensive; (ii) the designated area is not central enough to cover very many customers for simple food items; (iii) M.P Okin volunteered and provided a very spacious and suitable location for a market; (iv) the Town Clerk attempted to micro-manage matters in the domain of the Central Division; (v) and that it takes shs. 2,000/= by boda-boda to reach the proposed new market and a similar amount for the return journey that dominate the rest of the plaint.

[49] That it is on basis of a claim for general and special damages for market stalls destroyed, trade goods damaged, stolen or lost that the respondents sought a temporary injunction stopping the 1st appellant from the enforcement of a planning decision that required them to relocate, speaks volumes about the main thrust of the suit. It is thus not surprising that in his ruling the trial Magistrate did not consider at all his jurisdiction over the claim for general and special damages but rather focused on the planning issues. The action for trespass to goods ought to have been initiated independent of the objections to the planning decision as pleaded in the grounds of objection in paragraphs 5 to 10 of the plaint. Otherwise, the plaint in its current form is a thinly veiled attempt to thwart the policy behind *The Physical Planning Act, No. 8 of 2010* of promoting expeditious resolution of planning disputes favours resolving such disputes within the statutory appeal procedures by which the planning tribunals or committees are adequate for purposes of conducting a far-reaching and extensive inquiry at first instance.

[50] The statutory appeal procedure provides for a system of appeals from the planning committees, right up to the High Court where a decision can be taken with the force of *res judicata*. It presupposes the availability of an adequate administrative remedy which offers substantial protection of the asserted rights at each level. But for the respondents' failure to avail themselves of the remedies, the planning tribunals or committees have in this case not be shown to be

incapable of providing effective and just remedies. The trial Magistrate therefore could only exercise jurisdiction to the extent that the issues placed before him did not involve pronouncements on the validity of the planning decision to relocate the respondents.

[51] To the contrary, in his ruling the trial Magistrate did not consider at all the court's jurisdiction over the claim for general and special damages but rather entirely focused on the planning issues raised and made pronouncements in respect thereof regarding the validity of the 1st appellant's enforcement notice, in the following terms;-

> I will quote section 46 (1) so far as it is relevant. It says; "A local physical planning committee shall serve an enforcement notice.....in the form specified in the 9th schedule where the committee is satisfied...." The decision to act as such must be originated by the said committee. So far as part of the relevant part of the letter (enforcement notice) dated 27th February, 2019 is applicable states, "....following the District Executive meeting.... and following my previous enforcement notices...it was resolved..." Clearly the District Executive is not the Physical Planning Committee envisaged under the Act of 2010.
>
> Secondly, the 1st respondent as an urban authority is entitled to have and proceed on the instructions of the local physical planning committee. There must be credible evidence brought before court that indeed the said planning committee met and resolved as such. This was lacking.
>
> I now turn to what I raised as the first question. It is extremely important for the enforcement notice to highlight the law under which it is brought. Like all other notices, the purpose of an enforcement notice is to make the party being served aware not only of the issuer's intention but as well the law under which it is issued. That is why Parliament took it upon itself to format the enforcement notice in the 9th schedule to the Act or else it would have delegated the function to the rules committee or Minister to handle. I say so because despite the Legislature not having the luxury of time at its

> disposal, it created time to format the notice in the 9th schedule to the Act. The pertinent opening paragraph of the notice states; "In accordance with section 48 of *The Physical Planning Act, 2010* the committee is satisfied that you are carrying out an illegal...." then space is provided for the other details to be entered.
>
> I am of the strong conviction that an "enforcement notice" which does not confirm to the statutory provided format is not an enforcement notice envisaged within the meaning of the s. 46 (1) of the Act. I accordingly dismiss the preliminary objection with costs. Let the application be heard and determined on its merits.

[52] By that decision, the trial Chief Magistrate opted to entertain and adjudicate questions that are clearly barred by section 47 (3) of *The Physical Planning Act*, No. 8 of 2010 which excludes the jurisdiction of civil courts when the time for appeal elapses without an appeal having been preferred. At no point in his analysis did he consider the claim for trespass to goods. He therefore misdirected himself on the jurisdiction of the court regarding that perspective of the respondent's claim that questions the validity of the 1st appellant's decision. He further misdirected himself regarding what he observed about the form of notice. According to section 43 of *The Interpretation Act*, where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead.

[53] It is trite that where a dispute involves the recognition, observance or enforcement of rights and obligations created by enactment, which enactment provides a forum for resolution of such disputes, the only remedy is to approach the forums created by the Act *(see Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke (1976) 1 SCC 496; Rajasthan SRTC v. Krishna Kant [(1995) 5 SCC 75; Chandrakant Tukaram Nikam v. Municipal Corpn. of Ahmedabad (2002) 2 SCC 542; and Scooters India v. Vijai E.V. Eldred (1998) 6 SCC 549).* Although in cases where jurisdiction of a civil court is barred, the High court can

still decide whether the provisions of an Act have been complied with or whether an order was passed de hors the provisions of law, the respondents' plaint in the instant case pleaded but did not explicitly seek a pronouncement on those issues, yet they form the crux of the dispute and the ruling of the trial court.

[54] The trial Magistrate therefore misdirected himself when on basis of findings regarding the validity of the enforcement notice, he concluded that the court had jurisdiction to entertain the application for a temporary injunction.

Order :

[55] In the final result, the appeal succeeds. The interim injunction is set aside, the suit and the application now pending before the Chief Magistrate's Court are struck out. The costs of those proceedings and this appeal are awarded to the appellants.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : .Mr. Jude Ogik

For the respondent : Mr. Charles Dalton Opwonya,