



**Mutula Kilonzo Junior & Kethi D Kilonzo t/a Kilonzo & Company  
Advocates v Kenya Urban Roads Authority & 2 others (Environment & Land  
Petition E018 of 2023) [2023] KEELC 19108 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19108 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E018 OF 2023**

**LN MBUGUA, J  
JULY 27, 2023**

**BETWEEN**

**MUTULA KILONZO JUNIOR & KETHI D KILONZO T/A KILONZO &  
COMPANY ADVOCATES ..... PETITIONER**

**AND**

**KENYA URBAN ROADS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**NATIONAL ENVIRONMENT TRIBUNAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner's application dated April 25, 2023 is for determination. It seeks an injunction /stay order restraining and /or prohibiting the Respondents or their agents from interfering with the building, wall, compound and quiet enjoyment of their place of business situated at Kay Group Centre pending the hearing and determination of the petition. It also seeks orders that the Honourable court be pleased to stay further proceedings before the National Environment Tribunal pending hearing and determination of the petition.
2. The application is based on grounds on its face and on the supporting affidavit of Kieti D Ndolo sworn on April 25, 2023. She avers that the 1<sup>st</sup> Respondent, through its contractors started construction of a footbridge about 3.5 m from Kay Group Centre's fence where the offices of the Petitioners are situated, but the construction is being done without proper approvals and compliance with the law.
3. She avers that a matter was filed at the 3<sup>rd</sup> respondent on March 17, 2023 seeking the Tribunal's intervention; of which the Appellant therein also filed an application for an injunction to stop the 1<sup>st</sup> Respondent from construction of the footbridge pending hearing and determination of the appeal.



4. She argues that the import of Section 129 (4) of the Environmental Management & Coordination is that the 1<sup>st</sup> respondent ought to have stopped the construction but it did not. She adds that in the said matter, the 1<sup>st</sup> Respondent herein filed a replying affidavit attaching a purported EIA license and minutes of purported meetings involving the public over the project. The said licence was initially issued on March 3, 2011 and it was valid for 24 months. It was for;  

“Proposed upgrading of All Saints Cathedral Junction –City Mortuary - Dagoretti Corner - Ngong Town...whose objective is to carry on expansion of the road into dual carriage throughout.”
5. She avers that while regulation 25(2) of the Environmental (Impact Assessment and Audit) Regulations, 2003 envisages extension of an existing EIA license, the 2<sup>nd</sup> Respondent purported to issue a variation to the EIA license on August 1, 2014 which is about 16 months from the time the initial EIA license expired. The license was later varied on January 13, 2021 to include a foot bridge on Ngong road.
6. The Applicants further argues that the Respondents and their agents’ activities have caused cracks on the Kay Group Centre perimeter wall and have left ditches that collect rain water which act as a breeding ground for mosquitos. The noise from the project activities is also a nuisance which resulted in abandonment of a section of the offices.
7. She also states that they filed an application at the Tribunal seeking prayers to cite the Director General of the 1<sup>st</sup> respondent for contempt of court on March 31, 2023 and 2 days to the mention date, the 1<sup>st</sup> defendant ceased construction works only to return a day after the matter was mentioned before the 3<sup>rd</sup> defendant which has refused to issue orders to stop the construction.
8. The application is opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents vide the replying affidavit sworn on May 19, 2023 by Martina Aloo Dawson, a sociologist of the 1<sup>st</sup> defendant. She avers that the substratum of the present action is active before the 3<sup>rd</sup> Respondent.
9. She contends that an environment and social impact study preceded the project and a licence was granted by the 2<sup>nd</sup> Respondent as license No. 008151 of March 3, 2011, which was further varied to accommodate additional works through license No. 001577 of August 1, 2014 and further revised on January 13, 2021 to facilitate the construction of the footbridge.
10. She avers that the location of the footbridge was a scientific process informed inter-alia by sufficient space on the road corridor, proximity to public institutions (universities, hospital, churches & mall), a bus layby, gradient, visibility and pedestrian traffic.
11. She avers that the bridge is substantially complete, the concrete ramps on either side of the road are 100% complete, thus it serves no useful purpose stopping the project at this stage as that would only delay a much needed public infrastructure utility whose aim is to enhance public safety for pedestrians and any delay would also occasion contractual dilatory penalties on the ex-chequer.
12. He avers that the issuance of a formal injunctive order viz a viz the interpretation and application of Section 129 (4) of the Environment Management and Co-ordination Act, are prerogatives of the 3<sup>rd</sup> Respondent and it was the exercise of such prerogative that informed the refusal to grant the petitioners request for a status quo order during one of its sessions.
13. The application was canvassed by way of written submissions. The Petitioner’s submissions are dated June 12, 2023. They address the following issues;



- a. Whether the Applicant has a prima facie case with chances of success.
  - b. Whether conservatory orders should issue.
14. On the 1<sup>st</sup> issue, the Petitioner submits that the 1<sup>st</sup> Defendant is carrying out the construction of the impugned foot bridge without following due process and without a valid EIA licence thus the whole project is void ab initio. They point out that the place of public participation is critical, yet the 1<sup>st</sup> Defendant never complied with the requirement for public participation under Regulation 17 of the Environmental (Impact Assessment and Audit Regulations) 2013 and *the Constitution*. It also contends that the purported variations of the EIA license No. 008151 are unlawful. To this end, reference was made to the case of National Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others [2020] eKLR as well as the case of Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others [2016] eKLR.
  15. On the 2<sup>nd</sup> issue, the Petitioner submits that it has demonstrated that the 1<sup>st</sup> Respondent's actions have breached their fundamental right to a clean and safe environment and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed to follow the law regarding public participation, not to mention being let down by the 3<sup>rd</sup> Defendant.
  16. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed their submissions dated June 28, 2023, where they address the following issues;
    - a. Whether this Honourable Court has jurisdiction to entertain this application at this stage.
    - b. Whether the Applicant has satisfied the conditions necessary for the grant of injunctive orders.
    - c. Whether this Honourable Court can stay the proceedings of the National Environmental Tribunal.
    - d. Whether the Respondents should bear costs of the application.
  17. On the first issue, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents rely on the case of Owners of the Motor Vessel "Lilian S" V Caltex Oil (Kenya) LTD [1989] eKLR to submit that this court has no jurisdiction to entertain the application as the matter is pending determination in the National Environmental Tribunal. They argue that the fact that the Appellant's Advocates at the tribunal have now become the litigants in this matter in place of Kay Group should not stop this court from ruling that the substantive issues in the application are the same as those in the appeal pending before the Tribunal.
  18. They cite the case of William Odhiambo Ramogi & 33 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR to submit that this application and petition offends the doctrine of exhaustion. They also rely on the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR as well as the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR to submit that this application is a waste of precious judicial time and even though any person has the right to institute proceedings, the courts have an obligation to ensure that such persons do not act in bad faith.
  19. On the 2<sup>nd</sup> issue, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submit that the Petitioner has not satisfied the conditions laid down in the case of Giella v Cassman Brown (1973)EA 358. They point out that the Petitioner has not clearly stated the legal rights infringed by the Respondents and it has not established that it will suffer irreparable harm.
  20. On the 3<sup>rd</sup> issue, they submit that the *Environment and Land Court Act* does not envision this court staying proceedings of the tribunal. To this end, it was argued that the Civil Procedure Rules under



Order 42 Rule 6 states that a court may stay proceedings in the event of an appeal; that this is not an appeal but a petition.

21. They also put forward the case of *Lulchand Fulchnad Shah v Investments and Mortgages Bank Limited & 5 others* [2018] eKLR to submit that the only way a court can stay proceedings of an independent body that are running concurrently with its proceedings is if the alleged public body acted illegally, irrationally or with impropriety which the Petitioner has not proved.
22. On the issue of costs, they rely on the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR and the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR to submit that they should not be condemned to pay costs of the suit.
23. I have considered the pleadings so far filed as well as all the issues raised herein. I deem it fit to frame the issues for determination as follows;
  - a. Whether this court should stay proceedings before the 3<sup>rd</sup> Respondent.
  - b. Whether the Petitioner has made a case for grant of an injunction/a conservatory order.

### **Stay of Proceedings**

24. It is not disputed that the petitioner's offices are hosted at Kay Group centre. The 1<sup>st</sup> defendant also admits that it is putting up a foot bridge just a few metres from the perimeter wall surrounding the said offices. Parties are also in agreement that there is pending litigation over this the foot bridge project at the 3<sup>rd</sup> Respondent.
25. The Petitioner argues that when the dispute herein arose, they filed an appeal at the 3<sup>rd</sup> Defendant which declined to issue an injunction stopping the project in issue, of which the 1<sup>st</sup> Respondent has progressed with the project. That is the basis upon which the Petitioner seeks orders that this court stays proceedings of the 3<sup>rd</sup> Respondent. As rightly submitted by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, and as discerned in the contents of paragraph 27,28, 31-36 of the Supporting Affidavit of D. Ndolo, the substantive issues before the Tribunal and before this court are the same; that is; the validity of the EIA licenses and by extension the project. The only variance is that the advocates for the appellants before the Tribunal are now the petitioners herein.
26. The 3<sup>rd</sup> Respondent is established under the provisions of Section 125 (1) of (EMCA), while under Section 129 of the said Act, it is clothed with jurisdiction on matters of Environmental Licences. Further, Section 130 of the aforementioned statute provides as follows;

“Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court”.
27. The implication of the laid down legal frame work is that this court has no jurisdiction to interfere with the workings of the 3<sup>rd</sup> respondent. It only has jurisdiction to hear appeals.
28. The 3<sup>rd</sup> defendant has to determine the validity of the licenses that gave rise to the construction of the footbridge. The issue as to whether the said licence was further varied within the law and whether the location of the project was unprocedurally changed to the current location all fall under its jurisdiction.



29. As the law dictates, 3<sup>rd</sup> respondent's jurisdiction on environment licencing cannot be interfered by this court. In *Benson Ambuti Adege & 2 Others v Kibos Distillers Limited & 5 Others* (2020) eKLR, the Supreme court stated as follows;

“...the more favorable relief that the Superior Court should have issued was to reserve the Constitutional issues on the rights to clean and healthy environment, pending the determination of the issue with regard to the issuance of the EIA Licence by the 4<sup>th</sup> Respondent to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Court should have reserved the issues pending the outcome of the decisions of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. Emphasize added. It would then have determined the reserved issues, alongside any of appealed matter, if all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected”

30. Still on the issue of stay, I find that the prayer for stay of the Tribunal proceedings as set out in paragraph 5 of the application are inconsistent with the prayer set out in the petition where at paragraph 35, the petitioner prays that:

“It is in the interest of justice that the construction be halted until the Tribunal determines the appeal before it”.

31. In light of the above analysis, I find that the prayer for stay of proceedings of the Tribunal is not merited.

### **Injunction**

32. The petitioner has admitted to having filed an application for injunction on March 17, 2023 before the Tribunal. They filed this suit a month or so afterwards when no orders were forth coming from the Tribunal. There is no evidence to indicate that the said application was fully determined.

33. The question I pose is; What powers would this court be exercising in entertaining a similar application for injunction; Appellate, Original or Supervisory jurisdiction?. And once this court renders a decision on the application at hand, what will be the fate of the application before the Tribunal. The logical conclusion to make is that the current application filed before this court is subjudice to the application filed before the Tribunal.

34. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court had this to say on the issue of subjudice;

“The sub judice rule, like other maxims of law had a salutary purpose. The basic purpose and the underlying object of sub judice was to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. That was to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and was aimed to prevent multiplicity of proceedings”.

35. I find that there being an active matter before the tribunal where an application for injunction to stop the construction of the bridge was filed, then the circumstances of this case do not warrant the issuance of the orders sought in the current application.



36. In Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR, the court held that;

“An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration”.

37. In the end, I find that the application dated April 25, 2023 is not merited. The same is hereby dismissed. Costs there of shall abide the outcome of the suit. Any orders of injunction or status quo given herein are hereby discharged.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:**

L. Magotsi for Petitioner/Applicant

Mwambunu for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Court Assistant: Eddel

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