



Coast Legal Aids and Resource v Fossils Supplies Ltd & 2 others; National Lands Commission & 4 others (Interested Parties) (Environment & Land Petition E008 of 2023) [2023] KEELC 17897 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17897 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E008 OF 2023

EK WABWOTO, J

MAY 25, 2023

IN THE MATTER OF ARTICLE 1, 2, 3, 4, 10, 21, 22, 23, 60, 61, 62, 66, 70 AND 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLE 40, 42, 48, 50(1) AND 70 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF THE KENYA RAILWAYS CORPORATION ACT CAP 397 LAWS OF KENYA

AND

IN THE MATTER OF THE SECTION 5 OF THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF CONTRAVENTION OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT SECTIONS 3, 57A AND 58

AND

IN THE MATTER OF UNCONSTITUTIONAL, ILLEGAL AND UNPROCEDURAL LEASE OF UNSURVEYED KENYA RAILWAYS RESERVE LAND IN CHANGAMWE YARD - MOMBASA BETWEEN KENYA RAILWAYS CORPORATION AND FOSSILS SUPPLIES LTD.

BETWEEN

COAST LEGAL AIDS AND RESOURCE PETITIONER

AND

FOSSILS SUPPLIES LTD 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT



**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

AND

**NATIONAL LANDS COMMISSION INTERESTED PARTY
KENYA AIRPORTS AUTHORITY INTERESTED PARTY
KENYA PIPELINE COMPANY INTERESTED PARTY
KENYA PORTS AUTHORITY INTERESTED PARTY
ENERGY AND PETROLEUM REGULATORY AUTHORITY INTERESTED
PARTY**

RULING

1. This Petition was instituted vide a petition dated 6th February 2023 wherein the Petitioner sought the following orders: -
 - i. A declaration that the Respondents violated the law in failing to procure National Lands Commission approval prior to the entering and signing of the lease.
 - ii. A declaration that the Respondents violated the law in failing to seek and get consents and or approvals from all the interested parties herein that must regulate such a project eg; The National Lands Commission, Kenya Airports Authority, Energy and Petroleum Regulatory Authority who must give their input and consent as provided by the law.
 - iii. A permanent order of injunction restraining the 1st Respondent from utilizing the said land for an LPG Project.
 - iv. Such other and or further relief as this Honourable Court may deem fit and just to grant.
 - v. Costs.
2. Contemporaneous to the filing of the petition, the Petitioner also filed an application dated 6th February 2023 in which conservatory orders were sought against the Respondents upon which the court granted some interim reliefs pending further directions.
3. The 1st Respondent upon being served with the Petition and the application dated 6th February 2023, filed an application dated 17th February 2023 seeking to stay the proceedings and have the Petition transferred to Mombasa, the 1st Respondent also filed a Replying Affidavit sworn by Aman Jafferli Kurji on 17th February 2023, grounds of opposition dated 17th February 2023 to the Petitioner's application dated 6th February 2023 and also a response to the Petition dated 17th February 2023.
4. The 3rd Respondent filed a preliminary objection dated 27th February 2023 in objecting to the Petition filed herein. The Preliminary objection was raised on the following grounds;
 - i. That this suit has been brought to this court in clear and or disregard of the provisions of Law and is an abuse of the due process of court.
 - ii. That the Petitioner's case against the 3rd Respondent is misguided and offends the provisions of Section 9 and 63 of the Environmental Management and Coordination Act. 3. THAT the



Petitioner's case as against the 3rd Respondent raises no cause of action as no decision regarding the 1st Respondents application for an EIA License has been reached.

5. As per the court's record, the Petition did not file any response to the 1st Respondent's application dated 17th February 2023.
6. Pursuant to the directions issued by this court on 23rd March 2023, it was directed that both the Petitioner's application dated 6th February 2023 and the 1st Respondent's application dated 17th February 2023 be canvassed by way of written submissions. The 1st Respondent filed its submissions dated 24th March 2023 while the 3rd Respondent filed its submissions dated 27th March 2023. As at the time of preparation of this ruling there were no written submissions filed by the Petition on record.
7. The 1st Respondent's submitted that pursuant to the provisions of on access to justice, the Petition ought to be transferred to Mombasa since there is an active Environment and Land Court which has jurisdiction to handle the matter. It was also submitted that the Petitioner, 1st Respondent and the suit property are all domiciled in Mombasa and in view of the foregoing, it will be unnecessarily expenses for the parties to have the matter conducted in Nairobi and reliance was made to the case of Peter O. Mwebi & John Kebaso Elijah & Another vs The Attorney General & Others (2020) eKLR. For those reasons the court was urged to grant the orders sought in the 1st Respondent's application dated 17th February 2023.
8. The 3rd Respondent in its submissions dated 27th March 2023 submitted that NEMA had not made any decision on whether or not to grant an EIA licence since the process was ongoing and hence therefore the Petition was filed prematurely. It was contended that the 3rd Respondent has the mandate to consider the decision to grant or reject the project even if there are complaints and further the same ought to be allowed to discharge its statutory mandate.
9. Reliance was also made to the following cases in support of the 1st Respondent's position herein, Joseph Owino and Another vs NEMA & Africa Polysack Ltd [2014], Supreme Court decision of Benson Ambuti Atega & 2 others –Vs- Kibos Distillers Ltd & 5 Others, Speaker of the National Assembly – Vs- James Njenga Karume (1992) eKLR.
10. The court has carefully considered the applications dated 6th February 2023, 17th February 2023 and the written submissions filed by the 1st and 3rd Respondent and the court is of the view that the following issues are for determination:
 - a. Whether the court has jurisdiction to entertain the Petition.
 - b. In answer to (i) above is in the affirmative, whether in light of doctrine of exhaustion and judicial restraint, the Petition is ripe and proper for consideration by this court at this stage.
 - c. What orders should the court grant.
11. The salient question which I will address myself on being whether the Petition as it is, is ripe for determination by this court. In other words, should the Petitioner have awaited the conclusion of the Environmental Impact Assessment process as envisaged under the *Environmental Management and Co-ordination Act* No. 8 of 1999 and the Environmental Impact Assessment and Audit Regulations of 2003 before moving to this court or seeking for redress before any appropriate forum?
12. In the instant case evidence was presented to this court to the effect that the 3rd Respondent has published a gazette notice inviting members of the public to submit their views, I have perused the entire petition and affidavit in support and noted that the Petitioner has not submitted his views or comments to NEMA in response to that Notice.



13. The invitation of comments during the EIA process is provided for under the law. It has often been said that a public body which is entrusted by parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be stopped from doing its duty. However, that is subject to the qualification that it must not misuse its powers and it is a misuse of power for it to act unfairly or unjustly towards a private citizen where there is no overriding public interest to warrant it.
14. While the court's jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute before approaching the court, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96-A* decision of the African Commission of Human and Peoples' Rights it was held that:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”
15. In my view, the mere finding that the court may have jurisdiction to entertain a constitutional petition, does not automatically imply that the court should proceed and determine the petition as it is, the doctrine of exhaustion and judicial restraint spells otherwise. Accordingly, having considered that the EIA process is yet to be concluded, it is the finding of this court that the Petition has indeed been filed prematurely. The Petition must await the conclusion of the EIA process. That process is participatory and provided for as per the law, the members of the public including the petition herein have an opportunity to participate in the same. In view of the foregoing, the 3rd Respondent's objection succeeds only to the extent that the Petition is deemed to have been filed prematurely.
16. From the foregoing analysis and findings, the Petition dated 6th February 2023, the Petitioner's Notice of Motion of even date together with the 1st Respondent's application dated 17th February 2023 and the 3rd Respondent's Preliminary Objection are hereby determined as follows;
 - a. The Petition and Notice of Motion both dated 6th February 2023 are hereby struck out.
 - b. Interim orders issued on 7th February 2023 are discharged.
 - c. Each party to bear own costs.Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Mkan for the Petitioner.

Mr. Paul Buti for the 1st Respondent.

Mr. Karina the 2nd Respondent.

Ms. Mwangi for 3rd Respondent

N/A for the other parties.



Court Assistant – Caroline Nafuna.

