



**Tirishe & 2 others v Tata Chemicals Magadi Limited & 2 others; County Government of Kajiado & 3 others (Interested Parties) (Constitutional Petition E003 of 2021) [2025] KEELC 2991 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2991 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
CONSTITUTIONAL PETITION E003 OF 2021**

**MD MWANGI, J**

**MARCH 26, 2025**

**IN THE MATTER OF ARTICLES 2(1), 3(1), AND 10, ARTICLES 19, 20, 21 AND 22, ARTICLES 42, 43, 60, 62 (1) (I), 67 (2) (A), 69(1) (A), 69 (1)(D), 69 (1)(F), 69 (1) (G), 69 (1) (H), AND 69 (2), ARTICLES 70 AND 71 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 174(C), 174(D) AND 174(E), ARTICLE 176, 177(1) (A) AND 185 (4) (A) OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF PARAGRAPHS 10 AND 14 OF PART 2 OF THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE NATURAL RESOURCES (CLASSES OF TRANSACTIONS SUBJECT TO RATIFICATION) ACT, 2016 AND IN THE MATTER OF THE COUNTY GOVERNMENTS ACT AND IN THE MATTER OF THE WATER ACT, 2016 AND IN THE MATTER OF THE ENVIRONMENTAL COORDINATION AND MANAGEMENT ACT, 1999 AND IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011 AND IN THE MATTER OF THE LAND ACT, 2012 AND IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012 AND IN THE MATTER OF VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**BETWEEN**

**HON PETER OLE TIRISHE ..... 1<sup>ST</sup> PETITIONER  
JOSEPH MPOKE ..... 2<sup>ND</sup> PETITIONER  
JOHN MOTOMPA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**TATA CHEMICALS MAGADI LIMITED ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL ENVIRONMENTAL - MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT  
WATER RESOURCES AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**



**AND**

**COUNTY GOVERNMENT OF KAJIADO ..... INTERESTED PARTY**  
**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**  
**CABINET SECRETARY FOR WATER – SANITATION AND**  
**IRRIGATION ..... INTERESTED PARTY**  
**NATIONAL WATER HARVESTING AND STORAGE**  
**AUTHORITY ..... INTERESTED PARTY**

**RULING**

(In respect of the preliminary objection dated 13<sup>th</sup> May 2021 by the 1<sup>st</sup> Respondent)

**Background**

1. This ruling is in respect of the preliminary objection by the 1<sup>st</sup> Respondent dated 13<sup>th</sup> May 2021. It is premised on 3 grounds, namely;
  - a. On the doctrine of constitutional avoidance, the Hon. Court lacks jurisdiction to hear and determine the issues upon which the petition is anchored and as such this Honourable Court cannot grant the reliefs as sought.
  - b. In any event, the petition does not disclose a violation of the Petitioners’ constitutional rights as alleged or at all.
  - c. On the doctrine of constitutional avoidance, the proper forum to hear and determine the Petitioners’ allegations are the National Environmental Tribunal (NET) and the Water Tribunal as established pursuant to the provisions of the Environmental Management Act (EMCA) and the *Water Act*, 2016, respectively.
2. The court’s directions were that the preliminary objection be canvassed by way of written submissions. The 1<sup>st</sup> Respondent and the Petitioners duly complied. The 1<sup>st</sup> Respondents submissions are dated 17<sup>th</sup> November 2021 whereas the Petitioners’ submissions are dated 14<sup>th</sup> March 2025. The Interested Parties did not participate in the hearing of the preliminary objection.
3. The 1<sup>st</sup> Respondent in its submissions admits that it carried out the River Kisamis diversion project sometimes in the year 2016 to reduce the siltation of Lake Magadi. The 1<sup>st</sup> Respondent submits that it sought the relevant statutory approvals from the National Environmental Management Authority (NEMA) and the Water Resources Authority (WRA) prior to commencing the project and prepared the various necessary reports which included the environmental and social impact assessment report, the hydrological report and others before being issued with the relevant licenses and permits by the statutory authorities. It was only upon compliance that the 1<sup>st</sup> Respondent commenced the river diversion project. The 1<sup>st</sup> Respondent notes that the petition is based primarily on allegations of breaches and or non-compliance with the terms of the referenced reports and licenses. The Petitioners further aver that the 1<sup>st</sup> Respondent failed to obtain parliamentary ratification pursuant to Section 4 of the Natural Resources (Clauses of Transactions subject to Ratification) Act, 2016 as read together with Section 124A of Environmental Management Act (EMCA) which they claim was a requirement prior to the commencement of the project. The Petitioners too allege want of compliance with the terms of the permit issued by Water Resources Authority (WRA) further alleging that the 1<sup>st</sup> Respondent



- did not obtain certain permits before it embarked on the river diversion project. It is alleged that the 1<sup>st</sup> Respondent also failed to comply with certain set of regulations under the Environmental Management Act (EMCA).
4. The 1<sup>st</sup> Respondent identifies the issue for determination being whether the court has jurisdiction to hear and determine the petition. It proceeds to submit that the petition is based on alleged breaches of statutes, for which there are express alternative dispute resolution mechanisms, provided under the various laws and regulations.
  5. The 1<sup>st</sup> Respondent submits that its objection falls within the threshold definition in the case of *Mukisa Biscuits Manufacturers Limited –vs- West End Distributers Limited (1969) EA 696*.
  6. It is the 1<sup>st</sup> Respondent claims that though the petition before the court has been crafted as a constitutional petition, the facts as crystalized demonstrates it is far from it. The facts do not support a case for infringement of rights but rather a case of breach of statutory duties for which there are established mechanisms for dispute resolution.
  7. The 1<sup>st</sup> Respondent cites the cases of *Samuel Kamau Macharia –vs- Kenya Commercial Bank & 2 others (2012) eKLR & Speaker of National Assembly –vs- James Njenga Karume (1992) eKLR*, to support its argument. Further reference has been made to the Court of Appeal decision in *Kibos Distillers Limited & 4 others –vs- Benson Ambuti Adega & 3 others (2020) eKLR*.
  8. In their submissions, the Petitioners pointed out the petition against NEMA and WRA had since been withdrawn. Nonetheless, they submitted that neither the National Environmental Tribunal (NET) nor the Water Tribunal had the jurisdiction to determine the alleged violations of the Petitioners Constitutional rights.
  9. The Petitioners relied on the decision of the Supreme Court of Kenya in the case of *Nicholus –vs- Attorney General & 7 others; National Environmental Complaints Committee & 5 Others (Interested Parties)(Petition E007 of 2023) {2023} KESC 113 (KLR) (28 December 2023) (Judgement)*, emphasizing thateven section 3(3) EMCA acknowledges the original jurisdiction of ELC by granting any person, who claims that their right to a clean and healthy environment has been violated, the right to apply to ELC for redress, by stating that; "If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter, which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest, apply to the Environment and Land Court for redress....."

### **Issues for determination**

10. In the court's considered opinion, the sole issue for determination is whether the 1<sup>st</sup> Respondent's preliminary objection is merited.

### **Analysis and Determination**

11. After the filing of the preliminary objection by the 1<sup>st</sup> Respondent, the petition herein has since been amended twice; 1<sup>st</sup> on 22<sup>nd</sup> September 2023. The 2<sup>nd</sup> amendment was on 2<sup>nd</sup> December 2024 as per the further amended petition filed in court on 25<sup>th</sup> February 2025. The 2<sup>nd</sup> amendment removed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as parties in this case leaving the 1<sup>st</sup> Respondent as the only Respondent to the petition.
12. The summary of the Petitioners' claim is at paragraphs 63 and 64 of the further amended plaint. The Petitioners allege that the diversion of River Kisamis through authorizations by National



Environmental management Authority and Water Resources Authority (WRA) is tantamount to exploitation of a natural resource and was therefore subject to ratification by parliament in line with the provisions of Article 71 of *the Constitution* without which the project was rendered unconstitutional, null and void.

13. It is the Petitioners' further case that the project further violated relevant provisions of the Environmental Management Act (EMCA) and the Environment (Impact Assessment and Audit) Regulations on submission of a project report, public notice to the affected communities, public hearing, environmental audit study and self-auditing. There are also allegations of violations of the provisions of the *Water Act*.
14. It is alleged that the Respondent constructed a 7 kilometres long channel canal downstream instead of a 35 kilometres long canal upstream, up to Oldorko swamp as authorized without notifying the Water Resources Authority (WRA) of such substantial change or modification in the project implementation. The canal was further constructed without obtaining easements over the community land.
15. The construction of the canal as claimed by the Petitioners has caused flooding on the lands contiguous to it and which is used by the local communities as pasture for their livestock.
16. The Petitioners allege violations of their rights to a clean and healthy environment, and the right to clean and safe water. They pray for various prayers including restoration of the River Kisamis to its natural flow with the alternative relief for an order of mandamus to issue, compelling the National Water Harvesting and Storage Authority to develop a national public water works for the storage and flood control of River Kisamis during rainy seasons and to constantly collect and provide information for the formulation of National Water Resources storage and flood control strategies relating to River Kisamis. They too allege a violation of the right to have the environment protected for the future generations.
17. A preliminary objection as defined in the Mukisa case (supra), raises pure points of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion.
18. In *Lorunyei & another -vs- Attorney General & Others* {2023} KEHC 1611 (KLR), the Court emphasized that;

“The validity of any preliminary objection is gauged against the requirement that it must raise pure points on law capable of disposing of a dispute at once. It is, therefore, mandatory for the court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.”
19. The preliminary objection by the Respondent herein is caught up in the realm of factual issues that necessitate the calling of evidence. It does not meet the threshold established in the Mukisa case.
20. Secondly, I must state that the petition herein falls under the category of what the Supreme Court of Kenya in the case of *Nicholus -vs- Attorney General & 7 others; National Environmental Complaints Committee & 5 Others (Interested Parties)*(Petition E007 of 2023) {2023} KESC 113 (KLR) (28 December 2023) (Judgement), described as a multifaceted case. The Supreme Court of Kenya guided that in such a case;

“A court on its part, must not descend to the arena of litigation but instead determine all contested issues judicially and in a multifaceted claim, address each issue within its



jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it.”

21. The Supreme Court’s judgement was a departure from the Court of Appeal approach in the Kibos Distillers case (supra) of throwing out the baby with the bath water. In this case, the issues highlighted at paragraphs 13 to 15, above, fall within the jurisdiction of this court.
22. Consequently, I disallow the preliminary objection by the respondent herein and direct that the petition proceeds to full hearing.
23. The costs of the preliminary objection shall be in the cause.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 26<sup>TH</sup> DAY OF MARCH 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Akoko h/b for Mr. Chacha Odera for the Respondent/Objector

Mr. Nganyi h/b for Mr. Katasi for the Petitioners

N/A for the Interested Parties

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

