



**Onunga v Attorney General & 2 others (Environment & Land Petition
55 of 2021) [2023] KEELC 19068 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 55 OF 2021**

NA MATHEKA, J

JULY 25, 2023

BETWEEN

JOHN ONUNGA PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF ENVIRONMENT AND FORESTRY 2ND RESPONDENT

KERAI KANJI 3RD RESPONDENT

RULING

1. The 1st and 2nd Respondents raised a preliminary objection dated 21st February 2023 that the suit has been brought prematurely and offends the principle of exhaustion as they exist a statutory mechanism hence this Court lacks jurisdiction.
2. The 1st and 2nd Respondents state that the Notice of Preliminary Objection dated 21st February 2023 raises a pure point of law being that the *Environmental Management and Co-ordination act* establishes a statutory mechanism for resolution of disputes. This point of law is not tainted by unproven or disputed facts but a mere statement of what is contained in the statute. That the petition involves a claim that the 3rd Respondent's farm has not met the required environmental safety standards and does not have the requisite National Environment Management Authority approvals. The National environmental complaints Committee as established under Section 31 of the EMCA act is tasked with the responsibility of receiving complaints of environmental degradation (see Section 32). That where a matter can be determined by another established legal forum then the Court should avoid pronouncing itself until exhaustion of that dispute mechanism. That the import of sections 31 and 32 of the Environmental Management Co-ordination Act is that there lies not only a grievance mechanism but also an enforcement plan to protecting the environment. The Petitioner has not approached the Committee to seek redress to what are grievances that lie completely in the purview of the Committee.



There is no evidence of any attempt to invoke the Committee to address the complaints. That failure to approach the Committee in this instance is fatal as the Petitioner cannot rely on any of the exceptions to the doctrine of exhaustion since nothing has been attempted at all. That the Court should find that it lacks jurisdiction to entertain the suits. It is trite that jurisdiction is everything and without which the tribunal should down its tools as held in the locus classicus *Owners of Motor Vessel Lilian 'S' v Caltex Oil (Kenya) Ltd* (1989) eKLR civil appeal 50 of 7989.

3. The Petitioner submitted that in the current case the he is not aggrieved by the decision of the County Executive Committee member regarding an application of development permission for the provision of Section 61, 63 and 75 of the *Physical and Land Use Planning Act* to be applicable. And the issuance of a license by NEMA, it is about violations of certain Constitutional and statutory provisions thus these are matters outside the jurisdiction and ambit of the Physical and Land Use Planning Liaison Committee and NEMA tribunal thus the Respondent cannot contend that Petitioner is in violation of the *Physical and Land Use Planning Act* and EMCA. That this Honourable Court is vested with jurisdiction as provided for in Article 162 of the *Constitution*. That the same cannot be a subject of usurpation of any other set laws in as much a there exists a doctrine of exhaustion of remedies that the aforesaid doctrine of exhaustion of remedies does not apply in the current case and thus the petition is properly before the Court. They relied on the following authorities; *Krystal line salt limited — v — Kenya revenue authority* (2019) eKLR, *Dawda K. Jawara v GambiaACmHPR* 147/95—149/96—A decision of the African Commission of Human and Peoples Rights, R v Independent Electoral and Boundaries Commission (I . E. B.C.) & Others Ex Parte and ELC Pet No 1 of 2022 Judgment 21 National Super Alliance (NASA) Kenya (2017) eKLR.
4. That the Petition seeks for remedies which cannot be granted by National Environmental Complaints Committee (NECC) as established under Section 31 of EMCA Act. The Petitioner is seeking reliefs in the nature of declarations and injunctive orders. That the Petitioners submission that the exception to the said doctrine are applicable to the current case as the National Environmental Complaints Committee (NECC) cannot issue injunctive reliefs and declaration of fundamental freedoms and where individual rights have been violated by the Respondents.
5. This Court has considered the Preliminary Objection and submissions therein. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
6. The above legal preposition has been made in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) E.A. 696 where the Court held that;

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
7. In the case of *Attorney General & Another v Andrew Mwaura Githinji & Another* (2016) eKLR the Court outlined the scope and nature of preliminarily objection as;



- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
8. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the 1st and 2nd Respondents herein was properly brought before the Court.
9. The Petitioner filed a Petition dated 30th November 2020 accompanied by a supporting affidavit dated 30th November 2020. The Petition alleges violation of the right to a healthy and clean environment under Articles 42, 69 and 70 of the Constitution. The Petitioner states that the 3rd Respondent has failed to obtain required environmental approvals and is endangering the health of the general public. The Petitioner is seeking the following orders:
- i. A declaration that the 3rd Respondent has violated the rights of the public at large who are the consumers of his farm produce under the Constitution of Kenya
 - ii. An order compelling the 2nd and 3rd Respondent to close down the farm and take action against the 3rd Respondent
 - iii. Such other and/ or further relief as this Court may deem fit and just to grant.
 - iv. The costs of and occasioned by this Petition to be provided for.
10. Section 31 of the Environmental Management and Coordination Act (EMCA) establishes the Public Complaints Committee. Section 32 of the EMCA provides as follows;
32. Functions of the Complaints Committee The functions of the Complaints Committee shall be—
- (a) to investigate—
 - (i) any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya;
 - (ii) on its own motion, any suspected case of environmental degradation,
11. The Jurisdiction of the National Environment Tribunal (NET) is provided under Section 129 of the EMCA. The same provides as follows;
129. Appeals to the Tribunal
- (1) 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.
 - (3) Upon any appeal, the Tribunal may—
 - (a) confirm, set aside or vary the order or decision in question;
 - (b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
 - (c) make such other order, including an order for costs, as it may deem just.
 - (4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

12. The Doctrine of Exhaustion is defined in *Blacks Law Dictionary 10th Edition* as follows –

exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain comity between the Courts and administrative agencies and to ensure that Courts will not be burdened by cases in which juridical relief is unnecessary.”

13. The doctrine was aptly captured by the Court of Appeal in *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd*, (2011) eKLR, where the Court of Appeal observed: -

... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”



14. In *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* (2017) eKLR, the Court while asserting that exceptions to the doctrine of exhaustion requirement will be decided on a case-by-case basis, held that;

As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it.”

15. This Court has both the Original and Appellate Jurisdiction, it does not mean that the Honourable Court therefore must render the established statutory agencies and/or bodies irrelevant and/or dysfunctional. There must be an orderly functioning within the bodies that are conferred with certain statutory mandates and to ensure that same achieve the purpose of their creation and existence. In the case of *Kibos Distillers Limited & 4 Others v Benson Ambuti & 3 Others* (2020) eKLR the Court held that;
16. Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A Court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.
17. A Court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any Court or statutory body.
18. In addition, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition. It was never the intention of the *Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court”.
19. It is incumbent that litigants knowing of the existence of alternative dispute resolution mechanism, should proceed to and exhaust the same before approaching the Court. This Court should be the last port of call. In the case of *Geoffrey Mutbinja Kabiro v Samuel Muguna Henry* (2015) eKLR, where the Honourable Court held as hereunder;

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”.



20. The Court of Appeal while addressing a similar question revolving around the doctrine of exhaustion of alternative statutory dispute resolution mechanisms in *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* (2017) eKLR held as follows:

The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petitions”

21. The EMCA establishes the NET and vests in it jurisdiction to hear and determine disputes relating to NEMA decisions, including to investigate any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya and take appropriate action. The same Act grants this Court appellate jurisdiction over decisions made by the NET. The Petitioner has not demonstrated that he has exhausted the redress avenue provided under EMCA. For these reasons I find that the preliminary objection is merited and I strike out this Petition with no orders as to costs as this is a public interest litigation.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

