



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO, 14 OF 2021

AGATHA JERUTO KIMASWAL.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

MINISTRY OF MINING.....2ND DEFENDANT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....3RD DEFENDANT

ELDOSONE QUARRY LIMITED.....4TH DEFENDANT

RULING

This ruling is in respect of a Notice of preliminary objection by the 4th defendant dated 30th March 2021 on the grounds that;

- a. The suit is fatally and incurably defective as it offends the provisions of Section 125 and 129 of the Environment Management and Coordination Act and as such cannot be ventilated before this honourable court.
- b. The suit is premature as the plaintiff has not exhausted the dispute resolution mechanism established under section 125 of the EMCA.
- c. The issues raised in the suit are incompetent as the plaintiff has another avenue being the National Environment Tribunal (hereinafter referred to as the Tribunal as established under section 125 of the EMCA vested with the jurisdiction to determine the dispute therein.

Counsel agreed to canvas the preliminary objection vide written submission which were duly filed.

4TH DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel for the 4th defendant listed two issues for determination, whether the suit is premature as the Plaintiff has not exhausted the dispute resolution mechanism established under Section 125 of the EMCA and whether this Court has jurisdiction to hear and determine the matter.

On the first issue whether this court has jurisdiction to hear and determine this matter, counsel submitted that the dispute before the court involves licensing of the 4th respondent to undertake quarry activities and the dispute falls perfectly within the purview and jurisdiction of the Tribunal established under section 125 of the Act and therefore this court has no jurisdiction.

Section 125 of the Act establishes the National Environment Tribunal and stipulates its composition. It provides that;

There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members —

- a. a chairman nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the High Court of Kenya;
- b. an advocate of the High Court of Kenya nominated by the Law Society of Kenya;

c. a lawyer with professional qualifications in environmental law appointed by the Minister; and

d. two persons who have demonstrated exemplary academic competence in the field of environmental management appointed by the Minister.

3. Further, Section 129 of the Act provides;

"Any person who is aggrieved by —

a. a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

b. the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

c. the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

d. the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

e. the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

Counsel therefore submitted that the plaintiff should have filed the complaint before the Director General, the Authority or the Committees established under the Act then an Appeal to the Tribunal if dissatisfied with the decision of the aforesaid bodies. And that an Appeal to this Honourable Court is only available against the decision of the Tribunal.

Mr Mwangi counsel for the applicant cited the case of **Bridge Gate Holding Ltd v National Environment Management Authority & another [2015] eKLR** where the court held that ;

'It is clear from the aforesaid provision of the law, that the decision of the 1st defendant is subject to the procedure stated therein namely, an appeal to the tribunal. Section 130 provides an avenue for a second appeal to this court should a party to the appeal to the tribunal not be satisfied with the decision of the Tribunal.

From the foregoing statement of the law, there is no doubt that the law does not contemplate a situation where this court would be seized of the dispute herein as a court of first instance. The upshot of the foregoing is that the suit before this court is premature."

Counsel further relied on the case of **Michael Moragia Nyachae Vs Buddies Kisii Ltd & 2 Others [2016] eKLR**, where the court held that ;

*"In the instant matter, it is my view that the Environment Management and Coordination Act (EMCA), has prescribed a procedure for handling 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. "

Counsel also cited the case of **Republic vs NEMA Exparte Sound Equipment Ltd CACA No. 84 of 2010 [2011] eKLR** , where the Court of Appeal held that;

"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. "

Mr Mwangi therefore urged the court to find that the court does not have jurisdiction to hear and determine this matter as the plaintiff should have given the Tribunal the first opportunity and option to consider the matter as it has the necessary mechanism to investigate and scrutinize the allegations levelled against the 4th Respondent.

On the second issue as to whether the suit is premature as the plaintiff has not exhausted the dispute resolution mechanism established under Section 125 of the EMCA., counsel submitted that where there is a forum provided for to address a concern either in the Constitution or in

the Acts of Parliament, a party must first exhaust that option before approaching this Honourable Court.

Mr Mwangi cited 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."

Similarly, in the case of **Geoffrey Muthinja Kabiru & 2 Others - vs Samuel Munga Henry & 1756 Others [2015]eKLR** held that;

*"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with **Article 159** of the **Constitution** which commands Courts to encourage alternative means of dispute resolution."*

Counsel therefore urged the court to uphold the preliminary objection and dismiss the suit with costs.

1ST AND 2ND RESPONDENTS'SUBMISSIONS

The 1st and 2nd respondents supported the preliminary objection and relied on the ratio decidendi of **Mukisa Biscuit Manufacturing Company Ltd -versus- West End Distributors Ltd (1969) EA 696** where Law LA defined a preliminary objection thus:

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arise by dear 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 (Emphasis ours).

Sir Charles Newbold P., in the same case, also opined as follows:

A. Preliminary Objection is in the nature of what used to be a demurrer. it raises a pure point of law which is argued on the assumption that all 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 the exercise of judicial discretion (Emphasis ours).

Mr Odongo submitted that the issue of jurisdiction is a pure point of law hence the preliminary objection meets the threshold in the Mukisa Biscuit case.

Counsel relied on the case **Michael Moragia Nvachae -versus- Buddies Kish' Ltd & 2 Others (2015) eKLR**, supra where mechanisms are laid down for dispute resolution in an Act of Parliament then the same must be adhered to and exhausted before moving to court.

Counsel further cited the Court of Appeal case of **Eliud Wafula Maelo versus- Ministry of Agriculture & 3 others (2016) eKLR** where it upheld a High Court finding that Section 31 of Sugar Act, 2011 and Section 32 of the Sugar (Arbitration Tribunal) Rules, 2008 ousted the jurisdiction of the High Court as follows:

"In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of the Constitution only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in The Matter of the Interim Independent Electoral Commission [2011] eKLR: "[291 Assumption of jurisdiction by courts in Kenya is a subject regulated by Constitution, statute law, and by principles laid out in judicial precedent."

Counsel therefore urged the court to uphold the preliminary objection and dismiss the case with costs.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the plaintiff opposed the preliminary objection and submitted that the Plaintiff's case is that the actions of the Defendants jointly and severally have caused extensive damage to her residential premises hence a determination as to whether or not the Defendants ought to be held accountable for the said damage is a matter to be determined through the calling of evidence.

Counsel submitted that determining such a question through a preliminary objection will be draconian as the Court will not have an opportunity to adjudicate all the issues that would have been raised by the Plaintiff at the main trial.

Counsel relied on the case of **Wilmot Mwadilo, Edwin Mwakaya, and Amos Nyatta & Patrick Mbinga vs Eliud Timothy Mwangunga & Sagalla Ranchers Limited (2017) eKLR** where the court held that:

"Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application."

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application".

Counsel also cited the case of **BASHIR HAJI ABDULAHI ...Vs...Adan Mohammed Nooru & 3 others (2004)eKLR** where the Court held that:

"We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that 'the Application is bad in law' without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged".

It was counsel further submission that Sections 125 and 129 of EMCA do not apply to the current suit as the same deals primarily with appeals from decisions already made by the Tribunal. Further that this matter has not been filed before the tribunal as envisaged by the said section.

Counsel relied on section 3(5) of the EMCA and section 18(a) of the EMCA and submitted that it is not in dispute that this court has the jurisdiction to hear and determine such disputes as its jurisdiction is conferred by section 13 of the Environment and Land Court Act and that the court has the jurisdiction to hear and determine not just the injunctive application but the main cause. Counsel therefore urged the court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the court has jurisdiction to determine the dispute before it. When an issue is raised on jurisdiction of a court to hear and determine a matter, the court must first deal with it as jurisdiction of a court is everything as was held in the case of **The Owners of the Motor Vessel Lillian 'S' Vs. Caltex Kenya Limited (1989) KLR 1** the Court of Appeal held 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.....'

The dispute before this court is that the 3rd respondent licensed the 4th defendant's mining activities without inviting the respondent to participate. The prayers sought are declaratory orders that the activities of the 4th defendant at Kapsaret area is a flagrant breach of a safe and healthy environment as envisaged by article 42 of the constitution. The plaintiff also seeks for a permanent injunction against the defendants restraining them from licencing or carrying out quarrying activities.

This court derives its jurisdiction Section 13 (1) of the Environment and Land Court Act which stipulates as follows:

- (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.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?
 - (a) relating to environmental planning and protection, 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.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters 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.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including? (a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

Section 129 of the EMCA states;

(1) Any person who is aggrieved by—

(a) a refusal to grant a license or to the transfer of his license under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his license under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his license under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

In the case of **Joseph Ojwang’ Oundo v National Environment Management Authority & 8 others** [2015] eKLR the court held;

24. The court in Wainaina Kenyanjui’s case (ibid) acted since there was no decision that could be subject of appeal. In this case there was a decision made by NEMA of granting the Respondents license to carry on with activities of constructing the Sugar Company at Busia. The Plaintiff came to question the authenticity of the license and the procedure of issuance. In this case therefore, the right arena to air the dispute was in the National Environment Tribunal which under Section 129 of the EMCA is accorded power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.

25. To my mind therefore, it would be inappropriate for the plaintiffs to address issues of license in this court whereas they have not exhausted the available statutory remedy which is provided under section 129 of the EMCA.

...

27. In the present case whereas section 129 cannot oust the exclusive jurisdiction of ELC to deal with issues of license which is an issue of use and occupation of land, redress should first be sort in the National Environment Tribunal.

...

29. Any matter relating to the EMCA Act is therefore dealt with by the tribunal and since the allocating of the impact assessment license is a matter falling under this Act the best forum to address it is in the National Environment Tribunal. Section 129 of the EMCA accords the National Environment Tribunal power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.

The provisions of section 129 of the EMCA does not oust the jurisdiction of this court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

The plaintiff's claim is for damage caused by the respondents to her house due to the quarrying activities. She also complains that she was not consulted to give her views on the likely impact to her house when the EIA was done. It should also be noted that the plaintiff's seeks for a declaratory order that the 4th defendant's activities are in breach of her right to a healthy and safe environment which the court has jurisdiction to hear and determine.

The issues raised by the plaintiff cannot be severed to be heard by the tribunal and the Court. The issue of a right to a clean and healthy environment can only be determined before this court.

In the case of **Taib Investment Ltd vs Fahim Salim Said & 5 Others [2016] eKLR Angote J.** held that :-

“ 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”

In the case of **Dominic G. Ng'ang'a & another v Director General National Environment Management Authority & 4 others [2020] eKLR Gacheru J** held that:

“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”.

I am of the same view that this court has jurisdiction to hear and determine this suit hence the preliminary objection is dismissed with costs to the plaintiff/respondent.

DATED and DELIVERED at ELDORET this 17TH DAY OF AUGUST 2021

M. A. ODENY

JUDGE