



Otieno & another v Ministry of East African Community (EAC) and Regional Development & 5 others; County Executive Committee for Agriculture & 2 others (Interested Parties) (Environment & Land Petition E003 of 2022) [2023] KEELC 19225 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19225 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION E003 OF 2022
GMA ONGONDO, J
JULY 26, 2023**

BETWEEN

MICHAEL KOJO OTIENO 1ST PETITIONER

EVANCE OTIENO OLOO GOR 2ND PETITIONER

AND

MINISTRY OF EAST AFRICAN COMMUNITY (EAC) AND REGIONAL DEVELOPMENT 1ST RESPONDENT

LAKE BASIN DEVELOPMENT AUTHORITY 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF EAST AFRICAN COMMUNITY (EAC) AND REGIONAL DEVELOPMENT 3RD RESPONDENT

PS DR BELIO KIPSANG 4TH RESPONDENT

KIMIRA OLUCH SMALL HOLDER FARM PROJECT 5TH RESPONDENT

HON ATTORNEY GENERAL 6TH RESPONDENT

AND

COUNTY EXECUTIVE COMMITTEE FOR AGRICULTURE INTERESTED PARTY

COUNTY GOVERNMENT OF HOMABAY INTERESTED PARTY

OLUCH IRRIGATION WATER USERS ASSOCIATION ... INTERESTED PARTY



RULING

1. This ruling is in respect of the 1st, 3rd, 4th, 5th and 6th respondents' notice of preliminary objection dated October 3, 2022 and the 2nd respondent, 1st and 2nd interested parties' Notice of preliminary objection dated October 26, 2022 and filed in court on October 4, 2022 and October 27, 2022 respectively (The 1st and 2nd preliminary objection herein).
2. The gist of the 1st preliminary objection is that this court lacks jurisdiction to entertain the instant petition as it entails transfer of management from one government agency to another government agency within the same ministry.
3. Similarly, the 2nd preliminary objection is grounded on the basis of lack of jurisdiction by this court to entertain the instant petition. Further, the said preliminary objection also contends that the petition is res judicata as the issues raised therein were heard and determined by this court in Homa Bay ELC Judicial Review no. E003 of 2021.
4. On October 5, 2022, this court ordered and directed that the 1st preliminary objection be heard by way of written submissions in the spirit of article 159 (2) (b) of *the Constitution* of Kenya, 2010; see also *Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 others* (2013) eKLR. The 2nd preliminary objection was also heard by way of written submissions.
5. Accordingly, the 1st, 3rd, 4th, 5th and 6th respondents through the Honourable Attorney General, filed submissions dated December 5, 2022 on even date. Counsel submitted that the jurisdiction of this court is limited to environment and land disputes and rights that arise therefrom. Reliance was placed on article 162 (2) (b) of *the Constitution* of Kenya, 2010 as well as Section 13 of the *Environment and Land Court Act*, 2011. To buttress the submissions, counsel relied on the case of *Owners of Motor Vessel “Lillian S” –vs- Caltex Oil (K) Ltd* [1989] KLR 1.
6. The 2nd respondent through Otieno, Yogo, Ojuro and Company Advocates, filed submissions dated December 5, 2022 on December 6, 2022. Briefly, counsel submitted that the jurisdiction of the court as stipulated under section 13 of the *Environment and Land Court Act*, 2011, does not extend to transfer of management from one government agency to another government agency within the same ministry. That further, the instant petition is res judicata Homa Bay ELC JR No. E003 of 2021, wherein the issues raised in this petition were heard and determined. Learned counsel relied on various authorities, including the case of *Owners of Motor Vessel “Lillian S”* (supra), to fortify the submissions.
7. The petitioners, acting in person, filed submissions dated May 16, 2023 on May 18, 2023, submitting that the petition tilts in favour of public interest and ought to be allowed as prayed. That the court has jurisdiction to hear and determine the instant petition and that the doctrine of res judicata does not apply herein. To fortify the submissions, the petitioners relied on various authorities including the case of *Independent Electoral and Boundaries Commission –vs- Maina Kiai & 5 others* (2017) eKLR.
8. It is noteworthy that, by way of a petition dated August 31, 2021 and filed herein on September 7, 2021, the petitioners, sought the orders infra:
 - a. A declaration that the 1st, 2nd, 3rd and 4th respondents have threatened and violated *the Constitution* of Kenya 2010 in articles 47 as read with the *Fair Administrative Action Act*, 2015.
 - b. A declaration that the 1st, 2nd, 3rd and 4th respondents herein jointly be compelled to meet the costs of this petition



- c. An order that the respondents' actions to transfer the project to the 2nd respondent, Lake Basin Development Authority, is unconstitutional, null and void ab initio.
 - d. Any other relief the court may deem just to grant.
9. The respondents opposed the petition vide the 1st and 2nd notice of preliminary objections as described in paragraph 1 hereinabove.
 10. Notably, the interested parties did not enter appearance herein.
 11. Initially, the petition was filed at the Environment and Land Court in Migori. The same was transferred to this court, upon its establishment, for hearing and determination.
 12. I have duly considered the subject notices of preliminary objection. So, are they sustainable?
 13. It must be noted that the preliminary objections are on points of law and may dispose of the suit; see *Mukisa Biscuits* case (infra).
 14. The Preliminary Objections are grounded on section 13 of the *Environment and Land Court Act*, 2011 and section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
 15. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696 the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear 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 a contract giving rise to the suit to refer the dispute to arbitration...”
 16. I have considered the preliminary objection. The main issues that arise therein are: whether the instant petition is res judicata and whether this court has jurisdiction to hear and determine the petition.
 17. It was stated in the case *Owners of Motor Vessel “Lillian S” (supra)*, that:

“Jurisdiction is everything. Without it a Court has no power to take one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”
 18. In *Samuel Kamau Macharia & another -vs- Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court of Kenya rendered itself in part;

“...a court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
 19. The Environment and Land Court is established under article 162 (2) (b) of *the Constitution* of Kenya, 2010. Section 13 (1) of the *Environment and Land Court Act* 2015 (2011) stipulates the jurisdiction of the Environment and Land Court 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.



20. Section 7 of the *Civil Procedure Act*, chapter 21 Laws of Kenya, provides for res judicata as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

21. Having perused Homa Bay ELC Judicial Review No. E003 of 2021 where ruling was delivered in April 2022, it is my considered view that the issues raised in the instant petition were heard and determined therein. Specifically, the issue of transfer of management from one government agency to another government agency within the same ministry has been raised herein. Clearly, this dispute does not fall within the purview of article 162 (2) (b) of *the Constitution* of Kenya 2010 or any other enabling statute, or both. Therefore, this court lacks jurisdiction to entertain the instant petition.

22. Also, the 1st and 2nd respondents herein were the 1st and 2nd respondents in Homa Bay ELC Judicial Review No. E003 of 2021. The applicant in the concluded matter is the 5th respondent herein while the 1st interested party in that matter is the 2nd interested party herein.

23. It is therefore, the finding of this court that the doctrine of res judicata is applicable to this case. Both the 1st and 2nd preliminary objections are merited in the circumstances.

24. A fortiori, I find the instant petition dated August 31, 2021 and lodged in court on September 7, 2021 res judicata. I proceed to strike out the same.

25. Due to the public interest nature of the matter, this court makes no order as to costs.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 26TH DAY OF JULY 2023.

G.M.A ONG'ONDO

JUDGE

Present

1st petitioner in person

2nd petitioner in person

Okello, Court Assistant

