



**Nkuito v County Government of Narok, County Executive, Environment,
Energy Water Irrigation & Natural Resources (Environment & Land Petition
E005 of 2022) [2023] KEELC 18661 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18661 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND PETITION E005 OF 2022

CG MBOGO, J

JULY 13, 2023

**IN THE MATTER OF ARTICLE 10,20,21 (1), 40 (1),40 (3),40 (4), 47,50, 232
(1), 232 (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

NEPATAO OLE NKUITO PETITIONER

AND

**COUNTY GOVERNMENT OF NAROK, COUNTY EXECUTIVE,
ENVIRONMENT, ENERGY WATER IRRIGATION & NATURAL
RESOURCES RESPONDENT**

RULING

1. Before this court for determination is the notice of preliminary objection dated March 31, 2023 filed in court on April 25, 2023 by the respondent challenging the petition on the following grounds: -
 1. That the honourable court lacks jurisdiction to hear and entertain the said petition as against the 1st respondent (sic) as the same is expressly ousted by the [Forest Conservation and Management Act](#).
 2. That the petition as against the 1st respondent contravenes section 70 (1) of the [Forest Conservation and Management Act](#) which provides that any dispute that may arise in respect of forest conservation, management, utilization or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the [County Governments Act](#), 2012.



3. That Section 70 (1) of the *Forest Conservation and Management Act* further provides that any matter that may remain unresolved in the manner prescribed above, shall be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie in the Environment and Land Court as established under the *Environment and Land Court Act*, 2011.
 4. That in the circumstance therefore the petition filed in court as against the respondent is incompetent and fails to comply with the mandatory provisions of the law and this honourable court should in cognizance of the glaring illegality strike it off in limine.
 5. That the costs of the application and the suit be borne by the plaintiff/applicants.
2. On April 27, 2023, this court directed that the preliminary objection to be canvassed by way of written submissions.
 3. The respondent filed written submissions dated May 17, 2023. The respondent raised two issues for determination as follows: -
 - a. Whether this honourable court is clothed with jurisdiction to hear and determine this matter.
 - b. Who should bear the costs of this preliminary objection and suit.
 4. On the first issue, the respondent submitted that the petition relates to trees planted by the petitioner on his property and the petitioner's permit of movement of forest products which jurisdiction is ousted by section 70 of the *Forest Conservation and Management Act*, 2016.
 5. The respondent further submitted that the permits that form the subject matter of the petition touch on forest conservation, management, utilization and conservation and that the petitioner ought to have raised his issue with the 1st respondent in the first instance. Also, that the petitioner has not referred the dispute to any structure under the County Government of Narok County and to the National Environment Tribunal. Reliance was placed in the case of Nyeri *Timber Manufacturers Association & 3 Others versus Kenya Forest Service & 3 Others* [2018] eKLR, *R versus Peterkin, ex-parte Soni* (1972) and *Methodist Church Kenya Trustees & Another versus Rev. Jeremiah Muku & Another* [2012] eKLR.
 6. The respondent further submitted that the doctrine of constitutional avoidance is an established doctrine before Kenyan courts that a court will not pronounce itself on a constitutional issue where there exist other ways to resolve it. Further, that in the present case, there exists other ways through which the matter would have been resolved through the procedure set out in the *Forest Conservation and Management Act*, 2016. The respondent relied on the cases of *Communication Commission of Kenya & 5 Others versus Royal Media Services & 5 Others*, Petition No. 14, 14A, 14B and 14C of [2014] eKLR, *Speaker of the National Assembly versus Karume* (1990-1994) E.A. 549, *Gabriel Mutave & 2 Others versus Managing Director, Kenya Ports Authority* [2016] eKLR and *Bernard Murage versus Fineserve Africa Limited & 3 Others* [2015] eKLR.
 7. On the second issue, the respondent submitted that it is entitled to costs pursuant to section 27 of the *Civil Procedure Act*.
 8. The petitioner filed written submissions dated 22nd June 2023. The petitioner submitted that the major issue in the petition is the arbitrary revocation and or reversal of the permit issued to him for movement of natural resources harvested from his parcel of land as it amounts to infringement and violation of article 47 of *the Constitution*.



9. The petitioner further submitted that this court has jurisdiction to deal with the petition as the prayers and orders sought fall within the orders that may be granted by this court. The petitioner relied on the cases of *Anarita Karimi Njeru versus Attorney General* (1979) KLR 154 and *Mumo Matemu versus Trusted Society of Human Rights Alliance & Others*, Nairobi Civil Appeal No. 290 of 2012.
10. On whether this court can entertain the petition despite the provisions of section 70 (1) of the *Forest Conservation and Management Act*, the petitioner while relying on the cases of *Minister of Health & Others versus Treatment Action Campaign & Others* (2002) 5 LRC 216 and *Council of Governors & 6 Others versus Senate* [2015] eKLR submitted that this court has jurisdiction to hear any question respecting the interpretation of *the Constitution* and from a plain reading and ordinary interpretation of the law and precedents cited, this court has jurisdiction conferred by articles 162 (2)(b) of *the Constitution* and sections 13 and 21 of the *Environment & Land Court Act* to hear and determine this petition.
11. While relying on the cases of *Chongeiywo & 10 Others (Suing as representatives of the Ndorobo/Ogiek Community of Chepkitale, Mt Elgon) versus Attorney General & 4 Others and Kenya National Commission on Human Rights (Amicus Curiae)* (Environment & Land Petition No. 1 of 2017)(2022) KEELC 13783 (KLR) (19 October 2022), the petitioner submitted that throwing out the petition at this stage will amount to a violation of the petitioner's rights in seeking the protection of this court to safeguard his constitutional and fundamental rights.
12. I have considered the preliminary objection and the written submissions filed by the respondent and the issue for determination is whether the notice of preliminary objection is merited.
13. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd* (1969) EA 696, the court stated as follows: -

Per Law, JA

“So far as I'm aware, 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.”

This was followed up by the judgment of Sir Charles Newbold, P in the same case:

“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 demurrer. 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 had to be ascertained or if what is sought is 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”



14. In the case of *Lemitei Ole Koros & another v Attorney General & 3 others* (2016) eKLR, Munyao, J stated as follows:
- “Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”
15. Having looked at the definition and what constitutes a preliminary objection considering the issue for determination before this court, I am satisfied that it raises a pure point of law which merits consideration by this court.
16. The petitioner filed the instant petition dated March 26, 2022 seeking the following orders: -
1. A declaration that the respondent violated the provisions of the *Fair Administrative Action Act* Sections 4 and 5; and *the Constitution* of Kenya articles 10,20,21(1), 40 (1),40 (3), 40 (4), 47,50,232 (1) and 232 (2).
 2. An order of Certiorari to bring into this court the decision of Narok County Executive Committee Member made on the May 26, 2017, recalling the permit of movement of forest products issued to the petitioner on May 11, 2017.
 3. An order of Prohibition prohibiting the respondent whether by itself, its agents, servants, employees from enforcing the recalling of permit or movement of forest products issued to the petitioner on May 11, 2017.
 4. An order of mandamus compelling the respondent to recant the said revocation/recalling of the permit of movement of forest products issued to the petitioner on May 11, 2017 and to allow the petitioner to transport the said forest produce without unnecessary intrusion from the respondent.
17. The gist of the petition is that the petitioner is the registered owner of land known as CisMara/Olokurto/847 and that on 1st April 2017, he applied to the Kenya Forest Service for permission to harvest and transport forest produce from his land which application was approved by the environmental sub-committee meeting held on April 20, 2017. Further, that on May 11, 2017 the respondent approved the petitioner’s request to harvest and transport forest produce which permit was valid for 40 working days with effect from May 22, 2017. Also, that on May 16, 2017, the Kenya Forest Service authorized the petitioner to utilize and transport cedar posts to the market for a period of 40 days from May 23, 2017.
18. The petitioner contended that on May 26, 2017, the respondent purported to revoke and recall all effective permits in circulation without affording the petitioner a fair hearing contrary to article 47 of *the Constitution* and section 4 of the *Fair Administrative Actions Act*.
19. In its preliminary objection and written submissions, the respondent was of the view that this court lacks jurisdiction to hear and entertain the petition as it is ousted by the *Forest Conservation and Management Act*. It was also the respondent position that the petitioner ought to have referred the dispute to any structure under the County Government and subsequently, to the National Environment Tribunal.
20. Jurisdiction is core in every suit. It must be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file it before the established body seized



of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction to itself. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):Nyarangi, JA held 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 judgement is given.”

21. Section 70 of the Forest Conservation and Management Act provides:

“(1) Any dispute that may arise in respect of forest conservation, management, utilization or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the County Governments Act, 2012.

(2) any matter that may remain un-resolved in the manner prescribed above, shall be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie in the Environment and Land Court as established under the Environment and Land Court Act, 2011.”

22. Section 3 of the Act further provides that “This Act shall apply to all forests on public, community and private lands.”

23. The averments deposed to by the petitioner point to a dispute between the respondent’s acts of revoking or recalling effective permits issued by the Kenya Forest Service for a period of 40 days among other issues. My analysis of the above provisions of the law vis a vis the averments of the facts relied on by the petitioner indicate that this is a matter that falls under the Forest Conservation and Management Act and which ought to be first and foremost resolved through the mechanisms provided under the Act.

24. I agree with the respondent that this court lacks jurisdiction to entertain the petition at this stage until the petitioner has exhausted the dispute resolution mechanisms provided under the Forest Conservation and Management Act.

25. The upshot of the above is that the notice of preliminary objection dated March 31, 2023 is hereby upheld. The petition dated March 26, 2022 is struck out with costs to the respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 13TH day of JULY, 2023.

HON. MBOGO C.G.

JUDGE

13/7/2023

In the presence of:

CA:T.Chuma

