



**Maina & 7 others v Kenya National Highways Authority & 2 others (Civil Case E005 of 2021) [2022] KEHC 11601 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE E005 OF 2021  
MM KASANGO, J  
MAY 26, 2022**

**BETWEEN**

**GODFREY GITONGA MAINA & 7 OTHERS ..... PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**KIKUYU WATER AND SEWARAGE COMPANY ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The eight plaintiffs filed this case alleging that the 1<sup>st</sup> defendant encroached their private land claiming it was riparian land. Further, that the 1<sup>st</sup> defendant began taking measurements of their land with intention of fixing sewage pipes. The plaintiffs pray for injunction to restrain the defendants from further constructing drainage and fixing sewage pipes, on the plaintiff's land.
2. The 1<sup>st</sup> defendant filed preliminary objection to this suit, dated July 1, 2021. By that objection, 1<sup>st</sup> defendant seeks a finding that this suit is fatally defective for not complying with provisions of section 67(a) of the *Kenya Roads Act*.
3. The other preliminary objection is filed by the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant objects to this suit on the grounds that it offends section 16 of the *Government Proceedings Act*, and that this court lacks jurisdiction to entertain this case.
4. Jurisdiction is everything. This is what the Court of Appeal stated in the case *Owners of The Motor Vessel "lillian S" V Caltex Oil (kenya) Ltd.*(1989) thus:-

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

5. In view of the above, I shall first consider the objection on jurisdiction and if indeed I determine this Court has jurisdiction, I shall consider the other objections raised.
6. Article 165(5)(b) of *the Constitution* provides the High Court does not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in article 162(2). One of the courts contemplated under that article is the Environment and Land Court (ELC). Section 13 of the *Environment and Land Court Act* (ELC Act) provides ELC has exclusive jurisdiction over matters relating to environmental planning and use of land amongst others. A case in point is Republic vs. Chief Land Registrar & another (2019) eKLR as follows:-
  10. A court of law can only exercise jurisdiction as conferred by *the Constitution* or other written laws. Article 165(1) of *the Constitution* vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction ‘to hear any question respecting the interpretation of *the Constitution*. The limitation of this courts vast powers conferred under Article 165 is to be found in Sub-Article (5) which states in mandatory terms that the high court shall not have jurisdiction in respect of matters:- (a) reserved for the exclusive jurisdiction of the Supreme Court under *the Constitution*; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b). It is a constitution edict that this court has no jurisdiction to determine matters falling under Article 162(2)(a)&(b). But what are these matters? The answer to this question is found in the provisions of Section 13 of the Environment and Court Act, an Act of Parliament enacted to give effect to Article 162(2)(b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.
  11. The use of the word shall in the Article 162(2)(b) is worth noting. As stated later in this ruling the use of the word shall is mandatory as opposed to directory.”
7. The plaintiff allege the defendants have encroached on their land and are in the process of constructing sewage pipe. The plaintiff in their plaint plead the reason given for the encroachment is that their property is on riparian land. Not only do those pleading reveal that the issues for determination by the court are the use of the land but also whether the same is riparian land. The latter issue is related to the environment. The ELC was called upon to determine in the case *Milimani Splendor Management Limited Vs. National Environment Management Authority & 4 others*(2019) eKLR on whether constitutional rights of the petitioner were in danger of violation by an order made to demolish the petitioner’s structure on the allegation they were built on riparian land. The ELC discussion in that case is in support of my finding that the High Court does not have jurisdiction to determine matters relating to environment. This is what the court stated in that case.
40. Section 9 of EMCA enjoins the 1<sup>st</sup> respondent to co-ordinate the various environmental management activities being undertaken by lead agencies and to promote the integration of environmental considerations into development policies, plans, projects and programmes to ensure the proper management and use of environmental resources. Sections 108 and 111 of EMCA empower NEMA and the court respectively to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to



cause harm to the environment. This places the court and NEMA on the forefront in the protection of the environment and lends credence to the preamble to *the Constitution* which states that the people of Kenya are respectful of the environment and are determined to sustain it for the benefit of future generations.

41. Section 42 of EMCA makes provision for the protection of rivers, lakes, seas and wetlands including prohibiting any person from erecting any structure or part of it in or under the river or disturbing the river without the approval of NEMA. Rivers and the riparian reserves form part of the environment under the definition in section 2 of EMCA.”(emphasis mine)

### **Disposition**

8. In the light of fact, the issue for determination in this case is both the land use and environmental, I find and hold that this court has no jurisdiction to hear this case.
9. Accordingly, I make the following orders:-
  - a. This case is hereby transferred to Thika Environment and Land Court.

At the reading of this ruling, a mention date will be fixed for this matter to be mentioned before the Presiding Judge of Environment and Land Court at Thika.

**RULING DATED AND DELIVERED AT KIAMBU THIS 26TH DAY OF MAY, 2022.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Mourice

For Plaintiff : - No appearance

For 1st Defendant :- Ms. Oduor

For 2nd Defendant:- No appearance

**RULING** delivered virtually.

**MARY KASANGO**

**JUDGE**

